Oath, torture, testimony:
language, law and life in the work of Giorgio Agamben

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ABSTRACT

In this paper, I will argue that Giorgio Agamben has provided for a radical theory of the import of torture on human life, one that provides a different genealogy and projects different implications for the relation between torture and politics than have otherwise been given. I will begin by examining some of the features of the current, post-September 11 'debate' about torture, before moving to an exegesis of Agamben's theses and their import for thinking politics today.

Key-words: torture, human life, testimony, language, politics.

RESUMEN

En este ensayo, defenderé que Giorgio Agamben ha propuesto las bases de una teoría radical de la importancia de la tortura sobre la vida humana, que proporciona una diferente genealogía de la misma y proyecta diferentes implicaciones para la relación entre tortura y política de las que se han dado hasta la fecha. Quiero comenzar por examinar alguno de aquellos rasgos del debate actual sobre la tortura tras el 11 de septiembre, antes de pasar a una exégesis de las tesis de Agamben y su importancia para el pensamiento político actual.

Palabras clave: tortura, vida humana, testimonio, lenguaje, política.

> 'The goal of torture, in effect, is to produce acceptance of a State discourse, through the confession of putrescence. What the torturer in the end wants to extort from the victim he tortures is to reduce him to being no more than that [*ça*], rottenness.' – Michel de Certeau

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1. Introduction: torture as the originary landscape of the political

Torture is the originary landscape of the political.[1] Why? Because torture is, historically, pragmatically and in principle, the 'technique' that functions to effect the transition between the living body and the life of the community.[2] It does this not only according to the well-known exigencies of spectacular punishment, the establishment of the grounds for debt reclamation, and festive enjoyment, but, perhaps fundamentally, in its establishment of the conditions of what counts as a legitimate speech act in and for a polity at all.[3] Torture is

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    2   S.C. Carey, Mark Gibney, S.C. Poe, *The Politics of Human Rights: The Quest for Dignity* (Cambridge: Cambridge University Press, 2010) obviously make a great deal of the Human Rights declarations. They note that no country voted against the Universal Declaration (1948), although eight countries abstained; also many countries were still under colonial rule. Moreover, noting problems with universality, they assert: 'Still, human rights are universal in the sense that all human beings possess human rights by the mere fact of their human existence,' p. 11. There is, moreover, an extraterritorial obligation of states who are signatories to the Convention against Torture (adopted by the UN General Assembly 10 December 1984 and ratified 26 June 1987). Carey *et al*. give three instance of the consequences of the extraterritorial obligation: 1) Jan 2009, Charles Taylor (not the philosopher!), a US Citizen and son of the ex-president of Liberia was convicted under 1994 US criminal law and sentenced to 99 years in prison, the only conviction so far; 2) Faryadi Sarwar Zardad, an Afghan warlord, arrested in London, 3 million pounds UK spent collecting evidence, July 2005, was convicted in Old Bailey and got 20 years; 3) Under Article 21, the Convention against Torture allows a state to file a complaint against another state for failing to fulfil its obligation: to date, not a single complaint has been filed.
    3   Due to the 'changed circumstances' (as the phrase has it) following September 11, there has been an extraordinary escalation in the number and intensity of texts dealing with the problem of torture in philosophy, politics, history and law. But obviously it didn't start there. In addition to the texts cited below, I would also mention here: R.D. Crelinsten and Alex P. Schmid (eds), *The Politics of Pain: Torturers and their Masters* (Boulder: Westview Press, 1995); M. Danner, *Torture and Truth: America, Abu Ghraib and the War on Terror* (New York: New York Review of Books, 2004); K.J. Greenberg (ed.), *The Torture Debate in America* (Cambridge: Cambridge UP, 2006); K.J. Greenberg and J.L. Dratel (eds), *The Torture Papers: the road to Abu Ghraib* Lewis Anthony (intro) (New York: Cambridge University Press, 2005); S. Grey, *Ghost Plane: The True Story of the CIA Torture Program* (New York: St. Martin's Press, 2006); J.K. Harbury, *Truth, Torture, and the American Way: The History and Consequences of US Involvement in Torture* (Boston: Beacon Press, 2005); T. Head (ed.*), Is torture ever justified?* (Detroit: Greenhaven Press, 2005); J. Heath, *Torture and English Law: An Administrative and Legal History from the Plantagenets to the Stuarts* (Wesport: Greenwood Press, 1982); J.H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime* (Chicago and London: University of Chicago Press, 1977); S. Levinson (ed), *Torture: A Collection* (Oxford: Oxford UP, 2004); R. Matthews, *The Absolute Violation: why torture must be prohibited* (Quebec: McGill-Queen's University Press, 2008); M.B. Merback, *The Thief, the Cross and the Wheel: Pain and the Spectacle of Punishment in Medieval and Renaissance Europe* (London: Reaktion Books, 1999); K. Millet, *The Politics of Cruelty: An Essay on the Literature of Political Imprisonment* (New York & London: Norton, 1994); E. Peters,

the point at which law necessarily shades into politics.[4] Strangely enough, something approximating this thesis has been operative throughout post-Enlightenment philosophy, if in a minor key; it is, moreover, quite directly linked to the centrality of the problematic of language. Even a rapid survey of writings by Cesare Beccaria, Jeremy Bentham, Friedrich Nietzsche, Sigmund Freud, Michel Foucault, Michel de Certeau, Judith Butler, Eric Santner, among many others, would have to acknowledge that the problem of torture has a crucial place there.[5] Why? Because part of the problem of accounting for man's essence as a speaking-being is, from the eighteenth-century onwards, necessarily linked to the question of how man *comes* to language in the first place. The question 'how does man come to language?' cannot be separated from the question concerning *questioning*, a question whose paradigm is that of torture, judicial torture, the elicitation of speech from a resisting body, and the implantation and regimentation of particular kinds of speech. Moreover, this paradigm is linked to what at least initially might seem its absolute other: the elicitation of language from the infant, the one-who-is-not-yet-speaking but whose destiny is always already to be caught in the chains of language.

The question concerning technology is therefore also at the heart of these political questions, particularly the technologies of the body that Foucault himself, in Nietzsche's wake, has so carefully and ingeniously tracked. But I would also want to be very careful about specifying the key technological problematic, necessarily subjacent to the others: the necessity for the elicitation and control of 'speech,' understood as the order of language in general. There are of course innumerable different technologies for doing this, and I will discuss some of them shortly. In doing so, I will also say why I think even Foucault is

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The Magician, the Witch, and the Law (Philadelphia: University of Pennsylvania Press, 1978) and *Torture*, Expanded Edition (Philadelphia: University of Pennsylvania Press, 1996 [1985]); P. Reddy, *Torture: What you need to know* (Charnwood: Ginninderra Press, 2005); K. Roth et al (eds.), *Torture: does it make us safer? Is it ever ok*? (New York: New Press, 2005); E. Scarry, *The Body in Pain: The Making and Unmaking of the World* (Oxford: Oxford University Press, 1985).

4   Or, in Kristian Williams' words, 'Torture…is not incidental to state power; it is characteristic of that power. Torture doesn't represent a system failure; it *is* the system,' *American Methods: Torture and the logic of domination* (Cambridge: South End Press, 2006), p. 3.

