PHILOSOPHERS AND LAW

ASHGATE

AGAMBEN AND LAW

THANOS ZARTALOUDIS

Agamben and Law

Edited by

Thanos Zartaloudis

University of Kent, UK

ASHGATE

Published by
Ashgate Publishing Limited
Wey Court East
Union Road
Farnham
Surrey GU9 7PT
England

Ashgate Publishing Company
Suite 3-1
110 Cherry Street
Burlington
VT 05401-3818
USA

www.ashgate.com

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library.

The Library of Congress has cataloged the printed edition as follows: 2015932187

ISBN: 9781472428844

MIX
Paper from responsible sources
FSC® C013985

Printed in the United Kingdom by Henry Ling Limited,
at the Dorset Press, Dorchester, DT1 1HD

Agamben and Law

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Acknowledgements

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Duke University Press for the essay: Catherine Mills (2008), 'Playing with Law: Agamben and Derrida on Postjuridical Justice', *South Atlantic Quarterly*, **107**, pp. 15–36. Copyright © 2008 Duke University Press.

Edinburgh University Press for the essays: Anton Schütz (2008), 'The Fading Memory of *Homo non Sacer*', in Justin Clemens, Nicholas Heron and Alex Murray (eds), *The Work of Giorgio Agamben: Law, Literature, Life*, Edinburgh: Edinburgh University Press, pp. 114–31. Copyright © 2008 Anton Schütz; Mathew Abbott (2014), 'The Creature before the Law', in *The Figure of This World: Agamben and the Question of Political Ontology*, Edinburgh: Edinburgh University Press, pp. 106–22. Copyright © 2014 Mathew Abbott.

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Parrhesia for the essay: Mathew Abbott (2012), 'No Life Is Bare, the Ordinary Is Exceptional: Giorgio Agamben and the Question of Political Ontology', *Parrhesia*, **14**, pp. 23–35.

Pion Ltd, London for the essay: Giorgio Agamben, Stephanie Wakefield (trans.) (2014), 'What Is a Destituent Power?', *Environment and Planning D: Society and Space*, **32**, pp. 65–74. Copyright © 2014 a PION publication.

The Rowman & Littlefield Publishing Group for the essays: William Watkin (2013), '*Homo Sacer* and the Politics of Indifference', in *Agamben and Indifference: A Critical Overview*, London: Rowman & Littlefield International, pp. 181–207. Copyright © 2014 William Watkin; Carlo Salzani (2013), 'In a Messianic Gesture: Agamben's Kafka', in Brendan Moran and Carlo Salzani (eds), *Philosophy and Kafka*, Plymouth: Lexington Books, pp. 261–82. Copyright © 2013 Lexington Books.

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Stanford University Press for the essays: Steven DeCaroli (2007), 'Boundary Stones: Giorgio Agamben and the Field of Sovereignty', in Matthew Calarco and Steven DeCaroli (eds), *Giorgio Agamben: Sovereignty and Life*, Stanford, CA: Stanford University Press, pp. 43–69. Copyright © 2007 by the Board of Trustees of the Leland Stanford Junior University. All rights reserved; Bruno Gullì (2007), 'The Ontology and Politics of Exception: Reflections on the Work of Giorgio Agamben', in Matthew Calarco and Steven DeCaroli (eds), *Giorgio Agamben: Sovereignty and Life*, Stanford, CA: Stanford University Press, pp. 219–42. Copyright © 2007 by the Board of Trustees of the Leland Stanford Junior University. All rights reserved.

