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Alistair Welchman

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## **Politics of Religion/Religions of Politics**

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## Abbreviations

- Aesthetics* G.W.F. Hegel, *Hegel's Aesthetics: Lectures on Fine Art*. Trans. T.M. Knox. 2 volumes (Oxford: Clarendon Press, 1988).
- Ästhetik* G.W.F. Hegel, *Vorlesungenüber die Ästhetik*. Suhrkamp Taschenbuch Wissenschaft (Suhrkamp: Frankfurt am Main, 1970 [1835–1838]).
- Basic Problems* Martin Heidegger, *The Basic Problems of Phenomenology*. Trans. Albert Hofstadter (Bloomington/Indianapolis: Indiana University Press, 1988 [1927]).
- Being and Time* Martin Heidegger, *Being and Time*. Trans. John Macquarrie and Edward Robinson (New York: Harper and Row, 1962 [1927]).
- The Brothers Karamazov* Fyodor Dostoyevsky, *The Brothers Karamazov*. Trans. and annotated by Richard Pevear and Larissa Volokhonsky (New York: Farrar, Straus and Giroux, 2002 [1880]).
- The Gay Science* Friedrich Nietzsche, *The Gay Science*. Trans. Bernard Williams (Cambridge: Cambridge University Press, 2001 [1882]).
- Kants Werke* *Kants Werke: Akademie-Textausgabe*. Berlin: Walter de Gruyter & Co., 28 Vol. 1900 ff. References will be to named text and volume and page number, except for the *Critique of Pure Reason*, which will be referenced in the standard A/B format giving the page number of the first (1782) and second (1787) editions.
- Letter* John Locke, A letter concerning toleration. In *John Locke: The Second Treatise of Government and a Letter Concerning Toleration*, ed. Tom Crawford, 113–153 (New York: Dover Publications, 2002 [1689]).
- Letter to d'Alembert* Jean-Jacques Rousseau, *Politics and the Arts: Letter to M. d'Alembert on the Theater*. Trans. Allan Bloom (Ithaca: Cornell University Press, 1960 [1758]).

<i>On Liberty</i>	John Stuart Mill, <i>On Liberty</i> (New York: Liberal Arts Press, 1956 [1869]).
<i>Phaedo</i>	Plato, <i>Phaedo</i> . Trans. CMA Grube. In Plato, <i>Complete Works</i> , ed. John Cooper (Indianapolis: Hackett, 1997).
PhS	G.W.F. Hegel, <i>Phenomenology of Spirit</i> . Trans. A.V. Miller (Oxford: Clarendon Press, 1979).
PhG	G.W.F. Hegel, <i>Phänomenologie des Geistes</i> , ed. J. Hoffmeister (Hamburg: Felix Meiner, 1952 [1807]).
<i>Philosophical Investigations</i>	Ludwig Wittgenstein, <i>Philosophical Investigations</i> . Trans. G.E.M. Anscombe (Oxford: Blackwell, 2001 [1953]). 3rd edition. References are to section numbers.
<i>Republic</i>	Plato, <i>Republic</i> . Trans. Allan Bloom (New York: Basic Books, 1992).
<i>Rise and Fall</i>	Plutarch, <i>The Rise and Fall of Athena: Nine Greek Lives</i> (London: Penguin, 1960).
<i>Seventh Letter</i>	Plato, <i>Seventh Letter</i> . Trans. Glenn Morrow. In Plato, <i>Complete Works</i> , ed. John Cooper (Indianapolis: Hackett, 1997).
<i>Twilight of the Idols</i>	Friedrich Nietzsche, <i>The Anti-Christ, Ecco Homo, Twilight of the Idols and Other Writings</i> , eds. Aaron Ridley and Judith Norman, trans. Judith Norman (Cambridge: Cambridge University Press, 2005 [1888]).

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## Chapter 4 Border Sovereignty

Alistair Welchman

### Part I

Agamben's analysis of the conceptual structure of sovereignty depends on a particular reading of Carl Schmitt's theory of sovereignty. Schmitt's argument proceeds from the claim that the sovereign is 'the one who decides on the state of exception [*Ausnahmezustand*].' (1985, p. 5; 1922, p. 13)<sup>1</sup> His argument appeals to the idea—now familiar from some interpretations of the work of Wittgenstein—that rules cannot ultimately specify the situations in which they can be correctly applied. The argument is a *reductio*. Assume that rules can specify their applications. This implies that the question of whether a given rule is applicable can itself be settled by appeal to some further rule. But this further rule would itself stand in need of application. And so there would be an infinite regress of rules. But this is impossible. So rules cannot ultimately specify the situations in which they can be correctly applied. We can call this the rule regress argument.

The issue has a long and venerable history, stretching back to Kant (*Critique of Pure Reason* A132-134/B171-173). Wittgensteinian critical legal theorists have for a long time understood rule-regress arguments as having an important impact on our understanding of how specifically *legal* judgments work, an understanding that usually sees legal judgment as underdetermined by explicitly stated legal rules, opening up important extra-legal areas of research (Finkelstein 2010). In a recent article on Agamben, for instance, William Connolly is typical in representing

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<sup>1</sup> *Ausnahme* is literally an exception, and the term *Ausnahmezustand* is often translated (including by Agamben) as 'state of exception' even though its corresponding technical sense in English is 'state of emergency'.

