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# The Normality of the Exception in Democracy's Empire

PETER FITZPATRICK AND RICHARD JOYCE \*

*The motif is one of inversion. In its received mode, the exception – the exceptional decision suspending the normal legal order – generates both the sovereign and the law. Here, on the contrary, the exception is found to be of the 'normal' law and, thus endowed, law goes to constitute the sovereign. This normality of the exception is then matched with the sovereign claim of democracy's empire. That empire is thence shown to have an oxymoronic quality, democracy and its constituent law being conducive to empire yet ultimately opposed to it. The empire of the United States provides a 'case'.*

## INTRODUCTION

Guantanamo is influentially taken to be the paradigm for our time of the state of exception and its attendant sovereign rule.<sup>1</sup> In this rendition, so to speak, Guantanamo is a place of pervasive sovereign control where people are comprehensively contained beyond the law. Yet it has been cogently shown that law flourishes in this very scene supposedly devoid of it.<sup>2</sup> This revisionist account of Guantanamo indicates at least that there is a question about the adequacy of the received version of the exception and its attendant sovereign rule. The abrupt answer offered here is that the exception to the law is itself of the law and that the exception's attendant sovereign rule is constituted by law. Such an answer is then related to the sovereign claim of

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<sup>1</sup> J. Butler, *Precarious Life: The Powers of Mourning and Violence* (2004) 51, 57; G. Agamben, *State of Exception* (2005, tr. K. Attell) 4.

<sup>2</sup> F. Johns, 'Guantanamo Bay and the Annihilation of the Exception' (2005) 16 *European Journal of International Law* 613; N. Hussain, 'Beyond Norm and Exception: Guantanamo' (in press) *Critical Inquiry*.

democracy's empire. In the result, democracy and its law are found to be conducive to empire yet also and ultimately opposed to it. The empire of the United States provides a telling 'case'.

## THE RECEIVED EXCEPTION

The inevitable starting point is Schmitt's pronouncement: 'Sovereign is he who decides on the exception.'<sup>3</sup> There is a dual constitution involved here. The immediate one is the constitution of the sovereign. The consequential constitution is that of a distinct legal order. It is the sovereign who, in deciding when a state of exception exists and the normal legal order has to be suspended, also decides what is the normal legal order.<sup>4</sup> The normal order is one of a 'boring', repetitive application of pre-existent rules.<sup>5</sup> 'In the exception the power of real life breaks through the crust of a mechanism that has become torpid by repetition'.<sup>6</sup> The exception is, then and of necessity, illimitable. It 'cannot be circumscribed factually or made to conform to a preformed law'.<sup>7</sup> Rather, it 'frees itself from all normative ties;' it 'departs...from the legal norm'.<sup>8</sup>

That is one side of the story. The other has to do with the primacy of law and the sovereign's dependence on it. That side will be recounted shortly. Its intimations are, however, already present in Schmitt's account. The sovereign decision on the exception needs the norm to which it is exceptional. Hence for Schmitt the exception only suspends the legal order. This legal order remains in the wings ever awaiting its return. And return it must if there is to be a sustaining of the norm to which the exceptional can continue to be exceptional. But that is not all. Law invades the realm of the exception, and does so despite the surpassing determinative force which Schmitt would accord the decision on the exception. Law constitutes the terms in which the exception can be decided on; it 'suspend[s] itself'; and although the sovereign 'stands outside the normally valid legal system, he nevertheless belongs to it'; and sovereignty remains 'a juristic concept', or remains 'within the framework of

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<sup>3</sup> C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (2005, tr. G. Schwab) 5.

<sup>4</sup> *id.*, p. 13.

<sup>5</sup> *id.*, p. 15.

<sup>6</sup> *id.*

<sup>7</sup> *id.*, p. 6.

<sup>8</sup> *id.*, pp. 12, 13.

the juristic'.<sup>9</sup> Nor is it simply the case that the sealed completeness of the decision on the exception is contaminated by legal matter – rather, the contamination is mutual. The exceptional inhabits the norm. With the operation of the norm, and for Schmitt, the 'autonomous moment of the decision recedes to a minimum',<sup>10</sup> but it exists. There is always 'space' for the norm in itself to be other than what it may be at any one time, 'space' for the entry from within the domain of the legal order itself of what is exceptional to the norm. In the like vein, Schmitt recognizes that 'every juristic decision' involves a generative creativity, that it cannot simply be read off from what is already there but that it entails 'an independently determining moment'.<sup>11</sup> The mutual contamination of the exception and the legal order will soon prove crucial for an argument placing the exception in and as law, but what must be considered first is another hugely influential elevation of the surpassing exception and of its attendant sovereignty, an elevation that now becomes pointedly challenging for it incorporates within itself a contamination that for Schmitt seemed merely to derogate from the purity of the separation between the sovereign exception and the legal order.

Agamben's exception has the same components as Schmitt's but the composition of each is different. For Schmitt the decision on the exception 'frees itself from all normative ties'.<sup>12</sup> Agamben's exception likewise frees itself but not as an occasional suspending of an otherwise distinctly enduring legal order. Rather, the exception now continuously enters into and comprehensively subordinates the legal order:

Indeed, the state of exception has today reached its maximum worldwide deployment. The normative aspect of law can thus be obliterated and contradicted with impunity by a governmental violence that – while ignoring international law externally and producing a permanent state of exception internally – nevertheless still claims to be applying the law.<sup>13</sup>

The exception 'everywhere becomes the rule' says Agamben,<sup>14</sup> and whereas for Schmitt the exception brings with it 'the power of real life [which] breaks through the crust' of the legal order, for Agamben the exception itself becomes a power ruling pervasively over life.<sup>15</sup>

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<sup>9</sup> *id.*, pp. 6-7, 12, 13-14, 16.

<sup>10</sup> *id.*, p. 12.

<sup>11</sup> *id.*, p. 30.

<sup>12</sup> *id.*, p. 12.

<sup>13</sup> Agamben, *op. cit.*, n. 1, p. 87.

<sup>14</sup> G. Agamben, *Homo Sacer: Sovereign Power and Bare Life* (1998, tr. D. Heller-Roazen) 9.

<sup>15</sup> Schmitt, *op. cit.*, n. 3, p. 15; Agamben, *op. cit.*, n. 14, generally.

The disparity between these lines of thought carries over into the relation between sovereignty and the exception. For Schmitt, as we saw, the sovereign is constituted as ‘he who decides on the exception’, and that power of decision somehow ‘becomes in the true sense absolute’ – something it would have to become if it is to match the illimitable exception.<sup>16</sup> With Agamben it is ‘life that constitutes the first content of sovereign power’, and the ‘production’ of that life is ‘the originary activity of sovereignty’, an originating sovereignty within which ‘law refers to life and includes it in itself by suspending it’.<sup>17</sup> In so doing sovereignty assumes complete control over that life – a life that is thence decidedly ‘bare’.<sup>18</sup> It is not only that this bare life is produced by sovereignty; it is the very power over bare life that constitutes sovereignty.

That aside, in its encompassing of life, of life that remains infinitely protean if now bare before sovereignty and its law, sovereign power would have to be at least co-extensive with life. How that could be or how it could be known to be is left aptly mysterious. Indeed, where the sovereign of Schmitt and of Agamben comes from is a mystery. Most immediately, it floats on tautology. The decision of Schmitt’s sovereign creates the exception which creates the sovereign. Agamben’s sovereign is constituted by the bare life it produces. More intriguingly, in both cases there is the evocation of a sacred foundation to sovereignty. Schmitt’s sovereign is announced into existence in the opening sentence of a work on ‘political theology’, the gist of which Schmitt explains in this way:

All significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development – in which they were transferred from theology to the theory of the state, whereby, for example, the omnipotent God became the omnipotent lawgiver – but also because of their systematic structure, the recognition of which is necessary for a sociological consideration of these concepts.<sup>19</sup>

Part of this systematic structure not exactly recognized by Schmitt is that his sovereign would have to be deiform in order to fuse its determinate presence with the

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<sup>16</sup> Schmitt, *op. cit.*, n. 3, pp. 5, 12.

<sup>17</sup> Agamben, *op.cit.*, n. 14, p. 28.

<sup>18</sup> *id.*, pp. 11, 83.

<sup>19</sup> Schmitt, *op. cit.*, n. 3, p. 36. Even more strongly: ‘The juridic formulas of the omnipotence of the state are...only superficial secularizations of the theological formulas of the omnipotence of God’: C. Schmitt, *The Concept of the Political* (1996, tr. G. Schwab) 42.

illimitability of the exception. That same fusion endows Agamben's sovereign, only in his case it derives from an ersatz sacred tradition.<sup>20</sup>

Even if a quixotic credence were allowed these grounds of sovereignty, an intriguing irresolution would remain. Schmitt's overweening sovereign, as we saw, remained 'a juristic concept' and 'belongs to...the normally valid legal system', a system able to decide autonomously even if Schmitt would arbitrarily confine this ability 'to a minimum'.<sup>21</sup> The inability of Agamben's sovereign to contain the law can be discerned more obliquely. The pervasion of this sovereign, its commensuration with life, is qualified by Agamben's finding that this is a catastrophe which is coming rather than already realized, and a catastrophe that could somehow in life be reversed.<sup>22</sup> So, this sovereign is less than comprehensive in its effective coverage of life, but the law it supposedly encompasses and subordinates is not so restricted but remains co-extensive with suspended life. This law becomes attenuated or is eventually eliminated only in Agamben's expectation of a new form of life alternative to the coming catastrophe.<sup>23</sup>

## THE LAW OF THE EXCEPTION

Not without a touch of the tendentious, then, we find Schmitt and Agamben instancing persistent irresolutions in Jurisprudence and in the field of Law and Society. Law is autonomous, or has some significant degree of autonomy. Yet law is receptively subordinated to some other power, usually conceived in terms of society or sovereign. There are various mediations of this divide. In Jurisprudence, for example, law has been notably endowed with a 'core' of stilled meaning and with a 'penumbra' of receptive adaptability.<sup>24</sup> Nothing remotely resembling a general line of division between these categories has been identified. Taking another example, now from the domain of Law and Society, a 'constitutive theory' would have it that whilst

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<sup>20</sup> For an account and criticism of which see P. Fitzpatrick, 'Bare Sovereignty: *Homo Sacer* and the Insistence of Law' in *Politics, Metaphysics and Death: Essays on Giorgio Agamben's Homo Sacer*, ed. A. Norris (2005) 49-73.

<sup>21</sup> Schmitt, op. cit., n. 3, pp. 12, 16.

<sup>22</sup> Agamben, op.cit., n. 14, pp. 12, 153, 188.

<sup>23</sup> id., p. 29; Agamben, op. cit., n. 1, p. 64. Cf. the law seemingly amenable to the new form of life which Agamben evokes in G. Agamben, *Potentialities: Collected Essays in Philosophy* (1999, tr. D. Heller-Roazen) 165; and G. Agamben, *The Time that Remains: A Commentary on the Letter to the Romans* (2005, tr. P. Dailey) 122.

<sup>24</sup> H. L. A. Hart, *The Concept of Law* (1961) 125, 149.

indeed society constitutes or 'shapes' law, law also constitutes or 'shapes' society.<sup>25</sup> Again, no dividing line has been identified, and no barrier to stop either pervading the other. The corresponding alternation with Schmitt would have the sovereign generating the legal order *and* law not only retaining an autonomy but also constitutively inhabiting the sovereign realm. With Agamben, the contrast, as we saw, was one in which a sovereign power encompassing life subordinated a law of equal extent, yet this same sovereign power also found itself to be less extensive than life leaving the extent of law's own relation to life undiminished.

That these contraries are not simply stark oppositions can be discerned in a more practical perspective on law. The notion of autonomous law usually imports law's providing some determinate reference, some available concentration of enforceable relations between us, some present normative hold on the futurity of our being together. To do all this, however, law has to be continually receptive to the ever-changing quality of those relations and of that futurity. Once, so the moderns say, these two dimensions of law, the determinate and the receptive, could be joined in a transcendent determination. Resort could be had to a deific or sacral resolution much like those evoked by Schmitt and by Agamben. Modernity is bereft of such resort. As the iterative tomes of Jurisprudence attest, no resolution is to be found in one side of the division or the other. Law cannot subsist as fixedly determinate. For law to accommodate the ever-pending infinity of possible relation in our being together, it must be utterly receptive. Yet if it were only receptive, it would be purely evanescent and, in the result, a vacuity.

More constructively, and more to our overall point, law is continuously constituted in a connecting receptivity to what is ever beyond its determinate self. The call for law always comes from beyond its determinate realisation for the time being. If law could not actively and receptively respond to that call, it would wither in cumulating irrelevance. But for law to bring what is beyond into its determinant existence, it must be of a position apart from that existence, a position that opens to, and that can be held open to, what is beyond its determinate existence. Yet that same position apart must also be one that resists what is beyond, selecting and gathering it in terms which maintain a connection generatively affirming law's continuing and determinate

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<sup>25</sup> A. Hunt, *Explorations in Law and Society: Toward a Constitutive Theory of Law* (1993), e.g. 174-5.

existence. This position is that of the exception, the exception now as normal.<sup>26</sup> This position is, then, like Schmitt's exception in that it combines being beyond and yet of the existing 'legal order'.

That self-transcendent position of law also positions the exaltation of the sovereign in both Schmitt's and Agamben's accounts of the exception. 'Law itself', says Nancy, 'does not have a form for what would need to be its own sovereignty'.<sup>27</sup> In its responsiveness to the infinity of possible relation in our being together, law has to be ever changeful and, in some ultimate sense, a vacuity. As such, it cannot in itself, in any formed self, enduringly unite its determinate and receptive dimensions. That same vacuity, however, renders law intimately receptive to power. And it is in the formation of the 'modern' national polity that we find a power endowing law, a power concentrated in the persistence of a pre-modern conception of sovereignty.<sup>28</sup> Taking matters that far would help explain the subjection of law to the sovereign within Schmitt's and Agamben's exception. What would still need explaining would be the saturation of Schmitt's sovereign exception with legal matter and Agamben's unwitting extension of law beyond the sovereign power that somehow also encompassed it.

For sovereignty to endow law with determining force, for it to bring together effectively the determinate and receptive dimensions of law, it must share those dimensions with law. In modernity, and like law, sovereignty cannot seek resolution of disparate dimensions in some transcendent reference apart from itself. Hence its starkly dual characteristics delimited by Derrida. Sovereignty, says Derrida, 'is undivided, unshared, or it is not'; yet he would ask: 'What happens when...[sovereignty] divides? When it must, when it cannot not divide?'<sup>29</sup> There is some merging of these seeming opposites when Derrida talks about ipseity in terms of 'the sovereign and reappropriating gathering of self in the simultaneity of an

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<sup>26</sup> This is not to deny that the position apart may provide an opening typically more wide in some legal situations than in others. The situation most frequently instancing the exception, a declaration of emergency, is but an example at the wider end. Congeries of 'exceptional' laws can now serve the same function as that performed by the supposed exception to the law (see Hussain, op. cit., n. 2). Standard lamentations, such as Schmitt's, about the spread of discretion and our being moved 'further and further from the ground or juridical certainty' (as quoted in Agamben, op. cit., n. 14, p. 172) manage to ignore the intrinsic ability of law to become other to itself. Even the most seemingly stable law carries with it a power of being radically revised or reversed.

<sup>27</sup> J-L. Nancy, *Being Singular Plural* (2000, tr. R. Richardson and A. O'Byrne) 131.

<sup>28</sup> This mode of sovereign appropriation is, of course, not the only way in which law's dimensions have been or are combined.

<sup>29</sup> J. Derrida, *Without Alibi* (2002, tr. P. Kamuf) xix-xx.



assemblage or assembly, being together or “living together,” as we say’.<sup>30</sup> Transposing this in terms borrowed from law’s dimensions, the determinate dimension could be seen as calling for an experientially undivided cohering; the receptive dimension could be seen as matching the necessity for sovereignty, like any vital organisation, to responsively incorporate and assemble the multitude of disparate forces that continually come to (re)constitute it. For this projected assembling, sovereignty must be intrinsically receptive to plurality. To be so receptive, sovereignty must always be incipiently vacuous, always capable of emptying any existent content. So, appropriating another arcanum, Nancy would find that ‘sovereignty is nothing’, ‘bare’, an ‘empty place’.<sup>31</sup> So a ‘modern’ sovereignty, like its exhausted sacral predecessors, must marvellously fuse being determinate with a receptiveness prehensively subjected to that sovereignty’s unconstrained efficacy. Such a sovereign power can enclose itself yet extend indefinitely, subsist finitely yet potentially encompass what is beyond its existent content.

