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AGAMBEN BEFORE THE LAW:
BIOPOLITICS AND FORM-OF-LIFE

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Abstract
This paper explores Agamben's philosophy of law, highlighting how his view on the topic relies on his reading of sovereignty and biopolitics. Indeed, within the fertile debate on Foucault's biopower, Agamben provides an original and radical reading of the political inclusion of life. His exegesis embeds biopolitics within a theory of the very essence of Western tradition and its fundamental elements: law and sovereignty. In the paper, deviations from a Foucauldian "orthodoxy" are traced back to the Italian philosopher's fascination with Heidegger, Benjamin, and Kafka, where a temptation of a leakage from history emerges, as demonstrated by Agamben's interpretation of the historical a priori. Hence, Agamben develops an unedited method and a positive political proposal. Last, this paper exhibits some shortcomings of his method, as an ontologising approach to politics could obliterate, rather than clarify, the manifold historical manifestations of power and make ineffective the positive strategies against its violence.

Keywords
Agamben, law, Sovereignty, biopolitics.

AGAMBEN ANTE LA LEY: BIOPOLÍTICA Y FORMA DE VIDA

Resumen
Este artículo explora la filosofía del derecho de Agamben, destacando cómo su visión del tema se basa en su lectura de la soberanía y la biopolítica. De hecho, en el fértil debate sobre el biopoder de Foucault, Agamben ofrece una lectura original y radical de la inclusión política de la vida. Su exégesis incorpora la biopolítica a una teoría de la esencia de la tradición occidental y sus elementos fundamentales, que son el derecho y la soberanía. En el artículo, las desviaciones de la "ortodoxia" foucaultiana se remontan a la fascinación del filósofo italiano por Heidegger, Benjamin y Kafka, donde surge una tentación de fuga de la historia, como lo demuestra la interpretación de Agamben del a priori histórico. Agamben desarrolla así un método sin precedentes y una propuesta política positiva. Finalmente, este artículo presentará algunas limitaciones de su método, ya que un enfoque ontologizante de la política podría borrar, en lugar de aclarar, las múltiples manifestaciones históricas del poder y hacer ineficaces las estrategias positivas contra su violencia.

Palabras clave
Agamben, ley, soberanía, biopolítica.

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Introduction: Variations on Biopolitics

Michel Foucault's notion of biopolitics and his explorations regarding the many ways of governing individuals and populations through power-knowledge on their lives have propelled philosophical reflections on urgent political matters and a revision of our understanding of liberal policy and democracy.[1] In a nutshell, the crucial implication of biopolitics pivots on the claim that, from the modern age onward, a new form of power was born with the fundamental scope of promoting, empowering, and multiplying life, pursuing this scope by regimenting, normalising, and knowing life in its regularities.

Developments in biopolitics were abundant in the Italian philosophical landscape, with the crucial contributions of thinkers such as Antonio Negri, his positive denotation of biopower, and Roberto Esposito and his inquiries into the politics of immunity.[2] Against this background, Giorgio Agamben's appropriation of biopolitics had significant international success due to his radicality and criticism of contemporary politics, including institutions such as human rights and liberal democracies. Although Agamben shares with Foucault an intriguing suspicion about these institutes and international standards of legitimate politics,[3] the reasons for their distrust diverge. Foucault underlines how a form of violence could also pervade care, as Snoek and Ojakangas underline,[4] while Agamben points out the actual violence hidden behind every political institution, following Benjamin's reading of the sovereign violence in its foundational relation to law and institutions.[5] The recent international debate in political philosophy has been highlighting the proximity and yet distance between Agamben and Foucault, especially for their different use of similar concepts. The notions that caught the attention of scholars were those of sovereignty, biopolitics, and governmentality, often combined.[6] Concerning law, several scholars underlined that Agamben stressed more the role of law in his conception of biopolitics when compared to Foucault, who focused instead on norms and strategies of normalisation.[7] Others focused on their different readings of subjectivity and parrhesia and Foucault's and Agamben's interpretations of the *dispositive*.[8] A relevant debate concerned the methodologies of the two authors: despite general affinity, scholars found that Agamben focuses more than Foucault on examining the present and underlines the

[1] For an incisive summarisation of the debate on biopolitics and update through contemporary issues – i.e., the SARS Covid-19 pandemic and the environmental crisis – see Marzocca, *Biopolitics for Beginners*.

[2] See Hardt, Negri, *Multitude*; Hardt, Negri, *Empire*; Esposito, *Bios*; Esposito, *Immunitas*. For an assessment of the Italian views on biopolitics see Marzocca, *Biopolitica, sovranità; Lavoro*; Marzocca, *Vida Desnuda*, and Gentili, *Italian Theory*.

[3] See also Schmitt, *The Nomos of the Earth*, pp. 240-258, 304-308.

[4] Ojakangas, *Impossible Dialogue on Biopower*, p. 5; Snoek, *Agamben's Foucault*, p. 49.

[5] Benjamin, *Critique of Violence*, pp. 281-286, 300.

[6] Besides the aforementioned works of Ojakangas and Snoek, another pivotal contribution came from Frost, *Biopower and Sovereignty in Foucault and Agamben*, who also assessed the two different theories with recent political events such as the pandemic (Destasio, *Agamben e Foucault*, and Gratton, *A 'Retro-version' of Power*).

[7] Frost, *Agamben's sovereign Legalisation of Foucault*; Short, *Life and Law*.

[8] Dittus, *The notion of "device" in Giorgio Agamben*; Frost, *The* Dispositif *between Foucault and Agamben*.

unnecessary character of some historical determinations.[9] Scholars also put Foucault's and Agamben's reflections at the trial of some crucial events of our time, including the pandemic, digital surveillance, the environmental crisis,[10] and reproductive policies,[11] with a few studies on terror and totalitarianism.

Furthermore, several scholars highlighted Agamben's debt to Heidegger,[12] Benjamin,[13] and Kafka.[14] However, these studies did not explore how Agamben's alteration of Foucault's method depends on crucial appropriations from these three authors. This paper will fill this gap, focusing on how these diverse influences result in an innovative approach far from Foucault's. Moreover, the heterogeneity of Foucault's and Agamben's theoretical, political, and methodological attitudes is evident if one considers the proposed positive patterns. Despite its originality, Agamben's method reveals ontologising temptations and even a tendency to ground historical processes into an aboriginal foundation, with the risk of a leakage from history. These remarks will be examined, focusing on Agamben's view of historical a priori, and through his readings of biopolitics and law.

The first section of this paper reconstructs Agamben's views on biopolitics, focusing on his appropriations of Foucault's biopolitics through Hannah Arendt and Carl Schmitt's insights, and Agamben's interpretation of Foucault's historical a priori. The second section examines Agamben's method, showing how he decidedly alters Foucault's perspective through trajectories imprinted by Martin Heidegger, Walter Benjamin, and Franz Kafka, resulting in an original philosophical method. The last section questions what could be described as Agamben's political *pars construens,* highlighting the role of figures such as use and form-of-life, and exploring whether his proposal could counter the scopes and strategies of biopolitical sovereignty as Agamben describes it. Some critical remarks conclude the paper.

1. Biopolitics, human rights, and sovereignty

One of the main scopes of the book that opened the twenty-year-long project *Homo sacer* is overcoming the distinction that Foucault had clearly outlined between biopower and sovereignty to grasp the fundamental structure of Western politics and tradition. Indeed, the French philosopher dated the birth of biopolitics to the mid modern age, when a crucial transformation occurred within Western politics: "l'homme, pendant des millénaires, est resté ce qu'il était pour Aristote: un animal vivant et de plus capable d'une existence politique; l'homme moderne est un animal dans la politique duquel sa vie d'être vivant est en question".[15] According to Foucault, in the 18th century, a modern biological

[9] See respectively McQuillan, *Philosophical Archaeology*; Pin and Cornelli, *Entre M. Foucault; e G. Agamben: sobre genealogia e método*.
[10] Marzocca, *Biopolitics for Beginners*; Peters, *Philosophy and Pandemic in the Postdigital Era*.
[11] Deutscher, *The Inversion of Exceptionality*; Sirens, *Deviance or Homo sacer?*.
[12] Acciaresi, *In convergente diaccordo*, Campbell, *Improper Life*; Tossige Gomes, de Moura Costa Matos, *Macchinazione e dispositivo*; Cimino, *Agamben's Political Messianism in 'The Time that Remains'*.
[13] See among others Taccetta, *Dalla Segnatura all'avanguardia*; Raciti, *Il fantoccio e il nano*; Moran, Salzani (eds.) *Towards the Critique of Violence*.
[14] Snoek, *Agamben's Joyful Kafka*; Salzani, *In un gesto messianico*; Vozzo, *La nuda vita della tana*.
[15] Foucault, *La volonté de Savoir*, p. 188, quoted in Agamben, *Homo sacer*, p. 3.

threshold was surpassed, inaugurating the penetration of calculations about human life, processes, and regularities – mortality, natality, morbidity, rates of work accidents, disability - among the main subjects of political concern. This form of power started operating alongside state sovereignty and increasingly forming alliances with the latter. From that moment onward, governmental policies were able to determine and alter human life.[16]

Drawing on the Foucauldian insights about the birth of biopolitics, Agamben's project is twofold: on the one side, he aims to find the juncture between Foucault's reflections on biopolitics and Arendt's explorations about human rights and totalitarianism.[17] On the other side, he seeks to fade the sharp distinction between biopower and sovereignty that Foucault had traced. With this scope in mind, Agamben employs Schmitt's theorisations about sovereignty to uncover the secret of Western politics, the point where biopolitics and sovereignty merge and reach a point of indistinction:

> The present inquiry concerns precisely this hidden intersection between the juridico-institutional and the biopolitical models of power. What this work has had to record among its likely conclusions is precisely that the two analyses cannot be separated, and that the inclusion of bare life in the political realm constitutes the original if concealed nucleus of sovereign power. It can even be said that the production of a biopolitical body is the original activity of sovereign power. In this sense, biopolitics is at least as old as the sovereign exception. Placing biological life at the centre of its calculations, the modern State therefore does nothing other than bring to light the secret tie uniting power and bare life, thereby reaffirming the bond (derived from a tenacious correspondence between the modern and the archaic which one encounters in the most diverse spheres) between modern power and the most immemorial of the *arcana imperii*.[18]

Thereby, Agamben delves into the concealed essence of politics, defining the common traits of biopolitics, sovereignty, and the Western political and philosophical tradition.

Concerning the intersection between Arendt's and Foucault's views, Agamben notices that Arendt shared Foucault's insight that life started becoming the cogent care of politics from the modern age onward.[19] However, Agamben also connects Arendt's insights about the politicisation of life with her accounts on human rights: Agamben

[16] Foucault, *La volonté de savoir*, p. 188.
[17] Agamben, *Homo Sacer*, pp. 3-4.
[18] Agamben, *Homo Sacer*, p. 6.
[19] Arendt, *The Human Condition*, pp. 101-135. Despite the proximity, Arendt's and Foucault's investigations on life's political relevance could not overlap. Indeed, the phenomenon that Arendt described focused on life as the overarching process of social and political reproduction, i.e., the whole societal and economic organisation of labour whose main aim is preserving and enhancing life. For her, the appearance of life on the political stage meant the destruction of politics. Conversely, Foucault addressed the discursive practices through which the members of a state became part of a biological group, whose regularities are subject to study, government, and management, thereby being employed for the scopes of the State: life is, for Foucault, always the power-knowledge over life. As his primary focus is the circulation of power, Foucault does not think of this transformation as a destruction of politics but as a new governmentality entangling rulers and ruled in complex power-knowledge magmatic relations. See Ojakangas, *Impossible Dialogue on Biopower*; Snoek, *Agamben's Foucault*.

radicalises Arendt's criticism of human rights to the point that he accuses them of being a device of sovereign biopower.[20]

To juxtapose Arendt and Foucault's views, Agamben employs the distinction between *zoé* and *bios*, the two ways in which the Greeks used to define life: "*zoé*, [...] expressed the simple fact of living common to all living beings (animals, men, or gods), and *bios*, [...] indicated the form or way of living proper to an individual or a group".[21] Indeed, for him, human life overlaps and entangles the two levels of existence. Nonetheless, for Agamben, politics is essentially biopolitics along a continuum from the effort to shape the *bios* on the *zoé*, till the erasure of the qualifications of the *bios* – i.e., the qualities that humans acquire through their activities, determinations, societal roles, and legal status – to turn human beings into bare life, a life pulled away from its lifeworld and completely subjugated to sovereign arbitrary violence.[22] In Agamben's words:

> If anything characterises modern democracy as opposed to classical democracy, then, it is that modern democracy presents itself from the beginning as a vindication and liberation of *zoé*, and that it is constantly trying to transform its own bare life into a way of life and to find, so to speak, the *bios* of *zoé*. Hence, too, modern democracy's specific aporia: it wants to put the freedom and happiness of men into play in the very place -"bare life" - that marked their subjection.[23]

However, to fully grasp how Agamben defines biopolitics as the truth of politics and sovereignty, it is crucial to follow the second thought pattern, where the Italian philosopher employs Schmitt's reflections on sovereignty. For Agamben, Schmitt's germinal definition of sovereignty – "sovereignty is he who decides on the state of exception"[24] – has a twofold relevance. Firstly, it defines the topological paradox of sovereignty: the sovereign is simultaneously inside and outside the juridical order,[25] and its specific task is producing an anomic space where violence unleashes, where law is suspended, and citizens become a bare life exposed to arbitrary decisions. Even if Agamben knows that for Schmitt sovereignty has the primary scope of setting the space for the political validity of law, the Italian philosopher stresses the subversive prerogative of sovereignty of capturing and violating life.[26]

The second crucial point is clarifying the logical structure of the exception, which is climacteric to grasp what I defined as Agamben's *pars construens*. Indeed, the specific

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[20] For Arendt's accounts of the perplexities of the rights of man, Arendt, *The Origins of Totalitarianism*, pp. 267-302. According to Agamben, Arendt's reflections on active life are detached from those on totalitarianism (Agamben, *Homo sacer*, p. 4).

[21] Agamben, *Homo sacer*, p. 1; Arendt, *The Human Condition*, p. 97.

[22] Benjamin, *Critique of Violence*, p. 297.

[23] Agamben, *Homo sacer,* pp. 9-10.

[24] Agamben, *Homo sacer*, p. 11; Schmitt, *Political Theology*, p. 5.

[25] Agamben, *Homo sacer*, p. 15.

