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Butler and Life: Law, Sovereignty, Power

Elena Loizidou

'Life' is a consistent theme in Butler's work. In *Subjects of Desire* (1999b) she offers a reading of desire that is inextricably linked to life. In *Gender Trouble* (1990) life takes the form of gendered life, as in *Bodies that Matter* (1993) and *Undoing Gender* (2004b). *Excitable Speech* (1997) reflects upon injuries inflicted on lives by speech acts. In more recent work, *Antigone's Claim* (2000a), *Giving an Account of Oneself* (2003; 2005) and *Precarious life* (2004a) she complicates claims made upon life by the ethical, political and legal sphere and unveils their discursive and material limitations. Nevertheless, despite the attachment to the concept of 'life', Butler makes no ontological claims regarding 'life' but rather articulates the practices involved in draining, restraining, or even destroying 'life'. And she analyses the possible ways in which we may resist restrictions imposed upon us by state apparatuses (such as governmental officials and legislative limitations), disciplinary regimes, and norms – all so as to make possible livable lives.

As is well known, Butler is suspicious of the juridical order and its ability to create better life conditions for subjects. Thus, some readers may be surprised to read, in *Precarious Life*, Butler's call for a robust juridical intervention to curb the growing executive powers exercised by the Bush administration. However, as I explain below, Butler's polemical approach there proves consistent with her overreaching philosophical thesis. That is, Butler's concern for how we may create better conditions for life entails an agonistic relationship between the various spheres of life, and this, in turn, requires the law. Thus, the demand for a more robust law in *Precarious Life* gestures towards the creation of vital conditions that may not only ensure survival but also reinvigorate the conditions for what Butler calls 'a livable life'.

When the US government issued a de facto state of emergency after the 11 September 2001 ('9/11') attacks in New York, Butler suggests that a new, synthetic modality of power emerged. The 'decree' (neither a piece of legislation nor an executive order, but a disciplinary and discursive production) not only suspended the laws but also did away with the separation of powers considered to be the pillars of the US constitution. The essay explains how this disciplinary production was managed, how it is still sustained, and what its effects are. Ultimately, I argue that these effects are produced through the re-emergence of a new type of sovereignty – one that *uses governmentality as technique*.¹

Governmentality and Law

Governmentality, Foucault writes, is a practice of government emerging in the 16th century but reaching its apex in the 18th century (2002a: 212). While sovereignty had as its end the preservation of the sovereign and its territoriality, governmentality's end is the management of populations. Foucault links its emergence with the coming into being of an administrative apparatus, the police, mercantilism and statistics. Foucault's reception of the concept of government comes from La Perrière's *Miroir Politique* and is defined 'as a right manner of disposing things so as to lead not to the form of the common good, as the jurists' text would have said, but to an end that is "convenient" for each of the things that are governed' (2002a: 212). A good governor, who above everything has to be patient (unlike the sovereign), will use tactics (even laws *as* tactics) to secure maximum security for their own population. This modality of power, as Foucault suggests, allows the state to survive (2002a: 221).

While Foucault provides us with a chronological understanding of the emergence of sovereign and governmental power, Butler, following Agamben, reminds us that both sovereign power and governmentality are *contemporary* forms. Further, she shows that they

hold an inverse relation to the rule of law (Butler 2004a: 60).² For just this reason, it proves highly significant, when, just two pages into 'Indefinite detention', Butler proposes the following regarding the US treatment of detainees in Cuba and the use of power:

'I would like to suggest that the current configuration of power, in relation both to the management of populations (the hallmark of governmentality) and the exercise of sovereignty in the acts that suspend and limit the jurisdiction of law itself, are reconfigured in terms of the new war prison' (Butler 2004a: 53).