5   See, *inter alia*, C. Beccaria, *On Crimes and Punishments and other writings*, ed. R. Bellamy, R. Davies et al. (trans) (Cambridge: Cambridge University Press, 1995); F. Nietzsche, *On the genealogy of morality*, ed. K. Ansell-Pearson, trans. C. Diethe (Cambridge: Cambridge University Press, 2007); S. Freud, 'Notes upon a case of obsessional neurosis,' in *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, Vol. X (1909), ed. J. Strachey (London: The Hogarth Press, 1955); M. Foucault, *Discipline and Punish: The Birth of the Prison*, trans. A. Sheridan (New York: Vintage, 1979); M. de Certeau, *Heterologies: Discourse on the Other*, trans. B. Massumi (Minneapolis: University of Minnesota Press, 1986); J. Butler, *Antigone's Claim: Kinship Between Life and Death* (New York: Columbia University Press, 2000); E. Santner, *My Own Private Germany: Daniel Paul Schreber's Secret History of Modernity* (Princeton: Princeton University Press, 1996).

sometimes a little misleading on the topic. Indeed, the contemporary context – the post-9/11 context in which torture has been explicitly put back on the global political agenda – has already foregrounded this problematic, at any number of levels. Whether it is the interminable scholarly and legal quibblings over its definition, the journalistic furore over whether waterboarding is really torture, or Donald Rumsfeld's little note on the bottom of the notorious memorandum from 2002 authorizing extreme interrogation techniques at Guantanamo, 'I stand for 8-10 hours a day. Why is standing limited to 4 hours?', one can immediately see how micro-technologies of the body, the minutiae of physical positions, are imbricated in these calculations.

In this paper, I will argue that Giorgio Agamben has provided for a radical theory of the import of torture on human life, one that, in taking account of all of the features mentioned above, provides a different genealogy and projects different implications for the relation between torture and politics than have otherwise been given. I will begin by examining some of the features of the current, post-September 11 'debate' about torture, before moving to an exegesis of Agamben's theses and their import for thinking politics today.

2. The current insistence of the ticking-bomb scenario as prospective license for pre-emptive torture

Let me begin by providing an only-too-familiar example of the contemporary dominant discourses about torture, whose emblem is the sophism of the 'ticking bomb.' In his Heidelberg University lecture of 1992, Niklas Luhmann opens with precisely such an example:

> Imagine: You are a high-level law-enforcement officer. In your country – it could be Germany in the not-too-distant future – there are many left- and right-wing terrorists – every day there are murders, fire-bombings, the killing and injury of countless innocent people. You have captured the leader of such a group. Presumably, if you tortured him, you could save many lives – 10, 100, 1000 – we can vary the situation. Would you do it?[6]

For Luhmann, there is no proper answer to this question: the problem as such is properly undecidable for our societies.[7] Such an example is at

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6   N. Luhmann, 'Are There Still Indispensable Norms in Our Society?' *Soziale Systeme*, Jg 14 (2008), Heft 1, p. 18.

7   See the responses to Luhmann's article in the same issue of *Soziale Systeme*, especially Niels Werber, 'A Test of Conscience Without Indispensable Norms: Niklas Luhmann's War on Terror' (83-101) and Costas Douzinas, 'Torture and Systems Theory' (110-125).

once chilling and ludicrous, but its very popularity is certainly an index of a kind of *Zeitgeist*.[8] As Costas Douzinas has noted, Luhmann seems to have been extraordinarily prescient in his choice of example: a mere decade after Luhmann's presentation, Wolfgang Daschner, a high-ranking Frankfurt police officer, threatened to harm the key suspect in the kidnapping of Jakob von Metzler, the 11 year old son of a prominent banking family.[9] As it happens, the suspect decided to talk without further intervention only ten minutes later: the boy, it transpired, was already dead. But Luhmann's apparent prescience is in fact a little misleading. As Douzinas adds, 'The trick is that we have to say yes or no to an unreal situation that never happens,' concluding that Luhmann's position is tantamount to a depoliticisation.[10] To some extent this is true, but it remains the case that Luhmann's particular formulation of the scenario captures something about torture in the contemporary political space that others, apparently very similar, do not.

For one can no longer ignore how popular this example is for those who clearly think that the topic of torture can be debated like any other, not to mention those who clearly enjoy the possibility of its official return. Hence Michael Levin, in a (to my mind repellent) essay titled 'The Case for Torture,' dating from 1982, when it appeared in *Newsweek*, lasciviously runs through one version of this scenario after another: 'Suppose a terrorist has hidden an atomic bomb on Manhattan Island which will detonate at noon on July 4 unless….Someone plants a bomb on a jumbo jet….Suppose a terrorist group kidnapped a newborn baby from a hospital….' Levin even announces, with staggering *sang froid*, that 'there are situations in which torture is not merely permissible but morally mandatory.'[11] If Levin still stands behind these arguments, the best known contemporary proponent of this view is perhaps the US civil rights lawyer Alan Dershowitz, who – with an enthusiasm verging on the hallucinatory – even denominates this position a 'new realism.'[12] Examples could be multiplied.

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8   It is an example that is in fact ubiquitous following 9/11. For instance, take the well-known syndicated Fox Network TV series *24*, which revels in precisely the same phenomenon.

9   See 'Police Threat Fuels Debate on Torture,' *Deutsche Welle*, 24 February 2003, <http://www.dw-world.de/dw/article/0,,785751,00.html>

10   Douzinas, 'Torture and Systems Theory,' p. 111.

11   M. Levin, 'The Case for Torture,' *Newsweek*, June 7, 1982, p. 13.

12   See A. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (Yale: Yale University Press, 2003). As Dershowitz – now part of the US wing of the international legal team assembled in defence of Julian Assange – puts it, 'The simple cost-benefit analysis for employing such nonlethal torture seems overwhelming: it is surely better to inflict nonlethal pain on one guilty terrorist who is illegally withholding information needed to prevent an act of terrorism than to permit a large number of innocent victims to die,' p. 144. Dershowitz's position, then, is as follows: 1) cost-benefit analysis recommends torture in certain cases; 2) torture is already being done, and we hypocritically pretend to be ignorant of it; 3)

As John Kleinig noted in a paper on the mysterious charm of this generic fiction:

> if it takes the ticking bomb argument to justify torture, we might wonder whether it ever justifies any *actual* torture that we might encounter. For, consider what gives the ticking bomb argument such persuasiveness as it has:
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> First, it posits a *known* – and not merely a possible or even probable – threat. Second, there is a *pressing* need for action. Third, the threatened evil is of *enormous magnitude*. Fourth, *only* torture is likely to succeed in getting the information needed to avert the evil. Fifth, the person to be tortured is *the perpetrator* of the threat. And finally, as a result of the torture, the evil is *very likely* to be averted.[13]

Kleinig also immediately shows how such a scenario is *de facto* mobilised to expand the cases under which torture is allegedly legitimately able to be used, and adds that torture is the worst assault on the dignity of the human being imaginable insofar as it effects a 'de-moralisation' of the individual, who is thereby turned against him- or herself. In this, his arguments rejoin those of Elaine Scarry or John Parry, or any of the others who find torture morally repugnant, an assault on dignity and decency, a contravention of fundamental human rights, and so on. But they thereby also come to share

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therefore, it is at once technically correct, legally right, and morally honest to bring torture back into law. It is also the case that, to the extent that he is thinking politically, Dershowitz follows Bentham's dictum that 'Government throughout is but a choice of evils.' Much like the *nouveaux philosophes'* defense of human rights as 'the lesser evil,' Dershowitz's position therefore evinces its essentially legal-technocratic nature; underneath this position, is a metaphysical position consistent with what Alain Badiou has denominated 'democratic materialism.' Dershowitz's position is essentially shared by other commentators, such as Adrian Vermeuele and Eric Posner. Richard Posner is even prepared to say that torture is clearly legitimate if its purpose is to 'ward off a great evil,' *Not a Suicide Pact: The Constitution in the Time of National Emergency* (Oxford: Oxford University Press, 2006). Indeed, we find the following statement: 'Even torture may sometimes be justified in the struggle against terrorism, but it should not be considered legally justified. A recurrent theme of the book is that a nonlegal "law of necessity" that would furnish a moral and political but not legal justification for acting in contravention of the Constitution may trump constitutional rights in extreme situations,' p. 12. One can, incidentally, see how the proliferation of minutiae themselves function to occlude the extremity and clarity of the proposals, shifting the debate onto other grounds. One dominant line, common to the discussants aforementioned, runs something like this: of course torture is bad, but it's sometimes better than the other options, so we may as well, nay, indeed we must use it, and the only real question then is whether we do it legally or covertly….

13   J. Kleinig, 'Ticking Bombs and Torture Warrants,' *Deakin Law Review*, Vol. 10, No. 2, p. 616.

a peculiar feature with their adversaries who, as Richard Matthews remarks, 'defenders of torture curiously focus on the ethics of specific decisions or acts of torture,' that is, on individual decisions.[14] Moreover, as David Luban puts it, 'the ticking bomb begins by denying that torture belongs to liberal culture, and ends by constructing a torture culture.'[15] One can certainly see Luban's diagnosis confirmed in the most recent disquisitions on the subject.

But there are several further features of the scenario which need to be addressed. First, it is at once surprising and unsurprising to find the origins of this example in the work of none other than one Jeremy Bentham, whose 'Of Torture,' which seems to have been part of a longer work titled *Plan of a Penal Code* dating from the late 1770s, speaks of the utility of torture in recapturing an arsonist who is going to strike again. One can immediately see how torture is unlikely to be excluded from any utilitarian calculations, on the one hand, but, on the other, how Benthamite technologies are strongly dedicated to minimizing physical punishments in favour of optical-blackmailing ones.[16] It is surely significant to find this example historically linked to democratic modernity itself: it seems that this example arises precisely at the moment when torture was about to disappear officially and from Western Europe.[17]

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14 Matthews, *The Absolute Violation*, p. 10. It is also noteworthy that Matthews, unlike many other legalistic-moral defenders of the prohibition on torture, explicitly refuses any appeal to human rights or to conceptions of dignity; he also remarks how the arguments for torture tend, above all, not to be empirically based, the latter – that is, evidence-based research! – is rather usually a feature of the rhetoric of anti-torture campaigners. It is probably worth noting this feature: the pro-torture camp claim 'realism' for their proposals, although they usually provide no empirical evidence, but imaginary scenarios; the anti-torture campaigners speak of 'principles,' but provide empirical date about the personal, social, political, and spiritual consequences of actually-existing torture practices.

15 David Luban, 'Liberalism, Torture, and the Ticking Bomb,' in Greenberg, p. 36.

16 See also Bob Brecher's book on the subject, entitled *Torture and the Ticking Bomb* (Malden and Oxford: Blackwell, 2007), in which he notes that the 'scenario remains in crucial respects a fantasy; and that the grounds it is said to offer for justifying interrogational torture so as to avoid a putative catastrophe are spurious,' p. x. As he puts it, 'no argument based on a ticking bomb scenario should even get off the ground,' p. 12. As Joshua Dratel also notes, 'the "ticking time-bomb" rationale ignores the fact that the torture approved in the current context occurred well after the detainees' apprehension, and continued for months, if not years, thereafter. Thus, any time-bomb would have ceased ticking, and detonated, long before any torture occurred,' 'The Curious Debate' in Greenberg, p. 112. Professor Twining's 'Bentham on Torture,' *Northern Ireland Legal Quarterly*, Vol. XXIV, No. 3 (1973), gives an atomic bomb example; one can see the enthusiasm among theorists for inventing their own little version of the sophism.

17 The lack of *political* understanding continues to vitiate contemporary utilitarian accounts in quite extraordinary ways. Take Fritz Allhoff's *Terrorism, ticking time-bombs and torture: a philosophical analysis* (Chicago: University of Chicago Press, 2012), which examines a range of arguments, from Bentham's claims about the scenario to its contemporary critics. Claiming that 'approaching the torture debate by placing a premium on the lives of innocents – rather than the putative rights of suspected terrorists – recasts it in a morally significant way.' Aside from the way in which such an assertion clearly and immediately removes all rights from 'suspects' (i.e., those who have never been found guilty of any crime), Allhoff claims to: a) give a rigorous,

In addition, however, to the historical emergence of this sophism at the very moment that the conundrum this sophism purports to raise has de facto been excluded from real political possibility, we should also mention that torture is thereby essentially linked to a radical experience of the multiplicity of possible futures, that is, of the opaque heterogeneity of anticipated possibilities. With Romanticism, philosophy – as Foucault himself notes – starts to become first and foremost a philosophy of time, and the future above all as an index and emblem of negativity that hollows out as it necessitates the plans of the present.[18] One derived logic of Romantic modernity is therefore that of *technical assaults on the future* or what is, strictly speaking, a *pre-emptive speculative strike*. This is why Levin, in the article I cited above, can so easily announce that 'I am advocating torture as an acceptable measure for *preventing* future evils,' and that '[b]etter *precedents* for torture are assassination and *pre-emptive* attack' [my emphases]. In accordance with this logic, of course, it's hard to know why you couldn't torture everybody on the planet immediately, just to make sure. But the point stands: torture is a political technique directed against time. It is surely the solidarity of this technico-legal consideration of torture with a generalised technocratic ethos of risk-management that supports the fantasy of its proponents that the scenario can constitute a 'realism' at all. Which leads us to another fundamental proposition: *the disappearance of torture from the legal system immediately gives rise to the conviction that the laws* against *torture are themselves antiquated and anachronistic, 'unrealistic.'* The paradox of the abolition of torture is that its very abolition comes to seem unrealistic in the space that that abolition opens up.

In being so, or being considered so, this does something to the status of torture itself. For the very calculations made by dirigeants – from Bentham's own 'felicific calculus' to the mathematically-modelled insurance schema of 'risk society' –depend on their desiring to remobilise a forbidden technique

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purely 'philosophical' account of the moral issues; b) place the debate back where it belongs in the context of contemporary terrorism; c) thereby emphasize, not the rights of those who are to be tortured but those who may be saved by such torture; d) does so from a utilitarian perspective. But Allhoff then misses entirely the properly *political* dimensions of the ban on torture, as he quite rightly queries the rights-based discourses that today are deployed in support of the latter; moreover, his shift between the allegedly 'philosophical' (quasi-logical) accounts of arguments and 'actual' situations becomes symptomatically and self-confessedly rhetorical, e.g., 'the point needs only to be that torture operates on a faster timetable than the alternatives' (146)….even though it admittedly may not be fast enough. This, *stricto sensu*, is tantamount to an argument for torturing in the dark. Presumably not coincidentally, Allhoff's book comes with a back-cover testimonial from none other than John Yoo, perhaps best known for his role in the US 'Torture Memos' advising President George W. Bush.

18   M. Foucault, *Power/Knowledge: Selected Interviews 1972-1977*, ed. C. Gordon (New York: Pantheon Books, 1980), pp. 149-150.

whose limits themselves thereby vanish. As Bentham admits of this aspect of torture, 'The Quantity of Torture is indeterminate.' What this means is clear, at least, to Bentham: that torture can have no particular codification that ensures its effectiveness; its effectiveness can be gauged only by results. As such, the paradox is that, precisely in order to assure oneself of torture's clarity and utility, what constitutes torture in terms of techniques, times, quantities of pain, etc., *must* become obscure. It is Bentham's probity of thought in this regard that is surely the reason why he vacillated on the benefits of torture throughout his life; and, moreover, why Luhmann, unlike those who proselytise for torture on the basis of such scenarios, concludes that it is properly undecidable. Luhmann is in this the true heir to Bentham insofar as he maintains that the scenario *cannot not continue to arise* in functionally-differentiated societies such as our own, precisely because systems-operations are and must be irreducible to moral considerations, and that *all* arguments for or against torture can therefore and thereafter receive no resolution.

I would like to add two further points here. The first is to ask: given the ubiquity of and enthusiasm for torture historically, how did people ever come to think that an absolute ban on torture was the only appropriate state of affairs?[19] Russell Grigg and I have posed this question from the standpoint of psychoanalysis.[20] On the basis of this approach, Grigg and I would answer: the struggle for democracy as equality.[21] To this end, we isolated a number of propositions that we consider historically invariant:

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19   This question is rarely posed, even by serious scholars of the historical record: take C.J. Einolf's recent article 'The Fall and Rise of Torture: A Comparative and Historical Analysis,' *Sociological Theory*, Vol. 25, No. 2 (2007), pp. 101-121. Part of the problem is surely the lack of properly *political* understanding by the sociologists and lawyers who, despite their often-stunning erudition and insights, cannot therefore make the properly *political* connections. See, also in this lineage, somebody like Sanford Levinson who in 'Slavery and the Phenomenology of Torture,' *Social Research*, Vol. 74, No. 1 (2007), pp. 149-168, brings the two together as evidence of a drive to sovereign control, yet in doing so, has simply restated an ancient truism. One of the commentators who has put the liberal defence in genuinely political terms is Luban: 'I am arguing that torture is a microcosm, raised to the highest level of intensity, of the tyrannical political relationships that liberalism hates the most,' p. 39.

20   J. Clemens and R. Grigg, 'Psychoanalysis and the Crime of Torture,' *Australian Feminist Law Journal*, Vol. 24 (2006), pp. 159-175; republished in M. Kulkarni (ed.), *Interdisciplinary Perspectives on Political Theory* (Delhi: Sage, 2011), pp. 236-259. See also J. Clemens, 'You have the right to remain silent,' *Heat*, No. 23 (2010), pp. 7-21.

21   For exemplary accounts of the actual role played by torture in democracy, see D.M. Rejali, *Torture and Democracy* (Princeton: Princeton University Press, 2007); Jinee Lokaneeta, *Transnational Torture: Law, Violence and Power in the United States and India* (New York: New York Press, 2011); as well as the Einolf article already cited. While the former two accounts in particular track the historical actualities of torture under liberal democracies in detail, including making the point that torture returns in democracy *as* exception, what their studies at once rely on yet underplay is that it is only democracy, of all known political systems, that makes *in principle* the exclusion of torture one of the constitutive elements of its inspiration, definition

- psychoanalytically speaking, there is nobody who does not enjoy the spectacle of torture, albeit often in the mode of denegation or disavowal;
- torture is politically the paradigm of arbitrary power;
- freedom of speech is not and should not be the right to say anything, but rather the right *not* to have to speak;
- torture and pre-publication censorship are *essentially* twinned;
- one essential element of democracy is the *exclusion* of torture as its necessary condition;
- the existence of slavery within any society in general is defined by a person's *torturability*;
- one universal wrong of torture is its *confusion-power* (e.g., confusion of sense and reference, aims and ends, actuality and potentiality, persons and voices, etc.)

Let's note that these are not really 'ethical' propositions in the common acceptation of ethics today. We refrain from speaking of the inherent or essential wrong of cruelty to others, of the mutilation of bodies, of the psychological consequences of such practices – although these are of course to be condemned. But our point was to speak of the specifically *political* dimensions of torture.[22]

This point is often occluded in the literature, including for reasons of legal or philosophical specialisation, yet can be rendered legible with a slight shift in optic. In the US context, for example, Jeremy Waldron has argued that 'the rule against torture operates in our law as an archetype – that is, as a rule which has significance not just in and of itself, but also as

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and practice. This is why, in my opinion, they mistake the *animus* of all the quite extraordinary routines by which liberal democratic officials constantly seek to reintroduce, deny, or redefine torture as not essentially anti-democratic acts, but a flaw of the system itself. To my mind, this is where psychoanalysis is indispensable: these self-declared 'democrats' are in fact essentially anti-democratic, and need to be re-apprised of the fundamentally political elements of democracy's principled exclusion of torture. On the other hand, psychoanalytically speaking, one would also have to agree that the 'repression' of torture in democracy is itself a sign of a modality of treating torture that allows for its covert return.

22   In other words, Naomi Klein is right to assert that, 'The widespread abuse of prisoners is a virtually foolproof indication that politicians are trying to impose a system…that is rejected by large numbers of the people they are ruling. Just as ecologists define ecosystems by the presence of certain "indicator species" of plants and birds, torture is an indicator species of a regime that is engaged in a deeply anti-democratic project, even if that regime happens to have come to power through elections,' *The Shock Doctrine: The Rise of Disaster Capitalism* (London: Penguin, 2008), p. 127.

the embodiment of a pervasive principle,'[23] and this comes somewhat close to the position offered by José Alvarez in his introduction to 'Torturing the Law': 'Lawyers – of all people – should not be addressing torture and cruel, inhuman, degrading treatment as if this were just another policy choice over which reasonable, civilized people can disagree.'[24] However, and this is one of the significant aspects of the contemporary discussions of torture – in fact, of the post-Romantic discussions more generally – even those against torture reason according to a radical depoliticisation of the theme, indeed, through a philosophical, moral and/or legal treatment of the theme.[25] This is as true for Waldron as it is for Levin, for those who take a stringently moral position or for those for whom the ticking bomb scenario comes to be the only universally-recognised exemplum: in other words, the very democracy that excludes torture also occludes the reasons for such an occlusion from its subjects. (The 'Enlightenment' is occasionally blamed for this occlusion, for instance by historians such as John Langbein).

That Grigg and I were able to make this point about the political status of torture by means of psychoanalytic theory also seems to us significant. How could psychoanalysis, which is so often incapable of dealing with political institutions and problems in any plausible way, nonetheless be so incisive in this particular context? Precisely because psychoanalysis deals essentially with the places at which speech and the body meet. This is self-evidently the same place upon which torture operates. Moreover, this recognition

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23 J.E. Alvarez, 'Torturing the Law,' *Case Western Reserve Journal of International Law*,' Vol. 37, No. 2 & 3 (2006), p. 175.

24 See J. Waldron, 'Torture and Positive Law: Jurisprudence for the White House,' *Columbia Law Review*, Vol. 105, No. 6 (October 2005), p. 1687. One can see evidence of the shift towards Waldron's dystopia in the laws regarding rendition; see A. W. Clarke, 'Rendition to Torture: A Critical Legal History,' *Rutgers Law Review*, Vol. 62, No. 1 (Fall 2009), pp. 1-74. See also the book version in J. Waldron, *Torture, Terror and Trade-Offs: Philosophy for the White House* (Oxford: Oxford University Press, 2010).

25 Exemplary here would be Henry Shue's moral arguments in 'Torture,' *Philosophy and Public Affairs* (1978), as well as his response to the ticking bomb scenario in 'Torture in Dreamland: Disposing of the Ticking Bomb,' *Case Western Reserve Journal of International Law*,' Vol. 37, No. 2 & 3 (2006), pp. 231-239. What Shue finds the scenario misleading insofar as it both idealizes and abstracts: 'Idealization adds sparkle, abstraction removes dirt,' p. 231. As Shue puts the alleged realism of the legal licensing about torture as helping with its restriction, 'Are we to believe that America is likely to be the first alcoholic in history who can take only one drink?' (234) For Shue, 'torture is an institution' (236), whose use will 'metastatize' throughout the social body, and, not least, eats taxpayer's money. Shue also points to the moral blackmail inherent in the scenario: you who deny the realism of this scenario are too squeamish to have any plausibility in its discussion! Shue therefore concludes: 'I now take the most moderate position on torture, the position nearest to the middle of the road, feasible in the real world: never again. Never, ever, exactly as international law indisputably requires,' p. 238. See also the other articles in the same issue of the journal, which is dedicated to the problem of torture.

also enables something further to be said about psychoanalysis itself. If democracy requires the exclusion of torture as the fundamental guarantee of free speech, psychoanalysis ratchets up this requirement to its impossible limit: free association, the 'fundamental rule' of psychoanalysis, shows that such free speech retains traces of the very torture it repudiates, and that the elicitation of such speech comes at a cost that cannot itself be spoken. As such, psychoanalysis is at once the unprecedented exacerbation of democratic principles and their radical subversion.

But this brings me to my second point, the one I will focus on here: the very popularity of the ticking-bomb scenario and its interrogational, informational arguments for torture masks something that is perhaps more sinister and unspeakable. For it is not that contemporary torturers are able to extract a rapid and effective confession from suspects by the judicious and restricted use of new technologies; it is that the new technologies of torture render all information-gathering impossible by rendering their subjects, in the language of military PR, neutralised. In this regard, one would have to say, echoing Luhmann, that we already inhabit thoroughly post-democratic societies, that these societies are indeed without any fundamental norms, and that a new dispensation of the torture-polity situation is at the heart of these developments. Such a dispensation no longer hinges on the elicitation of speech, but upon the absolute obliteration even of its possibility.

I will adduce some evidence, offer some arguments, and draw some conclusions about these propositions. To do this, I rely here upon the work of Giorgio Agamben on the powers of language, and I will give a brief exegesis of three crucial moments in Agamben's work which have a direct bearing on the question of torture: one drawn from his recent short book, *The Sacrament of Language: An Archaeology of the Oath*; one from the short essay 'K,' published in English in a collection I co-edited with Nick Heron and Alexander Murray; and from *Remnants of Auschwitz*, essentially Agamben's study of Holocaust testimony. Peculiarly, although this is perhaps due only to my ignorance rather than to the actual state of affairs, it seems that there is as yet no scholarship on this question in Agamben. I will be treating Agamben's extracts in reverse order of their appearance, before concluding with some remarks about the consequences for political life today.

3. *The Sacrament of Language: An Archaeology of the Oath*

The role of the oath in the formation of political communities has been well-known and well-studied for some time. As John Spurr puts it in 'A Profane History of Early Modern Oaths,' 'Oaths bind lovers, just as they adjudicate between litigants. They are constitutive of communes, gilds,

fraternities, professions and institutions. They are at the heart of covenanting communities and bonds of association.'[26] Oaths, in a word, are speech-practices that bind individuals to communities, at once sacred and profane. As one might expect, recent studies in the field – the ones I know best concern early-modern England – tend to effect a double move. The first is to mobilize a theory of performatives to account for oaths; the second, connected with the first, is to insist on the situated nature of the use of oaths, which means that part of the point is to avoid undue metaphysical presuppositions or disavowed anachronism.[27] But this sort of historical polemic is foreign to Agamben.

As Agamben notes of the oath in general, it is indissociably an affirmation, an invocation, and a profanation.[28] As such, the oath precedes received divisions between magic, religion and law that have hitherto governed – and, as Agamben demonstrates, often severely bungled – its study. Agamben typically pinpoints a key problem in the relevant scholarship, showing how this scholarship falsifies its own evidence to the extent that disputes within the scholarship come to mirror each other without realising it. He proceeds to isolate the key features of the problem, and, by way of close analyses of the crucial texts, turns them towards the paradoxes of its invariance. Agamben seeks the exposure of an *arché* within immanence, not the transmission of a hermetic transcendence. As he puts it, 'the *arché* is not a given, a substance, or an event but a field of historical currents stretched between anthropogenesis and the present, ultrahistory and history.'[29] Here this also means: don't think that the truth of words can be found outside words themselves. But it also means: don't think that an attentiveness to allegedly contextual specifics relativises the operations within and upon language.

It is with this principle in hand that Agamben unlocks the enigma of the oath as that primordial function whereby speaking beings try to curtail the irreducible possibility of language's perjuries: the 'proper context of the oath is therefore among those institutions....whose function is to performatively affirm the truth and trustworthiness of speech.'[30] As such, an oath can only be an oath of allegiance to a particular office on the basis of this prior

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26 J. Spurr, 'A Profane History of Early Modern Oaths' in *Transactions of the Royal Historical Society* (Cambridge: Royal Historical Society, 2001), p. 47.

27 See, for example, 'often unexamined perspectives can impose an anachronistic structure on the past,' Conal Condren, *Argument and Authority in Early Modern England: The Presupposition of Oaths and Offices* (Cambridge: Cambridge University Press, 2006), p. 11; D.M. Jones, *Conscience and allegiance in seventeenth century England: the political significance of oaths and engagements* (University of Rochester Press, 1999).

28 G. Agamben, *The Sacrament of Language: An Archaeology of the Oath*, trans. A. Kotsko (Stanford: Stanford University Press, 2011).

29 Agamben, *The Sacrament of Language: An Archaeology of the Oath*, p. 11.

30 Ibidem, p. 65.

operation: the oath is required as a self-reference of language to language within language before any putatively reliable reference to the world can take place. Agamben: 'The oath seems, then, to result from the conjunction of three elements: an affirmation, the invocation of the gods as witnesses, and a curse directed at perjury.'[31]

The oath, a supplemental ritual declaration, expressed as a futile but necessary attempt to stabilize the insuperable rift between words and things, inscribes its own futility in its very expression by means of the curse. Some people care more for grammar than they do for God, Augustine complained; God, as Nietzsche added, *is* a function of grammar. For Agamben, 'God' is a name that humans give to the hope that names can reliably name at all, *de jure* if not *de facto*. But God is then the name for the name of everything that cannot not be taken in vain. For if 'the connection that unites language and the world is broken, the name of God, which expressed and guaranteed this connection based in blessing, becomes the name of the curse, that is, of a word that has broken its truthful relation to things.'[32] As Jacques Lacan constantly essayed to remind his auditors – and Lacan, not to mention psychoanalysis more generally, is possibly the true, if well-secreted prime precursor of Agamben's work – you can't speak without believing in a God you also can't help but betray in and by that very utterance.[33]

But this gives us a real problem. For if 'every oath swears on the name par excellence, that is on the name of God, because the oath is the experience of language that treats all of language as a proper name,'[34] then how can one speak at all without implicitly participating in the oath? Silence, or showing in silence, can become one attempt to escape this situation; inventive expressions of senselessness is another. But the first, a recurrent tactic of what Alain Badiou would call 'anti-philosophy' (from Pascal to Lacan himself), finds its withdrawal towards muteness becoming indiscernible from that of the victims of the powers it would contest. As for the latter, we find a Romantic problematic of poetry (or artistic creation) establishing the very politics that

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31 Ibidem, p. 31.

32 Ibidem, p. 42.

33 See J. Lacan, *The Seminar of Jacques Lacan, Book XX*, trans. B. Fink (Norton: London and New York, 1999). For Agamben, 'If, in polytheism, the name *assigned to* the god named this or that event of language, this or that specific naming, this or that *Sondergott*, in monotheism *God's* name names language itself,' *The Sacrament of Language: An Archaeology of the Oath*, op. cit., p. 49. A Bataillean remark: it is presumably of some interest too, that, while oaths have primordially involved the utterance of the names of divinities shorn of their semantic context, the rather risible flavour generated today by the utterance of the name of God compared to the banal obscenity of the word 'shit!' must make one think of the equation shit = God, or, at least, our own post-Christian God.

34 Ibidem, p. 53.

come to foreclose it. Hence, a third way: the practice of philosophy itself, which, in Agamben's words, 'is constitutively a critique of the oath: that is, it puts in question the sacramental bond that links the human to language, without for that reason simply speaking haphazardly, falling into the vanity of speech.'[35]

Yet it is this point that the principle of immanence that enables Agamben's insights in this particular work also curbs them, for it forgoes the question of the *crossing* of the body and its speech. For what of those figures who are excluded from swearing an oath at all, but who are nevertheless required to appear as the subjects of a legal process in which testimony can be given only on oath? I am thinking here of the figure of the slave, whose testimony in ancient law could only be admissible if it had been extracted by torture, as Agamben himself has noted elsewhere (of which more below). Yet he does not acknowledge that torture and the oath are necessarily, if asymmetrically, bound together: on his own terms, torture must be the shadow bodily accompaniment of the oath, its foundation and truth. It is thus no wonder today, when the oath has fallen into desuetude, that torture is explicitly back on the agenda even for those democratic states which had prided themselves on their thoroughgoing rejection of it. Without any trust in oaths – indeed, having repudiated almost altogether their function and efficacy – our contemporary materialist polities can imagine no other recourse than direct psychophysical incursions into bodies in a forlorn and terrifying attempt to extract 'reliable' 'information.' This enables us to add to our discussion of the ticking-bomb another, perhaps unexpected corollary: those who argue for the good of torture today have at once unconsciously registered a serious transformation in the status of language, the loss of the efficacy of the oath, and, panicked, betray their own impotence and thoughtlessness precisely by trying to reinscribe the lack within the 'natural' 'human' body itself. So if Agamben does not name torture as such as the corporeal underlining of the oath, he has nonetheless implicitly provided a profound explanation for torture's recent re-emergence on a global scale. It is now to another part of Agamben's *oeuvre* to which I turn, in which he explicitly discusses the role of torture in law.

4. K.O.

It is precisely because Agamben had already dealt with the question of torture that its absence from his book on oaths is so noteworthy. One suspects that this is partially due to the very difficulty of the articulation. Yet, in an essay simply denominated 'K,' and dedicated to a doubled reading of Franz

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35 Ibidem, p. 72.

Kafka's *Trial* and *The Castle*, Agamben speaks directly of this. Noting that the letter K for *kalumniator* was branded on the forehead of those found guilty of bringing false accusations in Roman Law, Agamben makes this insight the 'key' to the *Trial*: 'Every man brings a slanderous trial against himself.'[36] In doing so, self-slander 'calls into question the principle itself of the trial: the moment of accusation,' 'it puts guilt into question,' and arraigns the law itself at the very threshold of its operations. For Agamben, 'the accusation is, perhaps, the juridical "category" par excellence (kategoria, in Greek, means accusation)….The law is….in its essence, accusation, "category."'[37]

The paradox is extraordinary: the false accuser has charged himself; if he is guilty, he is innocent; if innocent, guilty. Or, more precisely, 'guilt does not exist, or rather, the only guilt is self-slander, which consists in accusing oneself of a non-existent guilt (which is to say, of one's own innocence – and this is the comic gesture par excellence).'[38] Agamben even discerns a triple operation in K's actions: he slanders himself; he colludes with himself in the slander; and he gives way on his own self-slander. As such, this is a 'strategy that aims to deactivate and render inoperative the accusation'[39] – *from the point of the accusation itself.*

Such slander, therefore, must be distinguished from confession. As Agamben writes:

> While in the law of the republican era confession was admitted with reservations and used more to defend the accused, in the imperial era, above all for crimes against power (conspiracy, treason, plot, impiety against the ruler), but also for adultery, magic and illicit divination, the criminal procedure involved the torture of the accused and his slaves in order to extort a confession from them. 'To extract the truth' (*veritatem eruere*) is the emblem of the new juridical rationality that, tightly binding confession and truth, makes torture – in cases of *lèse majesté* extended even to witnesses – the probatory instrument par excellence. Hence the name *quaestio* that designates it in juridical sources: torture is an inquiry into truth (*quaestio veritatis*)….[40]

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36 G. Agamben, 'K' in J. Clemens et al. (eds), *The Work of Giorgio Agamben* (Edinburgh: Edinburgh University Press, 2008), p. 14.

37 Ibidem, 'K,' p. 15.

38 Ibidem, 'K,' p. 14.

39 Ibidem, 'K,' p. 16.

40 Ibidem, 'K,' p. 18.

We are thus dealing with not one, but two paired, linked oppositions. On a first level, that of linguistic acts, we have the paradox of self-slander, which stalls and evades the operations of law qua law of truth, against the act of confession, which is the paradigm of the action of law. On a second level, that of bodies, we have the peculiar continuation of freedom of movement – K's '"arrested" condition,' as Agamben notes, 'does not entail any change in his life'[41] – against, not a death-sentence, but the use of torture. Indeed, speaking of the murderous, malfunctioning device in *In the penal colony*, Agamben remarks that 'the true purpose of the machine is…torture as *quaestio veritatis*; death, as often happens in torture, is only a collateral effect of the discovery of truth.'[42]

A grimly comic struggle ensues between self-slander and self-condemnation, the dissolution of cause and the violent inscription of marks upon the body, in the course of which these antitheses merge and become indistinguishable. Hence the strategy of self-slander fails; indeed, becomes in turn the strategy by which the law turns its own groundlessness into its justification. The trial opened by the accusation will end inevitably in a confession, or in a torture-death, which comes to the same thing.

Before I proceed to my third example, let me note a few aspects of Agamben's procedure. Above all, he takes literary texts absolutely seriously as providing the most profound analyses of the relation between life and the law. Kafka's text shows precisely what it is unable to say without succumbing to precisely the operations of the law it seeks to evade. In its own failure, it nonetheless enables what it shows to be said philosophically, that is, a saying which seeks to break the bond between law and language without falling into what W.H. Auden might have called 'elderly rubbish' or 'drivel.' Or, to put this another way, philosophy is an experiment with examples of language that exceed the grip of properties (i.e., those phenomena which can be brought under a law identified by science). In doing this, philosophy testifies to a very peculiar experience which it does not itself have, but which it discerns above all in poetry: a split and impossible experience of the non-relation between language and the living body.

5. The *Muslim* in Auschwitz

The key text of Agamben's in this regard is *Remnants of Auschwitz*, perhaps the book of Agamben's that has come in for the most vocal criticisms. More particularly, the examination that he provides there of the figure widely

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41 Ibidem, 'K,' p. 16.
42 Ibidem, 'K,' p. 19.

known as the *Muselmann* has proved especially contentious. So Ruth Leys charges Agamben with an illicit junking of the affect of guilt in favour of an analysis of shame.[43] J.M. Bernstein claims that Agamben aestheticises the Muselmann's 'fate for the sake of a metaphysics of language.' Mesnard and Kahan similarly charge Agamben with misunderstanding the historiographical debate and aestheticising the figure. Marianne Hirsch and Leo Spitzer speak of this 'deeply problematic argument of Giorgio Agamben.'[44] On the other hand, even apparently friendly commentary, such as that as Slavoj Zizek, seems to miss the point.[45] Perhaps the harshest critic – but also, by that very mark, the most illuminating – is perhaps Dominick LaCapra, who writes in

> Heidegger is probably the most important intellectual reference point for Agamben, yet Agamben does not try to sort out the relations or nonrelations between Heidegger's philosophical and political orientations, notably the implications of his notorious postwar silence, or at most equivocal remarks, concerning Auschwitz. More generally, I argue that philosophy and theory in Agamben are most importantly quasi-transcendental and postapocalyptic….in Agamben's conceptualization of the new, history, including experience, is voided of specificity and counts at best as an instantiation of transhistorical theoretical concerns and postapocalyptic apprehensions.[46]

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43 R. Leys, *From Guilt to Shame: Auschwitz and After* (Princeton: PUP, 2007), esp. ch. 5; see also E.M. Vogt, 'Catastrophic Narratives and Why the "Catastrophe" to Catastrophe Might Have Already Happened,' in S. Jottkandt et al. (eds), *The Catastrophic Imperative* (Houndsmills: Palgrave Macmillan, 2009), pp. 26-52.

44 M. Hirsch and L. Spiter, 'Holocaust Studies/Memory Studies,' in Susannah Redstone (ed.), *Memory: Histories, Theories, Debates* (Fordham University Press, 2010), p. 398.

45 So Zizek writes, regarding the 'Muslims,' 'This is why one should insist more than ever on their humanity, without forgetting that they are in a way dehumanised, deprived of the essential features of humanity: the line that separates 'normal' human dignity and engagement from the Muslim's 'inhuman' indifference is *inherent to 'humanity*,' which means that there is a kind of inhuman traumatic kernel or gap in the very midst of 'humanity' itself,' *Did Somebody Say Totalitarianism? Five Interventions in the (Mis)use of a Notion*. London: Verso, 2001), p. 77, and goes on to compare their situation to that of M. Valdemar in E.A. Poe's tale. I have written elsewhere about just how politically compromised this comparison is, J. Clemens, 'The Politics of Style in the Work of Slavoj Zizek,' in G. Boucher et al. (eds.), *Traversing the Fantasy: Critical Responses to Slavoj Zizek* (Aldershot: Ashgate, 2005), pp. 3-23.

46 D. LaCapra, *History in transit: experience, identity, critical theory* (Ithaca: Cornell University Press, 2004), pp. 12-13. LaCapra misunderstands Agamben to the point that he can say of the latter's conception of the *Muselmann*: 'The result is an unsituated, extreme mode of victimology or identification with the abject and utterly disempowered,' p. 180. In a similar vein, Robert Eaglestone writes that 'to concentrate on the Muslemanner [sic.] as the "event" at the heart of the camps is open to question…The point is not that the focus on the Muslemanner [sic.] is wrong, but any focus on any event of the Holocaust is already the result of a theory-laden choice,

I think all of these responses, different as they are, are not only radically insufficient (even in the simplest sense of clearly not having read what Agamben has written), but their disorder is precisely symptomatic of what Agamben is trying to analyse. Indeed, the disorder of *Remnants of Auschwitz* itself which, as a glance at the text will immediately testify, fails to achieve the consistency of, say, *Homo Sacer*, *The Time that Remains* or *The Sacrament of Language*, is itself testimony to the difficulty of this subject-matter.

Indeed, this is one of the first phenomena that Agamben notes in his discussion: that 'It is a striking fact that although all witnesses speak of him as a central experience, the *Muselmann* is barely named in the historical studies on the destruction of European Jewry.'[47] Relying on the testimony of witnesses themselves, including Primo Levi and Jean Amery – and not only or primarily upon subsequent historiography, Agamben attempts to bring to light some of the consequences of the appearance of such a creature. As survivors such as Levi testify, if the Nazis perpetrated mass industrial genocide in the death camps, another kind of personage emerged as an unintended, unexpected by-product. Often denominated the '*Muselmann*' – although there were regional variations in the jargons of different camps – this personage is crucial for Agamben insofar as what philosophy had always maintained was the essence of the human (its capacity for language) had been fully stripped from the *Muselmänner*. The *Muselmann survived* as a biological organism, but could no longer be tolerated as human not only by the Nazis, but by fellow-camp inmates themselves.[48] The classical figure that Levi invokes in this regard

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and will already lead to certain conclusions and answers,' *The Holocaust and the Postmodern* (Oxford: Oxford University Press, 2004), p. 322. Eaglestone continues that, second, Agamben could also look at colonialism and, third, from a Levinasian perspective that his 'bare life is too bare, too much like Heidegger's abstract *Dasein*,' p. 323. Such remarks entirely fail to understand Agamben's attention to the relationships between language and the body, which is at once the thread of his examinations, and which then are punctuated by irreversible events: the Muselmann is that for 'Auschwitz' precisely because it is: i) an unintended byproduct (i.e., not consciously planned, an 'accident') of; ii) industrial genocidal processes (i.e., technologically novel), which; iii) exacerbates by an unprecedented actualisation the separation between language and the body. Moreover, such a focus hardly 'will already lead to certain conclusions and answers,' given that Agamben's 'focus' (which he takes from the testimonies of camp survivors themselves) leads to genuinely *novel* propositions about the operations of Nazi genocide. It is precisely this that I believe offends those in the 'discipline' of 'Holocaust studies.'

47 G. Agamben, *Remnants of Auschwitz: The Witness and the Archive*, trans. D. Heller-Roazen (New York: Zone, 1999), p. 34.

