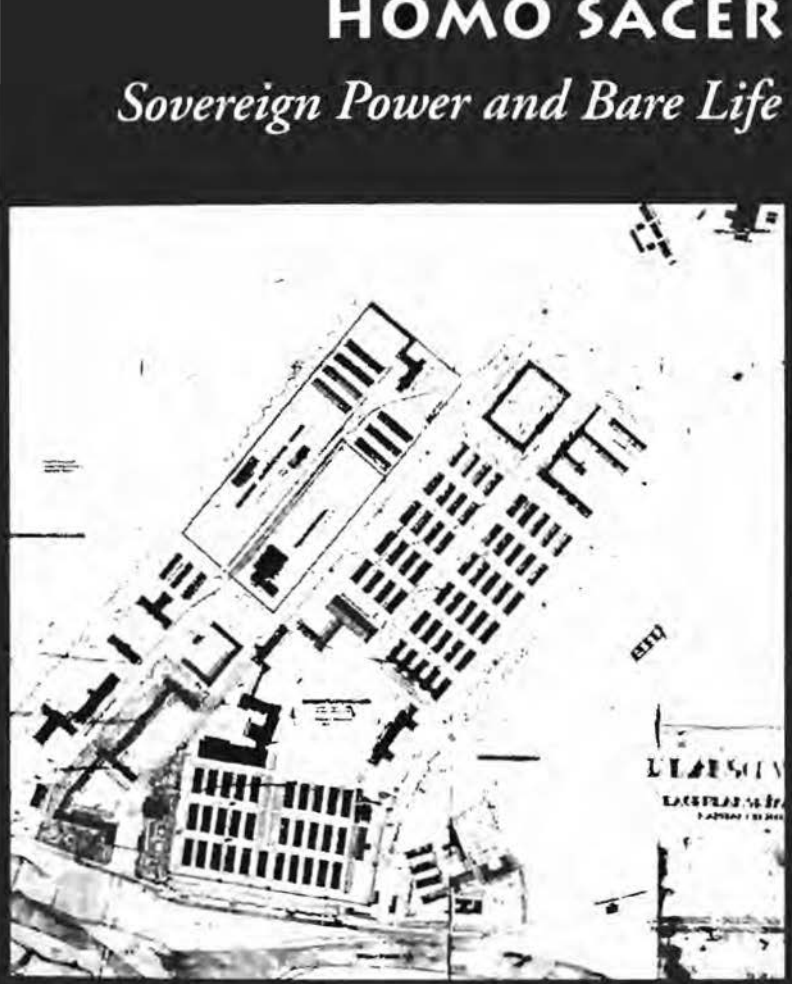
MERIDIAN

CROSSING AESTHETICS

HOMO SACER

Sovereign Power and Bare Life



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Crossing Aesthetics

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Sovereign Power
and Bare Life

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Contents

Das Recht hat kein Dasein für sich, sein Wesen vielmehr ist das Leben der Menschen selbst, von einer Seite angesehen.

—Savigny

Law has no existence for itself; rather its essence lies, from a certain perspective, in the very life of men.

Ita in iure civitatis, civiumque officiis investigandis opus est, non quidem ut dissolvatur civitas, sed tamen ut tanquam dissoluta consideretur, id est, ut qualis sit natura humana, quibus rebus ad civitatem compaginandam apta vel inepta sit, et quomodo homines inter se componi debeant, qui coalescere volunt, recte intelligatur.

—Hobbes

To make a more curious search into the rights of States, and duties of Subjects, it is necessary, (I say not to take them in sunder, but yet that) they be so considered, as if they were dissolved, (i.e.) that wee rightly understand what the quality of humane nature is, in what matters it is, in what not fit to make up a civill government, and how men must be agreed among themselves, that intend to grow up into a well-grounded State.

Euretē moi hē entolē hē eis zōēn, autē eis thanaton.

—Saint Paul

And the commandment, which was ordained to life, I found to be unto death.

HOMO SACER

Sovereign Power
and Bare Life

Introduction

The Greeks had no single term to express what we mean by the word "life." They used two terms that, although traceable to a common etymological root, are semantically and morphologically distinct: *zoē*, which expressed the simple fact of living common to all living beings (animals, men, or gods), and *bios*, which indicated the form or way of living proper to an individual or a group. When Plato mentions three kinds of life in the *Philebus*, and when Aristotle distinguishes the contemplative life of the philosopher (*bios theōrētikos*) from the life of pleasure (*bios apolaustikos*) and the political life (*bios politikos*) in the *Nichomachean Ethics*, neither philosopher would ever have used the term *zoē* (which in Greek, significantly enough, lacks a plural). This follows from the simple fact that what was at issue for both thinkers was not at all simple natural life but rather a qualified life, a particular way of life. Concerning God, Aristotle can certainly speak of a *zoē aristē kai aidios*, a more noble and eternal life (*Metaphysics*, 1072b, 28), but only insofar as he means to underline the significant truth that even God is a living being (similarly, Aristotle uses the term *zoē* in the same context—and in a way that is just as meaningful—to define the act of thinking). But to speak of a *zoē politikē* of the citizens of Athens would have made no sense. Not that the classical world had no familiarity with the idea that natural life, simple *zoē* as such,

could be a good in itself. In a passage of the *Politics*, after noting that the end of the city is life according to the good, Aristotle expresses his awareness of that idea with the most perfect lucidity:

> This [life according to the good] is the greatest end both in common for all men and for each man separately. But men also come together and maintain the political community in view of simple living, because there is probably some kind of good in the mere fact of living itself [*kata to zēn auto monon*]. If there is no great difficulty as to the way of life [*kata ton bion*], clearly most men will tolerate much suffering and hold on to life [*zoē*] as if it were a kind of serenity [*euēmeria*, beautiful day] and a natural sweetness. (1278b, 23–31)

In the classical world, however, simple natural life is excluded from the *polis* in the strict sense, and remains confined—as merely reproductive life—to the sphere of the *oikos*, "home" (*Politics*, 1252a, 26–35). At the beginning of the *Politics*, Aristotle takes the greatest care to distinguish the *oikonomos* (the head of an estate) and the *despotēs* (the head of the family), both of whom are concerned with the reproduction and the subsistence of life, from the politician, and he scorns those who think the difference between the two is one of quantity and not of kind. And when Aristotle defined the end of the perfect community in a passage that was to become canonical for the political tradition of the West (1252b, 30), he did so precisely by opposing the simple fact of living (*to zēn*) to politically qualified life (*to eu zēn*): *ginomenē men oun tou zēn heneken, ousa de tou eu zēn*, "born with regard to life, but existing essentially with regard to the good life" (in the Latin translation of William of Moerbeke, which both Aquinas and Marsilius of Padua had before them: *facta quidem igitur vivendi gratia, existens autem gratia bene vivendi*).