From the very start of the well-known essay, first published as a newspaper editorial, Butler separates modalities of power and law. Governmentality and sovereignty are read from the start as forces that act upon jurisdiction, the 'territory'³ of law. At first blush, the proposition (and its consequences) creates an aporia, at least to those who are familiar with Foucault's modalities of power, the very modalities that Butler is invoking in this essay. In *Discipline and Punish* (1991a), Foucault hardly differentiates between the sovereign and the law: both fall under the category of juridical power. Nevertheless, I want to emphasise that Foucault does not *equate* the sovereign with the law; rather, he vests the sovereign with the 'force of law'. Foucault recognises that there is a jurisdiction that is legal. This jurisdiction, through the instrument of the *trial*, decides upon the 'truth' of the alleged event, and through the instrument of *punishment*, publicises the 'truth'. In this context, Foucault writes, '[t]he body, several times tortured, provides the synthesis of the reality of the deeds and the truth of the investigation, of the documents of the case and the statements of the criminal, of the crime and the punishment' (1991a: 47). For Foucault, the juridical order entertains itself with the trying of the accused (1991a: 44-8), but the king or prince, engages in a distinct practices with distinct effects. In the sovereign is vested the power of deciding life or death

Therefore the sovereign's power falls under the name 'force of law'. This power, as Foucault explains, is a power of vengeance:

Besides its immediate victim, the crime attacks the sovereign: it attacks him personally, since the law represents the will of the sovereign; it attacks him physically since the force of law is the force of the prince ... The intervention of the sovereign is not, therefore, an arbitration between two adversaries; it is much more, even, than an action to enforce the respect of the rights of the individual; it is a direct reply to the person who has offended him (Foucault 1991a: 47-8).

This passage makes clear that under the juridical model of power, the law is the instrument of the will of the sovereign. And Foucault sustains this position in *Society Must be Defended* where he shows that the juridical system serves the demands of, and benefits, royal power (2003: 25). Moreover, he explains that even when the juridical system concerns itself with the *limits* of sovereign power it never ceased to be *about* royal power. Nevertheless, this proximity between the juridical order and the sovereign cannot allow us to conclude that the sovereign *is* the law. In establishing a juridical order precisely for the *exercise* of his power, the king demonstrates that his interests reside in preserving himself and his territory. The interests of the juridical order itself thus *include* the preservation of sovereign power. The *telos* of the juridical order, on the other hand, lies in the production of 'truth' (no matter how fictitious this might be). However, and most importantly, when the sovereign decides over the life or death of subjects, what is being reproduced is not the truth but the sovereign's *will*, i.e. power backed by the 'force of law'. It is this distinction between the juridical order's production of truth and the sovereign's expression of force and will through that order, which informs Butler's analysis of the contemporary political situation in the USA.

New Modalities of Power

Sorting out the relation between sovereignty, law, disciplinary power, and governmentality proves to be a highly fraught, yet extremely worthwhile endeavour: fraught because no one seems to map the relations in quite the same way; worthwhile since the stakes

of such mapping prove very high indeed. Agamben, Foucault, and Butler all provide essential contributions to this effort to grasp the relation of these modalities of power, but each comes at the problematic from a distinct angle, and sometimes those angles are irreconcilable with each other. Nevertheless, as much as the overlaps in their accounts help to clarify the concepts under discussion, the differences in those accounts show how high the political stakes may be.

Agamben suggests that sovereign and governmental powers' antithetical relation to the rule of law emerges at the moment when the norm is suspended, or when the law is withdrawn. Law, as Butler explains, '... withdraws from the usual domain of its jurisdiction; this domain becomes opened to both governmentality (understood as an extra-legal field of policy, discourse, that may make law into a tactic) and sovereignty (understood as an extra-legal authority that may well institute and enforce law of its own making)' (2004a: 60). For his part, Foucault also describes the withdrawal or ineffectiveness of law when new powers emerge. Disciplinary power, he says, often operates with the human sciences rather than law as its reference point (2003). Foucault thereby confirms that normalisation is not intrinsic to law, but rather to concrete disciplinary practices like policing, schooling, psychoanalysis and psychiatry, etc. From Foucault's (or Butler's) perspective we might say that Agamben conflates the norm with the law and effectively makes the law the epitome of normalisation.

Butler, however, uses Agamben's exposition of contemporary modalities of power to provide us with an analysis of power relevant to our current context. She builds upon Agamben's understanding to propose her own version of sovereignty. Sovereignty, she writes:

'[is]... produced at the moment of this withdrawal, [therefore, we must] consider the act of suspending the law as a performative one which brings a contemporary configuration

of sovereignty into being, or more precisely, reanimates a spectral sovereignty within the field of governmentality' (2004a: 61).