Taylor & Francis for the essays: Daniel McLoughlin (2012), 'Giorgio Agamben on Security, Government and the Crisis of Law', *Griffith Law Review*, **21**, pp. 680–707. Copyright © 2012 (Taylor & Francis Ltd, http://www.tandfonline.com) on behalf of Griffith University; Jessica Whyte (2013), '"The King Reigns but He Doesn't Govern": Thinking Sovereignty and Government with Agamben, Foucault and Rousseau', in Tom Frost (ed.), *Giorgio Agamben: Legal, Political and Philosophical Perspectives*, London: Routledge, pp. 143–61. Copyright © 2013 Tom Frost. Reproduced by permission of Taylor & Francis Books UK; Adam Kotsko (2013), 'The Curse of the Law and the Coming Politics: On Agamben, Paul and the Jewish Alternative', in Tom Frost (ed.), *Giorgio Agamben: Legal, Political and Philosophical Perspectives*, London: Routledge, pp. 13–30. Copyright © 2013 Tom Frost; Paolo Bartoloni (2008), 'The Threshold and the Topos of the Remnant: Giorgio Agamben', *Angelaki: Journal of the Theoretical Humanities*, **13**, pp. 51–63. Copyright © 2008 Taylor & Francis and the editors of *Angelaki*, reprinted with permission of the publisher (Taylor & Francis Ltd, http://www.tandfonline.com); Alexander Cooke (2005), 'Resistance, Potentiality and the Law: Deleuze and Agamben on "Bartleby"', *Angelaki: Journal of the Theoretical Humanities*, **10**, pp. 79–89. Copyright © 2005 Taylor & Francis and the editors of *Angelaki*, reprinted with permission of the publisher (Taylor & Francis Ltd, http://www.tandfonline.com); Nicholas Heron (2011), 'The Ungovernable', *Angelaki: Journal of the Theoretical Humanities*, **16**, pp. 159–74. Copyright © 2011 Taylor & Francis and the editors of *Angelaki*, reprinted with permission of the publisher (Taylor & Francis Ltd, http://www.tandfonline.com); Boštjan Nedoh (2011), 'Kafka's Land Surveyor K.: Agamben's Anti-Muselmann', *Angelaki: Journal*

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Series Preface

The series *Philosophers and Law* selects and makes accessible the most important essays in English that deal with the application to law of the work of major philosophers for whom law was not a main concern. The series encompasses not only what these philosophers had to say about law but also brings together essays which consider those aspects of the work of major philosophers which bear on our interpretation and assessment of current law and legal theory. The essays are based on scholarly study of particular philosophers and deal with both the nature and role of law and the application of philosophy to specific areas of law.

Some philosophers, such as Hans Kelsen, Roscoe Pound and Herbert Hart are known principally as philosophers of law. Others, whose names are not primarily or immediately associated with law, such as Aristotle, Kant and Hegel, have, nevertheless, had a profound influence on legal thought. It is with the significance for law of this second group of philosophers that this series is concerned.

Each volume in the series deals with a major philosopher whose work has been taken up and applied to the study and critique of law and legal systems. The essays, which have all been previously published in law, philosophy and politics journals and books, are selected and introduced by an editor with a special interest in the philosopher in question and an engagement in contemporary legal studies. The essays chosen represent the most important and influential contributions to the interpretation of the philosophers concerned and the continuing relevance of their work to current legal issues.

TOM CAMPBELL
Series Editor
Centre for Applied Philosophy and Public Ethics
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Introduction

Thinking of any idea in its historical experience, appreciates that an idea, such as law, traverses the disciplinary boundaries of legal study and practice and has done so from its inception. In other words, the legal system could not monopolize the idea of law, though more and more it captures within its reason a legal conception of law as well as what may lie outside it, by capturing, pre-emptively, the so-posed outside itself. The capturing of the outside *of* law is the result of a legal operation. Thus, the distinction between law and life becomes paradoxical in that it is, at the same time, presupposed to occur outside history, that is, not as an act, but as a matter of fact (whether natural or institutional). In contrast, Agamben's most important, yet subtle, contribution to legal and philosophical thought of the law, may be in that he offers to our thinking what could be called, in one sense, a radical kind of pragmatism (which however does not fall into the confines of conventional distinctions between 'ideas and things', such as in the career-building conflict between materialism and idealism, or the career-stabilizing pragmatism).