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Wittgenstein (and hence the rule-regress argument) as showing that 'every rule and law encounters uncertainty and indeterminacy as it bumps into new and unforeseen circumstances' so that formal self-rule can only be established on the basis of an informal (institutional) network of practices bolstering the capacity for self-rule (2007, p. 23). Indeed, Agamben himself sometimes appears to support this kind of interpretation when he claims, appealing to Gadamer's hermeneutics, that 'the application of a norm is in no way contained within the norm and cannot be derived from it; otherwise there would be no need to create the grand edifice of trial law.' (1998, p. 40)<sup>2</sup>

On this view, Schmitt's definition of the sovereign decision is a special case of a general problem possessed by all conceptual rules or norms that can be explicitly formulated. If it is impossible in general for a rule of any kind exhaustively to specify its correct applications, then, a fortiori, it is impossible for a legal-constitutional rule to specify exhaustively which authority is competent to declare an emergency or exceptional situation. Only something non-rule-governed can fill in the gap. And a criterion-less i.e. free decision is the only understanding we have of such non-rule-governed action. The sovereign is then simply the name for the one who makes this decision. Schmitt himself refers obliquely to Kierkegaard,<sup>3</sup> so that the existentialist overtones of this description are not at all inappropriate.<sup>4</sup>

Nevertheless, Agamben ultimately rejects this understanding of Schmitt: 'Here [i.e. in Schmitt] the decision is not the expression of the will of an individual hierarchically superior to all others.' (2005, pp. 25–6) Agamben retains the term 'decision', especially in *Homo Sacer*, but re-interprets its meaning. This is, in part, in line with Wittgenstein commentary. Wittgenstein does occasionally describe following a rule in terms of a 'decision' (*Philosophical Investigations* §186) and of course he famously claims that any 'reasons [Gründe]' we can give for going on in a particular way 'soon give out. And then I will act without reasons.' (§211) But such apparent 'existentialism' is clearly inconsistent with the basic results of the private language argument: if I just make up the next application, then there is no difference between correct and incorrect applications of a rule, and hence no normativity, and hence no rule. (§202) It is not really clear what Wittgenstein's solution is. But its structure clearly involves the claim that there must be some other way of 'grasping a rule' than the one that leads to this paradox. (§201) Here Wittgenstein adverts to the notion of a 'practice', or some form of quasi-empirical regularity that underlies and makes possible normative rule following.<sup>5</sup> Schmitt adverts to something similar, I

<sup>2</sup>This passage is interesting because he presents Gadamer as giving a *critique* of Kant, whose account of 'the relation between the particular case and the norm' is of 'a merely logical operation' that put everything on the wrong track (1998, p. 39). Agamben, I think, underestimates the importance of Kant here, although he is correct to say that Kant thinks the rule regress argument concerns only what he calls general (rather than transcendental) logic.

<sup>3</sup>He refers to 'a protestant theologian.' (1985, p. 15; 1922, p. 21).

<sup>4</sup>Consider Schmitt's description of de Maistre later in the text: 'In ... de Maistre we can see a reduction of the state to the moment of pure decision, to a decision not based on reason and discussion and justifying itself, that is, to an absolute decision created out of nothingness.' (1985, p. 66; 1922, p. 69).

<sup>5</sup>Quite possibly, the objections recur at the level of a (collective) practice.

think, when he makes the following famous—but opaque—remark: 'There exists no norm that is applicable to chaos. For a legal order to make sense, a normal situation must exist.' (1985, p. 19; 1922, p. 13) The obvious interpretation here would be that Schmitt, like Wittgenstein, also understands that 'rule-following', or what he calls 'the legal order', is only possible if there is sufficient quasi-empirical regularity of behavior, a 'normal situation', not chaos; enough regularity for a Wittgensteinian 'practice' to emerge.<sup>6</sup>

Agamben continues to use the vocabulary of a decision. But what is this decision if it is not to be thought in the apparently existentialist and personalist terms that Schmitt uses? I think that this question can best be answered in the theological context of the later German Idealist tradition. Agamben's reading of the Schmittian decision on which the law rests is first and foremost as a *transcendental* decision akin to god's decision to create, that is, a decision (or act) that takes place at the transcendental level and which conditions the possibility of the legal order and hence should not be confused (conceptually) with any empirical part of that order.

The *locus classicus* for the notion of a transcendental decision is Kant's late analysis of radical evil in his 1793 text *Religion with the Limits of Mere Reason*. Kant argues that our moral natures, our intelligible characters, are constituted by an act—a decision—, but not one that can be localized in the empirical flow of time. Rather that decision—like god's 'before' it—takes place out of time and explains *both* why we can be held responsible for our moral natures *and* why the propensities embodied in that nature have the phenomenal appearance of innateness:

To have a good or an evil disposition as an inborn natural constitution does not here mean that it has not been acquired by the man who harbors it, i.e. that he is not the author of it; but rather, it means that it has not been acquired in time (that he has *always* been good or evil *from his youth up*). The disposition, i.e. the ultimate subjective ground of the adoption of maxims can be one only and applies universally to the whole use of freedom. Yet this disposition itself must have been adopted by free choice, for otherwise it could not be imputed. (*Werke*, v. 6, pp. 22–3)

Kant's idea of a transcendental act of freedom effectively integrates the two elements at issue in Schmitt's discussion of the application of norms: this temporally non-localizable act *both* fixes the empirical regularities that underlie human behavior (for Kant, the universal but empirical generalization that everyone has an evil disposition, i.e. is disposed to make bad choices) *and* makes it the in principle revocable content of an of a free act.<sup>7</sup>

<sup>6</sup>Norris (2006, pp. 19f) criticizes Mouffe's appropriation of Wittgenstein on just this point: that she interprets Wittgenstein's talk of a 'decision' as it were 'existentially', where Wittgenstein clearly has something else in mind.

<sup>7</sup>Fichte and Schelling take up this notion of a constitutive transcendental act: Fichte in his quasi-mythic *Tathandlung* in which the transcendental subject is responsible for the creation of the entire empirical world; and Schelling, who, in his middle period works, elaborates a sustained analogy between the atemporal choice of moral personality and the criterionlessness of god's decision to create—or, ultimately, to exist at all. But it is in Schopenhauer's philosophy that the notion reaches

## Part II

One of the most important tendencies in the development of the idea of the transcendental in general is an increasing sensitivity to its paradoxical nature. In its most elaborated form, this tendency can be (rather brutally) summarized with the axiom that for any  $x$ , the transcendental condition of possibility of  $x$  is not itself an  $x$ . This leads to immediately paradoxical results in general cases of transcendental investigation: the condition of possibility of any experience is not itself something that can be an object of possible experience; the condition of conceptuality is not itself a concept etc. Heidegger's claims (a) that everything that is, is a being but (b) that the Being of beings is not itself a being, are well-known versions of this axiom. And Derrida radicalizes Heidegger's conception of this ontological difference, i.e. of the difference between Being and beings, by effectively noting that the opening up of the space of this difference is in a sense prior to and 'constitutive of' any attempt to characterize Being. This is at least one of the senses of his *mot d'art* 'différance.'