It is true that in a famous passage of the same work, Aristotle defines man as a *politikon zōon* (*Politics*, 1253a, 4). But here (aside from the fact that in Attic Greek the verb *bionai* is practically never used in the present tense), "political" is not an attribute of the living being as such, but rather a specific difference that determines the genus *zōon*. (Only a little later, after all, human politics is

distinguished from that of other living beings in that it is founded, through a supplement of politicity [*policità*] tied to language, on a community not simply of the pleasant and the painful but of the good and the evil and of the just and the unjust.)

Michel Foucault refers to this very definition when, at the end of the first volume of *The History of Sexuality*, he summarizes the process by which, at the threshold of the modern era, natural life begins to be included in the mechanisms and calculations of State power, and politics turns into *biopolitics*. "For millennia," he writes, "man remained what he was for Aristotle: a living animal with the additional capacity for political existence; modern man is an animal whose politics calls his existence as a living being into question" (*La volonté*, p. 188).

According to Foucault, a society's "threshold of biological modernity" is situated at the point at which the species and the individual as a simple living body become what is at stake in a society's political strategies. After 1977, the courses at the Collège de France start to focus on the passage from the "territorial State" to the "State of population" and on the resulting increase in importance of the nation's health and biological life as a problem of sovereign power, which is then gradually transformed into a "government of men" (*Dits et écrits*, 3: 719). "What follows is a kind of bestialization of man achieved through the most sophisticated political techniques. For the first time in history, the possibilities of the social sciences are made known, and at once it becomes possible both to protect life and to authorize a holocaust." In particular, the development and triumph of capitalism would not have been possible, from this perspective, without the disciplinary control achieved by the new bio-power, which, through a series of appropriate technologies, so to speak created the "docile bodies" that it needed.

Almost twenty years before *The History of Sexuality*, Hannah Arendt had already analyzed the process that brings *homo laborans*—and, with it, biological life as such—gradually to occupy the very center of the political scene of modernity. In *The Human Condition*, Arendt attributes the transformation and decadence of the political

realm in modern societies to this very primacy of natural life over political action. That Foucault was able to begin his study of biopolitics with no reference to Arendt's work (which remains, even today, practically without continuation) bears witness to the difficulties and resistances that thinking had to encounter in this area. And it is most likely these very difficulties that account for the curious fact that Arendt establishes no connection between her research in *The Human Condition* and the penetrating analyses she had previously devoted to totalitarian power (in which a biopolitical perspective is altogether lacking), and that Foucault, in just as striking a fashion, never dwelt on the exemplary places of modern biopolitics: the concentration camp and the structure of the great totalitarian states of the twentieth century.

Foucault's death kept him from showing how he would have developed the concept and study of biopolitics. In any case, however, the entry of *zoē* into the sphere of the *polis*—the politicization of bare life as such—constitutes the decisive event of modernity and signals a radical transformation of the political-philosophical categories of classical thought. It is even likely that if politics today seems to be passing through a lasting eclipse, this is because politics has failed to reckon with this foundational event of modernity. The "enigmas" (Furet, *L'Allemagne nazi*, p. 7) that our century has proposed to historical reason and that remain with us (Nazism is only the most disquieting among them) will be solved only on the terrain—biopolitics—on which they were formed. Only within a biopolitical horizon will it be possible to decide whether the categories whose opposition founded modern politics (right/left, private/public, absolutism/democracy, etc.)—and which have been steadily dissolving, to the point of entering today into a real zone of indistinction—will have to be abandoned or will, instead, eventually regain the meaning they lost in that very horizon. And only a reflection that, taking up Foucault's and Benjamin's suggestion, thematically interrogates the link between bare life and politics, a link that secretly governs the modern ideologies seemingly most distant from one another, will be able to bring the political out of

its concealment and, at the same time, return thought to its practical calling.

One of the most persistent features of Foucault's work is its decisive abandonment of the traditional approach to the problem of power, which is based on juridico-institutional models (the definition of sovereignty, the theory of the State), in favor of an unprejudiced analysis of the concrete ways in which power penetrates subjects' very bodies and forms of life. As shown by a seminar held in 1982 at the University of Vermont, in his final years Foucault seemed to orient this analysis according to two distinct directives for research: on the one hand, the study of the *political techniques* (such as the science of the police) with which the State assumes and integrates the care of the natural life of individuals into its very center; on the other hand, the examination of the *technologies of the self* by which processes of subjectivization bring the individual to bind himself to his own identity and consciousness and, at the same time, to an external power. Clearly these two lines (which carry on two tendencies present in Foucault's work from the very beginning) intersect in many points and refer back to a common center. In one of his last writings, Foucault argues that the modern Western state has integrated techniques of subjective individualization with procedures of objective totalization to an unprecedented degree, and he speaks of a real "political 'double bind,' constituted by individualization and the simultaneous totalization of structures of modern power" (*Dits et écrits*, 4: 229–32).

Yet the point at which these two faces of power converge remains strangely unclear in Foucault's work, so much so that it has even been claimed that Foucault would have consistently refused to elaborate a unitary theory of power. If Foucault contests the traditional approach to the problem of power, which is exclusively based on juridical models ("What legitimates power?") or on institutional models ("What is the State?"), and if he calls for a "liberation from the theoretical privilege of sovereignty" in order to construct an analytic of power that would not take law as its model and code,

then where, in the body of power, is the zone of indistinction (or, at least, the point of intersection) at which techniques of individualization and totalizing procedures converge? And, more generally, is there a unitary center in which the political "double bind" finds its *raison d'être*? That there is a subjective aspect in the genesis of power was already implicit in the concept of *servitude volontaire* in Étienne de La Boétie. But what is the point at which the voluntary servitude of individuals comes into contact with objective power? Can one be content, in such a delicate area, with psychological explanations such as the suggestive notion of a parallelism between external and internal neuroses? Confronted with phenomena such as the power of the society of the spectacle that is everywhere transforming the political realm today, is it legitimate or even possible to hold subjective technologies and political techniques apart?