To do all this, however, sovereign power cannot simply and purely in itself match the dimensions of law. It has also to be dependent on law. For the sovereign to sustain its being in an importunate futurity, no amount of the present assertion or exercise of power (‘exceptional’ or otherwise) would suffice. That being is of necessity oriented in a claim of right, a claim that projects sovereign power beyond its determinate dimension and attaches it receptively to what is beyond. Law, then, as the carrier of that right, provides this continuously projected, amenable and generally enforceable means of combining the determinate and receptive dimensions of sovereignty. In all, as the mutual contamination of Schmitt’s law and sovereign intimated, law and sovereignty subsist in a constituent mutuality. It is also possible now to reconcile Agamben’s contradiction. In its vacuity law is indeed needful of sovereign assertion, yet law extends beyond such assertion in the cause not just to its own but also the sovereign’s continuance ‘in being’.

## DEMOCRACY’S EXCEPTION

Democracy, like law, finds its being in this position of exception – in an opening to what is beyond itself and in bringing what is beyond to itself. There is more here than

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<sup>30</sup> J. Derrida, *Rogues: Two Essays on Reason* (2005, tr. P-A. Brault and M. Naas) 11.

<sup>31</sup> Nancy, *op. cit.*, n. 27, pp. 36, 147.

a simple correspondence between democracy and law. Rather, there is an integral tie in which law creates, and continuously generates, democracy. The necessity for law specifically to do this can be derived from a seeming contradiction in democracy itself.

Democracy is rule by the people, but the people in itself cannot rule. This is the gist of Plato's complaint about democracy in *Republic*.<sup>32</sup> He, or his *dramatis personae*, concentrate on the quality of the democratic individual, but they do so in order to derive the quality of a 'corresponding...democratic political system'.<sup>33</sup> Such an individual 'indulges in every passing desire that each day brings', submits to 'every passing pleasure as its turn comes to hold office, as it were'; and, in all, 'his lifestyle has no rhyme or reason'.<sup>34</sup> The corresponding political system is promiscuously 'open' and potentially 'adorned with every species of human trait'.<sup>35</sup> It is, in short, this illimitable openness that is the prime and impelling constituent of democracy. Putting this in terms relevant to modern democracy, for Lefort democracy 'inaugurates the experience of an ungraspable, uncontrollable society in which the people will be said to be sovereign, of course, but whose identity will constantly be open to question, whose identity will remain latent'.<sup>36</sup> Hence Lefort's thesis that the place of power in democracy is an 'empty place'; and the empty throne becomes the 'normal' condition.<sup>37</sup> It is not, however, a condition that simply and somehow results from naturalistic traits that Plato, for example, would attribute to it – a crucial point that will now be taken up.

The immediate problem is how the people, the demos of democracy, can assume any determinate existence at all, let alone a position of sovereignty. Democracy's pre-modern forms could resort to a defining force of the natural or of the supernatural to selectively constitute the people. With modernity, and as Lindahl incisively notes, 'the people' is incapable of coming together to constitute itself as a political unity and from there institute a political and legal order; rather, they come to be a people

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<sup>32</sup> Plato, *Republic* (1998, tr. R. Waterfield) 293-302 (555a-560b).

<sup>33</sup> *id.*, p. 296 (557b).

<sup>34</sup> *id.*, p. 301 (561c-d).

<sup>35</sup> *id.*, p. 296 (557c-d).

<sup>36</sup> C. Lefort, *The Political Forms of Modern Society: Bureaucracy, Democracy, Totalitarianism* (1984, tr. J. B. Thompson) 303-4.

<sup>37</sup> *id.*, p. 303; C. Lefort, *Democracy and Political Theory* (1988, tr. D. Macey) 86, 225-6; S. Žižek, *For they know not what they do: Enjoyment as a Political Factor* (1991), 267-8.

through the creation of that order.<sup>38</sup> So, this very people, in a feat of what Derrida would call ‘fabulous retroactivity’,<sup>39</sup> is a creation of what it is taken in standard perspectives as creating, a creature of the constitution and of laws made pursuant to it – electoral laws, laws to do with citizenship and immigration, laws to do with mental capacity, and so on. What is more, law produces the definitive processes of democratic, and of sovereign democratic, assertion. Such production extends to the vacuity, the empty place of democracy. In constituting democracy and its definitive processes, this production does so in a way that gives force and effect to this empty place. Law, that is, integrates into democracy’s form and processes the ability to be other than what it may determinately be at any one time. With modern democracy, in short, power is purposively constituted or constructed as empty.<sup>40</sup> More specifically, this is achieved through law’s sharing in and making operative

...a discourse which reveals that power belongs to no one; that those who exercise power do not possess it; that they do not, indeed, embody it; that the exercise of power requires a periodic and repeated contest; that the authority of those vested with power is created and re-created as a result of the manifestation of the will of the people.<sup>41</sup>

This generative emptiness, then, is embedded in democracy’s determinate composition – embedded as a template, no matter how varied its realization. The commensurate ability of democracy to be other than its determinate existence cannot extend to being other to this template securing its emptiness. Democracy then, and like law, imports an ‘exceptional’ position. It is oriented beyond and as other to its determinate existence but still relates and returns to that existence.