This is a distinct and powerful (if not unproblematic) understanding of sovereignty. Agamben has proposed that the sovereign declarative utterance of a state of emergency activates the suspension of the law and constitutes the new modality of sovereign governmentality. This proposition implies that the sovereign pre-exists the utterance. And it may imply that Agamben himself knows who the sovereign is (e.g. the President of the United States, the Roman Emperor, etc.). For Butler, on the other hand, it is precisely the utterance of the state of emergency, or extraordinary conditions, that forms this sovereign governmentality. In other words, there is no sovereign before the declaration. *The declaration brings about the sovereign power.* Her reading refuses any naturalisation of power, in the sense that there would be an originary holder of such power. And her interpretation resists any foundationalist account of power, even if she proposes, as we shall see, that this type of power has the characteristics of a totalitarian regime.

Thus, one might say that Butler holds to the general 'structure' of power proposed by Foucault – power as multifaceted dynamic, shifting *relations*. Her account creates multiple sites for sovereign governmentality and, simultaneously, creates multiple sites for resistance. Butler proposes that the withdrawal from law shares the characteristics of a performative act, in the sense that it brings into being what we would normally take to be already there, but at the same time it transplants this modality of power onto governmental practices (e.g. the management of detainees, the decisions of military tribunals, etc). These governmental practices that would otherwise have been part of some legal apparatus – such as prison codes of practice or laws of evidence – now act as 'sovereign' satellites without any legal foundation. Moreover, these very practices become endowed with the 'sovereign' power to make decisions over the right to life or death of these detainees (2004a: 94-5).

Governmentality, generally associated with the practice of managing populations, becomes revitalised as new modality of power that takes on the very 'rights' previously reserved for the sovereign.

Performativity and the Dangerous Detainee

This new coalition between governmental and sovereign power, as Butler suggests earlier in the same essay, has as its aim the augmentation and proliferation of state power (2004a: 58). This is achieved in two ways: firstly, by establishing military tribunals, whereby trials can come to 'independent' conclusions that nevertheless can be reversed by the executive; and secondly, by detaining the prisoners in Guantánamo Bay indefinitely. As the essay covertly suggests, there is a clear interrelation between the two practices: each of them presupposed the other for its successful operation. More explicitly, they are both produced performatively.

Butler argues that this new form of sovereign power comes into being at the moment when it withdraws the applicability of law. The withdrawal correlates to the performative act that brings this new type of power into being and inaugurates a series of performative speech acts not *founded* in law but *justified* by the 'force of law'. In relation to the establishment of military tribunals, Butler explains the operation of performative speech acts by citing an example. She analyses the justification provided by a Department of Defence (DOD) representative when asked by a reporter why the DOD did not use the already existing military courts to try the detainees. The DOD representative justifies the establishment of these tribunals by saying that the circumstances needed another 'instrument' (2004a: 83). As Butler writes, 'the law is not that to which the state is subject nor that which distinguishes between lawful state action and unlawful, but is now expressly understood as an instrument, an instrumentality of power, one that can be applied and suspended at will' (2004a: 83). Thus, the utterance itself, the DOD representative's response, brings into being the

coincidence of these two models of power. Law is withdrawn, due to the ‘special circumstances; that the state finds itself in, replaced by sovereign power that uses law as a technique of governmentality. Withdrawal of law achieves the best management of the detainees. Moreover, by delegating the power to decide over the future of the detainees to a tribunal, power is transferred to the President to decide on the life of these detainees. While the tribunal can decide whether it could apply the death penalty, for example, the President has the power to decide whether or not to overrule their decisions. Butler’s essay also tracks the response to journalists’ questions put to William Haynes (DOD General Counsel). What would happen to the detainees if the military tribunal found them not guilty? Haynes’s reply: even under these conditions, detainees would not be released unless the state was satisfied that they were not dangerous (2004a: 74-5). Once more we witness a speech act that suspends the law. The place of law is taken up by sovereign power that could at any point withdraw its applicability for the so-called better protection of US citizens. At the moment of legal withdrawal we can see the efficacy of sovereign power and governmentality.