[26] Agamben, *Homo sacer*, p. 19. Agamben is well aware that Schmitt had formulated the theory of the state of exception before the rise of Nazism, during the Weimar Republic, as a legal device to justify political interventions before the left-wing and right-wing agitations spreading in Germany in the first afterwar (Galli, *Genealogia della politica*, p. 851). Nonetheless, Agamben tends to ascribe the state of exception mainly to National-socialism, claiming that the latter's rise to power had been enabled by years of exceptionality and that Hitler had no need to proclaim the *Ausnahmezustand* (Agamben, *State of Exception*, pp. 15-16). Galli underlines the stabilising function of the exception in Schmitt's thought, as it has the twofold task of grasping the emerging order and translating it into juridical terms. Contrarily, Agamben stresses the subversive and arbitrary potential of sovereignty.

function of the exception is to capture a set of objects outside their context and group. The exception is an exclusive inclusion, which makes it the symmetric structure of the example, i.e., the inclusive exclusion:

> while the exception is [...] an inclusive exclusion (which thus serves to include what is excluded), the example instead functions as an exclusive inclusion [...]. While the example is excluded from the set insofar as it belongs to it, the exception is included in the normal case precisely because it does not belong to it. And just as belonging to a class can be shown only by an example – that is, outside of the class itself – so non-belonging can be shown only at the center of the class, by an exception. In every case [...], exception and example are correlative concepts that are ultimately indistinguishable and that come into play every time the very sense of the belonging and commonality of individuals is to be defined. In every logical system, just as in every social system, the relation between outside and inside, strangeness and intimacy, is this complicated.[27]

Therefore, within the political and juridical order, sovereignty could suspend that order to open a space of anomy.[28] Nevertheless, within this space, the political and juridical system is not simply absent, as it is still in force without significance: the law is valid but without content, thereby revealing the violence that grounds it, the pure force substantiating its establishment and execution.[29] Agamben describes this suspension of law as the form of law or as being in force without significance.[30]

For Agamben, sovereignty grounds the validity of law for its capacity to suspend it, and sovereign violence is the essence of law. Agamben uncovers proof of this claim in Pindar's famous fragment about the *nomos basileus*.[31] For him, this fragment declares that law and violence, right and force reach an area of indistinction within sovereignty. Therefore, the spread of exception in contemporary democracies is the revelation of the

[27] Agamben, *Homo sacer*, pp. 21-22.

[28] McLoughhlin, *In Force without Significance*, p. 249.

[29] The idea that law is ultimately grounded on a double violence – lawmaking and law-preserving violence – derives from Benjamin (Benjamin, *Critique of Violence*, pp. 283-284). For Benjamin, the law's monopoly on violence does not respond to its scope of pursuing just ends, but of preserving itself. Agamben reads Schmitt's essay on sovereignty as an answer to Benjamin's essay on violence (Agamben, *State of Exception*, pp. 52-53).

[30] Agamben, *Homo sacer*, p. 51; McLoughlin, *In Force Without Significance*, p. 249. According to Agamben, a law in force without significance is what Kafka described in his famous parable "Before the Law" (Kafka, *Metamorphosis and Other Stories*, pp. 197-198). According to Agamben, the man from the country cannot enter law's palace because the door is always already open (similarly Cacciari, *Icone della legge*, pp. 58-143). The third section further assesses Agamben's reading of Kafka's parable.

[31] Agamben, *Homo sacer*, p. 30. Notoriously, Schmitt employed this fragment to criticise the positivist interpretation of the law, according to which its validity depends on its institution, *Gesetz* (Schmitt, *The nomos of the Eart*, p. 72). Agamben notices that in the 1950s, Schmitt abandoned the syntax of the exception that he had employed in the 1920s. Nonetheless, for Agamben, the exception is still at work in *The nomos of the Earth*, especially in Schmitt's exam of nobody's lands within the colonial enterprise: the lines that divided the world used to delineate a lawless area, a zone where the state of nature was in force and where Agamben situates the exception. However, here, Agamben abandons his thesis that that the exception corresponds to sovereignty, and identifies the exception with pure violence in the state of nature: indeed, within nobody's lands, the exception is not, at the same time, inside and outside the juridical order, as sovereignty does not extend to them.

hidden foundation of law, the lawless violence of the constituting power kept out of sight behind constituted power.[32]

At this point, the coincidence between biopolitics and sovereignty shows itself. If the prerogative of sovereignty is the decision over the exception, the objects to which it preferably applies are human beings reduced to their bare life. The exception captures humans outside the sphere of qualified life (*bios*) and natural life (*zoé*), flattening them to mere life.[33] Therefore, sovereignty grasps bare life through a double exclusion: it politicises natural life and depoliticises qualified life. Based on these equations – of sovereignty to the decision over the exception and of the object of exception with the shapeless entity between qualified and natural life – Agamben assimilates biopolitics, sovereignty, and politics. Indeed, for Agamben, politics has been sovereign and biopolitical from the very dawn of the Western tradition, as its specific task is producing a mere life to submit to its power of life and death.[34]

The final part of this section will examine two examples of the emergence of the biopolitical-sovereign power within history: *homo sacer* and human rights. However, a preliminary remark is needed: Agamben does not explore the history of Western politics, its transformations, and processes. Contrarily, he focuses on some crucial examples that, for him, reveal the hidden essence of politics. The following section will discuss Agamben's method, which recalls Benjamin's fragmentary historiography more than Foucault's genealogy: for Agamben and his inspirator, truth glimpses through marginal events and neglected figures, not through overall processes and regular trends.[35] Furthermore, examples are political devices that can counter the exception's structure.[36]

Homo sacer was a figure of the ancient Latin law that raised Agamben's attention as it shows the meaning of sacrality.[37] Agamben digs into the archaic Latin institute of sacrality to uncover the source of the paradox of bare life: not the untouchable and sacrosanct guarantee of human dignity acquired by the bare fact of birth, but the Trojan horse to extend power over humans indefinitely. Concerning the *homo sacer*, the Latin grammatist Festo defined him as follows:

> The sacred man is the one whom the people have judged on account of a crime. It is not permitted to sacrifice this man, yet he who kills him will not be condemned for homicide; in the first tribunitian law, in fact, it is noted that 'if someone kills the one who is sacred according to the plebiscite, it will not be considered homicide'. This is why it is customary for a bad or impure man to be called sacred.[38]

[32] Agamben, *Homo sacer*, pp. 41-44; Benjamin, *Critique of Violence*, p. 284.
[33] Benjamin, *Critique of Violence*, p. 297, where mere life indicates the barely vital sphere of human existence.
[34] Agamben, *Homo sacer*, p. 6
[35] For Benjamin and Arendt's use of fragmentary historiography, see Benhabib, *The Reluctant Modernism of Hannah Arendt*, p. 88. See Benjamin, *Theses on the Philosophy of History*, pp. 255, 257.
[36] Agamben, *The Signature of all Things*, pp. 1-32; Salzani, *Introduzione a Giorgio Agamben*, pp. 128-131.
[37] Here Agamben draws on Benjamin and Arendt's insights about sacrality. Benjamin underlines that aboriginally sacredness was a condition of bodily vulnerability due to guilt (Benjamin, *Critique of Violence*, p. 299). Arendt follows that reading in claiming that "the world found nothing sacred in the abstract nakedness of being human" (Arendt, *The Origins of Totalitarianism*, p. 299).
[38] Agamben, *Homo sacer*, p. 71.

The double exception that captures the humans deemed sacred reflects bare life's condition: banned from the community of citizens and yet captured by political power, exposed to its arbitrary violence as sovereignty suspends law, bare life is imprisoned in the zone of indistinction between *bios* and *zoé*.

However, in the premodern age, the capture of bare life seldom happened. Contrarily, for Agamben, modernity progressively broadened the state of exception, which in the 20th century became almost everywhere a rule. On this point, Arendt's insights on human rights are crucial. In her work on totalitarianism, Arendt explored the paradoxes of the enlightenment's rights of man, showing how the abstractedness of the universal human being had paved the way for the transformation of human rights into the rights of national citizens and for the depoliticisation of "bare humans" – for those who were no more citizens of their country.[39] Agamben radicalised this criticism to the point that he considers human rights as one of the devices of power to expand indefinitely its grip over bare life: with human rights, the politicisation of life is completed, as it begins with birth and is accomplished with the biological and ethnical belonging to the nation.[40]

In the 20th century, the expansion of the exception allowed biopolitical sovereignty to show its deadly face: the Nazi camps and the medical experiments on human guinea pigs were the apotheosis of biopolitical sovereignty and consecrated the concentration camp as the biopolitical paradigm of modernity. Indeed, in the anomic spatiality of camps where the law is in force without significance, life is grasped through a politicisation of natural life and depoliticisation of qualified life: for Agamben, this is the destiny looming over all humans until sovereignty is fully deactivated. Indeed, biopolitics is revealing its dark side, fading into a power of death (thanatopolitics), in compliance with the traditional definition of sovereignty as a power of life and death.[41] For this reason, contemporary democracies stand in an unsettling continuity with totalitarianism: law and force, violence and rights, human rights and Nazism reveal their common foundation seldom glimpsing across history, and yet perilously expanding from the modern age.

2. A dangerous method: paradigm, signature, archaeology

This section will explore Agamben's method: his reflections on the topic were elaborated late in his thought pattern with *Signatura rerum* (2008).[42] Nonetheless, this exposition will address methodology before examining Agamben's positive proposal to deactivate law and exception, as the latter largely relies on his methods, formal-legal, and ontological insights. Indeed, Agamben's philosophical assumptions and even ontological

[39] To these paradoxes, Arendt responded with her famous "right to have rights", or "the only one human right" (Arendt, *Es gibt nur ein einziges Menschenrecht*).

[40] Agamben, *Homo sacer*, p. 128.

[41] Here Agamben retrieves the traditional definition of sovereignty as a power of life and death over its subjects (Benjamin, *Critique of Violence*, p. 286, see also Foucault, *La volonté de savoir*, p. 177), thereby revealing that this notion is still at work in his thought alongside Schmitt's definition of sovereignty through the exception.

[42] "A reflection on method usually follows the practical application, rather than preceding it" (Agamben, *The Signature of all Things*, p. 7). From a temporal viewpoint, the *Homo sacer* twenty-year project started in 1995 with *Homo sacer*. Its volumes are: *Remnants of Auschwitz* (1998), *State of Exception* (2003), *Kingdom and the Glory* (2007), *The Sacrament of the Language* (2008), *Highest Poverty* (2011), *Opus Dei* (2012), *The use of the bodies* (2014), and *Stasis* (2015).

stances play a pivotal role in delineating an emancipative path, which, as the last paragraph will show, goes far beyond Foucault's path.

Agamben's interpretation of the historical a priori will exhibit the radical difference between his and Foucault's conception of history.

For Agamben, the sovereign decision over bare life, the threshold it arbitrarily traces between citizens worth of speaking and those who are not allowed on the political stage, *bios* and *zoé*, man and animal, is not only the aboriginal task of politics but the essential feature of the Western tradition, hunting its philosophy and especially its language.[43]

Formally, Agamben understands his examination of political figures such as the exception, sovereignty, and bare life as the relation between potentiality and actuality. For example, he frames the sovereign suspension of law as the separation between actuality and potentiality. When sovereignty actualises the space of exception, it suspends law and leaves it in a state of latency or potency, yet unleashes the violence that grounds it. According to Agamben, a preliminary step toward deactivating sovereignty is rethinking the relation of potency and actuality, i.e., renovating the ontological reflection to defeat the traditional distinction between potentiality and actuality and addressing what it left unthought. As the whole Western tradition has always been thinking of potentiality through its capacity of turning into actuality, for Agamben, defeating sovereignty requires following the pathway sketched by Schelling, Nietzsche, and Heidegger, who proposed to rethink the relation between potentiality and actuality.[44] Indeed, authentic potentiality implies that it must be set free from its actualisation, as a potentiality not to be: "The potentiality that exists is precisely the potentiality that can not pass over into actuality [...]. This potentiality maintains itself in relation to actuality in the form of its suspension; it is capable of the act in not realising it, it is sovereignly capable of its own im-potentiality".[45] The logical-ontological structure of actual potentiality that overturns the negative undecidability between two opposed poles (exception and example, *bios* and *zoé*, human and animal, law and violence) is at the core of Agamben's strategy against power.

Another crucial aspect of Agamben's methodology is his fragmentary historiography based on examples. For him, examples are both methodological and strategic devices. From a methodological standpoint, Agamben claims that his search for paradigms (or examples) follows Foucault's methodology. Indeed, for Foucault, figures like "the panopticon [function] as a paradigm in the strict sense: it is a singular object that,

[43] Agamben, *Homo sacer*, p. 11 and *The Open*, pp. 33-38, where he describes the Western metaphysics and politics as an anthropological machine tasked with distinguishing animals and humans. Agamben associates politics and metaphysics through the analogy between language and law. Indeed, at the beginning of the Western tradition, Aristotle politically defined the human being as the animal capable of speech (Aristotle, *Politics*, 1253a). However, Agamben's juxtaposition of law and language widely employs Kafka's parable *In the penal Colony* (Kafka, *Metamorphosis and other Stories*, pp. 147-180; Liska, *Il Messia davanti alla legge*). In Agamben's view, the deadly machine that carves the sentence in the flesh of those convicted to its justice represents the analogous functioning of language and law. It is through the destruction of language and law that justice could shine: this is Agamben's interpretations of the end of the parable, where the machine crumbles down once the colonel administrating it is sentenced with being just (Liska, *Il Messia davanti alla legge*, p. 52; Agamben, *Idea of Prose*).
Agamben disagrees with Benjamin on language (Benjamin, *Critique of Violence*, p. 289), as for the former language hides an inextinguishable violence.

[44] Agamben, *Homo sacer*, p. 48.

[45] Agamben, *Homo sacer*, p. 45; Stahl, *The Exception and the Paradigm*, pp. 237-240.

standing equally for all the others of the same class, defines the intelligibility of the group, of which it is a part and which, at the same time, it constitutes".[46]

Nonetheless, Agamben imprints this methodology with an ontological significance that makes the example even a political tool: examples and paradigms are the theoretical negative of the exception, their logical overturn and deactivation. In Agamben's words: "the example is, then, the symmetrical opposite of the exception: whereas the exception is included through its exclusion, the example is included through the exhibition of its exclusion".[47] Furthermore, as a method that does not move from the universal to the particular or from the particular to the universal, yet from particular to particular, exemplarity dissolves traditional logical dichotomies such as "particular/universal, form/content, lawfulness/exemplarity",[48] diachrony/synchrony, reaching an undecidable area where examples face sovereignty and trigger it off.

However, Agamben entrusts paradigms with an even more crucial task: for him, in the form of linguistic signatures – of signs detected and activated by the signator-philosopher – paradigms guarantee the connection between things, a stance that Agamben derives from Benjamin:

> An actual philosophy of signatures is contained in the two fragments that Walter Benjamin dedicated to the mimetic. Even though the term itself does not appear in them, what Walter Benjamin calls the 'mimetic element' (*das Mimetische*) or 'immaterial similarity' undoubtedly refers to the sphere of signatures. The specifically human capacity of perceiving similarities, whose phylogeny he seeks to reconstruct and whose decline in our time he documents, precisely coincides with the ability to recognise signatures that we have examined so far. As with Paracelsus and Böhme, the sphere of the mimetic faculty consists not only in astrology and the correspondence between the microcosmos and the macrocosm (which Benjamin examined at some length), but above all in language [...]. From this perspective, language – as well as writing – appears as a sort of 'archive of nonsensuous similarities, of nonsenuous correspondences', which ground and articulate 'the ties not only between what is said and what is meant but also between what is written and what is meant, and equally between the spoken and the written'.[49]

To track the difference between Agamben's and Foucault's methods, an overview of their interpretations of the historical a priori is necessary. Indeed, Agamben dates the birth of biopolitics to the very dawn of Western civilisation. This paper suggests that Agamben is tempted by a leakage from history toward an ahistorical view, as he assumes historical dichotomies to conceal a fundamental and aboriginal unity which should be reconstructed and deactivated in order to assure salvation from biopower and sovereignty, as "what seems to be an opposition is actually an interplay within a more fundamental dimension".[50]

[46] Agamben, *The Signature of all Things*, p. 17.
[47] Agamben, *The Signature of all Things*, p. 24.
[48] Agamben, *The Signature of all Things*, p. 20.
[49] Agamben, *The Signature of all Things*, p. 71, where Agamben quotes Benjamin's *Über das mimetische Vermögen*. In her portrait of Benjamin, Arendt claims that Benjamin's theory of mimetic derived from his literary fascination with Baudelaire's correspondences. She even grounds Benjamin's adhesion to Marxism in this allure (Arendt, *Walter Benjamin*, p. 10).
[50] Cimino, *Agamben's Political Messianism in 'The Time that Remains'*, p. 109.

Foucault elaborated the formula "historical a priori" in his book from 1969, *The Archaeology of Knowledge*, clearly referring to Kant[51] to define the conditions of actual scientific judgments, similarly and yet differently to Kant's intent of determining the conditions of possibility of any possible experience.[52] With this formula, Foucault aimed at grasping the structure of events and things organised into themes, ideas, concepts that substantiate different sciences, and which allow a statement to be claimed and to make sense. In Foucault's words, "ce sont tous ces systèmes des énoncés (événement pour une part, et choses pour une autre) que je propose d'appeler archive".[53] Foucault underlines that the idea of a historical a priori might seem a little jarring, and yet he emphasises that these historical events allow the formation of specific judgements: the archive is the law of what can be said,[54] "c'est le système general de la formation et de la transformation des énoncés".[55] However, it is relevant to stress that, for Foucault, only the archives that are concluded and no longer effective can be grasped by the present inquiry, as the latter is too embedded in current structures of discourse to detach from and grasp them.

By his side, Agamben returns to the notion of the historical a priori, and considers it not only a strident but a true oxymoron.[56] Indeed, Agamben does not follow the Kantian background of the a priori, indicating what enables a judgment to be claimed. Contrarily, for him, the a priori is an ahistorical category hunting history itself. Agamben explicated the historical a priori as the almost unconscious category of understanding constantly concealed under every historical manifestation or concept.[57] Significantly enough, Agamben refers here to the Freudian psychoanalysis and its endeavour to make the unconscious explicit to deactivate its secret mechanism, thereby addressing a structure which is at the same time prehistorical and post-historical, in Agamben's words.[58] As this paper will demonstrate, this prehistorical and post-historical is the aboriginal and abyssal grounding where historical dichotomies begin and to which they must return in a deactivated form.[59] Through this discourse, Agamben reveals the early influence of Heidegger's ontology[60] and his method of grounding historical phenomena into the double movement of revelation and concealment of Being. Similarly, according to Agamben,

[51] McQuillan, *Philosophical Archaeology in Kant, Foucault, and Agamben*, pp. 39-41. The idea of a redefinition of Kant's transcendence and a priori was inspired by Foucault's mentor, Hyppolite, with his book *Constitution d'un transcendental historique chez Hegel* (Nigro, *Foucault e Kant*, p. 280). Contrarily, for Agamben, Foucault took inspiration from Maus (Agamben, *The Signature of all Things*, p. 94).

[52] Foucault, *L'archéologie du savoir*, p. 167; Nigro, *Foucault e Kant*, p. 281. McQuillan underlines that Foucault rejects Kant's philosophical archaeology as a history of what has not happened (McQuillan, *Philosophical Archaeology in Kant, Foucault, and Agamben*, p. 42).

[53] Foucault, *L'archéologie du savoir*, p. 169.

[54] Foucault, *L'archéologie du savoir*, p. 170.

[55] Foucault, *L'archéologie du savoir*, p. 171.

[56] Agamben, *The Signature of All Things*, p. 93.

[57] Agamben, *The Signature of All Things*, p. 94.

[58] Agamben, *The Signature of All Things*, pp. 95-97.

[59] Therefore, McQuillan's claim that Foucault would consider as necessary the outcomes of the historical a priori while Agamben would see them as unnecessary does not seem to be adequate (McQuillan, *Philosophical Archaeology in Kant, Foucault, and Agamben*, p. 44). Indeed, for Agamben, historical divisions are so necessary that they are preserved in their final overcoming – for example, when the dichotomy of *bios* and *zoé* turns into the form-of-life, sovereignty in an actual state of exception, potential and act into the potentiality not to.

[60] Pin, Cornelli, *Entre M. Foucault e G. Agamben,* p. 81; Destasio, *Agamben e Foucault*; Frost, *Agamben's Sovereign Legalisation of Foucault*.

historical phenomena could be brought back to the same "ahistorical" entities that ground them, which are all characterised by the symmetrical logical structures of the exception and example, that can be neutralised when finally coupled and compenetrated with one another.

To better explain Agamben's argument, it will be compared to a similar argumentation elaborated by Jacques Derrida, in his remarks about Foucault's History of Madness during a conference in 1991. In this text, Derrida struggles to comply with Foucault's imperative to be "just with Freud" in a double sense: on one side, he suggests that Foucault's approach to madness did not examine the historical a priori from which his text derived. Indeed, for Derrida, Foucault's book was possible only because of the ambivalent liberation of the mad by Freud's psychoanalysis.[61] Second, according to Derrida, Foucault relied on the removal of an aboriginal madness: grounding his history with Descartes' rational *cogito*, Foucault would have removed the madness hunting it, e.g., in the form of Descartes' Evil genius and the irrational and authoritarian thaumaturgic power of the psychoanalyst. In this sense, for Derrida, at the origin of the history of madness stands the interweaving of reason and madness, which he supposes would be the answer of Foucault, if he had had the chance to respond.

Derrida's interpretation shows some similarities with Agamben's reading, as both see the historical a priori enabling a science or a phenomenon as the unconscious or concealed side of the present, with which the present has constantly to come to terms. Nonetheless, while Derrida stays within the tension and oscillation between two elements, Agamben longs to overcome their dichotomy toward their hidden foundation and salvific destiny, the opportunity to suspend the historical splits to reach their higher and more fundamental unity. Therefore, contrary to what McQuillan claims, these dichotomies are not surpassed when deemed unnecessary, as they are the necessary pathway for resolving historical oppositions in the aboriginal undecidability at their basis.

Some conclusive remarks on Agamben's archaeology are necessary. Even in archaeology, Agamben claims that he follows Foucault. Nevertheless, his archaeology's "retreat [in] its own trajectory back to the point where something remains obscure and unthematised"[62] entangles with paradigms and signatures to engender something decidedly different from the Foucauldian archaeology. In Agamben, archaeology does not address the archive, yet becomes the search for an *arché*,[63] a primordial undecidable,[64]

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[61] Derrida, *'Être juste avec Freud'*. It should be noted that Foucault would probably have declined such a task, as he considered the research on the historical a priori to be possible only when a whole knowledge was concluded and overcome. In this sense, Agamben seems to focus on the analysis of the present more than Foucault did (Pin, Cornelli, *Entre M. Foucault e G. Agamben*), offering at the same time a genealogy, an etiology, and a diagnosis for them (Cimino, *Agamben's Political Messianism in 'The Time that Remains'*, p. 110). Yet, this could indicate his reliance on the ahistorical structure substantiating historical events, which must be assaulted to counter the latter. In this sense, maybe he shares the temptation that Foucault found in the Kantian studies of his time: for the French philosopher, his contemporaries forgot that Kant's critique of reason was all about limits, negativity, deficiency, i.e., about grasping what reason cannot do (Nigro, *Foucault e Kant*, pp. 285-287).

I thank the anonymous reviewer for suggesting Derrida's book: this section on the historical a priori follows his insightful remarks. However, despite their relevance, I did not further delve into the similarities with Ricoeur's notion of the transhistorical as it overcame the scope of this paper.

[62] Agamben, *The Signature of all Things*, p. 8.

[63] Agamben, *The Signature of all Things*, pp. 72-73.

