

Overhearing Bartleby: Agamben, Melville, and Inoperative Power

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A Slip of the Tongue: Refugee, Bartleby

In a short essay entitled “Beyond Human Rights” [1993], Giorgio Agamben departs from a paradox he finds in the work of Hannah Arendt: “that the very figure who should have embodied the rights of man par excellence – the refugee – signals instead the concept’s radical crisis.”¹ He argues, following Arendt, that “[i]n the system of the nation state, so-called sacred and inalienable human rights are revealed to be without any protection precisely when it is no longer possible to conceive of them as rights of the citizens of a state.”² Echoing Karl Marx’ position in “On the Jewish Question” [1844], he suggests this is implicit in the “ambiguity of the very title of the 1789 *Déclaration des droits de l’homme et du citoyen*, in which it is unclear whether the two terms [“homme” and “citoyen”] are to name two distinct realities or whether they form, instead, a hendiadys in which the first term is always already contained in the second.”³

“The status of the refugee,” Agamben continues, “has always been considered a temporary condition that ought to lead either to naturalization or to repatriation. A stable statute for the human in itself is inconceivable in the law of the nation-state.”⁴ He argues that the refugee should be considered as a “limit-concept that at once brings a radical crisis to the principles of the nation-state and clears the way for a renewal of categories that can no longer be delayed.”⁵ Industrialized countries today are facing a “permanently resident mass of noncitizens who do not want to be and cannot be either naturalized or repatriated. These noncitizens often have nationalities of origin, but, inasmuch as they

prefer not to benefit from their own states' protection, they find themselves, as refugees, in a condition of de facto statelessness [emphasis mine]." Agamben ends by envisioning a community "in which the guiding concept would no longer be the *ius* (right) of the citizen but rather the *refugium* (refuge) of the singular."⁶

I find it interesting that Agamben uses the phrase "prefer not to" to describe the refugee's condition of statelessness. Although the phrase is neither quoted nor italicized "prefer not to" can be read as a reference to Herman Melville's story "Bartleby, the Scrivener," in which a law-copyist brings a crisis to his employer's offices through his repeated use of the phrase "prefer not to." In the same year in which "Beyond Human Rights" was published, Agamben also wrote an extended commentary on Melville's story entitled "Bartleby, or On Contingency."⁷ Even though nothing suggests that his use of Bartleby's phrase in "Beyond Human Rights" was intentional – perhaps his contact with the scrivener had simply uncannily "affected [him] in a mental way" and gotten him, as with Melville's narrator and characters, "into the way of involuntarily using the word 'prefer' upon all sorts of not exactly suitable occasions"⁸ –, I choose to read Agamben's slippage as an invitation to think of Bartleby as a figure who brings a radical crisis to three debates in critical theory that Agamben's work takes part in: on representative democracy, human rights, and sovereign power.

In "Bartleby, or On Contingency," Agamben reads Bartleby as "the last, exhausted figure" of what Avicenna refers to as "a complete or perfect potentiality that belongs to the scribe who is in full possession of the art of writing in the moment in which he does not write."⁹ Later on in the essay, it becomes clear what Bartleby's ending or exhaustion consist in: the scrivener's potentiality is at the same time potentiality for the opposite. The formula "prefer not to" does not consent; but it doesn't simply refuse either. According to Agamben, it refers to something "whose opposite could have happened in the very moment in which it happened."¹⁰ Bartleby is ultimately not a figure of potentiality, but of a specific mode of potentiality – potentiality that is, at the same time, potentiality for the opposite. Agamben refers to this potentiality as contingency. In the final pages of the essay, he characterizes Bartleby as a messianic figure who has come "to save what was not." He emphasizes, however, that unlike Jesus, "Bartleby comes not to

bring a new table of the Law but [...] to fulfill the Torah by destroying it from top to bottom.”¹¹

The essay on contingency shows Agamben struggling with ideas that he will express much more clearly later on, in his commentary on Saint Paul’s Letter to the Romans, *The Time that Remains* [2000].¹² In this book, but also for example in his *State of Exception* [2003],¹³ it becomes clear that Agamben’s thought is not a thought that aims to destroy the law. What opens up a passage towards justice in these works, is rather the law’s “deactivation and inactivity [inoperosità] – that is, *another use of the law* [emphasis mine].”¹⁴ But what does Agamben mean by this other use of the law? Can this inoperativity (“inoperosità”) fully be understood within the limits of legal thought or political science? I want to address these questions by having a closer look at Agamben’s argument on human rights.

A revised version of “Beyond Human Rights” was published in Agamben’s *Homo Sacer: Sovereign Power and Bare Life*. In a recent article on this book, political scientist and philosopher Andreas Kalyvas points out that “there are two lines of arguments that implicate rights” in Agamben’s work, “two readings that uneasily coexist in Agamben’s text.”¹⁵ While in the one reading, the nation has to “divest” its citizens of their rights in order to reduce them to a life that can be killed without legal consequences, the other argues that the “granting of rights is one of the constitutive operations” by which the nation exercises its “biopower” over the life of its citizens. We find ourselves here on what could be characterized as the political side of Agamben’s writings: the side of sovereign power, law, human rights, bare life, and biopolitics. As Kalyvas makes clear, it’s not a particularly “easy” side to be on: on the one hand, the nation *divests* its citizens of their rights *in order to kill them*; on the other (but does “other” still mean anything here?), it *gives* its citizens rights... *in order to kill them*. It doesn’t seem to matter whether you are with or without rights; as a citizen, you are doomed to live within the biopower of the nation. If we add to this, however, and this is what Kalyvas proposes, “Agamben’s assertion that the new politics will be a ‘nonstatal and nonjuridical politics,’ his vision of the coming community comes dangerously close to the one of an extralegal,

permanent (though sovereignless) exception” that Agamben in “Beyond Human Rights” and *Homo Sacer* is criticizing.