Haynes’s statement is also telling in other ways since, as Butler observes, the detainees are not considered by the US administration to be common criminals but something more – *dangerous individuals*.⁴ The alleged ‘dangerousness of the detainees’ – cited as reason for the withdrawal of the rule of law – is also integral to a series of answers given by Donald Rumsfeld regarding indefinite detention. When asked why the US administration was holding these detainees indefinitely, Rumsfeld answered that if they were not restrained they would kill (2004a: 73). Rumsfeld uses clear ends-justify-means logic here, but he also contends that such means have a legal foundation. Rumsfeld suggests that the US administration is acting within the parameters of international and national law, even citing the example of Britain and the case in which ‘European human rights courts ... allowed the British authorities to detain Irish Catholic and Protestant militants for long periods of time, if

they “were deemed dangerous, but not necessarily convicted of a crime” (2004a: 71). And in relation to domestic legislation, the US administration cites the restraining and hospitalisation of mentally ill people that takes place without the invocation of a criminal charge (2004a: 73). In both cases, while one sees the detainees linked to the category of ‘the dangerous individual’ between one see little explanation or justification of this categorisation.

The invocation of the ‘dangerous individual’ allows the state once more to use law as a technique of sovereign power. This tactic further suspends the norm of the rule of law, but at the same time it transforms the exception to the norm into the norm itself (2004a: 67). As Butler suggests, the performative speech acts justifies both the indefinite detention of the detainees while it simultaneously sustains, and renders coherent, the constitution of special military tribunals. The invocation of danger and the dangerous individual creates a space from which extra-legal power can be exercised indefinitely. According to Butler, the release of images of the detainees, both through television and photographs, aims to strengthen the effect of this performative act: ‘there is a reduction of these human beings to animal status, where the animal is figured as out of control, in need of total restraint’ (2004a: 78).

If we consider in their totality the effects of this series of performative acts, we can clearly see that they reduce the detainees to bare life, to subjects that are outside ‘*bios politicos*’ (2004a: 67-8). Butler agrees with Agamben on this point, but she does not hesitate to problematise this conclusion. Agamben does not explain why only certain citizens are reduced to bare life (2004a: 67-8). In her attempt to grasp the problem of who or what counts as ‘bare life’, Butler turns to the equivalence that the US administration draws between the Guantánamo Bay detainees, on the one hand, and the mentally ill (as dangerous individuals) on the other. ‘Bare life’ includes those who are dead but not sacrificed; it captures a category of human being *not* equated with danger, animality, incivility and madness. Thus, one sees a

certain type of life, one deemed unlivable and unviable, read as a threat to those lives that are worth something.⁵

Livable Lives

Butler's central concern lies with the very possibility of a livable life. Butler indicates that this new form of power (sovereign-governmentality) produces unlivable and unviable lives, and she thereby forces us to think about whether it is possible, given the conditions that govern us, to produce livable and viable lives. Would law be such a space? Throughout the essay Butler appears to want the detainees to be put through the process of a proper trial, within the parameters of the rules of evidence, but towards the end she clarifies her account and contends that she is *not* interested in merely upholding the rule of law. We can interpret this to mean that she is not interested in rule-based trials if rule-based trials will be in the hands of sovereign-governmentality. We might say that in Butler's case a rule-based trial will still produce the unbearable effects for detainees if the rules and the practice of trying them remain instruments of governmental sovereignty. Nevertheless, she is curious to see whether law can have a '... place ... in the articulation of an international conception of rights and obligations that limit and conditions claims of state sovereignty' (2004a: 98).