[64] Agamben, *The Signature of all Thins*, p. 90.

the prehistorical arising point heterogeneous from history itself and yet always present in it as its unconscious and hidden side. Agamben's archaeology aims to reach a historical *a priori* that remains immanent to all present as its source and fulfilment.[65] Beyond Foucault, Agamben compares this inquiry to the psychoanalytic recovery of the unconscious,[66] but differently from the latter, archaeology's scope is

> to decompose, displace, and ultimately bypass [the previous stage] in order to go back not to its content but to the modalities, circumstances, and moments in which the split, by means of repression, constituted it as origin. This is the exact reciprocal face of the eternal return: it does not will to repeat the past in order to consent to what has been, transforming the 'so it was' into 'so I willed it to be'. On the contrary, it wills to let it go, to free itself from it, in order to gain access beyond or on this side of the past to what has never been, to what was never willed.[67]

An eschatological intent lies within Agamben's search for the *arché*, as its scope is deactivating the hidden ground of historical phenomena and taking a look into a different configuration of things: "to go backward through the course of history, as the archaeologist does, amounts to going back through the work of creation in order to give it back to the salvation from which it originates".[68]

Agamben did not close his reflections on the method with a systematic examination of the relation between paradigm, signature, and archaeology. Nonetheless, despite this Foucauldian weaponry, his primary theoretical reference seems to be still Heidegger's abyssal ontology, which offers the formal-logical structure for interweaving these three figures: apparent dichotomies lead the philosopher-signator to discover the fundamental and abyssal ground that binds them together and in which they are ultimately dissipated. This structure is the logical articulation of historical paradigms, which by their side correspond to all the other paradigms that Agamben pinpoints in history: the example/paradigm does not only stand for its class, but it indicates all the different paradigms with an analogous formal structure. The zone of undecidability where paradigms converge is the enemy the philosopher addresses, yet the place where they could be overturned and disbanded.

Agamben builds his response to the undecidable on these theoretical and explicitly ontological assumptions.[69]

3. Deactivating law: form-of-law and use

This section examines Agamben's *pars construens*: his concerns about the dangers of contemporary democracies, the risks of an unbridled power revealing its deadly possibilities, which, for him, the recent pandemic confirmed,[70] undoubtedly gained him his international success. His radical criticism resulted in the image of a "prophet of

[65] Agamben, *The Signature of all Things*, p. 95.
[66] Agamben, *The Signature of all Things*, p. 97.
[67] Agamben, *The Signature of all Things*, p. 103.
[68] Agamben, *The Signature of all Things*, p. 108.
[69] Agamben, *The Signature of all Things*, pp. 32, 66; Agamben, *Homo sacer*, p. 44, where he claims that politics has an ontological status.
[70] Agamben, *A che punto siamo?* For a critical assessment of these theses, see Lorenzini, *Biopolitics at the time of Coronavirus*; Antoniol, *Biopolitica e Tanatopolitica nella pandemia*.

doom, paralysed by his own pessimism",[71] and the pathways he sketched toward salvation from the threat of sovereignty did not receive due attention. Indeed, for some authors, joy and redemption peek out in Agamben's work.[72] This section demonstrates how Agamben delineates this positive pattern, collecting inspiration from remarkable philosophers and poets. Therefore, his conclusions radically differ from Foucault's, even if Agamben recognises his primary theoretical reference in the French thinker.[73]

The previous paragraph demonstrated that Agamben's method could be defined as a search for paradigms, i.e., seldom historical manifestations of a hidden and ungrounded foundation of dichotomies, to deactivate this hidden ground and the deriving historical dichotomies through their reversion.

Indeed, Agamben trusts Hölderlin's famous dictum that "where danger threatens/ That which saves from it also grows":[74] fighting sovereignty, the violence concealed in law and democracy, language, and the anthropological machine of the Western tradition requires the overturning of the threat, its deepening to the point of deactivation. The ontological revision of the notions of potentiality and actuality, their triggering off through the potentiality not to, offers the logical structure for this operation. Agamben even uses the image of the Gordian knot, requiring a decisive cut to solve the unresolvable:[75] salvation arises from the womb of undecidability.

In what follows, I examine two cases of political relevance among those explored by Agamben: Agamben's exegesis of Kafka's parable "Before the Law" and his interpretation of the Franciscan rejection of the right of property over worldly things toward their bare use.

For Agamben, Kafka's novels and short stories describe a world where the exception became the rule.[76] Kafka's famous parable "Before the Law" tells the story of a man from the country who reached the door of the law, before which a doorkeeper stood. The doorkeeper does not let the man in for years. While the man from the country waits, death comes for him, just in time for him to listen to the doorkeeper whisper in his ear that the door was only open for him and that with his death, he has to close it.[77] Agamben attunes with Derrida and Cacciari's interpretations:

> Nothing – and certainly not the refusal of the doorkeeper – prevents the man from the country from passing through the door of the Law if not the fact that this door is already open and that the Law prescribes nothing. The two most recent interpreters of the legend, Jacques Derrida and Massimo Cacciari, have both insisted on this point, if in different ways. 'The Law', Derrida writes, 'keeps itself [*se garde*] without keeping itself, kept [*gardée*] by a doorkeeper who keeps nothing, the door remaining open and open onto nothing [...]. And Cacciari, even more decisively, underlines the fact that the power of the Law lies precisely in the impossibility of entering into what is already open, of reaching the place where one already is: 'How can we hope to open if the door

[71] Stahl, *The Exception and the Paradigm*, p. 233.
[72] Stahl, *The Exception and the Paradigm*, p. 234; Snoek, *Agamben's Joyful Kafka*; Whyte, *Catastrophe and Redemption*.
[73] Agamben, *The Signature of all Things*, p. 7.
[74] Whyte, *Catastrophe and Redemption*, p. 5, quoting Friedrich Hölderlin, *Selected Poems and Fragments*. Stahl convincingly argues that Agamben's adherence to Hölderlin's claim does not make him an accelerationist, as Whyte states (Stahl, *The Exception and the Paradigm*, p. 248, note 4; Whyte, *Catastrophe and Redemption*, p. 5)
[75] Agamben, *Homo sacer*, p. 48; Liska, *Il Messia davanti alla legge*, p. 48.
[76] Liska, *Il Messia davanti alla legge*, p. 48.
[77] Kafka, *Before the Law*.

> is already open? How can we hope to enter-the-open [*entrare-l'aperto*]? In the open, there is, things are there, one does not enter there [...]. We can enter only there where we can open. The already-open [*il già-aperto*] immobilizes. The man from the country cannot enter, because entering into what is already open is ontologically impossible.[78]

As the village people at the foot of the Castle,[79] the man from the country represents a life fully captured by the exception, exposed to a law at the minimum of its significance, yet at the maximum of its force. Agamben offers a positive and unexpected reading of the parable: for him, the waiting of the man from the country is nothing less than a strategy to reach the definitive closure of the door and, thereby, the actual deactivation of the law. In Agamben's words:

> If it is true the door's very openness constituted, as we saw, the invisible power and specific 'force' of the Law, then we can imagine that all the behaviour of the man from the country is nothing other than a complicated and patient strategy to have the door closed in order to interrupt the Law's being in force. And in the end, the man succeeds in his endeavour, since he succeeds in having the door of the law closed forever (it was, after all, open 'only for him'), even if he may have risked his life in the process (the story does not say that he is actually dead but that he is 'close to the end').[80]

For Agamben, the strategy of the man from the country delineates the pathway toward the actual state of exception where counterstrategies spoliate sovereignty and law of their violent and deadly attitude. In the actual state of exception, the law ceases to be in force and even in force without significance to become only the object of studying or playing: law reduced to its potentiality becomes a powerless game. Indeed, drawing inspiration from Kafka's *The Trial* and following Benjamin's reading, studying the law means disbanding it, making it ineffective:

> One day humanity will play with law just as children play with disused objects, not in order to restore them to their canonical use but to free them from it for good. What is found after the law is not a more proper and original use value that precedes the law, but a new use that is born only after it. And use, which has been contaminated by law, must also be freed from its own value. This liberation is the task of study, or play. And this studious play is the passage that allows us to arrive at that justice that one of

[78] Agamben, *Homo sacer*, p. 49; Cacciari, *Icone della legge*, p. 69. The incommensurability between the generality of law and particularity is one of the cases where law is in force without significance, yet not the only case that Agamben has in mind. McLoughlin seems to focus only on this case, a fact that helps him discussing Agamben's arduous analogy between Kafka's parable and Kant's universal moral law that prescribes only the form of the practical maxims (McLoughlin, *In Force without Significance*; Agamben, *Homo sacer*, pp. 51-54).