Although the existence of such a line of thinking seems to be logically implicit in Foucault's work, it remains a blind spot to the eye of the researcher, or rather something like a vanishing point that the different perspectival lines of Foucault's inquiry (and, more generally, of the entire Western reflection on power) converge toward without reaching.

The present inquiry concerns precisely this hidden point of 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 center 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*.

If this is true, it will be necessary to reconsider the sense of the Aristotelian definition of the *polis* as the opposition between life (*zēn*) and good life (*eu zēn*). The opposition is, in fact, at the same time an implication of the first in the second, of bare life in politically qualified life. What remains to be interrogated in the Aristotelian definition is not merely—as has been assumed until now—the sense, the modes, and the possible articulations of the "good life" as the *telos* of the political. We must instead ask why Western politics first constitutes itself through an exclusion (which is simultaneously an inclusion) of bare life. What is the relation between politics and life, if life presents itself as what is included by means of an exclusion?

The structure of the exception delineated in the first part of this book appears from this perspective to be consubstantial with Western politics. In Foucault's statement according to which man was, for Aristotle, a "living animal with the additional capacity for political existence," it is therefore precisely the meaning of this "additional capacity" that must be understood as problematic. The peculiar phrase "born with regard to life, but existing essentially with regard to the good life" can be read not only as an implication of being born (*ginomenē*) in being (*ousa*), but also as an inclusive exclusion (an *exceptio*) of *zoē* in the *polis*, almost as if politics were the place in which life had to transform itself into good life and in which what had to be politicized were always already bare life. In Western politics, bare life has the peculiar privilege of being that whose exclusion founds the city of men.

It is not by chance, then, that a passage of the *Politics* situates the proper place of the *polis* in the transition from voice to language. The link between bare life and politics is the same link that the metaphysical definition of man as "the living being who has language" seeks in the relation between *phonē* and *logos*:

> Among living beings, only man has language. The voice is the sign of pain and pleasure, and this is why it belongs to other living beings (since their nature has developed to the point of having the sensations of pain and pleasure and of signifying the two). But language is for

> manifesting the fitting and the unfitting and the just and the unjust. To have the sensation of the good and the bad and of the just and the unjust is what is proper to men as opposed to other living beings, and the community of these things makes dwelling and the city. (1253a, 10–18)

The question "In what way does the living being have language?" corresponds exactly to the question "In what way does bare life dwell in the *polis*?" The living being has *logos* by taking away and conserving its own voice in it, even as it dwells in the *polis* by letting its own bare life be excluded, as an exception, within it. Politics therefore appears as the truly fundamental structure of Western metaphysics insofar as it occupies the threshold on which the relation between the living being and the *logos* is realized. In the "politicization" of bare life—the metaphysical task *par excellence*—the humanity of living man is decided. In assuming this task, modernity does nothing other than declare its own faithfulness to the essential structure of the metaphysical tradition. The fundamental categorial pair of Western politics is not that of friend/enemy but that of bare life/political existence, *zoē/bios*, exclusion/inclusion. There is politics because man is the living being who, in language, separates and opposes himself to his own bare life and, at the same time, maintains himself in relation to that bare life in an inclusive exclusion.

The protagonist of this book is bare life, that is, the life of *homo sacer* (sacred man), who *may be killed and yet not sacrificed*, and whose essential function in modern politics we intend to assert. An obscure figure of archaic Roman law, in which human life is included in the juridical order [*ordinamento*][1] solely in the form of its exclusion (that is, of its capacity to be killed), has thus offered the key by which not only the sacred texts of sovereignty but also the very codes of political power will unveil their mysteries. At the

1. "Order" renders the Italian *ordinamento*, which carries the sense not only of order but of political and juridical rule, regulation, and system. The word *ordinamento* is also the Italian translation of Carl Schmitt's *Ordnung*. Where the author refers to *ordinamento* as *Ordnung*, the English word used is the one chosen by Schmitt's translators, "ordering."—Trans.

same time, however, this ancient meaning of the term *sacer* presents us with the enigma of a figure of the sacred that, before or beyond the religious, constitutes the first paradigm of the political realm of the West. The Foucauldian thesis will then have to be corrected or, at least, completed, in the sense that what characterizes modern politics is not so much the inclusion of *zoē* in the *polis*—which is, in itself, absolutely ancient—nor simply the fact that life as such becomes a principal object of the projections and calculations of State power. Instead 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 the political order—gradually begins to coincide with the political realm, and exclusion and inclusion, outside and inside, *bios* and *zoē*, right and fact, enter into a zone of irreducible indistinction. At once excluding bare life from and capturing it within the political order, the state of exception actually constituted, in its very separateness, the hidden foundation on which the entire political system rested. When its borders begin to be blurred, the bare life that dwelt there frees itself in the city and becomes both subject and object of the conflicts of the political order, the one place for both the organization of State power and emancipation from it. Everything happens as if, along with the disciplinary process by which State power makes man as a living being into its own specific object, another process is set in motion that in large measure corresponds to the birth of modern democracy, in which man as a living being presents himself no longer as an *object* but as the *subject* of political power. These processes—which in many ways oppose and (at least apparently) bitterly conflict with each other—nevertheless converge insofar as both concern the bare life of the citizen, the new biopolitical body of humanity.

If anything characterizes modern democracy as opposed to classical democracy, then, it is that modern democracy presents itself from the beginning as a vindication and liberation of *zoē*, 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 *zoē*. Hence, too, modern democracy's specific aporia: it wants to put the freedom and happi-

ness of men into play in the very place—"bare life"—that marked their subjection. Behind the long, strife-ridden process that leads to the recognition of rights and formal liberties stands once again the body of the sacred man with his double sovereign, his life that cannot be sacrificed yet may, nevertheless, be killed. To become conscious of this aporia is not to belittle the conquests and accomplishments of democracy. It is, rather, to try to understand once and for all why democracy, at the very moment in which it seemed to have finally triumphed over its adversaries and reached its greatest height, proved itself incapable of saving *zoē*, to whose happiness it had dedicated all its efforts, from unprecedented ruin. Modern democracy's decadence and gradual convergence with totalitarian states in post-democratic spectacular societies (which begins to become evident with Alexis de Tocqueville and finds its final sanction in the analyses of Guy Debord) may well be rooted in this aporia, which marks the beginning of modern democracy and forces it into complicity with its most implacable enemy. Today politics knows no value (and, consequently, no nonvalue) other than life, and until the contradictions that this fact implies are dissolved, Nazism and fascism—which transformed the decision on bare life into the supreme political principle—will remain stubbornly with us. According to the testimony of Robert Antelme, in fact, what the camps taught those who lived there was precisely that "calling into question the quality of man provokes an almost biological assertion of belonging to the human race" (*L'espèce humaine*, p. 11).

The idea of an inner solidarity between democracy and totalitarianism (which here we must, with every caution, advance) is obviously not (like Leo Strauss's thesis concerning the secret convergence of the final goals of liberalism and communism) a historiographical claim, which would authorize the liquidation and leveling of the enormous differences that characterize their history and their rivalry. Yet this idea must nevertheless be strongly maintained on a historico-philosophical level, since it alone will allow us to orient ourselves in relation to the new realities and unforeseen convergences of the end of the millennium. This idea alone will

make it possible to clear the way for the new politics, which remains largely to be invented.

In contrasting the "beautiful day" (*euēmeria*) of simple life with the "great difficulty" of political ***bios*** in the passage cited above, Aristotle may well have given the most beautiful formulation to the aporia that lies at the foundation of Western politics. The 24 centuries that have since gone by have brought only provisional and ineffective solutions. In carrying out the metaphysical task that has led it more and more to assume the form of a biopolitics, Western politics has not succeeded in constructing the link between *zoē* and *bios*, between voice and language, that would have healed the fracture. Bare life remains included in politics in the form of the exception, that is, as something that is included solely through an exclusion. How is it possible to "politicize" the "natural sweetness" of *zoē*? And first of all, does *zoē* really need to be politicized, or is politics not already contained in *zoē* as its most precious center? The biopolitics of both modern totalitarianism and the society of mass hedonism and consumerism certainly constitute answers to these questions. Nevertheless, until a completely new politics—that is, a politics no longer founded on the *exceptio* of bare life—is at hand, every theory and every praxis will remain imprisoned and immobile, and the "beautiful day" of life will be given citizenship only either through blood and death or in the perfect senselessness to which the society of the spectacle condemns it.

Carl Schmitt's definition of sovereignty ("Sovereign is he who decides on the state of exception") became a commonplace even before there was any understanding that what was at issue in it was nothing less than the limit concept of the doctrine of law and the State, in which sovereignty borders (since every limit concept is always the limit between two concepts) on the sphere of life and becomes indistinguishable from it. As long as the form of the State constituted the fundamental horizon of all communal life and the political, religious, juridical, and economic doctrines that sustained this form were still strong, this "most extreme sphere" could not

truly come to light. The problem of sovereignty was reduced to the question of who within the political order was invested with certain powers, and the very threshold of the political order itself was never called into question. Today, now that the great State structures have entered into a process of dissolution and the emergency has, as Walter Benjamin foresaw, become the rule, the time is ripe to place the problem of the originary structure and limits of the form of the State in a new perspective. The weakness of anarchist and Marxian critiques of the State was precisely to have not caught sight of this structure and thus to have quickly left the *arcanum imperii* aside, as if it had no substance outside of the simulacra and the ideologies invoked to justify it. But one ends up identifying with an enemy whose structure one does not understand, and the theory of the State (and in particular of the state of exception, which is to say, of the dictatorship of the proletariat as the transitional phase leading to the stateless society) is the reef on which the revolutions of our century have been shipwrecked.

This book, which was originally conceived as a response to the bloody mystification of a new planetary order, therefore had to reckon with problems—first of all that of the sacredness of life—which the author had not, in the beginning, foreseen. In the course of the undertaking, however, it became clear that one cannot, in such an area, accept as a guarantee any of the notions that the social sciences (from jurisprudence to anthropology) thought they had defined or presupposed as evident, and that many of these notions demanded—in the urgency of catastrophe—to be revised without reserve.

PART ONE

The Logic of Sovereignty

§ 1 The Paradox of Sovereignty

1.1. The paradox of sovereignty consists in the fact the sovereign is, at the same time, outside and inside the juridical order. If the sovereign is truly the one to whom the juridical order grants the power of proclaiming a state of exception and, therefore, of suspending the order's own validity, then "the sovereign stands outside the juridical order and, nevertheless, belongs to it, since it is up to him to decide if the constitution is to be suspended *in toto*" (Schmitt, *Politische Theologie*, p. 13). The specification that the sovereign is "*at the same time* outside and inside the juridical order" (emphasis added) is not insignificant: the sovereign, having the legal power to suspend the validity of the law, legally places himself outside the law. This means that the paradox can also be formulated this way: "the law is outside itself," or: "I, the sovereign, who am outside the law, declare that there is nothing outside the law [*che non c'è un fuori legge*]."

The topology implicit in the paradox is worth reflecting upon, since the degree to which sovereignty marks the limit (in the double sense of end and principle) of the juridical order will become clear only once the structure of the paradox is grasped. Schmitt presents this structure as the structure of the exception (*Ausnahme*):

> The exception is that which cannot be subsumed; it defies general codification, but it simultaneously reveals a specifically juridical for-

mal element: the decision in absolute purity. The exception appears in its absolute form when it is a question of creating a situation in which juridical rules can be valid. Every general rule demands a regular, everyday frame of life to which it can be factually applied and which is submitted to its regulations. The rule requires a homogeneous medium. This factual regularity is not merely an "external presupposition" that the jurist can ignore; it belongs, rather, to the rule's immanent validity. There is no rule that is applicable to chaos. Order must be established for juridical order to make sense. A regular situation must be created, and sovereign is he who definitely decides if this situation is actually effective. All law is "situational law." The sovereign creates and guarantees the situation as a whole in its totality. He has the monopoly over the final decision. Therein consists the essence of State sovereignty, which must therefore be properly juridically defined not as the monopoly to sanction or to rule but as the monopoly to decide, where the word "monopoly" is used in a general sense that is still to be developed. The decision reveals the essence of State authority most clearly. Here the decision must be distinguished from the juridical regulation, and (to formulate it paradoxically) authority proves itself not to need law to create law. . . . The exception is more interesting than the regular case. The latter proves nothing; the exception proves everything. The exception does not only confirm the rule; the rule as such lives off the exception alone. A Protestant theologian who demonstrated the vital intensity of which theological reflection was still capable in the nineteenth century said: "The exception explains the general and itself. And when one really wants to study the general, one need only look around for a real exception. It brings everything to light more clearly than the general itself. After a while, one becomes disgusted with the endless talk about the general—there are exceptions. If they cannot be explained, then neither can the general be explained. Usually the difficulty is not noticed, since the general is thought about not with passion but only with comfortable superficiality. The exception, on the other hand, thinks the general with intense passion." (*Politische Theologie*, pp. 19–22)

It is not by chance that in defining the exception Schmitt refers to the work of a theologian (who is none other than Søren Kierkegaard). Giambattista Vico had, to be sure, affirmed the superiority

of the exception, which he called "the ultimate configuration of facts," over positive law in a way which was not so dissimilar: "An esteemed jurist is, therefore, not someone who, with the help of a good memory, masters positive law [or the general complex of laws], but rather someone who, with sharp judgment, knows how to look into cases and see the ultimate circumstances of facts that merit equitable consideration and exceptions from general rules" (*De antiquissima*, chap. 2). Yet nowhere in the realm of the juridical sciences can one find a theory that grants such a high position to the exception. For what is at issue in the sovereign exception is, according to Schmitt, the very condition of possibility of juridical rule and, along with it, the very meaning of State authority. Through the state of exception, the sovereign "creates and guarantees the situation" that the law needs for its own validity. But what is this "situation," what is its structure, such that it consists in nothing other than the suspension of the rule?

ℵ The Vichian opposition between positive law (*ius theticum*) and exception well expresses the particular status of the exception. The exception is an element in law that transcends positive law in the form of its suspension. The exception is to positive law what negative theology is to positive theology. While the latter affirms and predicates determinate qualities of God, negative (or mystical) theology, with its "neither ... nor ... ," negates and suspends the attribution to God of any predicate whatsoever. Yet negative theology is not outside theology and can actually be shown to function as the principle grounding the possibility in general of anything like a theology. Only because it has been negatively presupposed as what subsists outside any possible predicate can divinity become the subject of a predication. Analogously, only because its validity is suspended in the state of exception can positive law define the normal case as the realm of its own validity.

1.2. The exception is a kind of exclusion. What is excluded from the general rule is an individual case. But the most proper characteristic of the exception is that what is excluded in it is not, on account of being excluded, absolutely without relation to the rule. On the contrary, what is excluded in the exception maintains itself

in relation to the rule in the form of the rule's suspension. *The rule applies to the exception in no longer applying, in withdrawing from it.* The state of exception is thus not the chaos that precedes order but rather the situation that results from its suspension. In this sense, the exception is truly, according to its etymological root, *taken outside* (*ex-capere*), and not simply excluded.

It has often been observed that the juridico-political order has the structure of an inclusion of what is simultaneously pushed outside. Gilles Deleuze and Félix Guattari were thus able to write, "Sovereignty only rules over what it is capable of interiorizing" (Deleuze and Guattari, *Mille plateaux*, p. 445); and, concerning the "great confinement" described by Foucault in his *Madness and Civilization*, Maurice Blanchot spoke of society's attempt to "confine the outside" (*enfermer le dehors*), that is, to constitute it in an "interiority of expectation or of exception." Confronted with an excess, the system interiorizes what exceeds it through an interdiction and in this way "designates itself as exterior to itself" (*L'entretien infini*, p. 292). The exception that defines the structure of sovereignty is, however, even more complex. Here what is outside is included not simply by means of an interdiction or an internment, but rather by means of the suspension of the juridical order's validity—by letting the juridical order, that is, withdraw from the exception and abandon it. The exception does not subtract itself from the rule; rather, the rule, suspending itself, gives rise to the exception and, maintaining itself in relation to the exception, first constitutes itself as a rule. The particular "force" of law consists in this capacity of law to maintain itself in relation to an exteriority. We shall give the name *relation of exception* to the extreme form of relation by which something is included solely through its exclusion.

The situation created in the exception has the peculiar characteristic that it cannot be defined either as a situation of fact or as a situation of right, but instead institutes a paradoxical threshold of indistinction between the two. It is not a fact, since it is only created through the suspension of the rule. But for the same reason, it is not even a juridical case in point, even if it opens the possibility

of the force of law. This is the ultimate meaning of the paradox that Schmitt formulates when he writes that the sovereign decision "proves itself not to need law to create law." What is at issue in the sovereign exception is not so much the control or neutralization of an excess as the creation and definition of the very space in which the juridico-political order can have validity. In this sense, the sovereign exception is the fundamental localization (*Ortung*), which does not limit itself to distinguishing what is inside from what is outside but instead traces a threshold (the state of exception) between the two, on the basis of which outside and inside, the normal situation and chaos, enter into those complex topological relations that make the validity of the juridical order possible.

The "ordering of space" that is, according to Schmitt, constitutive of the sovereign *nomos* is therefore not only a "taking of land" (*Landesnahme*)—the determination of a juridical and a territorial ordering (of an *Ordnung* and an *Ortung*)—but above all a "taking of the outside," an exception (*Ausnahme*).

ℵ Since "there is no rule that is applicable to chaos," chaos must first be included in the juridical order through the creation of a zone of indistinction between outside and inside, chaos and the normal situation—the state of exception. To refer to something, a rule must both presuppose and yet still establish a relation with what is outside relation (the nonrelational). The relation of exception thus simply expresses the originary formal structure of the juridical relation. In this sense, the sovereign decision on the exception is the originary juridico-political structure on the basis of which what is included in the juridical order and what is excluded from it acquire their meaning. In its archetypal form, the state of exception is therefore the principle of every juridical localization, since only the state of exception opens the space in which the determination of a certain juridical order and a particular territory first becomes possible. As such, the state of exception itself is thus essentially unlocalizable (even if definite spatiotemporal limits can be assigned to it from time to time).

The link between localization (*Ortung*) and ordering (*Ordnung*) constitutive of the "*nomos* of the earth" (Schmitt, *Das Nomos*, p. 48) is therefore even more complex than Schmitt maintains and, at its center, contains a fundamental ambiguity, an unlocalizable zone of indistinction

or exception that, in the last analysis, necessarily acts against it as a principle of its infinite dislocation. One of the theses of the present inquiry is that in our age, the state of exception comes more and more to the foreground as the fundamental political structure and ultimately begins to become the rule. When our age tried to grant the unlocalizable a permanent and visible localization, the result was the concentration camp. The camp—and not the prison—is the space that corresponds to this originary structure of the *nomos*. This is shown, among other things, by the fact that while prison law only constitutes a particular sphere of penal law and is not outside the normal order, the juridical constellation that guides the camp is (as we shall see) martial law and the state of siege. This is why it is not possible to inscribe the analysis of the camp in the trail opened by the works of Foucault, from *Madness and Civilization* to *Discipline and Punish*. As the absolute space of exception, the camp is topologically different from a simple space of confinement. And it is this space of exception, in which the link between localization and ordering is definitively broken, that has determined the crisis of the old "*nomos* of the earth."

1.3. The validity of a juridical rule does not coincide with its application to the individual case in, for example, a trial or an executive act. On the contrary, the rule must, precisely insofar as it is general, be valid independent of the individual case. Here the sphere of law shows its essential proximity to that of language. Just as in an occurrence of actual speech, a word acquires its ability to denote a segment of reality only insofar as it is also meaningful in its own not-denoting (that is, as *langue* as opposed to *parole*, as a term in its mere lexical consistency, independent of its concrete use in discourse), so the rule can refer to the individual case only because it is in force, in the sovereign exception, as pure potentiality in the suspension of every actual reference. And just as language presupposes the nonlinguistic as that with which it must maintain itself in a virtual relation (in the form of a *langue* or, more precisely, a grammatical game, that is, in the form of a discourse whose actual denotation is maintained in infinite suspension) so that it may later denote it in actual speech, so the law presupposes the nonjuridical (for example, mere violence in the form of the state of nature) as

that with which it maintains itself in a potential relation in the state of exception. *The sovereign exception (as zone of indistinction between nature and right) is the presupposition of the juridical reference in the form of its suspension.* Inscribed as a presupposed exception in every rule that orders or forbids something (for example, in the rule that forbids homicide) is the pure and unsanctionable figure of the offense that, in the normal case, brings about the rule's own transgression (in the same example, the killing of a man not as natural violence but as sovereign violence in the state of exception).

ℵ Hegel was the first to truly understand the presuppositional structure thanks to which language is at once outside and inside itself and the immediate (the nonlinguistic) reveals itself to be nothing but a presupposition of language. "Language," he wrote in the *Phenomenology of Spirit*, "is the perfect element in which interiority is as external as exteriority is internal" (see *Phänomenologie des Geistes*, pp. 527–29). We have seen that only the sovereign decision on the state of exception opens the space in which it is possible to trace borders between inside and outside and in which determinate rules can be assigned to determinate territories. In exactly the same way, only language as the pure potentiality to signify, withdrawing itself from every concrete instance of speech, divides the linguistic from the nonlinguistic and allows for the opening of areas of meaningful speech in which certain terms correspond to certain denotations. Language is the sovereign who, in a permanent state of exception, declares that there is nothing outside language and that language is always beyond itself. The particular structure of law has its foundation in this presuppositional structure of human language. It expresses the bond of inclusive exclusion to which a thing is subject because of the fact of being in language, of being named. To speak [*dire*] is, in this sense, always to "speak the law," *ius dicere*.

1.4. From this perspective, the exception is situated in a symmetrical position with respect to the example, with which it forms a system. Exception and example constitute the two modes by which a set tries to found and maintain its own coherence. But while the exception is, as we saw, an *inclusive exclusion* (which thus serves to include what is excluded), the example instead functions as an *exclusive inclusion*. Take the case of the grammatical example

(Milner, "L'exemple," p. 176): the paradox here is that a single utterance in no way distinguished from others of its kind is isolated from them precisely insofar as it belongs to them. If the syntagm "I love you" is uttered as an example of a performative speech act, then this syntagm both cannot be understood as in a normal context and yet still must be treated as a real utterance in order for it to be taken as an example. What the example shows is its belonging to a class, but for this very reason the example steps out of its class in the very moment in which it exhibits and delimits it (in the case of a linguistic syntagm, the example thus *shows* its own signifying and, in this way, suspends its own meaning). If one now asks if the rule applies to the example, the answer is not easy, since the rule applies to the example only as to a normal case and obviously not as to an example. The example is thus excluded from the normal case not because it does not belong to it but, on the contrary, because it exhibits its own belonging to it. The example is truly a *paradigm* in the etymological sense: it is what is "shown beside," and a class can contain everything except its own paradigm.

The mechanism of the exception is different. 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 (as is shown by the dispute between anomalists and analogists among the ancient grammarians), 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.

א The *exceptio* of Roman court law well shows this particular structure of the exception. The *exceptio* is an instrument of the defendant's defense that, in the case of a judgment, functions to neutralize the conclusiveness of the grounds proffered by the plaintiff and thus to render the normal

application of the *ius civile* impossible. The Romans saw it as a form of exclusion directed at the application of the *ius civile* (*Digesta*, 44. 1. 2; Ulpianus, 74: *Exceptio dicta est quasi quaedam exclusio, quae opponi actioni solet ad excludendum id, quod in intentionem condemnationemve deductum est*, "It is said to be an exception because it is almost a kind of exclusion, a kind of exclusion that is usually opposed to the trial in order to exclude what was argued in the *intentio* and the *condemnatio*"). In this sense, the *exceptio* is not absolutely outside the law, but rather shows a contrast between two juridical demands, a contrast that in Roman law refers back to the opposition between *ius civile* and *ius honorarium*, that is, to the law introduced by the magistrate to temper the excessive generality of the norms of civil law.