Agamben himself is clearly in close dialogue both with Heidegger (Agamben 2007) as well as with Derrida, (1998, pp. 49ff; 2005, pp. 10ff.) and some of his own technical terms echo these claims about the refractory nature of the transcendental. For instance, he conceives of what I have described as the transcendental relation between positive law (the empirical) and sovereignty (the decision that makes it possible) on the basis of an *indifference* between transcendental and empirical, as comprising the paradoxical (non)space in which transcendental and empirical (coordinating various series of constitutive distinctions: fact/law, outside/inside, exclusion/inclusion, *nomos/phusis* etc.) cannot be distinguished, the (non)space of their 'indistinction.' (1998, pp. 4, 9, 20, 31-2, 90, 168). Thus, for instance, shortly after rejecting Schmitt's existentialist understanding of the sovereign decision that makes the law possible, he argues that '[t]he sovereign structure of the law ... has the form of a state of exception in which fact and law are indistinguishable.' (1998, p. 27)

At a conceptual level in his 'political theory' texts, Agamben often deploys these blankly paradoxical formulations involving a 'zone of indiscernibility' between opposing terms that are strongly reminiscent of the principled indeterminacy and negatively conceptual formulations characteristic of Derrida's deconstruction. But in the 'empirical' dimension of his work (which I am attempting to prolong into a consideration of the effects of the US/Mexico border wall and the unauthorized migrants it both produces and hinders), I think Agamben can be understood as moving in a different and less blankly negative direction.

The case I want to make is that the proper understanding of the Schmittian decision as operating on a transcendental level should not—or at least not merely—be an opportunity for a conceptual investigation into the difficulties of thinking the

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its most general expression in a conception of the world as it is in itself, an active striving that is endless and aimless because non-temporal and non-spatial.

transcendental; rather it should be an opportunity for considering the unique spatiotemporal structures that a transcendental decision produces when it founds normativity. Such an investigation could be given the label, following Kant, of a 'transcendental aesthetic.' But it would be important to observe a crucial difference: in the Transcendental Aesthetic of the *Critique of Pure Reason* Kant treats spatiotemporal sensory determination (the 'aesthetic') as itself transcendental i.e. as making experience possible. The structures of space and time themselves remain unchanged through this process (it is precisely the fact that the propositions of Euclidean geometry are unchangeable i.e. a priori that motivates Kant's transcendental idealism), even if their ontological status is modified (because the conclusion of his argument is that they are forms of human sensibility, not properties of things as they are in themselves). By contrast, I want to argue that the intrusion of a founding transcendental decision into the empirical creates distinctive *transcendental* spatiotemporal forms whose properties and structures differ in interesting ways from empirical space and time.

Most significant among these is the specifically transcendental temporality that attaches to a transcendental decision. Since a transcendental decision is not directly conditioned by time, the event that comprises it is not one that can be localized in empirical time. Thus Agamben describes the fundamental political decision, the founding of the *polis* as 'an event [that cannot be] achieved once and for all but is continually operative in the civil state in the form of the sovereign decision.' (1998, p. 109) It is precisely the transcendental (as opposed to personal) nature of the decision that comprises sovereignty on Schmitt's analysis that makes this comprehensible. The decision to found a political unit can *never* be completed because it takes place (in a sense) outside of time, like the decision that comprises my intelligible character in Kant's analysis of radical evil. But this exteriority to time is not blankly paradoxical in the way that a conceptual contradiction would be. Rather there is a quite precise way to understand it, as involving a transcendental temporality distinct from and irreducible to empirical temporality, but also not its simple negation (sheer timelessness): this temporal structure that Agamben describes is more like the *intrusion* of timelessness into time.

A second aspect of this transcendental temporality is advanced by the German idealist philosopher, F.W.J. Schelling, who claims that we can understand the past not as something that was once present (but now is not) but rather as something that was never present.<sup>8</sup> In later works, Schelling identifies that transcendental past with the temporality of the myth. But here *muthos* should not be understood as in simple opposition to *logos*. The temporality of transcendental decision can *only* be

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<sup>8</sup> '[T]he past clearly cannot be a present at the same time as the present; but as past, it is certainly simultaneous with the present, and it is easy to see that the same holds true of the future.' (Schelling 1813, p. 197) But the 'simultaneity' of the past with the present does not constitute the past *as* present (as a 'now'). It follows from this that this conception of the past is *never* present since it is 'simultaneous' with every present moment in the sequence of nows, but is not itself present in any of them. Schelling's argument is taken up again by Bergson and more recently Deleuze.

expressed in the temporality of myth, a temporality, as Lévi-Strauss observes, that expresses the fact that it is (conceptually speaking) 'timeless' by (temporally) locating events in a past time, but not one that could ever have been present (Lévi-Strauss 1967, p. 205).

Agamben effectively combines these views in his analysis of the temporality of the sovereign decision. On the one hand, this decision necessarily appears in mythic form, in terms of a foundational event whose transcendental effects always exceed its empirical content and that takes place in a past not supposed to have been a past present. On the other hand, the act is never fully completed and recurs, is 'continually operative', in the permanent possibility of sovereign intervention. The founding or grounding of the *polis* appears both as an event that is always already completed (never took place in the present) and as impossible to complete because still on-going, so that the exercise of sovereign power is effectively required as the permanent possibility of re-grounding the *polis*. Understood both as a quasi-conceptual condition and as a necessarily mythical founding event, it becomes possible to understand the motivation behind Schmitt's claim that in the state of emergency, the 'entire subsisting order' is no longer operative, but the pure sovereign decision is still the manifestation of some kind of order, 'in a juridical sense, even if it is not a legal order [*Rechstordnung*]' (1985, p. 12; 1922, p. 18). The decisive act definitively characteristic of sovereignty is a moment of a continuous re-founding of the political unit that is both a part of the political order (in that it founds this order) and distinct from it (because, as condition for the political order, it cannot simply be identified with it).