Butler clearly recognises the limitations of international law; the Geneva Conventions, for example, only provide protection for the states that are signatories to it (2004a: 86). States described as 'rogue', displaced stateless people, and citizens of emerging states – none of these can be protected by the convention. In and of itself, the law cannot provide sufficient conditions for a livable and viable life. Still, throughout the essay, she stubbornly and consistently calls for the detainees to be tried through the criminal or military courts. Why does she do so? If we are to understand her paradoxical position, we must look not only to this essay but to her other work where she either explicitly or inexplicitly invokes the law. If we are to give a more meaningful understanding to her call to put detainees on trial

than merely saying that Butler is a left liberal who upholds a faith in law, we need to grasp more fully the architecture of her thought.

To do so, I suggest a return to *Excitable Speech* (1997), a place where Butler writes explicitly that the subject comes into being through language. We are named at birth. This is a type of proto-violence, since a subject's ability to answer to that given name, may *enable* rather than avert future violence. At the moment of responding to our name, we gain a certain agency, but we also come under the force of an undeniable power. This process of agency and injury goes on throughout one's life; life itself depends upon this endless process of 'speaking back'.⁶ *Excitable Speech* invokes the possibility of creating vitality through the modality of agonism – a sort of warring with the conditions that bring us into being.

In significant and subtle ways, this agonism resembles the process of the trial. Butler's invocation of the trial⁷ in 'Indefinite detention' might thereby be read as a call to sustain this agonistic spirit, to sustain it *through the law*. If law's central characteristic is agonism then law may itself cultivate the conditions under which a livable life becomes possible. Thinking the law in this way makes it powerfully clear why Butler would insist on a trial for the detainees: it is only in the first place through the law that they might struggle for the conditions for a bearable, livable life. Unlike Agamben, who thinks that law has no connection with the production of life, Butler can see the role that law can play in this production. At the same time, like Agamben, she is aware that for this production to come about we need to transform the conditions of political action, so as to reconsider what it means to be human. Human rights, she argues, have failed so far to wrestle with the meaning of the human. The trial as a model creates the space for such consideration to take place. Nonetheless, the meaning of 'human' will remain open, contested:

'[t]o be human implies many things, one of which is that we are the kinds of beings who must live in a world where clashes of value do and will occur, and these clashes

are a sign of what a human community is. How we handle those conflicts will also be a sign of our humanness, one that is, importantly, in the making' (2004a: 89).

Butler not only emphasises the *concept* of humanness but also, and more importantly she focuses on the way we *negotiate* conflicting understandings of the human. It is precisely our handling of such an issue that will (or will not) produce our humanness. Butler, as I am reading her here, makes a powerful suggestion: that law can have a meaningful and important role to play in this process. Of course, negotiations with the human must transpire in many other spheres as well, and the political domain will be central to this endeavour.

Butler wonders what type of power would be able to limit, alter, or utterly transform the dehumanising effects of the current status quo (2004a: 98–9). Indeed, what type of power could provide such an opening? If our lives are totalised by a sovereign power that uses governmentality as its strategy for re-territorialising itself, then what type of power can put a stop to the production of this death machine? If law is impotent because it cannot allow subjects to answer back, then what type of power could reverse this decay? In response to questions such as these, Agamben calls for pure violence, in the spirit of Benjamin.

Reflecting upon both 'Indefinite detention' and Butler's broader body of work leads to me the conclusion that she would consistently refuse to invoke the modality of pure violence.

Indeed, in recent public lectures Butler has stated that she is searching for possible answers within philosophies of peace (2004c) and that she is committed to a type of violence that does not kill (2004d). Butler gives violence new requirements: not to kill but rather to revitalise life. I explain below that this search returns her to a combination of disciplinary and governmental power, whereby the very materiality of bodies and the conditions that they find themselves in can be re-addressed through practices of resistance.

Disciplinary Power and Resistance Through the Law

In *Discipline and Punish* (1991a [1977]) and *History of Sexuality*, vol. 1 (1990 [1978]), Foucault explains how the subject is produced through disciplinary power. For Foucault, disciplinary power is a different type of law, an infra-law: a type of law that is ahead of the juridical, that permeates the social, cultural and political body, and produces subjects precisely through the exercise of a series of disciplinary practices, including those of surveillance. As Brown and Hartley (2002: 11) remind us, disciplinary power does not lie with the state but rather with culture and society. To this extent Foucault imagines disciplines fighting against the juridical order (Foucault, 1991a: 222). This argument promotes an understanding of the norm, engendered by a series of practices, as located not within the law but rather within the social and cultural body – a part of its various institutions and discursive practices. The law is no longer perceived as the sole producer of the norm.