Put simply, Kalyvas’ question is this: does Agamben think human rights – and, by extension, law – are a good thing or a bad thing? Does he consider the state of exception to a desirable or an undesirable state? Against the background of Agamben’s later works, I argue that the problem we are confronting here is essentially a problem of division. In the third chapter of *The Time that Remains*, Agamben discusses a story he finds in Pliny “concerning a contest between Apelles and Protogenes.” “[T]he contest is about a line. Protogenes draws such a fine line that it seems not to have been drawn by the paintbrush of any human being. But Apelles, using his brush, divides his rival’s line in two with an even finer line, cutting it lengthwise in half.” Agamben uses this story to argue that messianism “does not have any object proper to itself but divides the divisions traced out by the law.”¹⁶ Thus, he argues, Paul’s messianism divided the legal division between Jews and non-Jews by adding to it the category of the *non-non-Jew*. As Agamben points out, the significance of this “division of divisions” is that “it forces us to think about the question of the universal and the particular in a completely new way, not only in logic, but also in ontology and politics.”¹⁷

I argue that Pliny’s story also invites us to think the problematic of human rights anew. It seems that for Agamben, the division between “beings-without-rights” and “beings-with-rights” needs to be divided in its turn. Such a division would produce a category of “beings-not-without-rights” – a category that would force us to rethink the assumed universality of (the subject of) human rights. My argument is that Agamben develops the thought of this category first and foremost in what could be characterized as his more literary or literary-philosophical works: in the essay on Bartleby, for example, but also in his commentary on the Letter to the Romans, and in his studies of the end of art, the end of the poem, and the end of man.¹⁸ Echoes of these publications appear in the more political works, however, and it is precisely at those moments that the political argument is pushed to a breaking point, because it stops making sense within the limits of political science. Who, politically or legally speaking, would be those “beings-not-without-rights”? Is Melville’s enigmatic scrivener one of them? And what would be this other use

of the law that, according to Agamben, would open up a passage towards justice? Who would be its agents? In order to engage with these questions, I want to turn now to Melville's story "Bartleby, the Scrivener."

Melville's Democratic Imagination

As many commentators have observed, Melville's account of Bartleby's life is framed by a prologue and an epilogue in which Melville's anonymous narrator reflects on the impossibility of writing precisely such an account. "While of other law-copyists, I might write the complete life," he notes at the beginning of the story, "of Bartleby nothing of that sort can be done." "Bartleby was one of those beings of whom nothing is ascertainable except from the original sources," he writes, noting that in Bartleby's case, these sources "are very small." (*Bartleby*, 3). These claims are repeated at the end of story, when the narrator regrets that he is "wholly unable to gratify" (*Bartleby*, 46) the reader's curiosity. Nevertheless, he closes by offering "one little item of rumor," a "vague report" that has "a certain suggestive interest to him," namely the fact that "Bartleby had been a subordinate clerk in the Dead Letter Office at Washington" (*Bartleby*, p. 46). The narrator's suggestion seems to be that there is a connection between Bartleby and dead letters; perhaps that Bartleby was already dead before he died; was, to speak in the language of Agamben and his commentators, a living dead.

The prologue and epilogue suggest that we are dealing with a narration that is rethinking its own representative power. Before the story begins and after it has been completed, its narrator takes care to point out that the story's subject – Bartleby, the scrivener – interrupts the totalizing aspirations of the biographical project. Instead of offering its readers the full story of Bartleby's life, Melville's account of the "unaccountable" (*Bartleby*, 35) Bartleby is instituted as an "irreparable loss to literature" (*Bartleby*, 3). The prologue and the epilogue realize a kind of "unworking" of the narrator's work: Bartleby forces the narrator to forego the biography's promise of fullness and satisfaction and to emphasize instead its limitations. These limitations are imposed upon the narrator by the story's "chief character" (*Bartleby*, 3), the scrivener, whose "native place"

(*Bartleby*, 25), as Melville puts it, is suggested to be the dead letter office. As the chief character of the story, Bartleby challenges the authority of its narrator. At issue here, and I will return to this below, is the space of the political, at whose center the question of sovereignty arises.

The crisis that Bartleby brings to the narration reflects the scrivener's subversion of the narrator's law-office. Although the narrator, a lawyer, belongs to a "profession proverbially energetic and nervous" (*Bartleby*, 4), he emphasizes that he has never let any of that turbulence invade his peace. His friends and colleagues consider him to be an "eminently safe man" whose first "grand point" is prudence (*Bartleby*, 4); the second, method. Confronted with the afternoon eccentricities of his employee Turkey – eccentricities that he is willing to overlook because of Turkey's quick and steady work in the morning –, he only occasionally and always "very gently" and "very kindly" remonstrates his employee for the blots he drops on the narrator's legal documents (*Bartleby*, 6). His other employee Nippers' morning tooth grinding, hissed maledictions, and continual discontent with the height of his working table the narrator is also willing to tolerate: Nippers writes a neat, swift hand and dresses "in a gentlemanly sort of way" that reflects positively on the office (*Bartleby*, 8).