If to act or to be, more than ever today, means to have a right to act or to be, then Agamben's reopening of the question 'what does it mean to act?' searches for a way of being (an *ethos*) whereby a right would no longer be able to separate itself from the life it promises or presupposes. In this *ethos*, the fulfilment of rights (laws) can only be a life, a life immanent to itself and not to an ahistorical law; and this would be the *Idea* of law, the good. Agamben's *syntagma* of a form-of-life, that is, a life that can no longer be separated from its form (or qualities) and vice versa, does not lead to a life of nihilism, or pessimism or an apolitical life, but a life that is no longer a programme or a promise. Instead, law is operating for centuries on the scission of a life-as-lived (a life that could never be other than it is) and a life-as-an-abstract ideality (a life that can never be). A religion of law of the secular dress-code that necessitates, once more, a discipline of hope.

What could an Idea of law entail? While the concept of law is most frequently understood as confined to legal practice and legal academic study, it is worth noting that historically the concept of law has had a far wider use and engagement and 'was said in many ways'. In Homeric times, for instance, law as *nomos* was not a matter of applying a general rule or a principle to a particular case, while in early ancient Roman law, the law was not delineated as monocular and certain, but as a field of means through which to respond to situations. Furthermore, there were times when there were more than one 'Laws', be they divine laws, natural laws, civil laws, cannon laws and so forth, all of which may have eventually struggled against each other to defend an imperialistic territory of applicability, but often co-existed and remained at least comparable, rather than incompatible. With the undeniable success of the positivization of the law, already in the fourteenth century, if not earlier, in what is called modernity, law comes to increasingly appear as a self-referential operation of, ultimately, being governed itself by law rather than by 'men'.

Yet if this success is considerable it has also replaced the earlier comparability of laws to the variety of sources internal to positive and customary law, as well as to the imperialistic scission

between 'cultures' of laws. Western law in particular in its ever-widening imperialistic project restricts its comparability more and more to its self-absorbed internal scissions and reforming, while denying any comparability to other legal systems (positive, natural or customary) that it declares to be outside its 'progressive logic' and hence secluding any chance of translation. To find one's self-sufficient unity within one's self, however, is to end experience. It is a reactive kind of progression where the wider the horizon may appear in later modernity, the narrower the possibility of comparability, translation, encounter. In this manner law has been more and more divorced from experience and the Idea of law has been often turned into a concept that one cannot participate in.

One is often told that in modern law, earlier problems have been displaced, but have they disappeared? If positing a law, each time, means positing a limit (presupposing and effecting a division between two things), that is limiting (also) that very positing as such within its own contingency in denial; the crucial relation that is posited (and hidden), each time, between the posited and what may lie outside it as its excess, or its unknown territory, remains the key matter for thought.

For instance, it has been a recurring suggestion that a 'culture' of positive law (though this is not to undervalue the contributions of positivism) has achieved progress by capturing excess as its very own in the first place in an attempt to pre-define, in one way or another, the past, the present and the future of its field of vision. If this has been crucial towards the achievement of systemic autonomy, at least to an extent, of the legal system; affording a legal system the hugely advantageous benefit of normatively distinguishing its claims from those of moral, theological, philosophical, economic and social laws, the disadvantage remains that instead of comparability and knowledge, the field of law can become one of monocular self-indulged (though often still creative) administrative analytics. While the criticism, too, of legal systems as to their self-enclosed analytics often misses itself the point (without such self-enclosed analytics the system of law would be unable to become the generally appreciated system of legal reasoning and adjudication that it is), it remains the case that such systemic closure can lead to self-reliance as much as to blindness. Law, after all, must be made (to see). It relies upon human acts relying upon other human acts and so forth. And *legal* acts have the peculiarity of being both human acts, as well as acts 'in the name of the law'.