In *Gender Trouble*, Butler uses disciplinary power to offer an understanding of how certain genders become intelligible, and how others are foreclosed from the visible spectrum. Intelligible genders are the ones that can maintain a certain stability and continuity between gender, sexuality, sex and desire (1990: 18). Any sexual practices or desires that derogate, destabilise and break the above unity are foreclosed. But Butler also shows that there is no ground lying behind these practices that would somehow ‘pronounce’ certain genders to be intelligible (or not). Rather it is the practices themselves, and the norms that they both (re)constitute and instantiate that produces intelligibility as such. The idea of gender performativity serves to reveal these practices as constitutive of gender norms. Butler argues that the practice of *gendering* proves always to be a performative practice. At the same time these practice enable the very agency of the always *gendered* subject to become agentic. And this agency makes possible a certain resistance to the very norm that formed it. Resistance emerges as a critical genealogy (1990: 5), one that is embedded in legitimising practices but not confined to them.

Therefore, Butler can be said to use disciplinary power as a weapon for challenging juridical law, in the sense of encountering and countering law's claim to universality and demonstrating that its very existence relies on those foreclosures that it brings about. Disciplinary power is also used to show that the normative does not always coincide with the law; the normative is *not* the law. This means precisely that norms are not static; they can be transformed by the subjects that are to be formed by them. To be called a woman, for example, relies on a cultural understanding of what a woman 'is' that, in turn, is based on the differentiation between man and woman. But when a woman becomes a man through reassignment, for example, we can see that the trans-sexual person both destabilises the normative understanding of what 'is' a woman (gender, sexuality, sex and desire), unconceals the very phantasmatic grounds of the norm, and simultaneously shows that norms are not static.⁸

Similarly, when a young man runs away from the police who are shouting at him, he resists the interpellative call that somehow names him as a criminal. His running away enables us to see that the normative understanding of who is a criminal is based precisely on discursive practices that produce the category of 'the criminal'. So, to put it another way, disciplinary practices, as Foucault would have it, create counter-disciplines that produce different narratives of the normative, and this different narratives may allow for the subject's survival. This was not the case with Jean-Charles Menezes, who was mistakenly shot by the Metropolitan Police in London, but our survivability as citizens of or visitors to the UK relies precisely on possibilities opening up, no matter how minimal they may be, that can allow us to undo normative hegemony. Consider for example, Butler's own understanding of the norm from 'Competing universalities':

[n]orms are not only embodied, as Bourdieu has argued, but embodiment is itself a mode of interpretation, not always conscious, which subjects normativity to an

iterable temporality. Norms are not static entities, but incorporated and interpreted features of existence that are sustained by the idealizations furnished by fantasy (Butler, 2000b: 152).

The re-interpretation of the norm, through resistance to it, creates the conditions for one's survivability. Moreover, such resistance reconfigures the plateau of intelligibility. In *Excitable Speech*, Butler calls for the avoidance of any form of censorship that could do away with the constant reconfiguration and survival of subjects, even if and when their interpellation into being is an injurious one.

At the heart of Butler's understanding of how we can sustain livable lives lies the structure of agonism. When norms do not become the law – when, in other words, the state and the sovereign do not totalise the sphere of intelligibility, either by using the law as a governmental instrument or by using disciplinary practices like surveillance to govern every aspect of our lives – then we can resist the cultural norms that bring us into being. Moreover, if we engage with this struggle then we may attain something more than our survival, our viability.