Bartleby brings a crisis to the easy life of this man of peace. When the scrivener "prefers not to" verify the accuracy of his own copying, the narrator loses his calm: he rises "in high excitement" from behind his desk to "cross the room with a stride" (*Bartleby*, 13). At a later point in the story, when he is calling for Bartleby and receives no answer, he "roars" (*Bartleby*, 19); he also notes that "[h]ad there been anything ordinarily human about [Bartleby], doubtless I should have violently dismissed him" (*Bartleby*, 13). There is something about Bartleby, however, that "not only strangely disarmed me," the narrator notes, "but, in a wonderful manner, touched and disconcerted me" (*Bartleby*, 14-5). Although the story never makes it explicit what this disarming "something" might be, I want to suggest that it has something to do with the "mildness" and "gentleness" of Bartleby's resistance: with the fact that Bartleby, like the narrator, is a man of peace.

Whereas Turkey and Nippers (and also the third employee, Ginger Nut) are noisy and energetic characters, Bartleby appears on the scene as a calm, silent, “motionless young man” who appears to be “of so singularly sedate an aspect” that the narrator hopes “it might operate beneficially upon the flighty temper of Turkey, and the fiery one of Nippers” (*Bartleby*, 11). He expects the scrivener will function as some kind of neutralizer who would save the law-office from the eccentricities of its employees by turning their seesaw-performance into a steady excellence. The neutralization, however, happens elsewhere: whereas the narrator by hiring Bartleby had thought to reinforce his authority, the scrivener instead exposes the narrator’s impotence. “Indeed,” the narrator notes, “it was [Bartleby’s] wonderful mildness chiefly, which not only disarmed me, but unmanned me as it were” (*Bartleby*, 21). The narrator’s authority, which from the beginning of the story seemed to depend entirely on the goodwill of his employees, becomes haunted by Bartleby’s chiefly silhouette; the scrivener’s “wonderful mildness chiefly” denaturalizes the fraternal, androcentric community of the law-office.

The crisis that we found at the level of the narration can be read as a reflection of the story’s portrayal of the crisis produced through the confrontation between two men of peace. The difficulty that Melville’s story presents us with lies in the conceptualization of such a dispute. After all is said and done, the narrator and Bartleby can only remain in their state of differend.¹⁹ The differend demands for the law office to be rethought not as a space of war but as a space of agonistics – a space of “gaming” in which the aim is not to win but to continuously reinvent the game.²⁰ The narrator seems to think that such a reconceptualisation implies a castration. Although at first, he decides to tolerate Bartleby’s subversive behavior, he will ultimately tear himself away from the scrivener, and change his offices. Instead of responding to the demand of the differend by rethinking the law-office as an agonistic space, he decides to move his offices. But what power is there in a peace that cannot acknowledge dispute? By turning away from the differend, by moving his offices away from the place where a peaceful but ultimately irresolvable conflict exists, the narrator – a “Master in Chancery” at the time when the story is taking place (*Bartleby*, 4) – misses out on a tremendous opportunity, namely the

chance, opened up by Bartleby, to conceptualize peace as a position that does not exclude conflict.

I want to translate these conclusions into two closely related *political* points that I argue Melville's story is making. The first one is connected to what Andrew Delbanco refers to as Melville's "democratic imagination."²¹ By its emphatic attention to the limits that Bartleby poses to representation, Melville's story reveals itself to the reader as a critique of the processes of "naming, enumerating, counting,"²² and the fragmentation into closed identities that we see taking place in representative democracies. Within the context of a much older and larger debate on representation, multiculturalism has led to a contemporary political situation in which it has become increasingly difficult to remain indeterminate. The "unaccountable" scrivener, however, demands precisely that: he wants to be present without letting himself be defined, accounted for, explained.

Both Nippers, who thinks of Bartleby's position as a temporal condition, "a passing whim" (*Bartleby*, 18) and the narrator, who would like to return Bartleby to "his native place" (*Bartleby*, 25), are unable to conceive of the scrivener as a person beyond the dichotomy of "naturalization" and "repatriation" that also dominates the condition of Agamben's refugee, and that challenges (according to Agamben) our conception of human rights. It is worthwhile noting, in this context, that Melville's story performs an interesting *humanization* of the scrivener. Whereas in the beginning of the story, the narrator observes that there is nothing "ordinarily human" (*Bartleby*, 13) about Bartleby, his figuration of the scrivener changes over the course of the story and leads him to exclaim at the very end "Ah Bartleby! Ah humanity!" (*Bartleby*, 46) – the use of parataxis suggesting that for him, Bartleby somehow represents humanity as such.

It is interesting to see, however, and this is the second point I want to make, *how* this shift from the inhuman to the human is established. In a passage that is written very much in the same tone as the exclamations I just quoted, Melville's narrator suggests that it was "the divine injunction: 'A new commandment give I unto you, that ye love one another'" (*Bartleby*, 47) that saved him. The reference to the commandment to "love your neighbor

as yourself” allows us to situate Melville’s story in the contemporary debate on the theologico-political in which Agamben’s work, and the dialogue it stages between Walter Benjamin and Carl Schmitt, takes up an important position. In the end, after all attempts to rationalize the scrivener’s behavior have failed, it is religiously inspired “charity” that make the narrator “indulge” Bartleby and allow him to let Bartleby remain in the law-office “for as long as [he] see[s] fit” (*Bartleby*, 34-5). His final decision to remove his offices is taken only under the pressure of “the constant friction of illiberal minds,” he writes, “that wears out at last the best resolves of the more generous” (*Bartleby*, 35). The story shows how the inhuman Bartleby is slowly but surely molded into a figure of humanity as such. This molding is achieved by figuring Bartleby as our neighbor, who we should – according to the divine injunction – love as ourselves.