Agamben has in fact examined within his long (and now fully published) book series of *Homo Sacer*, in a sense, this very peculiarity and what consequences follow from it.[1] The response of the legal system to its potential blindness towards social and existential desires, laws and acts, has been to attempt to capture whatever lies outside it and render it procedurally as an inside–outside part of the system to which a relation can be maintained in the sense

[1] The series is composed as follows: volume I, part 1 is *Homo Sacer: Sovereign Power and Bare Life*, trans. D. Heller-Roazen (1998). There does not seem to be a part 2 to this volume. Volume II, part 1 is *State of Exception*, trans. K. Attell (2005). Part 2 is *The Kingdom and the Glory: For a Theological Genealogy of Economy and Government*, trans. L. Chiesa (with M. Mandarini) (2011). Part 3 is *The Sacrament of Language: An Archaeology of the Oath*, trans. A. Kotsko (2010a). There may be an error as to whether the next volume is part 4 or 5 but in any case the part that follows is indicated in print as part 5: *Opus Dei: An Archaeology of Duty*, trans. A. Kotsko (2013a). Volume III is *Remnants of Auschwitz: The Witness and the Archive*, trans. D. Heller-Roazen (1999a). Volume IV entails two parts: the first is *The Highest Poverty: Monastic Rules and Form-of-Life*, trans. A. Kotsko (2013b); and the second is *The Use of Bodies*, trans. A. Kotsko (2015, forthcoming).

of a reservoir, a field of potentiality for the sovereign law's application and enforcement (see Agamben, 1999). To ensure that the system can occupy both sides to a limit it hopes to control itself so to be on the threshold of its own positing, is the ambition of legal (but also political, economic or moral) closure. An absolving limit that through its sufficiency promises the salvation of its subjects. From then on the two camps of 'the law in the name of law' and 'justice in the name of justice' are separated, unaware that their relation has been played out always already from the inception of the closure of the legal system. What is missed by both sides is that there is no justice for us (not at least in the sense of a salvation or reparability), and there is also no way in which law can merely be posited in some kind of purity of its own making, secluding all comparability to other 'laws' or 'traditions' or potentialities.

Given that philosophy, despite its waning 'academic' importance, has been the classic field wherein the act of positing and its presuppositions have been thought, it is particularly meaningful that the Italian philosopher, who has had training in both law and philosophy, has during the last 20 years or so, turned thought, to key questions as to how law is conceived and experienced, such as in raising questions as to: the relation between a state of normalcy and a state of exception, the relational foundation of law in violence, the forms of exclusion of certain 'bare lives', the relationship between sovereignty and government (or *oikonomia*), the distinction between using things and having rights to use things, studying the law and applying the law, and so forth.

Beside the legal profession, legal operations and processes, the academic study of law, and further, wider political and social expressionisms with/against the law, it is a good idea to maintain, thus, for a theoretical thinking of the Idea of law, both within the auspices of the discipline of law, but equally crucially outside its disciplinary limits and academic skirmishes in a usually far too stifling field of doctrinal legal study. One could call this thinking Idea of the law in its multiple (and anything but unitary) historical formations and deformations, while remembering that the metaphysics of law are as old (and prevalent) as the Idea of law. Yet what if the Idea of law was understood as an experience? Historically, the Western image of thinking the law, while not exclusively in the field of legal knowledge, has mostly been presupposed as a movement or a passage from a, more or less, ahistorical, transcendental or pseudo-immanent foundation (or origin) *to* a plane of knowledge, expression, application; and in late modernity, perhaps most characteristically a self-referentially qualified-truth position. Law appears increasingly in this version of its history as a signature-arrow that crosses time. In fact as a signature that can even cross backwards in time and determine whatever the so-called pre-law state of things may have been. If thinking the law in the discipline is to be divided only between the glorifications of doctrinal communion and the reactive sociological reformism of reparations, then this would be a disservice to both the necessity of doctrinal tradition-forming and the sociological vision. What would indeed happen if one was to think of law without having to join a movement or a programme?

Instead, when thinking (the Idea of law) as an experience that does not suppose such a movement, thought at its contingent starting point finds, could only find some questioning, some hesitation and peculiar combination of negligent modesty so to render its articulation not on the obsessive trail of self-sufficient progress, truth, society, meaning, values and the like, but in an affirmative relation to a zone of non-knowledge. What would it mean to maintain a genuine relation to a zone of the unknowable or the unsaid in thinking the law? This question could help one conceive what Agamben's, the unlikely legal theorist, contribution to coming

legal thought may be. