

Exceptions There Are That Are Not the Case

Exceptions

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Abstract

There is something essential we need to know of power that is visible only when power makes certain exceptions. Power, we are arguing, is fundamentally without content. This occluded piece of information about power is partially illuminated at every exception to a rule but appears to only be fully visible to thought when a state of exception is declared by someone in power. This seems to be the crucial point of the theories of the exception elaborated by Giorgio Agamben, Carl Schmitt and Walter Benjamin. Schmitt because the sovereign decision is content indifferent. Benjamin because it is only if you remove referential content from the terms exception and rule that you could mistake the two words for the same thing. Agamben because according to his theory of signatures, the law appears as ultimately contentless. Through a close engagement with the theories of these three authors, this article suggest that an exception is not some statement or ruling which stands outside the rule, but is the process wherein the interior of the rule, its actual rulings, is either negated or suspended. Is this what the legal exception is, the indifferentiation of law's specific contents?

Keywords: exception, Agamben, Schmitt, Benjamin, indifference

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Sovereign is he who decides on the state of exception.
(Carl Schmitt 1922)

The state of [exception] in which we live is not the
exception but the rule.
(Walter Benjamin 1940)

The decisive fact is that, together with the process by
which the exception everywhere becomes the rule,
the realm of bare life—which is originally situated at
the margins of political order—gradually begins to
coincide with the political realm, and exclusion and
inclusion, outside and inside, bios and zoe, right and
fact, enter into a zone of irreducible indistinction.
(Giorgio Agamben 1995).¹

1. EXCEPTION SHOWS US THAT POWER IS CONTENTLESS

There is something essential we need to know of power: that is visible only when power makes certain exceptions. Power, we are arguing, is fundamentally without content. This occluded piece of information about power, is partially illuminated at every exception to a rule, but appears to only be fully visible to thought when a *state* of exception is declared by someone in power. During such a state of exception or emergency, our theorists above appear to agree that exception, ordinarily a small cog on the machinery of rule, suffers a violent synecdochism such that this part, this cog, suddenly stands for the whole machine. A state in force in part due to the function of exception, now becomes

¹ All cited in Giorgio Agamben, *State of Exception* (Stanford University Press 2005) 52-64. This is not a work of scholarship on Schmitt or Benjamin. Many of these exist, not least in our source, Agamben's *State of Exception*, which goes back into the German record in some detail. We are instead interested in the staging of the meeting of Schmitt and Benjamin, Agamben explains therein, and its wider implications for a post-Agambenian, indifferential conception of exception.

analogically mapped onto exception as such. And when it does so the operations of the machine momentarily come to a halt. The occasional exception to the rule, during the state of exception, experiences a violent anamorphosis, stretched to its limits such that it becomes as big as the state it is an occasional exception to. This stretching is facilitated by a certain, simultaneous shrinking of the state or diminution of the dominion of power. Those vast dispositions of power across millions of subjects captured in innumerable, overlapping, complex dispositifs, of which Foucault speaks² during a state of exception, are curtailed. Power becomes simpler, its disposition more direct, its mechanisms decidedly more cruel.

As Schmitt argues in particular, sovereign power is reduced to simply deciding on the state of exception after which the word of the sovereign becomes pure rule with no institutional intermediary. Agamben cites Schmitt's comments on the principle of *Führung* as 'a concept of the immediate present and of real presence' that Agamben interprets as 'a living law'.³ The process of *Führung* then instigates, according to Schmitt via Agamben, a disastrous indistinction between the political and the non-political, such that the state decides, politically, on what is outside of the political. The ultimate political exception, the pure fact, suddenly becomes the basis of all political decisions. At this moment, the violent simplification of the state that is totalitarianism, what I say is now the law, indifferentiates the complexity of subjectification positions assigned to us by power. When there is just one law, the law of what the despot says, there is just one subject, that of bare life, or the *homo sacer*. Famously, the geographical location of this process is the camp, the ultimate zone of disposed indistinction.

Let us say that a state is constituted by the rules that sovereign power legitimates and enforces. If a state primarily exists as a limited unity composed of rules, the true power of the state however appears to be established and maintained by the ability to decide on exceptional

² Michel Foucault, 'Governmentality' in Graham Burchell, Colin Gordon and Peter Miller (eds) *The Foucault Effect* (Chicago University Press 1991) 87-104.

³ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press 1998) 173

circumstances, when the rules are suspended, so that we enter a period of pure rule. The state clearly depends on a circularity of cause and effect here. The state is composed of rules but defined by the ability to suspend those rules. Power is therefore a mode of corporeal self-abnegation. Not just the ability to negate the content or matter that composes its body, rules and laws, but more than that, it would appear the very ontology of power is defined by this moment of self-destruction. Yet the body in question is not killed, eradicated, wounded or truncated. Rather, the internal differentiations, dispositifs, subjective positions, signatures, and statements, in their distinctions, dissolve. Like the poisonous effects of certain wasps when injected into their prey's body, during a state of exception, the internal differentiation of the body politic is liquefied. The moment that exception rises up to become the analogy of the state, (the state *of* exception), synecdochically allowing a part, an excluded part no less, to become the whole, the content of any state is neutralised into a single, un-differentiated mass, not unlike Deleuze's Body Without Organs.⁴ Interestingly, this is not just the result of a state of exception, a state made up of an exception, but is also the facilitator of this process. It is this circularity of state becoming exception resulting in, and thanks to, content neutralisation, that internal liquefaction I just mentioned, that we wish to further investigate.

Which comes first, the state or its disposition of power through rules, laws, examples and exceptions? This is an all but impossible question to answer, subject as it is to the hermeneutic circle. For example, pure rule, or decision on a state of exception, is an event that is decided upon by suspending rule of law. Pure power comes after law it would seem. Yet, of course, no suspension of law is possible, unless a sovereign already exists to warrant and legitimate specific laws, which then argues with equal credibility that power is a pre-requisite for any law to be a rule. State power is defined by its ability to suspend all rules, from which point on, every decision is an exception to law, in that law has been suspended. This exception proves the potency of

⁴ Gilles Deleuze, *A Thousand Plateaus* (Athlone Press 1987).

power *qua* power, or pure rule. Real power is the ability to suspend law and to stand in an ontological immediacy with a verbal action. From now on, what the sovereign says is the same as the law. Yet if the state, which is composed of the disposition of its rule across actually constituted rules, via institutions like jurisprudence, suspends these rules, then what is power actually composed of, what is its specific content? Does a state have any content at all? Did it ever? Are there, indeed, laws that are then suspended by an exception, or does the state of exception reveal the most damaging truth as regards all power structures, which is that they are contentless, empty, neutral, and indifferent?

It strikes us, contrary to Schmitt, that the ability of a state to call an exception to the rule of law is not the definition of power, but of debility and weakness. For Schmitt, the validity of a decision is not so much defined by the concept of the ruling, its content, but by the legal and moral legitimacy of the state deciding on such a ruling. As long as the state is legal, its decisions on exceptions have to be so too. As long as the sovereign is legitimate, her decisions are also legitimated. If the sovereign, for example, says that a rule is the same as its exception, although logically this is not possible, this does not alter the fact that this is now 'true.' The *Führer* said it and in doing so fact, he said it, becomes law, it is therefore true. Power, on this reading, is the ultimate epistemological warrant. It can make $2+2=5$. Power is the ability to make contradictions true, because power removes content from words in its most absolute state. The sentence $2+2=5$ actually says: I am in complete control. In other words, statements of power are content indifferent. It is not what is said in a statement that matters, but what the fact of that statement being made, how it is made, who says it, who legitimates it, who defines its truthfulness; demonstrates or enacts.

Power, we can conclude, taking our lead from Foucault's famous consideration in the essay 'Subject and Power',⁵ is the modality of what we have called, after Kant and Agamben, communicability.⁶ Communicability does not concern what is said in a statement. The politics of

⁵ Michel Foucault, 'The Subject and Power' (1982) *Critical Inquiry* 8.4, 777-795.

⁶ William Watkin, *Agamben and Indifference* (Rowman&Littlefield International 2014); id *Badiou and Communicable Worlds* (Bloomsbury 2022).

truth rather dictates that communicability is concerned with the fact that such and such a statement can be made, understood, accepted and legitimated, irrespective of its actual content. The decisiveness of power, encapsulated in powerful words, statements or what we will term, inspired by Agamben, signatures, is contentless, or content neutral.⁷ It is not the content of the decision that matters, but pure decisiveness as such. It is not the content of an exception to the rule that proves the rule, but the ability to decide on exception, which proves you are the ruler. Communicability is, as the phrase suggests, a communal warrant for the truthfulness of statements, and most of the time that might be based on naturalised epistemology, warrant due to verification, a faith in the difference between words that are used rather than mentioned and so on, as our analytical cousins insist. During a state of exception, however, communal meaning is suspended. It is the sovereign who decides, and the sovereign alone. At this moment, the context for the meaning of words, their communicability, has nothing to do with the content or meaning of those words, and everything to do with what the sovereign wants them to mean. At this juncture, not only can a state make contradiction true, but it is surely also the case that a state of exception no longer has any exceptionalism. The pure rule in a state of emergency is power devoid of exteriority. At this moment we experience a self-mentioning, self-predicating, pure power that logic tells us is as impossible as two contradictory statements being true. A state of exception, therefore, augments or foregrounds the secret of all rules, all law, which is not just that they *rely* on the exception, but that there is something of exception that indifferentiates power, by emptying it of content, and suspending it between the two extremes of its contradictions. A state of exception is, in other words, a state of indifference, requiring on our part not just a reappraisal of power and law, but a considerable job of work to excavate precisely what a state of exception-indifference is actually composed of.

According to our epigraphs, we can say that all three thinkers, Schmitt, Benjamin and Agamben, observe an intrinsic relation between

⁷ Giorgio Agamben, *The Signature of All Things: On Method* (Zone Books 2009).

the rule, and its exceptions, at a particular moment in the life of any state: the state of exception. We further learn from them three facts about the state of exception concerning power, in particular sovereign power. From Schmitt, that the sovereign can decide to enter any state into an exceptional period where normal rule of law is suspended. According to Benjamin, if left unchecked this extraordinary executive power can make an impossible statement wherein the exception to the rule, now becomes the rule. The impossibility of this statement is proof of a state of exception in that the power of the *Führer* is such that contradictions can easily exist. This being the case, Agamben concludes, an essential distinction for power and the law, becomes increasingly indifferenced and indistinct, so that the foundational and operational difference between outside and inside, right and fact, is suspended. At which point the machinery of power is also suspended or rendered inoperative. The circularity of state and rule, which defines the economy or *oikonomia* of the machinery of power, can be its undoing in moments when this economic motility is suspended by the state in or of exception.

We are now in possession of a trinity of ideas in play as regards the relationship of any state to its exceptions. Schmitt's decision of exception defines such a state as the evacuation of content from the rule in times of crisis. When word becomes fact, the very idea of content, of something containing something else, is suspended. The immediacy of fact and law is a gapless state, as we observe in set theory for example between two successive multiples, such that there is no spatial possibility of differentiating content from container.⁸ Benjamin's phrasing suggests a particular period in time, the rise of the Nazis, where a state of exception is equivalent to a state of rule. Here rule and exception are more than synonymous, they are immediate. Finally, in Agamben, exception *becomes* the rule. What is significant is that this becoming rule, as Agamben terms it, is an economic process. It is this process of becoming that is important.

⁸ William Watkin, *Badiou and Indifferent Being* (London: Bloomsbury) 101-129

Three different considerations of exception, yet all three are notable for their refutation of the content of the rule, namely its rulings and laws. Schmitt because sovereign decision is content indifferent. Benjamin because it is only if you remove referential content from the terms exception and rule that you could mistake the two words for the same thing. Agamben because, as we have shown repeatedly elsewhere, his theory of signatures, in this instance [Law] is our signature, is that they are contentless.⁹ Thanks to this analysis, we can suggest that an exception is not some statement or ruling which stands outside the rule, but is the process wherein the interior of the rule, its actual rulings, is either negated or suspended. Is this what the legal exception is, the indifferentiation of law's specific contents?

2. EXCEPTION PROVES THE RULE: HOMONYMY AND CITATION IN THE SIGNATURES [LAW], [POWER] AND [STATE]

I am intrigued as to what degree, if any, this extended consideration of rule and exception from Schmitt, through Benjamin to Agamben, shares any semantic commonality with the widely used maxim 'the exception proves the rule', which seems to be echoed in the words of all three thinkers. Especially when Agamben is making the distinction that exception does not *prove* the rule, but *becomes* the rule, a change of quite some significance. The phrase 'Exception proves the rule', is a simplification of the medieval legal statement dating from around the 12th century, '*Exceptio probat regulam in casibus non exceptis*' or, 'The exception proves the rule in cases not excepted'. It would seem in the quotations I gave from Benjamin and Agamben in particular, that it is this phrase and its wide dissemination in our culture, that is being appropriated to aphoristically prove a point whose full discussion is otherwise rather technical and complex. The phrase is particularly important to Agamben, I think, because it encapsulates, in ordinary language, a complex

⁹ Watkin 2014 *supra* 6

philosophical observation of the economic inter-relation, in a signature like [Law] or [Power], wherein two terms that must remain oppositional, the rule and the exception to the rule, are capable, however, of swapping positions, while retaining their incompatibility. As they change places, it would appear that we, as a community, accept this exchange of position, up to a point, as the widespread use of the phrase indicates.

But at a certain moment, here where the exception *becomes* the rule rather than just proving it, the clarity of opposition is blurred, and the economy of interchange falters, slows, and grinds momentarily to a halt. This might be the fault of Schmitt's sovereign who, in declaring a state of exception, has based their decision on the pure and contentless function of rule. Such a rule of decision relieves words of their normal, essence-founded and property-judged, referential meaning. It is surely only when words are meaningless that two opposing words, rule and exception, for example, can *become* each other. 'Exception becomes the rule' is, therefore, a neat way of explaining a challenging philosophical system, that of the suspensive indifference of the oppositional terms necessary for the continuation of certain signatures. The fact that it riffs on 'exception *proves* the rule', gives the phrase purchase in everyday discussion, allows access to Latin medieval law, and orchestrates a 'debate' on exception and rule from the 12th century, through Schmitt and Benjamin, to our current situation. These are all typical Agambenian techniques.

Yet, to what degree is Agamben, certainly, Benjamin, possibly, and Schmitt, maybe, *using* the terms 'state', 'rule' and 'exception', and to what degree are they simply *mentioning* or citing them, to use the classic, analytical distinction? Is the sovereign 'exception' in Schmitt, formally and semantically the same as Benjamin's 'exception' for example? Agamben clearly believes so and spends some time looking at the publication dates and language of key works by the two thinkers to show how Schmitt, in particular, is responding to Benjamin.¹⁰ And there is no doubt because of this analysis that Agamben intends to use the same terms as his predecessors. Hence, we will trust Agamben's

¹⁰ Agamben, *supra* 1 52-64

scholarship and not spend time here further considering Schmitt's decisionism and its relation to Benjamin, that is not the point of our discussion. What we will ask about concerns the status of the terms in play more generally.

Due to the nature of Agamben's archaeological method, Agamben is not just analysing Schmitt and Benjamin's use of the same language, he is also citing them and their language. Citation, rather than deduction or pure assertion, being his favoured philosophical mode. In a very basic sense, their words are evidence to warrant his conclusion that biopower today is defined by bare life, wherein exception becomes the rule making *homines sacrii* of us all. Our point being that the terms, the rhythm, the rhetoric and the logic of the phrase 'the exception becomes the rule', in order to compose an effective observation on power and law, have to be using the same referent, the same exterior fact, in order to compose the veracity of this law. It is far from clear to me that this is the case, especially in Agamben's analysis. Not least because, as we said, the alteration of 'proves' to 'becomes', which does seem to depend on proving coming first, becoming later, for the power of the phrase in Benjamin and Agamben to prove its point, makes the relation of exception to rule really rather different. Or, across the various moments in the history of exception-proving rules, there is not just one use of the word exception, but many mentions, many exceptions, multiple kinds of citations, a fact masked by the homonymic use of the same sound-word to refer to quite different phenomena, different exceptions. And if there are multiple exceptions in play here, then there are multiple rules and, of course, different kinds of states of exception. Or so you would think if your commitment to the "use" of such terms was based on a naïve idea that language, when used sincerely, in the right context, can be warranted by rules of logic, verifiability, empiricism, extension, falsification and so on, such that you can be certain that this word legitimately refers to the same phenomenon every time it is used in this way. Schmitt somewhat shatters this belief. Decision, he realises, is not based on referentiality and verifiability. Power is not rational, not good at composing arguments, not logical. The warrant of power, its legitimation, is pure power devoid of content. This is the defining feature of a state of exception we are arguing.

This realisation, that states may sometimes “use”, (I mean it) and sometimes ‘mention’ (I am citing it and so don’t actually mean it) terms like exception, is not a criticism of Agamben, but is rather at the heart of Agamben’s choice of the term ‘signature’ for persistent metaphysical concepts such as [State] and [Law]. Agamben’s entire point is that our terms remain in play for centuries, not because they refer to the same object, which is warranted and verifiable (we are using these words correctly), or because we fail to notice that they do not always, (sometimes we use them, other times we mention or cite them), but because they do not refer to anything, appearing like they do simply because they sound the same. It is the radical homonymy of terms like [Law], [Power], [State], and [Exception] that hoodwinks us into thinking that they are the same words used to refer to the same things. When in truth, in their repeated use over time, they are the same word, [Law], [Law], [Law]..., but in being devoid of content, do not refer to the same objects, as they do not refer to anything specifically. A fact revealed only when the sovereign decides to enter them into a state of exception. Radical and sustained homonymy, or content indifference, is, we are arguing, the defining feature of the signature, our development of Agamben’s work in *The Signature of All Things*¹¹ and of Foucault’s conceptions of intelligibility and statement in *The Archaeology of Knowledge*.¹²

Agamben chose the term signatures for his archaeological method primarily because Foucault refers to them in *The Order of Things* where he makes his famous, anti-Kuhnian, comments on paradigms, using the work of Paracelsus. For Paracelsus, the signature pattern on a butterfly’s wings, resembling say an eye, means there is a natural affinity between the butterfly and the eye, so that the smashed corpse of the butterfly, might be efficacious in treating eye conditions. In adopting the term signature in his work, it seems to us that Agamben is arguing that we constantly “use” the same words, [Law], [Power], [State], over time to refer to divergent aspects of the worlds we live in. But because each time we use the word it ‘rhymes’ with the last time it was used, like the fallacious relation between wing pattern and eye

¹¹ Agamben, *supra* 7

¹² Michel Foucault, *The Archaeology of Knowledge* (Routledge 1972).

malady, we assume that the two uses of the term must be the same, or closely related.

The signature is, in many ways, a highly sophisticated reconsideration of the use-mention idea specifically of the relation of power to citation or signatory mention. Each time you declare the words “state”, “exception” and “rule”, you appear to be using them to access the same meaning. Ontologically speaking, they refer to the same beings, and so epistemologically speaking, they are adequate tokens for a sustained analysis of power over time, for example. Yet, in reality, this is simply not the case. First, because of the reason I have just given re: homonymy. They sound the same, so we assume they are identical, when in fact they are homonymic: same word, different meaning. And second, because signatures are contentless. They carry no content, rather they are the facilitation of there ever being any content whatsoever. They are content *qua* content, presentation *qua* presentation, in the neutral, purely abstract sense. It is not that sometimes words can be mere mentions, and thus semantically illegitimate, but that signatory terms are always only mention, always citation, always spoken as if on a stage with no direct reference to the real world that the audience live in. Their use is their being pure mention. This observation on the citational, contentlessness of the signature is significant because Schmitt’s decisionism, as we said, is such that the content of a decision by a state is not the source of the power of that rule. Power is simply the fact that a legitimate state can make decisions. Hence, power is a modality of what we have called communicability. The decisiveness of power, encapsulated in powerful words or signatures, is contentless, or content neutral.

Signatory and decisionist contentlessness sheds new light on our debate over rules and states of exception. In particular the question: to what degree is each of these terms a citation, rather than an actual linguistic use of a term to refer to communally warranted, and verified objects? The words used by 12th century law, the same words used by Schmitt and Benjamin and countless thousands of others--state, exception, rule--are always the same word and have the same function, but not the same meaning simply because, as signatures, they have no referential meaning at all. What is important is rather the functional

relation of these terms to the operations of power. The way an exception proves a rule, differs from how sovereign power decides on such exceptions, which differs again to the point where exception then becomes the rule. Power is little more than rhyming. Our credulity as subjects, bought by melody and the comforting nature of hearing those same tunes over and over and over again. We are all Caliban, charmed by the narcotics of a thousand twangling instruments. The sounds and sweet airs of power certainly give delight, but it would be naïve in the extreme to supposed that they hurt not.

3. THE LOGIC OF EXCEPTION

The 12th century legal precedent is sourced in Cicero's defence of Lucius Cornelius Balbus in ad56. Cicero is reported as saying 'If the exception makes an action unlawful, where there is no exception the action must necessarily be lawful'. (*Quod si exceptio facit ne liceat, ubi non sit exceptum, ibi necesse est licere*). This original phrase shares with the medieval legal formula definition by negation but does not yet include the essential concept 'proves the rule'. Having said that, this is implied because the statement relies on one of the most foundational formulations of logic, the excluded middle and the means by which the negation of the negation of a truth, is itself truthful. What Cicero is assuming is, if there is no exception or negation of the rule, here termed the 'lawful', then the negation of this negation, there is no exception, means that the rule or ruling of the law is true or correct. It is a rather circumlocutory, yet ultimately safe, assumption. The excluded middle is still an essential part of nearly all philosophical systems to this day.

Using the excluded middle, a logical way of stating our phrase is simply . The negation of the negation of the rule, or what we can call the exception, proves the truth of the rule, because not-not-A is the same as stating A. That said, is proof the same as identity? One thing we can note about this formula is that it is symmetrical and transitive. The exception proves the rule, but equally the rule proves the exception. Whereas our phrase is asymmetrical and associative, the

exception proves the rule, but the rule does not in any way prove the exception. If a sign says “Museum free on Sundays”, the exception proves the rule that otherwise you have to pay. But another sign that says “Museum Entry £10”, does not tell you it is free on Sundays. So that while the phrase depends on the excluded middle, there is obviously more to it than that.

Between Cicero’s ‘original’ words and its translation into medieval Latin law a subtle change has occurred. The phrase *Exceptio probat regulam in casibus non exceptis*, from which we arrive at ‘Exception proves the rule’ at some juncture, now encapsulates a specific legal process of proof of law, for which Cicero might be a precedent, but which has subsequently become a more generalised statement on rule and exception. As Smith is noted as indicating, the 12th century dictum rather means ‘A special exception to a rule proves it to hold concerning things not specially excepted’.¹³ Here the exception is a rule applied or not applied to an object or thing, but it is not the object or thing itself that is exceptional. The free entry applies an exception to the museum that does not alter the essence of the museum. It is not the external world that is exceptional therefore, rather it is a form of language pertinent to that world that, when inapplicable in certain special circumstances, then allows one to prove it is otherwise generally applicable. Here the proof of a law is defined as putting a law to the test, checking a law against a factual instance of the law to see if it is sound.

In the example Entry is Free on Sundays, the implication is that it is not free on all other days. If children are allowed to be out of school at lunch, this proves the rule that in general school children are not allowed to be out of school. If a parking sign says you cannot park between the hours of 8-10 am, it means you can park there otherwise, and so on. Why prove, by which we mean test, a rule in terms of a potential exception to it, rather than simply say what you mean? In fact, logically at least, it sounds like the exception does not prove the rule in modern, propositional, extensional logic since Frege. If, Frege’s extensional logic argues, you establish a concept, free entry, outside of school, parking,

¹³ Percy Smith, *Glossary of Terms and Phrases* (K. Paul Trench 1885).

and extend it out into the world, then you rely on instances of that concept to prove your concept expression true. The exceptions to this concept are, effectively, not-proven and thus, for this concept at least, false. If there are instances, however, where the meaning of parking is problematised by our human complexity and messiness, these intensional truths, as they are called, have to be reduced to a single extensional truth, according to Frege and Quine, by removing them from the set of objects over which your concept extends. To call these excluded examples of intensional statements exceptions is, I believe, a misuse of the term. If we take Frege's classic example of the morning and evening star, if the rule was, this is the same star, you can see that the terms of the concept, morning and evening, exclude this possibility.¹⁴ When it was discovered they were the same star seen from a different location on the earth's surface, the concept morning and the concept evening, and indeed the concept star, had to be excluded. There are no exceptions to this rule. Yes, intensionally, we humans find it meaningful to think of the same planet in different ways, but scientifically, and hence extensionally, this is not the case.

Yet we would be wrong to assume that exception to a rule is excluded from extensional logic. If we think of Popper's famous dictum that something can only really be a rule if it has a domain of application, then by definition every scientific concept has such a domain, which means there can be things which exceed this domain. All extensional truths, all scientific truths, must be falsifiable. The reason for this is that while the concept precedes the object in terms of its being expressed in truth-preserving, first order propositional logic, the concept is merely an abstraction or any statement whatsoever, until it extends over an actual object. A statement of logical identity is only truthful if extended over objects that are identical. The sentences in logic do not make a statement true, rather they preserve material truth in an unambiguous, generic, and universal language. If science invented a new category of large bodies in space, based on new data from distant telescopes and ancient dying stars, and Venus, our "star" met those

¹⁴ Gottlob Frege, *Begriffsschrift* 'Selections' in *The Frege Reader* (Blackwell 1997) 47-78.

criteria, it would no longer be a planet, just as it was once a star, then no longer a star. There are debates, for example, as to how many planets are currently in our solar system. In this sense, the possibility of an external exception to the rule of the concept “Venus” has to exist, as otherwise, you are guilty of what Bar-Am usefully terms Aristotelian determinism, or using information outside of logic, to prove a logical sentence, by negation.¹⁵

In saying that a logical sentence has precedence over an external fact, you are arguing that logic’s truth is due to logic, not external states of affairs, as Wittgenstein’s strict extensionalism calls it, and this erroneous assumption eventually leads to logical sentences that make statements on external reality to fix faults in the logic. Humans as featherless bipeds being equal to a plucked chicken requiring a judged human essence as distinguishing factor.¹⁶ In extensional logic, the possibility of an exception to your rule, your logical sentence extended over actual objects, is built into the model in that the exterior world must be able to bring to the table new data to disprove a truth object, as otherwise extensional logic is not extensional, but surreptitiously intensional and determinist. In a sense, the ordinary language meaning of exception proves the rule is, therefore, pleasingly correct. Whatever the rule, here the rule of rational thought and/or legal jurisprudence, an exception is not just possible but necessary and thus, in a sense, inevitable. To prove a rule extensionally speaking, there must be instances where the rule currently does not apply, such that the rule is altered to cope with the new facts. Right, in other words, has to give way to fact.

It is a salutary thought that all extensional sentences we know of today, all of science, will eventually be disproved, to some degree, by new external data. All rules will find their exceptions, have to indeed, to be rules at all, logically speaking. The same is true surely of legal rules, or what we call laws. It is important in this regard that we have the stipulation in the literature that an exception applies to an object, but that the object itself is not exceptional. Basic maxim: no objects are exceptional. Only our statements on objects are exceptional. When we

¹⁵ Nimrod Bar-Am, *Extensionalism: The Revolution in Logic* (Springer 2008) 39-61.

¹⁶ *Ibid.*

choose to devise a rule, we walk a delicate balance between an interior abstraction, and an external reality, for law more than for logic in fact. The legal exception is the exceptional statement about a certain objective situation. If entry is free on Sunday, then the overall rule is that it is not free. Payment here is vouchsafed by a limit case, a limit between what has to be paid for and what does not. In this way, the legal dictate and modern logic are in agreement in that it is the cases which exceed the rule, that allow the rule to exist, and, more importantly, to function.

4. DECONSTRUCTION, EXCEPTION AND THE PERFORMANCE OF POWER

If an exception proves the rule, does it also prove the body of rules that compose the rule? New data alters any extensional concept, but new data cannot alter the sentences used to speak of the truth of the concept. The concept precedes the object, and the object is only accessible via truthful statements about it, in sentences that can only be truth-preserving if they follow a logical language, or L-determined language as Carnap calls it.¹⁷ Carnap's tolerance principle allows multiple languages to be applied to the world, but only if they are L-determined. Here we arrive at Russell's paradox and Gödel's incompleteness theorems. Any potential exception to a logical statement proves that the logical statement is extensionally true. Quine says these are the only true sentences.¹⁸ Wittgenstein seems in agreement.¹⁹ Carnap says the language of such statements is up to you, as long as it is logically self-consistent. A consistency, a rule, that cannot be proved internally. The rules of any language are incapable of proving the veracity of that language. This sounds like an exception has to prove the truth of propositional, extensional logic, but that is not the case. The whole point of the language, in being extensional, is it is truthful as a language irrespective

¹⁷ Rudolph Carnap, *Meaning and Necessity* (Clarke Press 2008).

¹⁸ Willard Quine, *Word and Meaning* (MIT Press 1960) 191-232.

¹⁹ Ludwig Wittgenstein, *Tractatus Logicus Philosophicus* (Routledge 1974) 5, 89

of what it extends over. External objects can alter what you say about the world, but not how you say it.

This situation is at the heart of Derrida's foundation of deconstruction between 1967 and 1971 around his considerations of exception as margins, prohibitions, writing, supplements and contexts in three central texts, "Structure Sign and Play", *Of Grammatology* and "Signature Event Context". In "Signature Event Context" he applauds the analytical philosophy of Austin, praising its originality in realising that speech acts 'do not designate the transport or passage of a content of meaning, but in a way the communication of an original movement (to be defined in a *general theory of actions*), an operation, and the production of an effect' (Derrida 1982, p.321).²⁰ Such performatives, as they are called, 'communicate a force by the impetus of a mark...The performative's referent...is not outside it, or in any case preceding or before it. It does not describe something which exists outside and before language'.²¹ Thus Austin frees the performative 'from the authority of the *value of truth*, from the opposition true/false...substituting for it the value of force, of difference of force'.²² Naturally, we are similarly interested in Derrida's reading of performatives because first, they are not to do with transport of meaning via content. And second, this liberates them from external reference and allows them, instead, to find their meaning and content in the value of force. Performatives are, in other words, like decisions, contentless economies of power.

In Derrida's hands, the L-determined language of the performative appears to entirely circumvent the issue of the exception. The performative statement, which is not the same language as extensional logic of course but shares with it the same L-determined commitment, has no need to extend a concept over an actual object because the truth of the statement is in the result of its force changing an action. Performatives are the logical formalism of Foucault's theory of power. Initially admiring this innovation in logic, Derrida then begins to note all the non-felicitous statements that Austin tries to exclude from speech act

²⁰ Jacques Derrida, *Margins of Philosophy* (Harvester Wheatsheaf 1982) 321.

²¹ *Ibid.*

²² *Ibid.*, 322.

theory, all the exceptions to the performative rule, for example, notably, actors ‘citing’ performative sentences but not meaning them, not being “serious”. Before long, Derrida’s constant picking at this thread causes the arguments of speech act theory to unravel. The rules which exclude the exceptions, such that we know a subject is serious in her performative statements are, Austin says, based on full intention in a pure context. A subject must absolutely mean what they say, use words as force, not simply mention them, in a pure context where it is absolutely clear from the context of their utterance what is meant, what they want to make happen. Derrida concludes that around every assumed fully intentional and context-pure performative statement, is a ring of generalised, cited, non-serious quasi-performatives, which warrant the truthful intension of the ‘good’ performative, but only in as much as these supplementary contexts are exceptions to the rule of performance. For such a context ‘to be exhaustively determinable... it at least would be necessary for the conscious intention to be totally present and actually transparent for itself and others, since it is the determining focal point of context’.²³ Yet each gesture to establish such a pure context requires recourse to a previous context or intension which, by definition, is outside the current one, and so on ad infinitum. Speech acts, like all forms of speech, logic included, are proven to be the rule, by a context of supplementary contexts forming an endless chain of supplements. Speech acts need to refer to something outside of the speech act, in order not to refer to something outside of the speech act: Russell’s paradox, Gödel’s incompleteness, Derridean deconstruction (RGD).

To sum up, thanks to RGD, an L-determined language--propositional logic, speech act theory, deconstruction--cannot prove its rule as a whole, in general, from within itself. Yet it also cannot access the exteriority it needs to fill this gap. Nor can it relinquish said exteriority by being purely inside the event of its performative utterances. It is this basic truth, if you can call it such, that Agamben’s reading of the state of exception is utilising. The [Law] in general, as a speech act, a sentence

²³ Ibid., 323.

of force, I clear your name or I sentence you to death, cannot be in force without significance, as Kafka says, because its significance is only that it acts on your actions. Yet the [Law] as a signature is devoid of content (it commands nothing) It has to be, as the point of the law is that it applies general rights, force, over specific facts, context. It is the facts that fill the law with content and authority. The law is extensional in this regard. Any law extends out over existing instances that it pertains to, and future occurrences of said instances. Law is also decisionist in the Schmittian sense. Yet the [Law] cannot justify itself qua [Law] legally. Right is founded on fact, but the existence of right, or of jurisprudence, cannot be. This is surely why law likes the exception to prove its rule, because if it uses the law to justify law, a law of laws, it gets caught in the endless chain of contextual supplements to this fully intensional, pure context. The exception it uses to prove the law to save the law from the miserable *mise-en-abyme* of RGD, Russell-Gödel-Derrida. It is this paradox that is at the heart of Agamben's analysis of the state of exception. Yet contrary to analytical logic or deconstruction, in blatant disregard of the three witches of RGD, what Agamben notes is the fact that this paradox is not truly paradoxical. It is this paradox that is-not, or a logical paradox that exists in the world of law and sovereign power, that is the basis of his indifferential suspension of [Law] due to states of exception which do not prove the rule but become the rule.

The function of a law is not based so much on scientific verifiability, as is the case with extensional logic, but on the wider communicability of legal statements due to legal institutions and the disposition of power across the various functions of their dispositifs. As we have shown, it is irrelevant for power that an L-determined sentence is truth-preserving of an empirically observable, yet falsifiable, set of data about the objective world. What matters for power is not L-determination, but P-determination, if we can call it that for a moment. Power decides the warrant of all non-scientific languages, which is why speech act theory is so interesting in the way in which it tries, and fails, to understand the fundamental truth of the relationship between a statement and its force. What we are arguing is that there are rules, conventions, rituals, professions, laboratories and telescopes, which depend on factual externality for their verification and their communicable existence. But

verifiability is not a precondition for all intelligibility or communicability, including the communicability of science, although that is of no concern for us here. For some dispositifs, it is not even a precondition for truth, unless verification is part of one's power quotient when one wishes to dispose one's power through one's actions on the actions of others, Foucault's classic definition. Extensional truths in the form of logical statements about the state of affairs of the world are, for Foucault and more widely for our community, a truth-preserving power function. Truth is not an end in itself, but a mode of convincing others of your superior knowledge power in the areas wherein empirically confirmed, logical truths are a defining feature of the disposed power of that dispositif. Law is most certainly one of these, as is philosophy.

Thus, we are stating that exception proves the rule as regards the communicability and generic format of logical and legal truths, as a disposition of power. If we are stating such a thing then what we are actually saying is that the exception to the rule is not only intrinsic to the rule, but that there is no rule without exception, such that exception qua exception, or something which 'stands outside' the rule of law, does not actually exist. In terms of the *nomos*, Law, there is no anomie. The exteriority that vouchsafes rule-governance as rule, tied to fact, is a false one. Or, 'exception proves the rule', proves that there is no exception, which disproves the rule itself as a crucial modality of rule proving in a generic or general sense. Each exception, each rebellion, each alterity, each marginality, every supplement, every line of flight, every *differance*, and exorbitance; in disproving a centralised, specific rule, at the same time facilitates the wider conception of rule as something that rules over, and yet is subject to, external reality. And so, we find ourselves in the very heart of Agamben's critique of the state of exception in *Homo Sacer* and *State of Exception*.

We can now better understand Agamben's use of Schmitt I think. For Schmitt, sovereignty stands for a calcified disposition of the usually fleet and malleable P, or power as defined by Foucault. From the perspective of P, sovereign power leading to despotic power has a certain attraction. If P is defined by the disposition of will through acting on the free actions of others to make them bend to your will, then a static and steep power gradient seems useful and efficient. Yet when sovereignty

becomes dictatorial, then one aspect of Foucault's formula for power, subjective freedom of action, is negated. Dictators are not powerful, according to Foucault's definition of P,²⁴ because their subjects are not free to act otherwise. At the same time, the constant disposition of power is surely exhausting, tedious and at times exasperating. If this is so, a state of exception could be a time-out for power, a sabbath, where they pause the disposition of their force, or they let the mask, their apparent disposition in the other sense of the term, slip for a period of time.

Let's go further, sovereign power is definable by the ability to decide on the state of exception. Does this mean what most take it to mean? After all, the state of exception is an essential state for all forms of rule desirous of external validation, which governance most certainly is, via law, but also via other agencies as we move into governmentality and finally biopolitical states. A sovereign is not someone who decides to suspend rule of law, so much as someone who reminds her subjects of the reliance of the rule of law on its exceptions. This is why power has to be mobile and yet also disposed. This being the paradox of P, that it is an economy and a structuration at one and the same time. Foucault gives examples of this in two agencies power cannot control, the milieu and the mass. Random events and large numbers are like new scientific discoveries for the science of governance. Covid, for example, was an unprecedented external event, the first globalised pandemic, that involved an impossibly large set, everyone on earth. Such events involving milieu and population effectively falsify, in a Popperesque sense, the P-determined language of biopolitical rule, in a Carnap-Foucault sense.

The philosophical implication of Schmitt's theory is that power, because the sovereign can decide to suspend law, due to an externalised exception, is theatre. A dictatorship is a performance of the necessity of rule, based on the inevitability of the external, and the impossibility of the internalisation of number. We need rules to judge on external cases in a generic fashion, because we cannot judge such cases as regards every single instance and its impact on every single subject. The

²⁴ Foucault, *supra* 5

power of the sovereign is vast, disseminated, yet in the end, always limited. To ameliorate the debilitating effect this has on P as a resource, the sovereign gets to choose the time of their performance of warrant, legitimation, truth preservation, law and falsifiability. In this sense, they are little more than the schedulers and bookers of the plays of power. Power is a contentless speech act. It does not rely on intention. It is defined rather by a generic intentionality: to rule. And it does not demand a pure context, because as pure communicability as such, it constitutes an absolute contextualisation only possible thanks to absolute power. Or, power is the only thing capable of breaking the chains of supplements Derrida applies to deconstruct speech act theory. One way of silencing the philosopher, is simply to put them to death. This is what is called a sound argument, during a state of exception.

An exception is a localised instance of an external fact, which in existing irrespective of your rule, proves the validity of your rule as based on, warranted by, external reality. When the *Führer's* word was declared law by Goebbels, the foundation of Hitler's sentences on external reality, (extensionality) was short-circuited. At that point, Hitler was no longer 'in power' because he was power incarnate in the immediate sense we mentioned. The epistemological exception to a rule, suddenly becomes an ontological reality. Not a statement about a reality, the statement is reality. The intriguing effect of this is that at this moment the despot is not actually 'in power' at the precise point they appear all-powerful. To be all-powerful, means to have total self-presence as power, as a full intention in a pure context, at the precise moment where the definition of the function of power, actions on the free actions of others, is negated. The power gradient in Foucault becomes a power precipice, and the dizzying cliff-face of pure force, a barrier to the free disposition of the dictator's power, such that she withdraws to her mountain lair, to her impossible self-predication, manifested in the dispositif of a brutal architecture of isolation and repulsion.

There is a world of difference between the exception becoming the rule and the exception proving the rule, we now realise. The first negates the spatial distinction that is the essence of the latter. The indistinction between rule and exception, disempowers the sovereign in that her only power is to decide on that, a decision defined by the fact

of a separation or difference between the internal logic of rule, of law, and the external warrant of its validity, which is founded on the event of new facts arising, which requires new rules. If there is no external realm of fact, fact and law have been indifferenced, then rule and the law would become ossified, needless, inactive. Here we need to remind ourselves of the medieval stipulation, which is that the exception in question pertains to the object but does not ontologically define the object. What we can say about the object, in logical sentences or legal judgements, does not define the being of the object, only our ability to found laws and rules on said object. It allows us to legitimate the rule-making procedure on the fact that objective occurrences will, from time to time, be exceptional to the rule, as a means of intermittently and repeatedly re-founding rule, logic, and law.

5. AGAMBEN'S STATE OF EXCEPTION: THE GENOCIDAL FORCE OF THE SIGNATURE

Having looked at the various arguments *State of Exception* in detail elsewhere²⁵ (Watkin 2014, pp.209-14) in this essay I just want to summarise Agamben's position as regards all rules of law towards the end of *State of Exception*.

1. Law is a signature: 'the ancient dwelling of law is fragile and, in straining to maintain its own order, is always in the process of ruin and decay'.²⁶
2. As a signature [Law], like all signatures, Law has a 'double structure, formed by two heterogeneous yet coordinated elements'.²⁷ The nature of this duality is that two elements that are not related, for example here inside and outside, *nomos* and *anomie*—in fact they

²⁵ Watkin 2014, *supra* 6

²⁶ Agamben, *supra* 1, 86

²⁷ *Ibid.*, 85-6

are contradictory so cannot occupy the same conceptual space, for example in a balanced logical statement *nomos* ≠ *anomie*—by definition, are still ‘coordinated’. I am going to take this term literally as meaning placed in the same rank, row or series. Two terms that do not sit together, are however placed together.

3. Examples of elements that habitually sit together in a common series or rank but which cannot sit together conceptually speaking because they are opposites are terms such as common and proper, inside and outside. In this case ‘one that is normative and juridical in the strict sense (which we can for convenience inscribe under the rubric *potestas*) and one that is anomic and metajuridical (which we can call by the name *auctoritas*).²⁸ [Law] finds its common foundation in *potestas* or *nomos*: ‘(that is, a power that can be exercised)’ (Agamben 2011, p. 210), in Roman Law due to the will of the people. And its proper element in *auctoritas* (*anomie*), or ‘(that is, a power without actual execution)’ (Ibid.), which in Roman Law is general authority.²⁹
4. There is a clear difference between the economy of [Power] and of [Law] taken as signatures. [Power], Agamben stipulates, depends on *auctoritas* as its founding or common element, what Derrida called presence and Schmitt decision, and on *postestas* is its common, or founded element, what Derrida would term its supplement, Schmitt the meaningless content of the decision. In contrast [Law], like logic, gains its foundational power from its being applied to the world first, relying on authority only when law will not suffice. As Agamben says ‘The normative element needs the anomic element in order to be applied, but, on the other hand, *auctoritas* can assert itself only in the validation or suspension of *potestas*’.³⁰

²⁸ Ibid., 86

²⁹ Giorgio Agamben, *The Kingdom and the Glory* (Stanford University Press 2011) 210

³⁰ Agamben, *supra* 1, 86.

5. This being the case, the state of exception ‘is the device that must ultimately articulate and hold together the two aspects of the juridico-political machine’.³¹
6. It does this by ‘instituting a threshold of undecidability between *anomie* and *nomos*, between life and law, between *auctoritas* and *potestas*’.³²
7. Agamben notes that as long as ‘the two elements remain correlated yet conceptually, temporally, and subjectively distinct...their dialectic—though founded on a fiction—can nevertheless function in some way’.³³
8. But when their division becomes indistinct, confused, blurred, indifferentiated, for example if they coincide in one authority, ‘when the state of exception, in which they are bound and blurred together, becomes the rule, then the juridico-political system transforms itself into a killing machine’.³⁴ When exception becomes the rule, rather than attempting to prove the rule, when exception is ontological, not epistemological, the equation of power facilitates mass murder through a bloody theatre of legitimation.

We can now summarise how the state of exception actually operates. [Law] as a signature is empty of content. It is a sign of nothing in particular. Its job is to retain the homonymic consistency of the material sign [Law] across time, space, texts, dispositifs and subjects. In this way, as in Schmitt, it is a form of contentless decision. The difference between a signature and a sign is essential here. A signature suggests similarities of qualities based on a resemblance. In Paracelsus a visible resemblance. The term ‘Law’ is repeated as a sound, a noise, a graphematic and grammatological design, a costume, a vocabulary, a chamber,

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ Ibid.

a wig. Each time we enunciate the term ‘Law’, the similarity of the sound, its powerful homonymy, convinces us we are using it in the same fashion, with full intention in a pure context, especially if it is always spoken by the ‘same’ person, a sovereign (what Carnap calls an equivalence class). In fact, it is merely the sustained iterability of the material signature that allows for its real meaning to persist sovereign after sovereign, war after war, treaty after treaty, ruling after ruling. Meaning is not what law refers to, but what it facilitates.

[Law] as a signature or intelligible and communicable statement, allows for two concepts that are not just heterogenous, but actually oppositional, to sit in the same rank or conceptual set. This is the ultimate destination of the politics of truth, its test condition. Can P be so much stronger than L, such that P can force L to accept contradictions in the same sentence? Power, P, means as a sovereign authority, say a judge, I can locate *nomos* and *anomie* in the same sentence, even though logically they cannot both be true. In extensional logic I would extend this rule out into the world and find examples of it. Thus, law would be a concept, and *nomos* would consist of all the examples of it. *Anomie*, pure authority as such irrespective of the examples, cannot be included in that set. Law, as the set of all examples of jurisprudence, cannot have The Law, or pure authority, as a component part of its extension. The concept ‘law’, is not included in the examples of laws, so as to avoid Russell’s paradox, Gödel’s incompleteness theorems and Derridean deconstruction. The universal RGD limit case for truth-systems.

In the case of the signature, we can see a quite different process. The exception, *anomie*, is included in the rule, *nomos*, not in an interiorised space, but because *nomos* can only occupy its function as an example if the empty space by its side within the same rank, (meaning of the term coordination) is taken up by its exception, *anomie*. Here, the exception proves the rule, but not the rule of *nomos*. The rule here is the rule of the signature, in this case [Law]. If, after Zartaloudis we take *nomos* to mean the accepted, habitual way of doing things,³⁵ then we can in

³⁵ Thanos Zartaloudis, *The Birth of Nomos* (Edinburgh University Press 2018).

fact state that the signatory economy we are describing is actually the real nomos, the hidden nomos, of all authority statements.

Another difference here between logical concept and the power of signature is that the positions beneath the signature are neutral, yet functional. Let us say that left is always common, foundational, constituting, inside, presence, speech, nomos, rule. And right is always proper, foundation, constituted, outside, absence, writing, anomie, exception. A peculiarity of oppositional terms, Agamben realises, contrary to what Derrida asserts for example, is that nomos (left) can swap over to anomie (right), for example in the case of the signature [Power] in *Homo Sacer* and [Kingdom] in *The Kingdom and the Glory*, and the overall stability of the signature remain in place so long as nomos, left, agrees to take up the now absented position on the right of the statement sentence. More than this, at any time in the history of the signature, the paradigmatic terms occupying left and right, can radically alter in content and meaning, so long as functionally, in the abstract, they can occupy these two positions.

The exception is part of the economy of the signature. It does not prove the rule, here the law, by being an excluded example of the law, free on Sunday suggests paying every other day. Rather, it articulates the rule of law in general. There is no nomos without anomie. More than this, it facilitates the persistence of the empty signature [Law], first by filling it with content, essays like this one or volumes of precedents, and also by providing an almost inexhaustible energy or force. Here, thinking about Derrida, we can see that that the hierarchical spacing of nomos and anomie, or inside and outside, or rule and exception (supplement), assumed by his early period work we are relying on, is slightly incorrect. In reality, it is absolutely crucial that nomos and anomie, rule and exception remain flat, in series, in a rank (coordinated). The hierarchy Derrida suggests as intrinsic to metaphysics, would in reality kill the economic interchange of the terms which the signature relies on to stay in force without significance.

What we are describing is the classic signatory position of all of Agamben's studies of signatures, but what is of greater importance is that the state of exception is overlaid in his work onto the *oikonomia*. As we saw from his comments, the state of exception is the paradoxical

overlay of the conception “state” and the conception, “exception”. Nomos is state, all laws, and anomie is exception, the law of all laws that cannot however be judged from within law. This is another way of stating Russell’s paradox and Gödel’s incompleteness theorems, reconstituted in Derrida’s early works as the means by which the margins in-consist the centre, (‘Structure, Sign, and Play in the Discourse of the Human Sciences’)³⁶, the way in which the supplement of writing in-consists speech³⁷ or the way in which context in-consists event/signature.³⁸ In Agamben, the ‘state of exception’ is the *oikonomia* of the signature [Law] that, in expressing a contradiction, the nomos of anomie, the rule of exception, the inclusion of exclusion, keeps the term [Law] in force. The signature [Law] encourages the contradictions of state and exception, or nomos and anomie, because this is a proxy or substitute function for its contentlessness.

While we are arguing over which is the foundation of law, pure legal authority or simply the set of all laws, while we take up contrary positions as a community, the empty chamber of law is filled with the echoes of our disputations. This plenitude, this self-presence, is of quite a different order to that proposed by Derrida, but its function is not dissimilar. Authority, after all, is fullness. Pure authority is an empty plenitude that is not paradoxical. In this case the [Law] is full of hot air, an echo chamber of century after century of contentless rulings, judgements, and declarations of exception. The twangling instruments of the practice of law. Objection? Object all you like. The more you argue with me, the more you present evidence, precedent, testimony, the more the law remains in force, without significance. It does not matter what the judge decides, as long as she retains authority as the decisive one. The objection is never over-ruled, because law as the over-ruler, has no need to listen to evidence and argument. As Kafka notes in *The Trial* and ‘In the Penal Colony’, we have all, already been judged, a judgement which then patiently waits for a crime. To rule over, absolutely, means never having to over-rule. It means ‘choosing never to stoop’ in the words of

³⁶ Jacques Derrida, *Writing and Difference* (Routledge 1978) 278-294

³⁷ Jacques Derrida, *Of Grammatology* (Johns Hopkins Press 1976).

³⁸ Derrida, *supra* 20, 207-330.

Browning's Duke of Ferrara. The state of exception is simple power, via law, never having to stoop to words or facts.

The radical homonymy of any signature means I can be speaking of [Life] with a colleague who is speaking of [Life] when in fact I am speaking of [Life₁] and she is speaking of [Life₂]. The materiality is the same, the dispositif may be the same, but these two identical terms do not refer to the same object in the world. This is basically the development of the extensional rule of the indeterminacy of translation in Quine, to statements made in the same communal context, verified by a naturalised epistemology, given warrant and commitment by that community, yet still not referring to the same thing, however you take the word thing to mean. The indeterminacy of translation when applied to every statement, not just translated statements, results magically in Derridean deconstruction. When I speak of the 'exception' that 'proves' the 'rule' legally, and then philosophically I analyse the idea that 'exception' 'becomes' the 'rule', in what way can I warrant or commit to a verifiable and iterable meaning for these three terms, as proof that the sentence, when spoken by a lawyer, and a philosopher, or just any person, in any way, 'means' the same thing? Are these words with meaning, or are each in force without intention, context or significance?

This question matters greatly to me, and its answers terrify me. Agamben is brutally clear. When the machine of the state of exception becomes disarticulated, 'then the juridico-political system transforms itself into a killing machine'.³⁹ For example, when a state becomes exception with Hitler whose word becomes law such that his last legal pronouncement was 'kill all Germans'. When anomie, pure authority, becomes nomos, everything said is now a law, then the necessary articulation and separation between rule and exception is indifferiated. It is at this point, Agamben argues, that people die in genocidally large numbers. At this moment Agamben is arguing, quite astonishingly really, that logical sentences do extend over objects in the world, namely people. The logical sentences rule \neq exception, or nomos \neq anomie

³⁹ Agamben, *supra* 1, 86.

extend out, in law, into legal judgements which affect the existence of subjects and objects. A logical-legal sentence can determine the life, and death, of a person. Can determine *your* life and death. Having said that, this lethal logic it is not the same as extensional logic. The sentence in question here is Law = nomos ≠ anomie anomie ≠ nomos. When this sentence is altered to Law = nomos ≠ anomie anomie ≠ nomos, this minor syncategorematic alteration from the symbol to the symbol =, killed countless millions of people during the reign of the Nazis. Speaking up for Derrida, this is the real power of spacing.

This, at least, is the proposition on the table for you to judge. Let me now pose a question to the reader. Do you believe in this? Do you accept that a logical discourse can determine the lives or deaths of millions? Even more challenging, if you accept this truth, do you further accept that it is not actually logic that is in play here, but illogic? It is the illogicality of sustaining contradictions in the same sentence that kills people. Specifically, in that in the sentence nomos ≠ anomie, the opposite sentence is equally true, in a construction that is however associative in nature, in other words the order matters, the rank is important. For, as I stated, position 1 or L (Left) is not the same as position 2 or R (Right). L founds R (L is founded), while L constitutes, (R is constituted). So, we are arguing, a sentence containing an L position and an R position, wherein L and R are two terms that have historically and logically always been opposed, yet where the logical difference between the two is impossible to determine (power founds instances of its power without which it could not be power and yet these instances cannot be instances of power unless first there is power etc.) is all that keeps [Law] in place as the decider. Alter that sentence, so that the positional distinction of L and R is blurred, suspended, indifferentiated, tragically overlaid, in a manner I cannot even write clearly using this prosaic and analogue technology of linearity, and state-sponsored murder occurs. This is the logical end point of what Agamben is suggesting I believe. It is also surely the point and purpose of political philosophy. That these are not just words, the edification of the liberal class as Rorty would have it (Rorty 1989). Words have force, but only in this complex understanding of the economy of the signature in relation to exception that I have been trying to construct in this paper.

Finally, unlike in Derrida, the contradiction or aporia at the heart of any self-present metaphysical term, here law, is not what destabilises it into a chain of endless supplements, but what keeps the stability in place thanks to this chain. The chain links and binds. It is an apparatus of power, after all. Derrida says of the hierarchised duality of oppositional terms like presence/absence that we never arrive at the ‘face-to-face of two terms, but a hierarchy’.⁴⁰ He then notes deconstruction cannot limit itself or proceed immediately to neutralization: ‘it must, by means of a double gesture...practice an overturning of the classical opposition and a general displacement of the system’.⁴¹ He concludes. ‘It is only on this condition that deconstruction will provide itself the means with which to intervene in the field of oppositions’.⁴² This is all becoming rather worrying, not least because he then proceeds to note ‘there is no metaphysical concept in and of itself’, quite right, only signatures which are never in and of themselves. But ‘There is work...on conceptual systems. Deconstruction does not consist in passing from one concept to another, but in overturning and displacing a conceptual order, as well as the nonconceptual order with which the conceptual order is articulated’.⁴³ Based on this early explanation, Derridean deconstruction is surely equivalent to Agambenian *oikonomia*. Deconstruction is the state of exception as *oikonomia*. It does not move from one concept to another, *nomos* and *anomie*, rule and exception, but operates by displacing the conceptual order. Rule is displaced by exception, the conceptual order, law, with the nonconceptual, exception or fact. Displacement, changing its location, moving *nomos* from the left to the right, and thus shifting *anomie* from the right to the left.

Deconstruction, I now realise, is all that is keeping us alive! If there was no deconstruction, the assumed hierarchy of *nomos* and *anomie*, reproduced in our sentence by associative sequence, would collapse into one figure, on discursive *Führer*, and we would die. But, as we

⁴⁰ Derrida, *supra* 20, 239.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

saw, deconstruction as prophylaxis against mass murder, is similarly fated to become genocidal. It is only because [Law] is in place due to the economic, constant interchange of positionalities of oppositional terms, *nomos* and law, rule and exception, that there occur moments when this rapid intermingling and counter exchange will hit a snag, or will become too blurred, too muddy. The clarity of the despot's vision as she stood before the masses, turning to hazy indistinctions once she retreated to her impredicative bunker of sustained contradictions.

Deconstruction, initially, saves, but it will, eventually, kill (*à-venire*).

6. A STATE OF EXCEPTION IS A MOMENT OF INOPERATIVITY WITHIN THE ECONOMY OF A SIGNATURE

It is, it transpires, across practically all philosophical texts and traditions, impossible to apply a general law to all the instances of that law (RGD). More than this, the necessity of a specific instance, undermines the ontological value of the general. Instead, it is more economical and seemingly less ontologically problematic, to designate the generality of a law, an essence, a being, a name, by finding within the set of circumstances to which the law applies, a specific circumstance where it does not. This exceptional circumstance is a special situation that a subject experiences, rather than a special subject *per se*. If a soldier is allowed from time to time to be outside of the barracks after 11 with a special pass, it is not that the essence of the soldier has changed, but simply they have been excerpted from the set of [soldiers], by being allowed to do something they cannot, by an external rule or law. Unlike the zero-sum Derridean approach to such matters, for example as regards special, exorbitant, marginalised or infelicitous instances in 'Signature Event Context'; the exception that proves the rule states that supplemental instances of the law, rather than deconstructing the central essence of law as self-presence, are actually the basis of the law, to such a degree that exceptions to the law make the law more, not less, stable. Law cannot in this manner be deconstructed, as it is already a self-conscious mode of deconstruction.

The question here is perhaps one of the most important for political theory for this century: to what degree, if any, does logic, aporia, contradiction, difference, deconstruction and so on, matter, to a state, a sovereign or a dictator? Do laws have to make logical sense? If they do not, then the very idea of political philosophy comes inelegantly to a halt. While it is clear for analytical philosophy in its attempts to reduce all sciences and mathematics to logic, that our relation to the outside has to conform with logical propositions, the fact is that the external is never internalised into logical or formal formulae however extensional your process. Agamben's presupposition is that if one is able to indicate to a signatory structure of power, that its *oikonomia* is in a state of suspended disarray, for example during a state of exception, then in some sense this is threatening to a state and its subjects. A state, he assumes, needs logic. The state of indistinction is when the logical separation between a common and a proper is impossible to maintain. The positions have been exchanged so many times that one cannot clearly distinguish them as separate positions.

The point about the signature we have repeatedly made is that it is devoid of specific content and so has to fill this void with paradigmatic material. For this material to be present within a signature, there appear to be four available positions. The signatory capstone at the top, the paradigmatic common, the paradigmatic proper, and the *oikonomic* exchange between. When we consider the exception in this regard, it is confusing to say the least. First of all, exception cannot be a signature. Nor, for that matter, can a state. A state has to have an exception, wherein the natural intercourse between state as foundational power, and its constitution in founded rules or laws, is interrupted by a sustained moment of confusion. Here the contradiction between exception and rule. If not a signature, an exception is more akin to a syncategorematic in that it is a function of *oikonomia*. Think of it like a symbol of equality or negation, it being a semantic function that itself carries no semantic content. A state of exception is a situation experienced by the *oikonomia*. Again, it is contentless. Not bearing any content, rather a state indicates that the exchange motility of two opposing, contradictory and associatively ranked terms, has foundered on its own blatant disregard for the basic norms of logic and reason. A state of exception

is a moment of inoperativity within the economy of a specific signature, here for example [Law] or [Power].

7. NONRELATIONAL RELATIONALITY, EXCEPTION AND PARADOX

Towards the end of *State of Exception*, Agamben mentions two salient points for the future thinking of exceptions. The first concerns the actual nature of the articulation of life and norm that is suspended in the state of exception pertinent to the signature [Law]. That the state of exception can halt or suspend the articulation between the opposed concepts of life and norm, fact and rule, demonstrates that ‘between violence and law, between life and norm, there is no substantial articulation’.⁴⁴ Agamben then suggests that along with the forces which ‘keep them in relation at all costs’, for example metaphysics or the institutions of power, ‘there is a countermovement that, working in an inverse direction in law and life, always seeks to loosen what has been artificially and violently linked’.⁴⁵ The state of exception maintains this necessary tension, certainly, but it also renders these essential distinctions, for power and law at least, indiscernible or indifferent. Agamben argues that life in a state of exception is the simultaneous experience of tension and slackness, maximum discernment and minimum indiscernibility, which at the same time is a conscious attempt to interrupt this difference between fact and rule, but also between the tension of difference and flattened indifference. Again, the alternative to this process is listed as disastrous: ‘global civil war’.⁴⁶

There is a solution, hinted at here, partially adumbrated in the final volume of *Homo Sacer*, *The Use of Bodies*, and that is nonrelational relationality. In the earlier text that is defined as ‘To show how law and its nonrelation to life and life in its nonrelation to law means to open up a space between them for human action, which once claimed for

⁴⁴ Agamben, *supra* 1, 87.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

itself the name of ‘politics’.⁴⁷ The argument returns us to the previous question, which is to what degree can logical contradiction in the form of exceptions that prove rules or outside facts, that determine the inside of law, and so on, be the determining factor of politics as power? Agamben’s work innovates Derrida’s approach, and that of extensional logicians indeed, by not being based on the excluded middle and the classical law of non-contradiction. Agamben argues that there is an operative sentence, one that affects the “real” or external world, which is not concerned with the actuality of contradiction but something more akin to its grammatical and spatial form.