### Part III

In many ways, this account is consonant with quite traditional ones. Social contract theory in general postulates a moment of decision (consent) that founds the legitimacy of juridical system without being located within in. In its simplest form, this event is understood historically. But even moderately sophisticated advocates of the view understand that this is naïve. The alternative is usually postulated as purely 'hypothetical'. The reasoning behind this shift is instructive however. Rawls gives a clear expression of this reasoning at the beginning of his *Theory of Justice* (1971, p. 13):

No society can of course be a scheme of cooperation which men enter voluntarily in a literal sense; each person finds himself placed at birth in some particular position in some particular society, and the nature of this position materially affects his life prospects. Yet a society satisfying the principles of justice as fairness comes as close as a society can to being a voluntary scheme, for it meets the principles which free and equal persons would assent to under circumstances that are fair.

This reasoning exactly mirrors Kant's account of natural propensities: they appear phenomenally as unchosen; and yet they must be regarded as having been chosen. What Kant's transcendental analysis adds is the insight that a

counter-factual account cannot work. There are two cases: either the counter-factual decision to accept the juridical system voluntarily has not in fact been taken (in which case the juridical system is not *in fact* legitimated) or it has (in which case it has been legitimated by an unproblematic decision of voluntary consent). Kant's transcendental analysis correctly apprehends the phenomenology of legitimation as comprising an irreducible moment within which the juridical system is experienced both as legitimate and as unchosen. To reconcile legitimacy with consent it is therefore necessary to postulate an originary decision in a mythic past time. Precisely because it occurs in a past that cannot be thought of as having once been present, this decision is always leaking back into empirical time in a permanent need for re-founding. What Rawls's hypothetical gloss on this structure does raise is the issue of whether Schmitt is right to think of this re-founding in terms of sovereignty. Why should it not also be thought of in terms of a *democratic* act of legitimation?

To evaluate this possibility it is instructive to compare the traditional paradox of democracy (Whelan 1983; Abizadeh 2008) with Agamben's reading of Schmitt as providing a 'paradox of sovereignty.' For Agamben, 'the paradox of sovereignty consists in the fact that the sovereign is at the same time inside and outside the judicial order.' (1998, pp. 15ff.) This confusion is what justifies Agamben's 'zone of indiscernibility' between sovereignty and the juridical order; and it is what I have explained as stemming from an essentially transcendental analysis: it is precisely as 'condition of possibility of the juridical order' that the sovereign exception is both connected to and simultaneously disconnected from that order (Agamben 1998, p. 17). However it is immediately noticeable that the expression of this paradox is directly spatial: the sovereign is both 'inside and outside' the juridical order. And this conceptual-spatial confusion has its parallel in the paradox of democracy. This paradox lies in the fact that in a democracy, political legitimation lies in democratic legislation. But any act of legislation in a democracy presupposes the prior constitution of a bounded *demos* endowed with the capacity to confer legitimacy. This *demos* cannot itself be legitimated democratically on pain of an infinite regress. And therefore any attempt at democratic legitimation is inherently paradoxical, in that it necessarily presupposes an indissoluble remainder of non-democratic legitimacy. The structure of this situation neatly parallels both the logical structure of Agamben's paradox of sovereignty and implies the spatialization of this structure in the border: democratic political legitimation is only possible on the basis of a 'prior' non-democratic decision that lies outside the politico-judicial sphere (in what Schmitt calls 'sociology'); but at the same time this non-democratic element is an intrinsic feature of every democratic decision and hence also inexorably 'inside' it. Every 'empirical' democratic decision is implicated in a prior 'transcendental' decision—that can no longer be counted as democratic—determining the bounds of the *demos* included in making the empirical decision.

This parallel is illuminating in a number of respects. First, it makes it clear—perhaps clearer than Agamben makes it—why even liberal democratic states are vulnerable to the permanent risk of exposure to sovereign power without principled limit. Agamben's Schmittian argument here is based on the necessary



indeterminacy of the exceptional situation within which (typically) executive power comes to the fore. One of the weaknesses of this account is that it is unclear why this indeterminacy necessarily implies the foregrounding of executive power. Other thinkers, like Negri, have used arguments in many ways similar to Schmitt's to establish the existence of a revolutionary moment of constituent power distinct from the institutional coagulations of constituted power. (Agamben 1998, p. 42)

Agamben's response is to deny that there are principled criteria to differentiate between a reactionary statist moment of sovereign power and a revolutionary realization of the ultimately political character of social institutions. This is technically correct: the sovereign is (in Schmitt's description) the one who decides the exception; so if the exception is decided (in some instance) by a revolutionary movement, then that movement is sovereign. But this fails to establish the conceptual link between sovereignty and *Gewalt* that is at the heart of Agamben's picture of sovereignty, because it depends on an apparently empirical claim. It might for instance be grounded in the view that all revolutions will go the way of the Nazis and Lenin, (Agamben 1998, p. 42); or by an argument (which Agamben does not make) seeking to show that the necessary absence of positive legal constraints on revolutionary moments of the insurgence of constituent power makes them permanently vulnerable to totalitarian capture. If the former claim is empirical, then so is the link between sovereignty and *Gewalt*; if it is not empirical, then it is surely itself grounded in some transcendental or conceptual link between sovereignty and *Gewalt* and therefore cannot be used to ground such a link. This latter is not such a bad argument, but is clearly empirical and does not establish the kind of strong (transcendental) relationship that Agamben is after.

However, if the parallel Schmittian argument about the insoluble remainder of democratic decision-making goes through, then the basis of the intrusion of a moment of non-legitimated power into even the most radically democratic decision becomes clear. Thus when Negri, attempting to distinguish his position from Schmitt's, declares: 'the absoluteness of sovereignty is a totalitarian concept, whereas that of constituent power is the absoluteness of democratic government,' (Negri 1999, p. 13) he is unwittingly reproducing Schmitt's very argumentation: sovereignty is precisely absolute, in Schmitt's view, because it names the site within which the intrinsic contradictions within the legal system are posed; similarly, any 'absoluteness' possessed by democracy names a parallel aporetic space within which the limits of democratic legitimation are posed.

## Part IV

Borders are privileged points of application for political sovereignty. In this section I want to investigate the traction that Agamben's theory of sovereignty has in explaining concrete effects on the border and to evaluate what counter-effects this application has on his theory. I am especially interested in the southern border of the United States—and so the term 'concrete' should be taken (also) literally,

since one of the most significant developments in recent years has been the construction of an 850 mile physical barrier along portions of the Texas-Mexico political boundary.

For this purpose the most important aspect of the intersection of the two paradoxes—of sovereignty and democracy—is the corollary of the transcendental temporality of the decision in a transcendental spatiality. Of course, the primary site of such spatiality is the border. Understood materially, the border is a physical limit, dividing a plane. But in relation to its role as condition of possibility of a juridical system, this physical realization of the border becomes complicated. The first and most obvious way in which this happens is that the division is a *normative* one (indeed, in part, it is the condition of functioning of norms): a border is not constituted merely by performing a spatial division, but only by establishing relations of inclusion and exclusion to human beings and their products. As the spatialization of a transcendental act, the drawing of a border in its full sense is not a project that can ever be completed: it requires something like Freud's 'permanent expenditure of energy' to maintain. (Freud 1986, p. 213) The continual re-founding of the *polis* is spatially situated at its border, which is therefore intrinsically incapable of complete securitization because the question of who comprises the *demos* is unanswerable in democratic terms, that is to say, it is in principle always open.

Mouffe (2000) accepts something like the paradox of democracy (although she presents it as a paradox *between* the liberal and democratic aspects of liberal democracy) but argues that it is benign. She accepts, drawing on Schmitt's *Freund/Feind* or friend/foe distinction, that the constitution of a democratic polity involves an irreducible act of exclusion but argues that it is formal rather than substantive (as in Schmitt). That is, there must *be* some exclusion, but the notion of what counts as a people is formed in that moment of exclusion (rather than, as with Schmitt, comprising a pre-political communal substance) and is hence a political construct open to perpetual re-negotiation (though never complete elimination) through liberal critical interrogation. Mouffe's insouciance provides one understanding of the necessarily incomplete securitization of the border. But the facts on the ground, at least in the southern United States, suggest another, less benign one. (Mouffe 2000, pp. 4ff., 36ff.)

The transcendental incompleteness of the border is mirrored at an empirical level in the well-known inefficacy of physical prohibition in controlling border transgression in the form of unauthorized migration. Large-scale physical barriers ('walls') have become an increasingly significant phenomenon in recent years, the most prominent examples being the US wall on the border with Mexico and the Israeli wall that acts to annex parts of the occupied Palestinian West Bank to Israel. Although their aims differ, it is hard to think them apart from the intention to restrict human movement across a simultaneously physical and political threshold.<sup>9</sup>

<sup>9</sup>In this sense the contemporary wall is quite different from the cold war paradigm of the Berlin wall.

Certainly it is true of the US southern border wall that its official justification revolves around its ability to 'deter' unauthorized migration.<sup>10</sup> Yet they are all, in this respect, grotesque failures (Brown 2010, pp. 109f). In the case of US border wall, these failures are particularly acute for the most recently authorized sections in Texas have the benefit of evidence about the effects of the previously constructed sections, mostly in California (the so-called 'primary fence' dates from 1994 in San Diego). Yet all this evidence, including official sources, suggests that the wall has no discernible impact on net unauthorized migration. (Haddal et al. 2009, p. 2) This is not surprising because, in a literally Kafkaesque scenario, the wall is, like the wall in Kafka's story *Beim Bau der Chinesischen Mauer*, built to be incomplete, stretching across only 850 miles of the nearly 3,000 mile border: 'how can protection be provided by a wall that is not built continuously?' asks the narrator of Kafka's story (1931, p. 10, my translation). How, indeed. And, again just as in Kafka's story, certainly by the time of the decision to build the Texas segment, the evidence of its failure is 'widespread and widely known', not least to policy makers.

Obviously this situation can be read ideologically: the manifest justification, it is clear, cannot be the real motivation. And it is easy to speculate about what the institutionally (politically) unconscious alternative motive might be that cannot be consciously i.e. publically, voiced. For instance, obvious considerations of global political economy suggest that US capital has an interest both in maintaining the traditional long-term barriers to the free flow of labor from Mexico (to perpetuate wage disparities that enable the practices of offshoring) and to permit some significant flows of the most desperate, as long as they remain unintegrated into the American polity (and can hence comprise a super-exploitable class and exercise downward pressure on US wages in the service sectors). A porous wall would serve just this end, an end that cannot itself be integrated into the conscious (public) discourse of legitimation, justification and explanation. (Davies 2005)

But, without denying the validity of this analysis, an understanding of the structural nature of the incompleteness of the wall offers an insight into the construction of the space within which *this* ideological appeal turns out to be a successful way of carrying through the latent project. Here the paradoxes of democracy and sovereignty intersect: the unresolved kernel of illegitimacy within the project of democratic legitimacy that constitutes the paradox of democracy entails an appeal to sovereignty, since to be sovereign is to be able, legitimately, to make a decision that cannot be legitimated.

The permanently incomplete act performed at the border is of the order of an exception or emergency, but an avowedly permanent one (whereas the discourse of the war on terror is forced to try to justify its own permanence). This is because, at the level of democracy, the border is the site at which a phase of the decision

<sup>10</sup> The public rationale for these measures is expressed in the slogan adopted by the US Border Patrol when the primary fence was built: 'Prevention through Deterrence'. As Congressional Research Service documents explain, this strategy calls for 'reducing unauthorized migration by placing agents and resources directly on the border along population centers in order to deter would-be migrants from entering the country.' (Haddal et al. 2009, p. 33)

comprising the constitution of the *demos* is enacted. The border is therefore the point at which the indissoluble transcendental core of democratic legitimation is negotiated, the question of the constitution of the *demos* that itself constitutes political legitimacy. The foundational nature of this question—however it is ultimately answered; or even if it has no substantive answer (as in Mouffe)—positions it in the space occupied by the question of the existence of the *polis*: just the question that comprises a state of emergency. The ideology of the 'state of emergency' or the 'existential threat' proceeds by means of what Kant would have called a transcendental subreption: substituting an *empirical* answer (migrants changing the 'nature' of the political substance of the nation) to a transcendental question (about the constitution of the political unit itself).