[79] Agamben, *Homo sacer*, p. 55.

[80] Agamben, *Homo sacer*, p. 55; Liska, *Il messia davanti alla legge*, pp. 47-50. Agamben hypothesises that the man from the country could even be the Messiah, thereby contravening Benjamin's prescription of avoiding the natural (i.e., psychological) or supernatural (i.e., religious and theological) readings of Kafka (Benjamin, *Franz Kafka*, p. 127).

Solving the enigma of this parable, which Kafka embeds in his novels The Trial and The Castle (Kafka, *The Trial*, pp. 153-155; Kafka, *The Castle*, pp. 189-190), is not an anodyne task: philosophers and intellectuals have thrown themselves into the arduous interpretation of this story. However, the versions of the parable within Kafka's novels are always an omen of death or misfortune; therefore, Agamben's reading counters most interpretations of Before the Law.

> Benjamin's posthumous fragments defines as a state of the world in which the world appears as a good that absolutely cannot be appropriated or made juridical.[81]

In *Highest poverty*, Agamben attempts two other patterns to deactivate sovereignty and law: the form of life and the use. In this text, Agamben examines the specificity of monastic life,[82] focusing on the relation between natural life and the form of life. Agamben claims that the life of the monks was structured along a rule that was not at all a law. Contrarily, the monastic rule tended to coincide with life and reached with it a point of indistinction where life itself structured its form: "the *nova lex* cannot have the form of law, but as *regula*, it approaches the very form of life, which it guides and orients".[83] Therefore, monastic life fulfilled and inverted the biopolitical scope of structuring the *bios* over the *zoé*. According to Agamben, the rule of the monastic life prevents the law from applying to it – both as law and as its suspension through the exception. At the same time, dwelling within the space of undecidability between natural life and qualified life, monks deactivate the law from the very anomic space where sovereignty hides: the salvation they pursue comes from the space of doom itself. Indeed, Agamben claims that the monastic form of life works as an "example, [a] paradigm"[84] for its effort to emulate Christ's exemplarity and for its exemplarity to all Christians: as such, it has the power to overturn the exception. Furthermore, Agamben highlights the relevance of the common life (*koinos bios*, from which cenoby) for monks. Indeed, for him, cenoby indicated a place for the common life and the *habitus* of living together, which, for Agamben, proofs the political implications of this experience.[85]

Indeed, a direct reflection on the deactivation of law resulted from the Franciscans' rejection of property. In enacting a form of life in perfect compliance with that of Jesus Christ, Saint Francis and the Franciscans radically actualised the prescription of poverty by detaching property from use. Indeed, according to the Franciscans, use does not need to imply any right of property:

> what is in question, for the order as for its founder, is the *abdicatio omnis iuris* ('abdication of every right'), that is, the possibility of a human existence beyond the law. What the Franciscans never tire of confirming […] is the lawfulness for the brothers of making use of goods without having any right to them (neither of property nor of use). In the words of Bonagratia, *sicut equus habet usus facti*, 'as the horse has *de facto* use but not property rights over the oats that it eats, so the religious who has abdicated all property has the simple de facto use (*usum simplicem facti*) of bread, wine, and clothes' […]. From the perspective that is of interest to us here, Franciscanism can be defined – and in this consists its novelty, even today unthought, and in the present conditions of society, totally unthinkable – as the attempt to realise a human life and practice absolutely outside the determinations of the law. If we call this life that is unattainable by law 'form of life', then we can say that the syntagma *forma vitae* expresses the most proper intention of Franciscanism.[86]

[81] Agamben, *State of exception,* p. 64, with reference to Benjamin, *Franz Kafka*, p. 139, "the gate of justice is learning" and Kafka, *The Trial*, p. 140.
[82] Maybe referring to Benjamin, *Theses on the Philosophy of History*, p. 258.
[83] Agamben, *Highest Poverty,* p. 25.
[84] Agamben, *Highest Poverty*, p. 44; *Cimino, Agamben's Political Messianism in 'The Time that Remains'*, p. 108.
[85] Agamben, *Highest poverty*, p. 11.
[86] Agamben, *State of exception,* p. 64.

At first glimpse, these insights seem inspired by Foucault's late reflections on the technologies of the self and the hermeneutics of the subject aimed at countering the infiltration of discursive practices of power-knowledge within the self.[87] Nonetheless, Agamben's reflections deviate from the Foucauldian pathway due to some suggestions in Benjamin – i.e., his search for a "good that absolutely cannot be appropriated or made juridical".[88]

According to Agamben, despite their radical rejection of rights and even their pretension of a right not to have rights,[89] the Franciscans fell into the trap of the Church that compelled them to let the language of the law grasp their form of life. Indeed, in the years following the outbreak of the Franciscan message, the dispute about their rule focused on framing use in legal terms. For example, legal debate concerned the possibility of use without property for those livelihoods whose use implies consumption (*abusus*),[90] the attention to the distinction between factual use and property,[91] the labelling of Franciscans as legal Minors, like sons whose property belongs to their father, the pope.[92] Allowing the infiltration of the legal language in their rule, the Franciscans jeopardised their attempt to deactivate law – a scope that, according to Agamben, they could have accomplished by disentangling use and activity, *energeia*, and framing use as a pure act that suspends any relation to law: for Agamben, the Franciscans did not think use in itself.[93] Therefore, Agamben judges the Franciscan experiment as a failed attempt to neutralise the law by giving up all property.

The last section will outline some aporias within Agamben's examination of law, sovereignty, and biopower and, consequently, within the responses he outlines before the political and metaphysical "anthropological machine".

[87] Stahl, *The Exception and the Paradigm*, p. 245.

[88] Agamben, *State of Exception*, p. 64, referring to Benjamin, *Notizen zu einer Arbeit über die Kategorie der Gerechtigkeit*.

[89] Agamben, *Highest poverty*, p. 54, where Agamben flips over Arendt's famous syntagm "the right to have rights".

[90] Agamben, *Highest poverty*, p. 56.

[91] Agamben, *Highest poverty*, p. 57.

[92] Agamben, *Highest poverty*, p. 50.

[93] "Holding firm to this conception of use as act and *energeia* ended up blockading the Franciscan doctrine of use within the totally sterile conflict between the Conventuals, who underlined its nature as an *actus intrinsecus*, and the Spirituals, who demanded that this be translated into an *actus extrinsecus*. Instead of confining use on the level of a pure practice, as a fictitious series of acts of renouncing the law, it would have been more fruitful to try to think its relation with the form of life of the *Friars Minor*, asking how these acts could be constituted in a *vivere secundum formam* and in a habit" (Agamben, *Highest poverty*, p. 60).

Agamben deepens the notion of use in itself in *The Use of Bodies*, where he explores the condition of the slave as a living tool, an inoperative life – a life without work. According to Agamben, this life is the perfect embodiment of life at the stage of its complete potentiality (Agamben, *The Use of Bodies*, pp. 58-62; and Agamben, *The Coming Community*) and reaches an even higher level of imperativity in the sadomasochistic practices where slave and master blur the difference between them (Agamben, *The Use of Bodies*, p. 35). For reasons of space, this work, which focuses on law and sovereignty, will not further examine these reflections. See Marzocca, *Biopolitics for Beginners*, pp. 161-165.