I would argue that once again, a tremendous opportunity is missed. Whereas the inhuman Bartleby could have allowed the narrator to turn Bartleby into a figure not just of human rights, but rather of inhuman rights, of the rights of the completely other, he instead decides to appropriate Bartleby’s being as the very figure of our common humanity. What we see happening here, and I think this should be resisted, is a version of what Slavoj Žižek has recently referred to as “the ethical ‘gentrification’ of the neighbor.”²³ It is useful to also recall at this point Agamben’s critique of the concept of dignity in the second chapter of *Remnants of Auschwitz: The Witness and the Archive* [1999].²⁴ Shouldn’t human rights first and foremost aim to protect those who have lost all humanity, those who are considered to belong to the community-without-community of the inhuman? Bartleby resists the multiculturalist logic of “naming, counting, enumerating” and the ethico-theological gentrification that dominates our contemporary political climate. Instead, he seems to be inviting something like what Derrida calls a “passive decision,”²⁵ a decision that would be delivered to the other – not to those with rights or those without rights, but to those not-without-rights.

Such a decision, I would argue, begins with listening. In the book *Just Gaming* [1979], Jean-François Lyotard suggests that language for us is first and foremost someone talking. He argues, however, that there are language games in which the important thing

is to listen, in which the rule deals with audition, and he suggests that such a game is the game of the just.²⁶ I want to suggest that Bartleby, who is ultimately forced to quit the narrator's premises and is imprisoned in a section of The Tombs called The Halls of Justice (cf. *Bartleby*, 46), invites a game of listening. It is precisely this speaking as a listener that the narrator in the story fails to achieve. When Bartleby arrives at the office, the narrator "procure[s] a high green folding screen" which is meant to "isolate Bartleby from my sight, though not remove him from my voice" (*Bartleby*, 12). The challenge of the story is to reverse the narrator's intention: to try – even though there is a screen (of time, space, text) blocking Bartleby from our view – *not* to be removed *from the scrivener's voice*.

Bartleby's Formula

So what is it that Bartleby is saying? On the third day of his new job, after Bartleby has already done "an extraordinary quantity of writing," the necessity arises for "having [Bartleby's] writing examined" (*Bartleby*, 12). When the narrator calls out to Bartleby "to verify the accuracy of his copy," Bartleby replies in a "mild, firm voice" that he "would prefer not to" (*Bartleby*, 13). This refusal turns out to be the beginning of a series of refusals that commentators have read as the scrivener's gradual "progress into silence."²⁷ I think it is worthwhile emphasizing, in this context, that Bartleby's first refusal is *not* a refusal to copy. Instead, he is refusing to verify the accuracy of his copy – he simply prefers not to verify whether his copy is identical to the original. To him, it doesn't matter whether the copy is accurate. I argue that, by giving back a copy that he refuses to verify, Bartleby interrupts the communication of the copy. He interrupts the sign of the copy and turns it into pure value instead.

It is not a coincidence that Gilles Deleuze has characterized Bartleby's phrase as a "formula"²⁸ and that Tom Cohen considers his text on Bartleby to be the centerpiece of the "material" readings collected in his book *Anti-Mimesis from Plato to Hitchcock* [1994].²⁹ It seems that for Bartleby, language is not transparent but material. During his first days in the law-office, the narrator writes, "Bartleby did an extraordinary quantity of

writing. As if long famishing for something to copy, he seemed to gorge himself on my documents. There was no pause for digestion” (*Bartleby*, 12). There is a kind of letter-eating going on here, perhaps even (if we recall the association between Bartleby and the dead letter office) a kind of auto-cannibalism. Bartleby consumes the documents that he is asked to copy, as if the letters of the documents are something material, cakes that can be eaten. I want to suggest that Bartleby’s interruption of the copy should not be read as an interruption against the copy. What is interrupted is not so much the copying as the sign of the copy, its *exchange* of the meaning of the original.

Bartleby is not against copying. In fact, even after he has given up copying, he remains deeply invested in it: he establishes his singularity precisely through the repetition of the phrase “I would prefer not to.” But, as Deleuze has argued, “I would prefer not to” actually means nothing. To listen to the phrase means to give oneself over to madness. The only way to listen to Bartleby is to overhear him. To listen to him means precisely not to listen to him: to speak *not* as a listener who expects that something will be communicated, *but* to speak *as someone who overhears*, who picks up on “little items of rumor” that have “a certain suggestive interest.” To listen to Bartleby means to take him at his word – to go beyond the horizon of communication.

Once again, Bartleby’s subversion of the space of the law office becomes particularly interesting when it is articulated politically. In the end, the problem that Bartleby poses to the narrator is a magnified version of his invitation to go beyond the horizon of communication; he would like to remain within the protective realm of the law-office without giving the office anything in return other than the mere, material fact of his life, his being. Bartleby’s demand, an appeal to an extraordinary generosity on the side of the narrator, is to be allowed to remain unconditionally within the protective space of the law-office. Bartleby interrupts the service economy of the law-office, not in order to destroy the law-office but to invite *another use of it*. As I’ve pointed out above, Agamben suggests something along similar lines: in his recent discussion of Benjamin’s reading of Franz Kafka, he argues that for Benjamin, “[w]hat opens up a passage toward justice is not the annulling of the law, but its deactivation and dereliction – which is to say, another

use of [the law].”³⁰ Although the narrator may not have learned Bartleby’s lesson as a lawyer, I would argue that he did learn it as a narrator: the prologue and epilogue to the story push the text precisely toward the kind of deactivation and dereliction that Benjamin is talking about. Melville’s story reveals itself here as another use of the law, as an inoperative use of the law.