In the legal literature concerning the United States, it is well established that the border policies flow from a direct assertion of the power of sovereignty, in the doctrine of so-called 'plenary' or 'Inherent powers' possessed by the national government of the United States. Such powers are distinct from the government's 'normal' powers, which have the source of their authority in the specifically enumerated clauses of the constitution. Plenary powers however have their source in 'the status of the US as a sovereign nation' and are—at least relatively speaking—unconstrained by the constitution and insulated from judicial review (Cleveland 2002, pp. 5–8).<sup>11</sup>

These powers were developed—by means of a mutually supporting network of case citation—during the course of the nineteenth century in three apparently distinct areas: regulation of affairs with Native Americans, regulation of aliens (non-citizen immigrants) and colonial rule over territories like the Philippines. What ties the three areas together is that they all involve the physical presence of non-citizens in territory claimed by United States. In these circumstances, so a series of Supreme Court cases argued, non-citizens are exposed to legislative power unchecked by constitutional constraint and ultimately to sovereign power unchecked by law.

The Report of the Select committee of the House of Representatives, made to the House of Representatives on Feb. 21, 1799 in response to the famous 1798 Alien Exclusion Act, marks a particularly clear expression of the idea: 'the citizen,' the House Report observed, 'being a member of the society,' could not be disenfranchised other than following conviction by a jury trial. Aliens, however, could be removed 'merely . . . from motives' of policy or security. Their removal was not a punishment, but the withdrawal 'of an indulgence . . . which we are in no manner bound to grant or continue.' (Cleveland 2002, p. 93) But similar ideas animate recent cases too. Thus in *Knauff v. Shaughnessy* (1950) Justice Minton writes: '[t]he exclusion of aliens is a fundamental act of sovereignty. The right to do

<sup>11</sup> Agamben rejects the characterization of the assertion of sovereignty within the state of exception as 'plenary' for reasons derived ultimately from his use of an Aristotelian metaphysics of potentiality (2005, pp. 5–6). But his rejection concerns only the description of such powers as 'plenary' i.e. full, not the understanding of sovereignty at issue.

so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation. When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power' (Cleveland 2002, p. 160).

This last claim is particularly interesting. For Agamben, the 'indiscernibility' between normal liberal democratic states and totalitarian ones is grounded in the increasing use of the state of exception. And states of exception have the empirical character of assertions of *executive* power. But Minton writes as if the legislative i.e. democratic power *becomes* executive when it deals with issues concerning the non-democratic core of the choice of the constitution of the *demos* in a border policy. This intersection of the paradoxes of sovereignty and democracy explains more directly how liberal democratic states are implicated in an on-going and constitutive emergency that opens up the ideological space in which even the abandonment of justification can present itself as a justification.

Indeed this abandonment is the most striking characteristic of the discourse of legitimation—and counter-legitimation—that surrounded the construction of the border wall: exactly those who would be affected by the project were absent from consideration of its effects. For instance, the obvious and well-known fact that an incomplete wall will have no discernible effect on overall migration is in part based on the equally well-known fact that would-be migrants will be able to circumvent built segments and go through the holes. The Border Patrol in particular has been quite clear about this, explicitly claiming that the wall would displace unauthorized migrant entry points from urban areas to extra-urban ones (Haddal et al. 2009, p. 26). But it is also well known that these alternative crossing-points, especially in the Sonoran desert between San Diego and El Paso, are extremely hostile to human life. Official sources have documented mortality rates since the beginning of the 'Prevention through Deterrence' strategy: these have risen in absolute terms through the whole of the 1990s and have continued to rise as a proportion of apprehensions (Haddal 2009, pp. 25f) so that more than 4,000 people have now died attempting to cross the US-Mexico Border wall in the last 12 years.<sup>12</sup>

What is striking about this absence of migrants themselves from the structures of justification and legitimation of policy is that it is almost equally as pronounced among those *opposed* to the construction of the wall. A large majority of people from the US borderlands object to the wall, but there has been relatively little national media coverage of the border wall, which is regarded as a 'regional' issue. However in April 2008 there was a small flurry of national interest in the topic manifesting a kind of official opposition. Several newspapers published editorials on the issue after then Homeland Security Secretary Michael Chertoff's invocation of the Real ID act of 2005, an act that enabled those involved in wall construction (and other projects related to the militarization of the border) to waive up to 60 laws

<sup>12</sup> According to the Congressional Research Service deaths peaked at 475 in 2005, more than twice the number prior to 'Prevention through Deterrence.' (Nuñez-Neto and Garcia 2007, p. 35). Other sources put the figures much higher (International Federation for Human Rights 2008).

that might conceivably impede the construction of the wall. So the 'official' opposition to the wall paid no attention to the contradictions within the official justification for the wall, nor to its effects on would-be migrants, but focused instead on the environmental laws waived to speed its construction.<sup>13</sup>

Even on the left, the fatal cost of the wall in general, and any costs to migrants in particular, are similarly downplayed. A recent film, *The Wall* (Ricardo Martinez 2009), devotes only one scene to the issue (albeit a gruesome one: the Chief Medical Officer for Pima Co. Arizona has run out of morgue space to house all the bodies of dead migrants). Its narrative arc instead focuses largely on the radicalization of a poor white woman living on the border whose garden was to be transected by the wall and the film therefore developed a theme of the suspension of legal rights, in this case property rights, similar in substance to the official discourse of objection.

This state of affairs is, I think, the symptom, within the democratic discourse surrounding the wall policy, of something more radical than merely the presence of an ideologically disavowed content (the wall is not 'really' about reducing migration but contributing to the construction of an even more radically disempowered super-exploitable underclass)—even if this content is certainly present. Rather, I think we are in the presence here of something more like the spatial localization of a primary or structural repression of the relation between the paradoxes of democracy and of sovereignty.