4. Conclusion: critical remarks

Agamben's reflections on biopolitics significantly diverge from Foucault's in a way that is both creative and captivating for understanding current entangled political crises. This paper demonstrates that the momentum for these deviations comes to Agamben from some relevant philosophers and thinkers, including Benjamin, Heidegger, and Kafka. Hence, Agamben's thought should not be compared to a Foucauldian orthodoxy. The Italian philosophers' views on thanatopolitics and the deadly allurements that tempt power dealing with migrants, stateless persons, criminals, political dissent, and even foreigners are enlightening. Agamben warns us that acquiescing to sovereignty unleashing its brutality on the most fragile social members opens the embrasure for the institutionalisation of violence – a law-ball of safety that overturns into a generalised risk of rightlessness.

Nonetheless, it is not anodyne that Agamben's ontologising approach promotes our understanding and resistance to the sources of these institutionalisations of violence[94]. Indeed, identifying biopolitics with sovereignty and the two with the destiny of Western metaphysics and politics has a twofold implication. First, it prevents a deeper analysis of the manifold forms of power and their historical transformations. Second, and relatedly, Agamben's strategies to counter power do not address its historical variations but its assumed ahistorical formal-logical features. From a methodological standpoint, Agamben's ontologising approach radically differs from Foucault's choice of a historical ontology that refuses substantialisation.[95] Agamben's proposal uniformises the historically heterogeneous forms of power by reducing them to the logical structure of exception. Despite Agamben's claim that his methodology is the same as Foucault's and that he only casts a longer shadow in the past,[96] Agamben actually "leaves aside Foucault's genealogy and opts instead for a formal-logical analysis that aims to delineate what is always already biopolitical in the permanent structure of sovereignty throughout Western politics".[97] For example, in identifying biopolitics and sovereignty, Agamben misses the possibility of

[94] Negri, *Quel divino ministerio per gli affari dela vita terrena*, p. 12.

[95] Foucault, *Qu'est-ce que les Lumières?*, p. 573. For a critical review of Agamben's version of biopolitics, see Marzocca, *Biopolitics for beginners*, pp. 145-165. Marzocca outlines some other relevant differences between Agamben and Foucault, including the role of medicine, preliminary in Foucault's biopolitics and only posthumous in Agamben's, the positive and empowering features of biopolitics, which is, for Foucault, a power to enhance life and not mainly to kill it ("longtemps, un des privilèges caractéristiques du pouvoir souverain a été le droit de vie et de mort.[...] Or, l'occident a connu depuis l'âge Classique une très profonde transformation de ces mécanismes du pouvoir. [...] Le droit de mort tendra dès lors à se transformer ou du moins à prendre appui sur les exigences d'un pouvoir qui gère la vie et à s'ordonner à ce qu'elle réclament", Foucault, *La volonté de savoir*, pp. 177-179). Moreover, for Marzocca, Agamben neglects the role of norms and normalization in Foucault's biopolitics and treats laws and norms as synonyms. Furthermore, Marzocca outlines that for Foucault the *bios* is not mainly the qualified life, but the *ethos* "understood as a way of conducting oneself. [...] The dimension of the bios as existence [is] the sphere in which those who intend to be and remain free can try to form or transform it by critically interacting with power and taking care of their own self, that is by practicing what [Foucault] calls *ethopoiesis*, the formation of an *ethos*" (Marzocca, *Biopolitics for Beginners*, p. 17). Moreover, Agamben identifies in the state, and not in the multiplicity of power-knowledge organizations the main subject of biopower (Foucault, *"Il faut defender la société"*, p. 204).

[96] Snoek, *Agamben's Foucault*, p. 47.

[97] Gündoğdu, *Rightlessness in an Age of Rights*, pp. 45-46.

recognising nationalism and sovereignty, not necessarily biopolitics, as the bearers of deadly and xenophobic imprints. Sovereign deadly impulses peak when they couple with biopolitics – e.g., during the Nazi regime – but this does not exclude the heterogeneity of the two forms of power.[98]

Agamben's critique of power through its logical and metaphysical structures defines the patterns he sketches to counter it. Nonetheless, as he brings back historical figures to their logical structure, he tends to dissolve the former into the latter, with two consequences: first, he treats historical figures as epiphenomena of their basic structure, only to let the former surreptitiously emerge. Second, he thinks about the response to these historical figures by opposing their logical forms, or vice versa, he responds to the logical structure of power through historical examples. This interplay of "esoteric" and "exoteric"[99] history – the formal-logical structure of the political and philosophical Western tradition and the apparent history of political and philosophical events - is evident for law: Agamben identifies the essence of law with the sovereign exception and assumes that a suspension of law could deactivate sovereignty. However, it is unclear how studying law could dismantle law and sovereignty. Also, as Stahl claims, Agamben overlooks the fact that suspending law does not necessarily lead to the end of violence but could result in a society based "on a violent ethos".[100] Similarly, and almost fractally, it is unclear how the Franciscans' renunciation of propriety for use could lead to suspending the whole law, not just the property right. Lastly, in a general sense, Agamben's account that from the modern age onward the exception has been expanding in the public sphere does not lean on historical causes and processes but seems to respond to an assumed exception's intrinsic growth, of which the multiplication of historical examples is read as proof. The expansion of the exception is not a historical transformation, but the manifestation of the concealed essence of power.

Generally, the interplay of historical figures and formal-logical structures makes Agamben's *pars construens* imprecise and, therefore, strategically ineffective.

Concerning more direct political considerations, Agamben's account of monastic life generates some perplexities. Agamben focuses on the communitarian trait of the monastic life, which means that this experience has "an obvious political meaning" for him.[101] Nonetheless, could the experience of a life wholly organised to comply with religious prescriptions, aimed at guaranteeing one's ultramundane salvation, and consequently dramatically alienated from worldly affairs, be considered political? After all, Agamben himself describes the monastic form of life as a *bios xenikos,*[102] the life of a foreigner in the world, as its authentic motherland is the heavenly city of God. In this sense, beyond the fight with the Church – in Agamben's narrative, the historical form of sovereignty and law – the Franciscan community worked in this world for the most glorious, otherworldly life that the reciprocal control of the monks in the cenoby assures.

[98] Foucault, *"Il faut defender la société"*, p. 211.
[99] For the metaphors of the esoteric and exoteric history, I draw inspiration from Marx's *Critique of Hegel's 'Philosophy of Right'*, p. 8, even if Agamben's philosophy of history radically differs from Hegel's.
[100] Stahl, *The exception and the paradigm*, p. 247.
[101] Agamben, *Highest poverty*, p. 11.
[102] Agamben, *Highest poverty*, p. 27.

Moreover, following Arendt's insights, could a community grounded on its love for God and aimed at his heavenly city be a political community? Is a worldless community political?[103]

Although Agamben's monitoring of the authoritarian and deadly temptations of contemporary democracies and his decided rejection of any violence over the individual, the risk of his worldless and ontological approach to politics could be that of neglecting the varied historical forms that power assumes and on which a critical and radical philosophy cannot help structuring its response.

[103] Marzocca, *Biopolitics for Beginners*, p. 160. For an assessment of the political relevance of the Christian community, see Arendt, *Love and Saint Augustine*. Concerning the common world as the fundamental stake of politics, see Arendt, *Between Past and Future*, p. 156. In Agamben, *Beyond Human Rights*, the uprootedness that Agamben promotes is significantly manifest. This uprootedness is not only topological but also historical, as it seems to be inspired by Benjamin's longing for a suspension of time – for the deactivation of progress in a time that "stands still and [comes] to a stop (Benjamin, *Theses on the Philosophy of History*, p. 262).

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