48 Agamben had briefly invoked this figure previously in the last moments of *Homo Sacer*: '*der Muselmann* – a being from whom humiliation, horror, and fear had so taken away all consciousness and all personality as to make him absolutely apathetic (hence the ironical name given to him).... He no longer belongs to the world of men in any way; he does not even belong to the threatened and precarious world of the camp inhabitants who have forgotten him from the very beginning. Mute and absolutely alone, he has passed into another world without memory

is that of the Gorgon, the creature that to look on directly entails one's own paralysis and destruction, and defines the *Muselmann* as 'he who has seen the gorgon.' Agamben in fact reads the apparition of this figure as an absolute limit, 'the final biopolitical substance to be isolated in the biological continuum.'[49] Why? Because the Western philosophical tradition had always considered the 'essence of man' to be the animal with language – it is precisely this characterisation that Agamben has visited in an earlier text, *Language and Death*[50] – what the *Muselmann* literally incarnates is that a creature, the 'human,' a biological creature endowed with language, can be stripped of its essence in actuality. This is why Agamben can remark that 'The *Muselmann* is not only or not so much a limit between life and death; rather, he marks the threshold between the human and the inhuman.'[51] The human being can thereafter be consigned by the most extreme expressions of sovereign power (the camps, contemporary torture) to a kind of undead, unspeaking subsistence. The potential for speech (to speak or not) had therefore been expropriated from the *Muselmänner;* it would be impossible for a *Muselmann* to say 'I am a *Muselmann*.' As a consequence, survivor testimonies exhibit an extraordinary structure. They testify in language to an experience which the writers state that they did not and could not have had, that is, the experience of being-stripped of the possibility of having an experience at all (i.e., language). This at once reveals something essential about the relationship between human language-use and political power (humans beings can be separated by power from their own essence) as they contest it (the witness confronts and resists this possibility).[52]

All the other extreme procedures familiar from the literature – mass extermination, selections, scientific experiments upon inmates, the organisation of the *Sonderkommando* – had had precedents elsewhere, and did not in themselves constitute a radical novelty, but an expansion and intensification of existing political techniques.[53] What the *Muselmann* shows

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and without grief. For him, Hölderlin's statement that 'at the extreme limit of pain, nothing remains but the conditions of time and space' holds to the letter,' *Homo Sacer: Sovereign Power and Bare Life*, trans. D. Heller-Roazen (Stanford: Stanford University Press, 1998), p. 185. In *Remnants*, he returns to the figure in a much more attentive and disturbing way.

49 Agamben, *Remnants of Auschwitz: The Witness and the Archive*, op. cit., p. 85.

50 See G. Agamben, *Language and Death: The Place of Negativity*, trans. K.E. Pinkus with M. Hardt (Minneapolis: University of Minnesota Press, 1991).

51 Agamben, *Remnants of Auschwitz: The Witness and the Archive*, op. cit., p. 55.

52 This paragraph repeats and extends part of my entry for 'Language,' in *The Agamben Dictionary*, ed. A. Murray and J. Whyte (Edinburgh: Edinburgh University Press, 2011), pp. 118-19.

53 However, see also J.-C. Milner, *Les penchants criminals de l'Europe démocratique* (Paris: Verdier, 2003), in which he notes that the 'Jew' was in fact that creature for whom a new technology (of destruction) was invented.

is that the 'ethical lesson' of the camps is not simply a matter of numbers or of intention or of technology. Leaving aside the well-known difficulties of such accountancy procedures, it's the question of a *remnant* – that which has gone almost undiscussed in the 50 years since Auschwitz. What Auschwitz constituted that was radically and irreversibly new was not simply human corpses in unprecedented numbers, but a structure which *inadvertently* produced humans who-were-no-longer-human as a kind of industrial waste-product. Unfortunately, this also means that – however desperately one would like to keep to these ideals – 'dignity,' 'human rights,' and 'rule of law' are no longer viable categories for thinking through what actually happened, for what has been actualised and cannot be wished away. As Agamben says: 'This is also why Auschwitz marks the end and the ruin of every ethics of dignity and conformity to a norm. The bare life to which human beings were reduced neither demands nor conforms to anything. It itself is the only norm; it is absolutely immanent.'[54] The equal and inalienable rights which derive from the inherent dignity of the human person cannot be viably sustained, even as a legal fiction: the problematic of the survivor has exceeded the frame of the trial, including in the projective forms of reparation- or war-crimes tribunals.

One of the unbearable revelations of Auschwitz is that the *Muselmann*-witness dyad is fundamental to being human: that the human biopolitical substance can be irremediably separated from language as such, from what makes it human. As Jessica Whyte writes, 'Agamben, unlike Heidegger, does not therefore see Auschwitz as simply one among a list of manifestations of technological nihilism, but as something radically new – and what was new was not so much the mass industrial production of death as the creation of the *Muselmann*, as the final point on a biopolitical continuum, beyond which "there is only the gas chamber."'[55] I truly cannot see how this is an 'aestheticization.' What was created inadvertently was subsequently captured technologically: US interrogation techniques are now allegedly able to destroy anyone as a person forever within one hundred hours.[56]

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54 Agamben, *Remnants of Auschwitz: The Witness and the Archive*, op. cit., p. 69.

55 See J. Whyte, *Catastrophe and Redemption: the Political Thought of Giorgio Agamben*, unpublished book manuscript.

56 Through a combination of sensory deprivation, drugs, noise, 'dietary management,' 'sleep management,' electroshock, neurosurgery, etc. See, for a rare public notice of these techniques, N. Klein, 'The US Psychological Torture System is Finally On Trial,' *The Guardian*, 23 February 2007, p. 41.

6. Conclusion

We have recently seen the re-instrumentalisation of the spectre of torture as a device for turning the panic of contingency attendant on the contemporary crisis of state legitimacy into the licensing of arbitrary state power as the solution to this crisis. Indeed, this aspect clearly underwrites the circulation of the Abu Ghraib photographs. These images are not based on any natural language, and hence able to convey their message of universal torturability universally, that is, technically; or, to put this differently, they concern a lesson at the level of perceptibility, not language. Coterminously, torture has now been explicitly legitimated in the oldest democracies through its legal-medical redefinition. Between 2002-2006, The Office of Legal Counsel for the US Justice Department, exemplified by the notorious 'Bybee memo,' enabled torture to emerge 'under the color of law.'[57] It is not so well known but a salient fact that Bybee memo drew on the health benefits clause of the non-US Citizens Statute Title 8 USC Sec. 1369, from the section 'Emergency Medical Condition' to define what separated the cruel, inhumane or degrading from torture, viz.,

> For purposes of this section, the term 'emergency medical condition' means a medical condition (including emergency labor and delivery) manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in –
> (1) placing the patient's health in serious jeopardy,
> (2) serious impairment to bodily functions, or
> (3) serious dysfunction of any bodily organ or part.

So only death, organ failure or serious impairment of bodily functions now counted as torture under this redescription, a redescription which therefore licenses all other practices up to those points. Note that in these cases, all the contemporary available terms for any public debate around torture – the ticking bomb, the necessity to urgently extract information that will save the lives of innocents – has no role to play here whatsoever. Except, that is, for the fact of legitimizing torture by the legitimizing of the discussion about torture.

So the relation between torture and the political that I began by sketching seems, in the wake of Agamben's demonstrations – and all the evidence – exactly as the defenders of torture often suggest, if for completely different

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57 I owe details regarding the Bybee memo and its usage to an unpublished paper by Peter Hutchings, 'Invented Sovereignty and the Bush Presidency,' *Australasian Society for Continental Philosophy Annual Conference*, 14 December 2011.

reasons, archaic. We no longer live in active polities, but in administrative waste-management societies. If democracy has historically defined itself by its repression of torture in order to enable 'free speech' – not simply to be able to say anything in public, but be able to speak publicly or not, in your own name, without coercion – it is now essentially over. Contemporary torture is no longer about the *extraction* of speech from the body, but the absolute and irreversible *separation* of speech from the body. Perhaps this feature alone is enough to render the whole 'debate' utterly otiose. In any case, it seems that Agamben's diagnoses are essentially correct, insofar as they manage to reconstruct a logic for apparently diverse phenomena (the ticking-bomb debate, testimony, oaths, etc.), which then also illuminate certain occlusions, opacities and undecidabilities in the debate. If this is indeed the case, then existing methods of political disputation and contestation will hardly be adequate to the challenge of our own torturing present.