This is perhaps an appropriate place to consider an objection to Agamben's Schmittian conception of sovereignty. In her important recent book on the contemporary spate of border wallings, Brown (2010) also uses broadly psychoanalytic resources. As I do, she sees them as intimately tied to assertions of state sovereignty. But for her their failure is an index of the erosion of state sovereignty itself. The massive physical presence of the walls themselves is a kind of overcompensation for the decline of state sovereignty in a post-Westphalian world. The walls themselves are, according to Brown's amplification of Mike Davies's judgment, 'hyperbolic' (Davies 2005, p. 88) performances of a state sovereignty that no longer exists (Brown 2010, p. 24): 'rogue-state behavior—manifest *inter alia* in the building of walls—may look like hypersovereignty, but is actually often compensating for its loss.' (p. 67) In particular, 'the US-Mexico barrier stages a sovereign power and control that it does not exercise.' (p. 38) But generally, there is a 'post-Westphalian distinctiveness to contemporary walls' precisely in 'the reaction they represent to the dissolving effects of globalization on nation-state sovereignty.' (p. 39)

So, although Brown certainly does not emphasize this, her account is continuous with one in which the contradictions in the manifest content of the wall projects are

<sup>13</sup> See, for instance, editorials in the *El Paso Times*, the *Houston Chronicle*, the *San Antonio-Express News*, the *Yuma Sun* on April 4th 2008 (all of which specifically mention environmental laws) as well as editorials in the *Austin-American Statesman* (April 4th 2008), the *Boston Globe* (April 7th) and the *New York Times* (April 3rd).

evidence of a latent but ideologically unavowable content: in the case I mentioned, to effect an intensified exploitation of labor; in her case, the collapse of any sovereignty of the state at all. By contrast, I am arguing that the failure fully and completely to secure borders is an intrinsic property of the assertion of democratic sovereignty, and hence not a repressed content, but the primary repression that opens up the space of ideological disavowal.

Nevertheless, I do not see Brown's reading as necessarily contradicting the one I offer: there can be latent contents only on the basis of the primary repression that opens up the space of latency. But the question my reading answers is a different one: not *what* are they really up to; but how is that they can use *this* manifest content as a justificatory screen. The paradox of sovereignty—where there is a remnant of juridical order without determinate legislation—fills up the space opened by the paradox of democracy—where democratic legitimation gives out, at the border. Instead of legitimation one has the appeal to sovereignty, which trumps legitimation, or legitimates by failing to legitimate, by occluding from consideration those affected by the foundational decision that comprises the *demos*. But I do think it is unwise to underestimate the effects of sovereignty—the deaths caused by the porous wall for instance—by reading its failure to successfully assert itself as an empirical index of its waning importance rather than as a structural condition of its functioning.

## Part V

In this section I want to address the question of whether this intersection of the paradoxes of democracy and sovereignty might involve something like the bare life that Agamben argues is the effect of sovereignty. I think so: the occlusion of unauthorized migrants from consideration corresponds to the legally anomalous status that unauthorized aliens in general possess within the US. And this anomalous legal situation can itself be best understood using Agamben's conception of bare life as that which, by virtue of its exclusion from the constituted legal system (e.g. through deprivation of legal rights) is exposed to a sovereign-type power that presents itself as legitimate without any legitimation.

Aliens who were not legally admissible at the time of their (physical) entry into the United States or who overstay the terms of their visas are guilty of a minor civil infraction to which no criminal penalties, certainly not imprisonment, apply. Nevertheless, those suspected of this civil violation are subject to proceedings with no right to a government-funded attorney, limited and in some cases no due-process rights, limited and in some cases no right of appeal,<sup>14</sup> forced imprisonment ('administrative detention') until a determination has been made, and whose

<sup>14</sup> Aliens found within 100 miles of the border are subject to 'expedited' removal 'without further hearing or review' (Scaperlanda 2009, p. 68).

outcome may be the alien's forced and involuntary removal from physical presence on US territory. In fact it is *because* 'the decision to remove (by exclusion or deportation) an alien from the United States has long been considered a civil matter, not a criminal one' that 'the alien in removal proceedings is entitled to none of the panoply of constitutional criminal procedure rights.' (Scaperlanda 2009, p. 33) Nevertheless, as the Supreme Court has itself noted, 'the impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence.' (Scaperlanda 2009, p. 103) Salinas (1996, p. 245) argues that in many respects, deportation can be viewed as a punishment that is more severe than confinement because 'removal from home, family, and country can mean permanent exile, in some cases to a country the deportee may have never actually known.'

The number of removals has been increasing exponentially in recent years, with nearly 400,000 people being deported in 2010. (Bruno 2010) But the fact of being 'deportable' is just as significant in the lived experience of unauthorized migrants since increasingly any interaction with the police—being stopped for a broken tail-light for instance—can result in the initiation of deportation proceedings, forced detention and ultimately forced removal. 'Deportability' is transformed from a legal category to an essentially totalitarian experience of aversion not only to the public sphere but even to public spaces (squares, highways, parks), which promise not the possibility of collectivity but the permanent potential for forced detention without trial and ultimately forced removal.

The crucial conceptual aspect of this tightly woven web of fear is the claim that removal is not a form of punishment. But paradoxically it is as a result of this fact that it is not subject to review, and those removed are not able to claim the rights of someone who is accused of committing a crime. Conversely, the triviality of the offence of merely being physically present in the United States without appropriate authorization affords little protection against search and seizure, as authority is transferred down to local law enforcement who can in effect target anyone they want. If it is not a punishment, how then must removal (and its threat) be understood? It is a purely administrative measure, aimed to correct the anomalous situation in which an alien is physically present on United States territory without authorization. It cannot even be seen as a legal response to the civil violation that comprises its occasion.<sup>15</sup> At the limit, it is a *physical* measure in which the state lays hold of a body that has been legally de-subjectified, and removes it from the territory that defines the state.

The sense of Agamben's provocative critique of human rights discourse is clear here. It is precisely a *humanitarian* gesture to separate immigration violations from criminal violations. Mexico for instance has recently succumbed to international pressure to move in this direction, so that migrants from Central America will not

<sup>15</sup> For three reasons: (1) this follows a fortiori from the fact that it is not any kind of punishment; (2) if it were a punishment it would be wildly disproportionate to the violation; (3) there exist other separate civil penalties for the violation that are proportionate (e.g. fines).

be subject to harsh criminal penalties.<sup>16</sup> But the effect of this humanitarian intervention is to create a separate parallel or shadow quasi-legal system of immigration judges, immigration detention centers and enforcement officers (ICE, Border Patrol) which, *exactly because they are not a part of the criminal justice system*, deprive alien migrants of crucial rights and expose them to arbitrary treatment.