If we think for a moment of Derridean grammatological spacing, and its origins in Heidegger’s *Identity and Difference*⁴⁸, we can reflect on the fact that it is the form of the statement of identity, $A=A$, that Heidegger is trying to deconstruct *avant la lettre*. It is the way in which A_1 visually resembles A_2 , that allows us to state it is the same A in this sentence. And it is the way that A_1 does not occupy the same space as A_2 , and is further spaced from A_2 by linear progression, a function of time, and the interposition of ‘=’, that leads Heidegger to conclude the two A s are identical, but not the same. They are identical because, after Wittgenstein, they form the full picture of identity, although by the time Heidegger is writing about these matters he must surely have been aware that $A=A$ was no longer the logical formula for identity. Leaving that to one side, $A=A$ is the visual picture of identity using the material tokens of ‘words’. To state the identity of A as self-present, self-predicating, self-mentioning, you have to spread out its components to see that this is the case. This is simply the visualisation of Russell’s paradox. You see the barber in both his aspects, as he who shaves only those who do not shave themselves, and as he who therefore has to shave himself into ontological oblivion. In passing, again it is worth noting that the apparent difference between continental and analytical thought is a mere fiction. Heidegger and Derrida on one side, Wittgenstein and Russell on the other results in the simple statement $A=A$.

⁴⁷ Ibid., 88.

⁴⁸ Martin Heidegger, *Identity and Difference* (University of Chicago Press 1969).

Here we encounter a truly ground-breaking observation on paradox which sets indifferent thought to one side of both traditions. In any logical sentence which supports the existence of a signature, for example [Law], you have two contradictory components: fact \neq rule. In a sense this is extensionally true. For a truth object to exist, it must not be its opposite, such that all logical sentences come down to true \neq false. But a signature is not a concept. A concept proposes content, and then extends content out to find objective examples of this concept, if you can accept maths and abstract notions as objects. A signature does not extend content over examples. It has no content thus it lets its examples, paradigms, fill it. That said, they do not fill it with content, but with functional force tied to specific content for this particular community at this particular period in time. Thus, within a signatory sentence, while A does not equal B, meaning 'fact' can be A and 'rule' can be B, within the sentence as we said, the two positions are not transitive or symmetrical. Position A is not the same as position B, even if, as in Heidegger, you put A in both. Position A is founding, common, universal, constituting, and position B is founded, particular, constituted.

Signatures allow us to realise that throughout history, the content of A and B in the set of the signature X, here [Law], changes. The content of B, can even occupy A. When it does so, the position of B is empty. A has to occupy B at this point. Why does A have to take the B position, why not something else more B-adequate? Because B is irrevocably tied to A. No A position without B position. Therefore the content of A is the only content that can go into B. When A becomes B, it has to alter its essence, its ontology. A cannot be founding and be in position B. Position B is founded, not founding. In tracing the various paradigmatic pairs that occupy the oppositional syntax of A \neq B, we come to realise that the content of A and B, which surely determines not only their position in the sentence but their co-relational nonrelationality, A cannot be B, is irrelevant. What matters is simply the location and the associative functions tied to this. A has to be first, B has to be second.

One concomitant of this, analysed in *State of Exception*, is the impossibility of thinking of any identity that is not already pre-fractured. 'There are not *first* life as 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 *nomos*, coincides with their articulation in the biopolitical machine'.⁴⁹ It is the articulation of common and proper generally or generically speaking that is at fault here, not the content of the machine. The content of the positions in the machine becomes the content it is, only when it is captured by the *oikonomic* articulation. Fact is no more foundational than it is particular. Nor is it any more tied to rule, than it is tied to any other word at all, for example fact and cabbage, or fact and virus. The common can only exist if it has proper examples of it. The proper can only give proper examples if there is a pre-existing concept that is the common.

8. CONCLUSION: INDIFFERENTIAL REASONING IS THE EXCEPTION TO THE PHILOSOPHY OF CONTRADICTION

The history of rational thought is dominated by the avoidance of contradiction. Yet in truth our simple phrase, the exception proves the rule, reveals the secret we commenced with. In reality, logic is not the exclusion of its exceptions in order to prove its truths, or the capitalising on exception to better define its rules. The exception proves the rule because truth is always the co-presence of a rule position and an exception position, held within a tension that allows contradictory material to swap places, and yet maintain oppositional consistency. The exception proves the rule, but the rule founds the exception, which proves the rule, which founds the exception, and so on forever. This is how, in Agamben, exception becomes the rule. Philosophy, we now realise, is not the resolution of contradiction or paradox. When Derrida finds aporia in canonical texts, he is not actually deconstructing them. He is simply an archaeologist who has only partially excavated the vast tomb of rationality. The *oikonomic* machine of all concepts, all signatures, here [Law], exists because it extends over a sustained

⁴⁹ Agamben, *supra* 1, 87.

contradictory pair which, when the logic of their positionality comes under question (how can the law be first if it is based on fact?), simply swaps the content or changes the position. ‘You are right’, power magnanimously concedes when you speak truth to it, ‘fact must be first, let’s swap and wait for you to realise the obverse is also true. At which point I will swap back to the original positions’.

Moments occur in history when this becomes untenable, zones of indistinction like the state of exception during Nazi Germany. If the signature can survive these, and remember these zones are part of its DNA so it is better placed to weather the storm of indifference than we are to take advantage of this conceptual tempest, then it might judiciously start to change the paradigmatic content of the pairing. People love content. We are obsessed with properties. We still appear to believe in essence. It is as if we actually think quality-based discernment is warranted. In the perpetual find-the-lady sideshow that is metaphysics, power and politics, content is the distraction technique that makes your eye stray from the cups, the cards, the coin, for a second. Yet, as we said, the content of the two positions is in any case irrelevant. All that we need is something that resembles content, to fill the signature set. Yet, the signature is not filled with the essence, quality and relation of this content, but with the economic interchange of the content across the two content-neutral, associatively ranked, positions.

That a system is illogical, paradoxical, contradictory and aporetic, does not disprove the validity of the system, deconstruction, but explains its persistence, Western metaphysics. When Derrida uses Russell’s paradox and Gödel’s incompleteness theorems to deconstruct structuralism in ‘Structure Sign and Play’, speech in *Of Grammatology*, subjective intention or pure context in ‘Signature Event Context’, he appears to assume that metaphysics cannot survive paradox without radically changing its internal structures. That metaphysics is based on the avoidance of paradox. That truth-systems cannot be, by their own admission, simultaneously true and false, complete and partial, all inside and yet with some outside. In reality, these exception or limit cases, infelicities in Austin, allusions to masturbatory shame in Rousseau, incest in Levi-Strauss, are simply one half of the *mana* of metaphysics. *Mana*, according to Levi-Strauss is: ‘simple form...a

symbol in the pure state...and therefore capable of becoming charged with any sort of symbolic content whatever...*mana* would simply be zero symbolic value...a sign marking the necessity of a symbolic content *supplementary* to that with which the signified is already loaded, but which can take on any value required, provided only that the value still remains part of the available reserve and is not, as phonologists put it, a “group-term”.⁵⁰ *Mana* is an ancient term for the signature in its content neutral indifference.

What indifferential thought shows, through Agamben’s analysis of the state of exception, is that a political philosophy based on argument, paradox, logic, aporia, contradiction, and deconstruction, will always fail. Exceptions always fail, fail at least to be exceptional. Only an internalised, indifferential and suspensive system, that realises that states and power both crave and fear contradiction, can begin to propose an alternative, indifferent, contentless, and nonrelational basis for a new kind of political philosophy. But before you rush to embrace such a system, pay heed to Agamben’s repeated warnings. Indifference can lead to a liberating nonrelational politics, but it can just as easily result in genocide, civil war and death. Can there be exceptions to this rule? Can there be a positive politics of indifference? I hand those questions out amongst you to cogitate on and ir-resolve. Exceptions there are, and exceptions there are not, simultaneously, at the same time, without contradiction. Understand how that can be the case, and perhaps we all have a future.

⁵⁰ Levi-Strauss cited in Derrida *supra* 36, 290.