Breaking Point: Another Use of the Law

The confusing thing, apart from the fact that “human rights” are presented in “Beyond Human Rights” and *Homo Sacer* as no more than a means to perpetuate sovereign power, is that the state of exception – to be without rights – also seems to emerge in Agamben’s work in another light, as a state that should not be avoided but that is, in fact, (almost) desirable. Let me illustrate what I am trying to say by means of an anecdote. In the summer of 2004, I visited an exhibition in the Museum of Contemporary Art in Leipzig, Germany. The exhibition was entitled “Ungleiche Platzverteilung” (“Unbalanced Allocation of Space”).³¹ Featuring works by various artists from the Balkans, it also showed photographs of a project entitled *Free Territory*. Conceived by the Macedonian artist Igor Toshevski, this project proposed to draw borders throughout Macedonia in order to mark out spaces in which each action, gesture, movement, expression or object would count as an artistic action or art object. As a consequence, Toshevski writes, anyone who would enter such a territory would – irrespective of their race, sex, language, religious or political opinion – become a free, creative performance activist, who would demand to express her/himself in the way that suits her/him best.

When I entered into the free territory that Toshevski had created in the garden of the museum, I began to feel uneasy. Whereas I had thought that the free territory, as a kind of extralegal space, would provoke in me a feeling of unlimited freedom, what I was feeling instead was unmistakably fear. As a member of Toshevski’s universal community of activists, I felt *free* through art *but unprotected* by it. In light of Agamben’s literary-political work, Toshevski’s project emerges as a remarkable undertaking because it invites us to think together the freedom of art and the protection of the law. This is, I

argue, what Agamben is also inviting us to do. It doesn't make sense to have law without freedom; but it doesn't make sense to have freedom without law either.

The aim of Agamben's project, I argue, is to think freedom as law and law as freedom – and thus to think law *against* (or as *different from*) sovereign power. This becomes most clear in his literary and philological works. He proposes there an understanding of sovereign power as a force under erasure and tries to think it as a force that would be in place without being in force. He proposes to look at sovereign power *as if it was ending*, as if it was always also *not*. To describe this way of looking, Agamben introduces the notion of inoperativity. To think of the law as freedom means to look at sovereign power in its inoperativity, its bounds and limitations. Agamben is indebted for this notion of inoperativity to Jean-Luc Nancy; he also traces it back to Alexandre Kojève, Georges Bataille, Maurice Blanchot, and Paul.³² It should undoubtedly also be related to Melville's scrivener, and to Benjamin's *The Arcades Project* [1927-1940] and the aesthetic Agamben develops, for example in *Means without End*, of fragments and shards. In fact, as I was looking out the windows on the top floor of the museum in Leipzig, it struck me that, when viewed from above, Toshevski's trapezoid free territory in the museum garden looked like a shard of broken glass. I imagined flying over Macedonia, and seeing the country unworked, its national sovereignty in place but rendered inoperative by Toshevski's free territories.

Art revealed itself to me at this moment, and I think it also does this in Agamben's writings, as the unworking or *désœuvrement* of sovereign power. Within the limits of political science, this unworking makes no sense. It can only be thought to the first degree: sovereign power needs to be kept in check; for that, we have the law. But because the law *itself* is an expression of sovereign power – the law is legitimized by and can be ignored by the sovereign – there is also a problem, for Agamben, with law. He realizes, however, that we cannot do without law. Therefore, the law needs to be in place, but in a self-annulling mode, as inoperative. (This is the only way in which his argument on human rights can become understandable.) The thought of inoperativity is not a thought that will be developed in law schools. This may be due to the fact that inoperativity is not

a *problem* that needs to be *solved*; it's a *non-non-problem* that *remains* – and what remains, as Hölderlin wrote, the poets establish... Is it a thought that can be confined to literature departments? I argue that it is not. Articulated in purely literary or aesthetic terms, inoperativity loses its political force. It seems to be a thought that needs to be developed comparatively, across the disciplines.

Bartleby as a Messianic Figure

The paradox that we are confronting is this: *as a political force, inoperativity cannot be articulated within the limits of political science*. This observation allows me to introduce the category of the “impolítico” as it has been proposed by Roberto Esposito.³³ The impolitical refers to a destructive element in politics, a condition of (im)possibility for political institution and practice. It requires us to think sovereign power and law in their self-annulling mode, their inoperativity. This is a deeply political project, precisely because of the fact that it cannot be articulated within the limits of political science. Who are the “beings-not-without-rights” that I referred to above? They are not “beings-with-rights” but they are not “beings-without-rights” either; they fall outside of these two categories and constitute instead Agamben’s coming community, a community that is mediated by belonging itself. The category of the impolitical also names the blind spot in a purely literary or aesthetic reading of Agamben. I would argue that contemporary understandings of comparative literature (such as the one offered, for example, by Gayatri Chakravorty Spivak in *Death of a Discipline* [2003])³⁴ could be read as attempts to think – as rigorously as possible – a discipline that exists, but has no name and that would try to do justice to the impolitical element of literary studies.