In its technical expression in the law of the Roman court, the *exceptio* thus takes the form of a conditional negative clause inserted between the *intentio* and the *condemnatio*, by means of which the condemnation of the defendant is subordinated to the nonexistence of the fact excepted by both *intentio* and *condemnatio* (for example: *si in ea re nihil malo A. Agerii factum sit neque fiat*, "if there has not been malice"). The case of the exception is thus excluded from the application of the *ius civile* without, however, thereby calling into question the belonging of the case in point to the regulative provision. The sovereign exception represents a further dimension: it displaces a contrast between two juridical demands into a limit relation between what is inside and what is outside the law.

It may seem incongruous to define the structure of sovereign power, with its cruel factual implications, by means of two innocuous grammatical categories. Yet there is a case in which the linguistic example's decisive character and ultimate indistinguishability from the exception show an unmistakable involvement with the power of life and death. We refer to the episode in *Judges* 12: 6 in which the Galatians recognize the fleeing Ephraimites, who are trying to save themselves beyond the Jordan, by asking them to pronounce the word "Shibboleth," which the Ephraimites pronounce "Sibboleth" ("The men of Gilead said unto him, 'Art thou an Ephraimite?' If he said, 'Nay'; then they said unto him, 'Say now Shibboleth': and he said Sibboleth: for he could not frame to pronounce it right. Then they took him, and slew him at the passages of Jordan"). In the Shibboleth, example and exception become indistinguishable: "Shibboleth" is an exemplary exception or an example that functions as an exception. (In this sense, it is not surprising that there is a predilection to resort to exemplary punishment in the state of exception.)

1.5. Set theory distinguishes between membership and inclusion. A term is included when it is part of a set in the sense that all of its elements are elements of that set (one then says that b is a subset of a, and one writes it $b \subset a$). But a term may be a member of a set without being included in it (membership is, after all, the primitive notion of set theory, which one writes $b \in a$), or, conversely, a term may be included in a set without being one of its members. In a recent book, Alain Badiou has developed this distinction in order to translate it into political terms. Badiou has membership correspond to presentation, and inclusion correspond to representation (re-presentation). One then says that a term *is a member of* a situation (in political terms, these are single individuals insofar as they belong to a society). And one says that a term is *included* in a situation if it is represented in the metastructure (the State) in which the structure of the situation is counted as one term (individuals insofar as they are recodified by the State into classes, for example, or into "electorates"). Badiou defines a term as *normal* when it is both presented and represented (that is, when it both is a member and is included), as *excrescent* when it is represented but not presented (that is, when it is included in a situation without being a member of that situation), and as *singular* when it is presented but not represented (a term that is a member without being included) (*L'être*, pp. 95–115).

What becomes of the exception in this scheme? At first glance, one might think that it falls into the third case, that the exception, in other words, embodies a kind of membership without inclusion. And this is certainly Badiou's position. But what defines the character of the sovereign claim is precisely that it applies to the exception in no longer applying to it, that it includes what is outside itself. The sovereign exception is thus the figure in which singularity is represented as such, which is to say, insofar as it is unrepresentable. What cannot be included in any way is included in the form of the exception. In Badiou's scheme, the exception introduces a fourth figure, a threshold of indistinction between excrescence (representation without presentation) and singularity (presentation without representation), something like a paradoxical inclusion of mem-

bership itself. *The exception is what cannot be included in the whole of which it is a member and cannot be a member of the whole in which it is always already included.* What emerges in this limit figure is the radical crisis of every possibility of clearly distinguishing between membership and inclusion, between what is outside and what is inside, between exception and rule.

ℵ Badiou's thought is, from this perspective, a rigorous thought of the exception. His central category of the event corresponds to the structure of the exception. Badiou defines the event as an element of a situation such that its membership in the situation is undecidable from the perspective of the situation. To the State, the event thus necessarily appears as an excrescence. According to Badiou, the relation between membership and inclusion is also marked by a fundamental lack of correspondence, such that inclusion always exceeds membership (theorem of the point of excess). The exception expresses precisely this impossibility of a system's making inclusion coincide with membership, its reducing all its parts to unity.

From the point of view of language, it is possible to assimilate inclusion to sense and membership to denotation. In this way, the fact that a word always has more sense than it can actually denote corresponds to the theorem of the point of excess. Precisely this disjunction is at issue both in Claude Lévi-Strauss's theory of the constitutive excess of the signifier over the signified ("there is always a lack of equivalence between the two, which is resolvable for a divine intellect alone, and which results in the existence of a superabundance of the signifier over the signifieds on which it rests" [Introduction à Mauss, p. xlix]) and in Émile Benveniste's doctrine of the irreducible opposition between the semiotic and the semantic. The thought of our time finds itself confronted with the structure of the exception in every area. Language's sovereign claim thus consists in the attempt to make sense coincide with denotation, to stabilize a zone of indistinction between the two in which language can maintain itself in relation to its *denotata* by abandoning them and withdrawing from them into a pure *langue* (the linguistic "state of exception"). This is what deconstruction does, positing undecidables that are infinitely in excess of every possibility of signification.

1.6. This is why sovereignty presents itself in Schmitt in the form of a decision on the exception. Here the decision is not the expres-

sion of the will of a subject hierarchically superior to all others, but rather represents the inscription within the body of the *nomos* of the exteriority that animates it and gives it meaning. The sovereign decides not the licit and illicit but the originary inclusion of the living in the sphere of law or, in the words of Schmitt, "the normal structuring of life relations," which the law needs. The decision concerns neither a *quaestio iuris* nor a *quaestio facti*, but rather the very relation between law and fact. Here it is a question not only, as Schmitt seems to suggest, of the irruption of the "effective life" that, in the exception, "breaks the crust of a mechanism grown rigid through repetition" but of something that concerns the most inner nature of the law. The law has a regulative character and is a "rule" not because it commands and proscribes, but because it must first of all create the sphere of its own reference in real life and *make that reference regular*. Since the rule both stabilizes and presupposes the conditions of this reference, the originary structure of the rule is always of this kind: "If (a real case in point, e.g.: *si membrum rupsit*), then (juridical consequence, e.g.: *talio esto*)," in which a fact is included in the juridical order through its exclusion, and transgression seems to precede and determine the lawful case. That the law initially has the form of a *lex talionis* (*talio*, perhaps from *talis*, amounts to "the thing itself") means that the juridical order does not originally present itself simply as sanctioning a transgressive fact but instead constitutes itself through the repetition of the same act without any sanction, that is, as an exceptional case. This is not a punishment of this first act, but rather represents its inclusion in the juridical order, violence as a primordial juridical fact (*permittit enim lex parem vindictam*, "for the law allows equitable vengeance" [Pompeius Festus, *De verborum significatione*, 496. 15]). In this sense, the exception is the originary form of law.

The cipher of this capture of life in law is not sanction (which is not at all an exclusive characteristic of the juridical rule) but guilt (not in the technical sense that this concept has in penal law but in the originary sense that indicates a being-in-debt: *in culpa esse*), which is to say, precisely the condition of being included through an exclusion, of being in relation to something from which one is

excluded or which one cannot fully assume. *Guilt refers not to transgression, that is, to the determination of the licit and the illicit, but to the pure force of the law, to the law's simple reference to something.* This is the ultimate ground of the juridical maxim, which is foreign to all morality, according to which ignorance of the rule does not eliminate guilt. In this impossibility of deciding if it is guilt that grounds the rule or the rule that posits guilt, what comes clearly to light is the indistinction between outside and inside and between life and law that characterizes the sovereign decision on the exception. The "sovereign" structure of the law, its peculiar and original "force," has the form of a state of exception in which fact and law are indistinguishable (yet must, nevertheless, be decided on). Life, which is thus obliged, can in the last instance be implicated in the sphere of law only through the presupposition of its inclusive exclusion, only in an *exceptio*. There is a limit-figure of life, a threshold in which life is both inside and outside the juridical order, and this threshold is the place of sovereignty.

The statement "The rule lives off the exception alone" must therefore be taken to the letter. Law is made of nothing but what it manages to capture inside itself through the inclusive exclusion of the *exceptio*: it nourishes itself on this exceprion and is a dead letter without it. In this sense, the law truly "has no existence in itself, but rather has its being in the very life of men." The sovereign decision traces and from time to time renews this threshold of indistinction between outside and inside, exclusion and inclusion, *nomos* and *physis*, in which life is originarily excepted in law. Its decision is the position of an undecidable.

ℵ Not by chance is Schmitt's first work wholly devoted to the definition of the juridical concept of guilt. What is immediately striking in this study is the decision with which the author refutes every technico-formal definition of the concept of guilt in favor of terms that, at first glance, seem more moral than juridical. Here, in fact, guilt is (against the ancient juridical proverb "There is no guilt without rule") first of all a "process of inner life," which is to say, something essentially "intrasubjective," which can be qualified as a real "ill will" that consists in "knowingly positing ends contrary to those of the juridical order" (*Über Schuld*, pp. 18–24, 92).

It is not possible to say whether Benjamin was familiar with this text while he was writing "Fate and Character" and "Critique of Violence." But it remains the case that his definition of guilt as an originary juridical concept unduly transferred to the ethico-religious sphere is in perfect agreement with Schmitt's thesis—even if Benjamin's definition goes in a decisively opposed direction. For Benjamin, the state of demonic existence of which law is a residue is to be overcome and man is to be liberated from guilt (which is nothing other than the inscription of natural life in the order of law and destiny). At the heart of the Schmittian assertion of the juridical character and centrality of the notion of guilt is, however, not the freedom of the ethical man but only the controlling force of a sovereign power (*katechon*), which can, in the best of cases, merely slow the dominion of the Antichrist.

There is an analogous convergence with respect to the concept of character. Like Benjamin, Schmitt clearly distinguishes between character and guilt ("the concept of guilt," he writes, "has to do with an *operari*, and not with an *esse*" [*Über Schuld*, p. 46]). Yet in Benjamin, it is precisely this element (character insofar as it escapes all conscious willing) that presents itself as the principle capable of releasing man from guilt and of affirming natural innocence.

1.7. If the exception is the structure of sovereignty, then sovereignty is not an exclusively political concept, an exclusively juridical category, a power external to law (Schmitt), or the supreme rule of the juridical order (Hans Kelsen): it is the originary structure in which law refers to life and includes it in itself by suspending it. Taking up Jean-Luc Nancy's suggestion, we shall give the name *ban* (from the old Germanic term that designates both exclusion from the community and the command and insignia of the sovereign) to this potentiality (in the proper sense of the Aristotelian *dynamis*, which is always also *dynamis mē energein*, the potentiality not to pass into actuality) of the law to maintain itself in its own privation, to apply in no longer applying. The relation of exception is a relation of ban. He who has been banned is not, in fact, simply set outside the law and made indifferent to it but rather *abandoned* by it, that is, exposed and threatened on the threshold in which life and law, outside and inside, become indistinguishable. It is literally

not possible to say whether the one who has been banned is outside or inside the juridical order. (This is why in Romance languages, to be "banned" originally means both to be "at the mercy of" and "at one's own will, freely," to be "excluded" and also "open to all, free.") It is in this sense that the paradox of sovereignty can take the form "There is nothing outside the law." *The originary relation of law to life is not application but Abandonment.* The matchless potentiality of the *nomos, its originary "force of law,"* is that it holds life in its ban by abandoning it. This is the structure of the ban that we shall try to understand here, so that we can eventually call it into question.

ℵ The ban is a form of relation. But precisely what kind of relation is at issue here, when the ban has no positive content and the terms of the relation seem to exclude (and, at the same time, to include) each other? What is the form of law that expresses itself in the ban? The ban is the pure form of reference to something in general, which is to say, the simple positing of relation with the nonrelational. In this sense, the ban is identical with the limit form of relation. A critique of the ban will therefore necessarily have to put the very form of relation into question, and to ask if the political fact is not perhaps thinkable beyond relation and, thus, no longer in the form of a connection.