However, and this is I think what explains Butler's recent quest for a different role for the juridical law, *when the law and norms become one* then the possibility for survival as humans becomes delimited. That is, when President George W. Bush presents the law and norms as unitary then only a very small space for resistance remains, since every form of dissent is rendered not only unintelligible but also dangerous, a threat to national security and cohesion. Under these conditions, law becomes for Butler the only vehicle for resistance, and, specifically, through the practice of the trial, the only force for dissent. Crucially, in order for law to become such a force for resistance it must, as Benjamin and Agamben suggest, do away with its interest in its own preservation. How could this become possible? As Butler suggests in 'Competing universalities', borrowing from Spivak's work,⁹ the practice of

translation may enable the agonism between competing universalities, competing concepts of the human. Such a practice will entail working with precisely the differences between competing notions without reducing the one into the other. Law perhaps can take up the task of the translator. But, nevertheless, the task of the translator necessitates, despite any logical incompatibilities between competing universalities, that there might be some common grounds for 'social and political aims' (2000b: 167). So perhaps the law could become that space whereby the illogical incompatibilities – or at least the illogical incompatibilities between those that are said to perpetuate the global terrorism and those that fight it – could meet. And perhaps a translation of what it is to be human, without the confinements of justice, the ends of law, can become the means for such discussion, if human survival and vitality can still be entertained. For, as Butler writes, life is precarious (some lives more than others), always an ambivalent concept, but as things now stand it risks losing its ambivalence if we continue to support the sovereign's contention that what it is to be human, and what life means are neutral terms.

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¹ This position still holds true today, even after the cases heard by the Supreme Court of the US relating to grant of a writ of *habeas corpus* to certain detainees in Guantánamo Bay; see Motha (2005).

² It is also important to note that Foucault is relatively clear in *Society Must be Defended* that neither sovereign power nor disciplinary power disappears once governmental power

emerges; rather, ‘society’ is permeated by this new form of power called governmentality (Foucault 2003: 241).

³ ‘Territory’ designates not only spatial boundaries, but also the custodian status of a detainee. For more in relation to a case of detainees in Guantánamo Bay and their *habeas corpus* challenges brought before the Supreme Court of the US, see Motha (2005).

⁴ Her observation invokes subtly Foucault’s essay ‘About the Concept of the “Dangerous Individual” in Nineteenth-century Legal Psychiatry’ (Foucault 2002b: 176-200). In this essay Foucault writes of the institutionalisation of individuals who committed motiveless crimes. The dangerous individual, who was in some respects insane, was the one whose crime was without motive or reason. The dangerous individual was to be assessed via the concept of risk. When an individual cannot account for, or take responsibility for, their act, judicial practice is rendered impotent.

⁵ However, when Butler problematises the correspondence of terrorist detainees with the mad she appears – unintentionally, I would suppose – to suggest that the mad are totally unintelligible, dangerous, etc. That is, she implies that the equivalence or correspondence of mad—terrorist is *truly* catachrestic. This move runs the risk of presenting the insane as unintelligible, unmotivated and uncivilised. Foucault, of course, alerted readers to the clinicians’ *invention* of insanity and, moreover, alerted us to precisely the construction of the insane as based on instrumentalisation. In *Madness and Civilization* (1991b) he suggests that the separation of madness from reason coincides with the birth of the profession of psychiatry and this specialised knowledge. The perception of insane acts as unintelligible, bereft of will and uncivilised is clearly a historical production, and Foucault’s historical accounting of this epistemic shift serves, in its own peculiar way, to render the category of ‘madness’ more intelligible. I have no intention here of dismissing Butler’s position, but rather I am suggesting that there are ways in which one could use this precise metonymic practice to the

advantage of those who are deemed 'bare life'. We can, for example, challenge in its totality the construction of the dangerous individual and its various configurations that has permeated both the legal and the political discourse.

⁶ All of this explains why the regulation of injurious language (hate speech, pornography, etc) *may curtail* the possibility for the subject to stay alive, to be recognised and recognisable (1997: 5).

⁷ In *State of Exception* (2005), Agamben argues that in the case of juridical law, the concrete case always entails a 'trial' of which the end is to pronounce a sentence guaranteed by other institutions of the state (39-40). Amongst other things this observation suggests that the operability of law necessitates the practice of trial, otherwise we would clearly see the decay of law.

⁸ I am by no means suggesting, nor is Butler herself, that this is an uncomplicated, nor that it can occur outside of processes and practices of surveillance.

⁹ See Spivak (2003: 162) and Benjamin (2004: 253-63).