## DEMOCRACY’S EMPIRE

Finally, then, to the question of whether this ‘normal’ exception accords with democracy’s empire, relating this to the promised case of the empire of the United States. The issue can be condensed in Jefferson’s conceiving of the United States as ‘the imperial republic’. This republic was imperial in that the ability and even the duty

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<sup>38</sup> H. Lindahl, ‘Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood’ in *The Paradox of Constitutionalism*, eds. M. Loughlin and N. Walker (forthcoming).

<sup>39</sup> Derrida, ‘Declarations of Independence’ (tr. T Keenan and T. Pepper) (1986) 15 *New Political Science* 7, 10.

<sup>40</sup> Žižek, op. cit., n. 37, p. 276 n. 52.

<sup>41</sup> Lefort, op. cit., n. 37, p. 225.

of the United States was to expand hugely, but it was republican in that the ‘territories’ so acquired had eventually to be admitted to the union as new states.<sup>42</sup> Imperial expansion beyond the existent range of the republic was justified because of the eventual return to a republican and democratic fold. All of which may seem to accord with the exceptional quality of democracy. Indeed, democracy and its law could be seen in ways as attuned to the imperial. Their vacuity makes them receptive to imperial power, specifically to the assertions of the sovereign of the imperial nation. And their orientation beyond the determinate can serve the expansionary grasp of empire, law having long been part of the ‘civilizing mission’, even if democracy has joined that mission only recently. So, updating the Jeffersonian model to the current formation of American empire so-called, we find its expansionary ‘influence’ is justified by the mantric insistence that, in the result, others will be brought within the fold of democracy and the rule of law.<sup>43</sup>

The grand solipsism of empire radically qualifies this easy correspondence with democracy and law. Modern imperialism has been and remains based on national sovereignty, a sovereignty bound in terms that are elevated exemplarily. So, Jefferson’s model, which was to be ‘an empire of liberty’, became racially qualified in its application leaving some indefinitely outside the range of achievable civilization.<sup>44</sup> Leaping over to the current scene, we find an imperium officially asserted in terms that are naturalist and divisive, yet transcendent. These are terms laying down ‘a single sustainable model for national success’; a model in which the market and an economic orthodoxy are enshrined as natural; a model in which certain attendant values are affirmed as ‘right and true for every person, in every society’; a model in which there has to be limited government and the ‘unleashing [of] the power of the private sector’; and, more generally, a model in which, conveniently, markets and ‘societies’ have to be ‘open’, especially to foreign investment.<sup>45</sup> This imperative

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<sup>42</sup> J. Wilson, *The Imperial Republic: A Structural History of American Constitutionalism from the Colonial Era to the Beginning of the Twentieth Century* (2002) 63, 73.

<sup>43</sup> E.g.: G. W. Bush, *The National Security Strategy of the United States of America* (2002), Introduction; G. W. Bush, *The National Security Strategy of the United States of America* (2006), 10-11.

<sup>44</sup> Wilson, *op. cit.*, n. 42, 107. For ‘empire of liberty’ see e.g. A. Stephanson, *Manifest Destiny: American Expansion and the Empire of Right* (1995) 22. The phrase was not quite so original in that the British had used it to describe their early empire by way of a contrast with the Spanish. The heavy historical irony is that the United States ‘empire of liberty’ was set against British imperialism, among others.

<sup>45</sup> Bush, *National Security Strategy* (2002), *op. cit.*, n. 43, Introduction; Bush, *National Security Strategy* (2006), *op. cit.*, n. 43, pp. 4, 27, 31-32.

openness turns out to be not quite universal. It excludes the United States which must always, so it is officially ordained, be ‘strong enough’ to counter any ‘surpassing, or equalling, [of its] power’: it must, then, ‘maintain a military without peer’; and it can use the ‘global commons’ (‘space, international waters and airspace, and cyberspace’) so as to ‘project power anywhere in the world from secure bases of operation.’<sup>46</sup> If this nationally enclosed predomination were incompatible with the ‘open’ quality of democracy and its law, then we would expect it to find an antithesis when it encountered the rough democracy of the international and its law.