Agamben’s literary-political imagination is a powerful one, because it concerns all of us. We *are* those “beings-not-without-rights” that I referred to above. We are all non-non-Jews, non-non-Muslims, or non-non-terrorists. The problem seems to be that our political institutions are only beginning to take this fact into account. Doesn’t the case of the Brazilian electrician who was shot in London during the summer of 2005 prove precisely that? Killed because the police didn’t know whether he was a suicide-bomber, his murder

shows that the state hasn't yet begun to think *the protection of the non-non-suicide-bomber*. Because the police wasn't sure whether this man was a non-suicide-bomber, they decided that he was, and because he was, he had to be killed. But, as we know now, it turned out that he wasn't. The problem at the moment of the killing, however, was that this man appeared as a non-non-suicide-bomber, and that the police had no idea how to deal with this.

As Judith Butler in her article on the Guantanamo Bay prisoners has shown, the state's answer to this problem is currently the extralegal solution of "infinite detention".³⁵ The prisoners who are held at Guantanamo Bay are mostly non-non-terrorists: they could be terrorists, or they couldn't. For the state, however, this doesn't matter. Because it thinks that it has to choose between two options, it chooses for the first one, and it tries to convince us that it does this *for our protection*. But the real problem that needs to be addressed, is how state power can be rethought in response to the situation of individuals who fall in between the division between terrorists and non-terrorists: the non-non-terrorists (the third option; the Bartleby-option). The problem is not trivial. Since we are all potential terrorists, we are all potential inmates of Guantanamo Bay. It is precisely where the state is currently claiming to act for our protection, that our protection is most in danger.

Let me illustrate this with an example: was Edward Said a potential terrorist because he was photographed – this is at least how the image was interpreted in newspapers worldwide – throwing stones at an Israeli border post? Should he have been imprisoned as a potential terrorist, as a non-non-terrorist who might have participated in terrorist activities against the Israeli state and might turn terrorist again? I don't think so. It's absurd to believe that the state could protect us from this kind of potential terrorism. There are of course measures that should be taken to protect citizens from terrorist attacks, but my argument is (and I'm following Judith Butler here) that those measures should be taken within limits of the law, a law that is inoperative. It seems that today, the state is aiming to totalize the law: to undo the separation of powers, and thus to make law appear as operative. Through multiple infringements on our freedom (think, for example,

of the Patriot Acts or the recent domestic spying affaire), it is trying to protect us from terrorist attacks *by treating us all as potential terrorists*. We have reentered, it seems, a McCarthy-like era of persecution in which the state's false binary of terrorist and non-terrorist is in the process of being exploded by the community of non-non-terrorists.

I would argue that the only solution to this problem is a thought of law in its inoperativity. As I have suggested above, such a thought needs to be pursued across the disciplines in order to make any sense. If we don't all want to end up in prison as potential terrorists, we need to learn to think the inoperativity of the law. My argument here has been that in Agamben's work, art opens up a passage into this thought of inoperativity. Keeping in mind Agamben's interest in Aby Warburg, and also Bartleby's association with the dead letter office, one could perhaps characterize law, when approached through this thought, as "posthumous" law:³⁶ as kind of law that would survive itself, or its sovereign origins, that would enter the stage of its ending, the time of its remains.

In *State of Exception*, Agamben refers to this time as law's "messianic fulfillment".³⁷ It is important to underline that there is nothing theological about this thought of law. I would argue, on the contrary, that Agamben's understanding of the law's "messianic fulfillment" is radically Marxist and can be interpreted as a reading of the figure of the dwarf of theology in Benjamin's "Theses on the Philosophy of History" [1940].³⁸ "What can be the meaning of a law that survives its deposition?" Agamben asks.³⁹ He argues that this difficulty, a difficulty that Benjamin is confronting in his reading of Franz Kafka, "was effectively formulated for the first time in primitive Christianity and then later in the Marxian tradition." "What becomes of the law after its messianic fulfillment?"⁴⁰

Obviously, it is not a question here of a transitional phase that never achieves its end [the logic of infinite deferral], nor of a process of infinite deconstruction that, in maintaining the law in a spectral life, can no longer get to the bottom of it [Agamben's quibble with

Derrida]. The decisive point here is that the law – no longer practiced but studied – is not justice, but only the gate that leads to it [the suggestion here seems to be that the inoperativity of the law does not make sense in practical terms; it can only be approached through comparative study]. What opens a passage toward justice is not the annulling of the law, but its deactivation and inactivity [inoperosità] – that is, another use of the law [translation slightly modified].⁴¹

According to Agamben, we should aim to study the law in order to deactivate it. He refers to this study as a kind of play: “One day,” he writes *teleiopoetically*, “humanity will play with law just as children play with disused objects, not in order to restore them to their canonical use but free them from it for good.”⁴² As will be clear, there is no contradiction in the passage I just quoted between messianism and secularism. The perspective is decidedly postsecular: instead, the puppet of historical materialism has the dwarf of theology within; but once the puppet starts moving, and we begin to play the game of chess (which is, after all, a game of sovereignty) this materialist-theological activity is overcome into the messianic or postsecular thought of inoperativity.

It is interesting to note that in *The Time that Remains*, Agamben cites a poem as a “concrete example” of messianic time.⁴³ The poem, a sestina by Arnaut Daniel, is presented by Agamben as “an organism or a temporal machine that, from the very start, strains toward its end.”⁴⁴ Thus, “[a] kind of eschatology occurs within the poem itself.” But this is not what Agamben is after. He notes that “for the more or less brief time that the poem lasts, it has a specific and unmistakable temporality”⁴⁵ that is different from the time of the eschaton. This other time is produced, Agamben argues, by the peculiar formal characteristics of the poem:

What is peculiar to the sestina is that the status of the repeated end words changes, in the sense that the homophony of the final syllables that you typically get in rhymed poems, is replaced by the

reappearance of the six end words in the six stanzas, in a complex but equally regulated order. At the end, the tornada recapitulates the end words by dispersing them within its three lines [translation slightly modified].⁴⁶

This will ultimately lead into a grand hypothesis formulated at the end of the fourth chapter: that rhyme is “the messianic heritage that Paul leaves to modern poetry.”⁴⁷

Whether we agree with this or not, it is important to point out that Agamben’s example of messianic time, which also contains his solution to the problematic link between sovereignty and bare life that he criticizes in *Homo Sacer*, is a *poem*. This illustrates the larger argument that I have been making in these pages, namely that Agamben’s thought is crucially a *literary-political* thought. It is a literary thought that, in its political force, *cannot be articulated within the limits of political science*. Thus, it oscillates between the literary and the political and demands to be studied comparatively, across the disciplines. Such a comparative study would not realize the destruction of disciplines, but rather their deactivation and inactivity, their inoperativity.

As I have argued above, the task of thinking inoperativity is a task that concerns us all. In contemporary situation that is dominated by the conflictual binary oppositions of a Schmittian concept of the political, we have all taken position in between beings-with-rights and beings-without-rights, Jews and non-Jews, Muslims and non-Muslims, terrorists and non-terrorists, Benjamin scholars and non-Benjamin scholars, Agamben scholars and non-Agamben scholars – we have all become non-non-Agamben scholars. In a world in which we are all non-non-terrorists (how else to describe myself when my phone-calls may be tape-recorded even though I am not a terrorist?), the thought of inoperativity can present itself as a powerful alternative to power’s abuse of the state of exception.

But is this thought of inoperativity also more than a thought? What would a practice of inoperativity look like? Who would be its agents? There is Bartleby, of course, who

resists any easy appropriation into the either/or of legal divisions. There is Toshevski, whose *Free Territory*-project unworks the state of Macedonia by creating zones in which free creative performance activists are invited to think the law as freedom. There is Agamben, also, who in a January 2004 article entitled “No to Bio-Political Tattooing”⁴⁸ announced (much to my dismay!) that he had cancelled the course he was scheduled to teach at New York University later that same year because of a new law that required whoever wants to go to the United States with a visa to be fingerprinted and photographed when they enter the country. In February 2006, a letter was published in the *New York Review of Books*,⁴⁹ in which a group of scholars of constitutional law and former government officials (Ronald Dworkin, Kathleen M. Sullivan, and others) expressed their concern about how the Bush administration’s National Security Agency’s domestic spying program violated existing law. Finally, I want to bring to your attention an extremely interesting case, dating from 1990, which shows that inoperativity can also be practiced by the sovereign him/herself. When King Baudouin of Belgium was faced with giving his assent to a bill that would liberalize Belgium’s abortion laws, he explained that he was unwilling to give official endorsement to what he found personally objectionable. (Baudouin was deeply religious; he and his wife Queen Fabiola did not have children.) Instead, he chose to abdicate his throne on the day he was expected to sign the bill. A state of exception was declared; the law was passed. The following day, Baudouin went back to work. These “extraordinary” (as Kalyvas would have it)⁵⁰ acts of subversion, whether they are committed *before*, *within*, or *next to* the law, show how the thought of inoperativity can also be a political practice.

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- ¹ Giorgio Agamben, "Beyond Human Rights." *Means Without End: Notes on Politics*. Trans. Vincenzo Binetti and Cesare Casarino. Minneapolis: U of Minnesota P, 2000. 14-26. This quotation is actually taken from a revised version of the essay: Agamben. "Biopolitics and the Rights of Man." In: Agamben. *Homo Sacer: Sovereign Power and Bare Life*. Trans. Daniel Heller-Roazen. Stanford: Stanford UP, 1998. p.126-135. Here p. 126.
- ² Agamben, "Beyond Human Rights," p 19-20.
- ³ Agamben, "Beyond Human Rights," p. 20.
- ⁴ Agamben, "Beyond Human Rights," p. 20.
- ⁵ Agamben, "Beyond Human Rights," p. 23.
- ⁶ Agamben, "Beyond Human Rights," p. 24.
- ⁷ Giorgio Agamben, "Bartleby, or On Contingency." *Potentialities: Collected Essays in Philosophy*. Trans. Daniel Heller-Roazen. Stanford: Stanford UP, 1999. 243-271.
- ⁸ All following parenthetical references are taken from Herman Melville, "Bartleby, the Scrivener." *Billy Budd, Sailor and Other Stories*. New York: Penguin, 1986, pp. 3-46: p. 27.
- ⁹ Agamben, "Bartleby, or On Contingency." p. 246-7.
- ¹⁰ Agamben, "Bartleby, or On Contingency." p. 262.
- ¹¹ Agamben, "Bartleby, or On Contingency." p. 270.
- ¹² Giorgio Agamben, *The Time that Remains: A Commentary on the Letter to the Romans*. Trans. Patricia Dailey. Stanford: Stanford UP, 2005.
- ¹³ Giorgio Agamben, *State of Exception*. Trans. Kevin Attell. Chicago: U of Chicago P, 2005.
- ¹⁴ Agamben, *State of Exception*, p. 64.
- ¹⁵ Andreas Kalyvas, "The Sovereign Weaver: Beyond the Camp." In: Andrew Norris, ed. *Politics, Metaphysics and Death: Essays on Giorgio Agamben's Homo Sacer*. Durham: Duke UP, 2005. pp. 107-134: p. 116
- ¹⁶ Agamben, *The Time that Remains*, p. 50.
- ¹⁷ Agamben, *The Time that Remains*, p 51.
- ¹⁸ See: Giorgio Agamben, *The Man without Content*. Trans. Georgia Albert. Stanford: Stanford UP, 1999; Giorgio Agamben, *The End of the Poem: Studies in Poetics*. Trans. Daniel Heller-Roazen. Stanford: Stanford UP, 1999; Giorgio Agamben, *The Open: Man and Animal*. Trans. Kevin Attell. Stanford: Stanford UP, 2004.
- ¹⁹ See: Jean-François Lyotard, *The Differend: Phrases in Dispute*. Trans. Georges Van Den Abeele. Minneapolis: U of Minnesota P, 1988.
- ²⁰ See: Jean-François Lyotard, and Jean-Loup Thébaud. *Just Gaming*. Trans. Wlad Godzich. Minneapolis: U of Minnesota P, 1985. See in particular Sam Weber's afterword to this translation.
- ²¹ Andrew Delbanco, *Melville: His World and Work*. New York: Alfred A. Knopf, 2005, p. 119.
- ²² Jacques Derrida, "Oligarchies: Naming, Enumerating, Counting." *Politics of Friendship*. Trans. George Collins. New York: Verso, 1997, pp. 1-25.
- ²³ Slavoj Zizek, "The Neighbor and Other Monsters: A Plea for Ethical Violence." In: Zizek, Slavoj, Kenneth Reinhard and Eric Santner. *The Neighbor: Three Inquiries in Political Theology*. Chicago: U of Chicago P 2005, pp 134-190: p.163.
- ²⁴ See Giorgio Agamben, "The Musulmann." In: *Remnants of Auschwitz: The Witness and the Archive*. Trans. Daniel Heller-Roazen. New York: Zone 1999. p. 41-8.
- ²⁵ Derrida, *Politics*, p. 68.
- ²⁶ Lyotard, *Just Gaming*, p. 71.
- ²⁷ See, for example Alan Lebowitz, *Progress into Silence: A Study of Melville's Heroes*. Bloomington: Indiana UP, 1970.
- ²⁸ See: Gilles Deleuze, "Bartleby, ou la formule." In: Deleuze. *Critique et Clinique*. Paris: Éditions Minuit, 1993, pp. 89-114.
- ²⁹ See: Tom Cohen, "The Letters of the Law: 'Bartleby' as Hypogrammatic Romance (Letters)." *Anti-Mimesis from Plato to Hitchcock*. Cambridge: Cambridge UP 1994, pp. 152-178.
- ³⁰ Agamben as quoted in Sam Weber, "Going Along for the Ride: Violence and Gesture: Agamben Reading Benjamin Reading Kafka Reading Cervantes." [ms of a lecture given in Paris, January 12th 2004] Note how Weber's translation is different from the one that I quoted above and will quote again later on.

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- ³¹ The information I present here is based on Toshevski's one-page "proclamation" of the project (which I consulted at the exhibition, and of which I took a photograph) and on some notes I made in my travel diary.
- ³² Agamben, *Homo Sacer*, p. 61./ Agamben, *The Time that Remains*, p. 101.
- ³³ Roberto Esposito, *Categorie dell'impolitico*. Bologna: Società editrice il Mulino, 1988.
- ³⁴ Gayatri Chakravorty Spivak, *Death of a Discipline*. New York: Columbia UP, 2003.
- ³⁵ Judith Butler, "Infinite Detention." In: Butler. *Precarious Life: The Powers of Mourning and Violence*. New York: Verso 2004, pp. 51-100.
- ³⁶ Giorgio Agamben, "Aby Warburg and the Nameless Science", 93.
- ³⁷ Agamben, *State of Exception*, 63.
- ³⁸ For this, see: Agamben, *The Time that Remains*, pp. 138-145); Walter Benjamin, "Theses on the Philosophy of History." Trans. Harry Zohn.. *Illuminations: Essays and Reflections*. Ed. Hannah Arendt. Trans. Harry Zohn. New York: Schocken, 1968. pp. 253-264.
- ³⁹ Agamben, *State of Exception*, p. 63.
- ⁴⁰ Agamben, *State of Exception*, p. 63
- ⁴¹ Agamben, *State of Exception*, p. 64.
- ⁴² Agamben, *State of Exception*, p. 64.
- ⁴³ Agamben, *The Time that Remains*, p. 79
- ⁴⁴ Agamben, *The Time that Remains*, p. 79.
- ⁴⁵ Agamben, *The Time that Remains*, p. 79
- ⁴⁶ Agamben, *The Time that Remains*, p. 79
- ⁴⁷ Agamben, *The Time that Remains*, p. 87.
- ⁴⁸ Agamben, Giorgio. "Non au tatouage biopolitique." *Le Monde* Jan. 2004.
- ⁴⁹ Dworkin, Ronald, Kathleen M. Sullivan, and others (Letter). "On NSA Spying: A Letter to Congress." *New York Review of Books* 53.2 (2006):
- ⁵⁰ Andreas Kalyvas, "The Politics of the Extraordinary: Max Weber, Carl Schmitt, Hannah Arendt." Dissertation, Columbia University 2001.