The absence of migrants from the discourse of democratic legitimation thus mirrors their subtraction from legal protection: the arbitrary administrative power in the one is the reflection of arbitrary democratic legitimation in the other. It is tempting to regard the suspension of environmental laws authorized by the Real ID Act in 2006 as characteristic expression of sovereign power as the bringing out of force of the law. But it is first of all *democratic* sovereignty that is expressed here (since the laws are taken out of force by the force of *another* law). And what this assertion of a specifically democratic sovereignty involves is the creation of an ideological situation in which it is only *environmental* laws that require suspension: the migrants who will be those most affected by the construction of the wall have already been so thoroughly subtracted from the law that *there is no need to suspend the law concerning them*.

## Part VI

I want to conclude by taking up again the spatial aspect of the transcendental 'aesthetic' of the act of sovereignty. As with its temporality, the transcendental spatiality of sovereignty is distinct from empirical spatiality but without being blankly negative. There are a number of aspects of this spatiality that deserve attention in this context, but the most relevant for thinking about Agamben's understanding of sovereignty on the border is a certain kind of dimensional twisting. There are various empirical manifestations of this twisting: the physical border between the US and Mexico is for instance extended into the country in a so-called 'depth barrier' extending 100 miles up so into the US within which any unauthorized migrants are subject to immediate deportation without any redress, just as if they had been discovered exactly at the physical border. Even further into the US are checkpoints on major highways that represent the only feasible exit points from the border, where, again, unauthorized migrants are subject to immediate deportation. (Brown 2010, p. 32) More radically, the spatial integration of unauthorized migrants into non-border communities that has taken place over the last decade means that the state's political outside has been fractally interiorized in increasingly small-scale local migrant communities interspersed throughout the whole territory of the US.

<sup>16</sup> See 'Mexican Congress votes to decriminalize illegal immigration,' *Arizona Daily Star*, Saturday, May 3rd 2011.

In his short essay on Arendt's essay on refugees, Agamben follows Arendt in proposing the migrant as 'the paradigm of a new historical consciousness' so that the 'refugee is perhaps the only imaginable figure of the people [as opposed to the nation state] in our day'. (Agamben 1995, p. 114) And he adverts in particular to a kind of dimensional twisting or complication of empirical space that is the effect of unauthorized migration: there is a kind of 'reciprocal extraterritoriality (or better aterritoriality)' that would 'deform' and dig 'holes in' the national territory. (1995, p. 118) In particular, Agamben uses the same images of Möbius strip or Leyden jar. These images are provoking because he uses exactly the same ones in *Homo Sacer* to characterize what comprises the *problem* of sovereignty (1998, p. 37). Indeed most of the theoretical apparatus of his political texts is oriented around this spatial metaphorization of the transcendental relation itself: it is when transcendental and empirical, fact and law etc. become mutually 'indistinct' that sovereignty is able to grip life, and to present itself as the unmediated synthesis of life and law, whose logical conclusion is the claim that the voice of the *Führer* is itself immediately law. So this fractalized space is at once what makes possible (by effecting their indistinction) the transcendental leak into the empirical constitutive of the state of exception *and* the structure of the experience of the unauthorized migrant as exposed to sovereign violence *and* the blueprint for a solution to the problem of sovereignty.

It is notoriously hard to read Agamben's positive program. But in *The Coming Community*, Agamben comments that '[e]vil . . . is the reduction of the taking-place of things to a fact like others' whereas the good (god) is 'the place that does not take place but is the taking-place of the entities.' (2007, p. 15) And this suggests that Agamben believes that the failure to respect ontological difference (i.e. the difference between the 'taking-place' of entities and 'facts' about entities) should be identified with evil. In the political texts, it is this Heideggerian account that motivates his hyperbolic view that the (concentration) camp is the result of the attempt to localize (i.e. to give ontic sense to) 'the unlocalizable,' i.e. the ontological (1998, p. 20). But here it really is hard to see where Agamben is going: the spatial structure of the camp is precisely *not* fractalized or twisted (like that of the border) but plain and Euclidian. So are we to have hope because of the transcendently complicated spatiality of the border (which maps onto the complexity of transcendental relation itself, as one of ultimately spatial 'indistinction')? Ultimately, Agamben's solution to the problem remains itself *indistinct* from his posing of the problem.

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## Chapter 5 The Gossip Circles of Geneva: Morals, Mores and Moralizing in Political Life

Anne O'Byrne

*The best lack all conviction, while the worst  
Are full of passionate intensity.*  
W.B. Yeats  
The Second Coming

Can there be such thing as a robust political life without a substantial shared social life formed through some form of moralizing process? Borrowing Yeats' formulation, can we have the experience of passionate political intensity without the experience of a love that can generate that passion, a love that comes with particular demands? Can we acquire political conviction outside the context provided by a group and its distinctive social practices? What sort of politics can there be without an *ethos*? In the terms Simon Crichtley uses in *Infinitely Demanding*, can there be direct democracy without the apple pie? In the terms of Rousseau's *Letter to d'Alembert*, can there be a republic without a set of intimately shared, constantly reinforced mores [*moeurs*]? In the terms of political ontology, can we grasp political life without acknowledging that we are not just ethical or moral but also *moralizing* beings?

Crichtley's memorable answer is 'Yes, but...' Yes, there needs to be a shared ethical framework but his hope is that it need not involve what we think of as moralizing; perhaps it can produce instead an 'infinitely demanding ethics of commitment and political resistance that can face and face down depoliticizing moralization' (Crichtley 2007, p. 130).

This is an admirable thought but the concern persists that moralization might not be so easily dispensed with. Or, since Crichtley would certainly admit that there is nothing especially easy about getting rid of it, we must ask whether it can be dispensed with in this way. This is worth worrying about for several reasons. First, as Chantal Mouffe points out, moralizing tends to take over the political space and eventually shut down the possibility of political struggle, the *agon* that is so valued in the tradition of political thinking. Second, moralizing often proceeds as though its demands issue either from a higher source (that is, as thought they are

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