Such proves to be the case. To take a stark example, in his ‘address to the nation’ prior to the invasion of Iraq, a putative President Bush declared: ‘The United Nations Security Council has not lived up to its responsibilities, so we will rise to ours’.<sup>47</sup> This self-elevation of the United States and of its conveniently constituted ‘responsibilities’ did not simply involve the embroiled question of whether the invasion of Iraq was ‘legal’. The breach of international law does not necessarily or usually entail the assertion that, as here, one is superior to it, and superior to the institutions of the international community that create it. The quality of a breach could, however, be quite telling in this respect. Violation of standards, of human rights for example, that are taken to be definitive of the international community, or violation that would seek to undermine the hold of law and its processes, could evidence a hostility or disregard that affirmed superiority at least implicitly. That much could also be extracted from not only the refusal to enter into treaties of a like quality but also from the assiduous undermining of them. And activities of these kinds have been plentiful in the recent history of American empire.<sup>48</sup> Any doubt that these activities are superordinate may diminish on a reading of the *National Defence Strategy of the United States of America* for 2005 where ‘our strength as a nation state’ is pitted against ‘those who

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<sup>46</sup> Bush, *National Security Strategy* (2002), op. cit., n. 43, Part IX; Bush, *National Security Strategy* (2006), op. cit., n. 43, Introduction; D. Rumsfeld, *The National Defence Strategy of the United States of America* (2005), 13.

<sup>47</sup> G. W. Bush, ‘Address to the Nation on Iraq’, (17 March 2003) 39 *Weekly Comp. Pres. Doc.* 338, at 339.

<sup>48</sup> See e.g. P. Fitzpatrick, “‘Gods would be needed...’: American Empire and the Rule of (International) Law’ (2003) 16 *Leiden Journal of International Law* 429, 457-66. Another indicative instance could be that the United States has not notified any derogation from the provisions of the International Covenant on Civil and Political Rights, as provided in Article 4, despite being in breach of several of its provisions. Or perhaps it could not justify a derogation because Article 4 relates to a ‘time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed’. Cf. however Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant—Third periodic reports of States parties due in 2003: United States of America*, UN Doc. CCPR/C/USA/3, November 28, 2005, Annex I, ‘Territorial Scope of Application of the Covenant’.

employ a strategy of the weak using international fora, judicial processes, and terrorism'.<sup>49</sup>

## CONCLUSION

Agamben begins his *State of Exception* with this epigraph, as translated: 'Why are you jurists silent about that which concerns you?'.<sup>50</sup> Perhaps the point of the question, and accusation, is that jurists should conspicuously condemn the disregard and desecration of the law and legal values in the 'exceptional' use of sovereign power he would instance with Guantanamo. In finding that the exception is not *to* but within law, this paper would question a silence that is more 'normal', a silence walled in the determinative elevation of naturalist and imperial categories that would deny the responsibility freighted with law's illimitable responsiveness. A like silence diminishes democracy, as we saw. If being modern is to be in a 'world of movement, of transformation, of displacement, and of restlessness, this world that is in principle and structurally outside itself, this world where nature does not subsist but steps out of itself into work and into history',<sup>51</sup> then one can only conclude, borrowing that most resonant of titles, 'we have never been modern'.<sup>52</sup>

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<sup>49</sup> Rumsfeld, *op. cit.*, n. 46, p. 5. The terminology could be a tribute to R. Kagan, *Paradise & Power: America and Europe in the New World Order* (2003), widely hailed for its eternal verities about this 'new world order', an order in which it is 'the weak' who place ultimate reliance on law, the United States having to be strong and act in ways untrammelled by law: at 38-39, 102.

<sup>50</sup> Agamben, *op. cit.*, n. 1, epigraph.

<sup>51</sup> J-L. Nancy, *Hegel; The Restlessness of the Negative* (2002, tr. J. Smith and S. Miller) 6.

<sup>52</sup> B. Latour, *We Have Never Been Modern* (1993, tr. C. Porter).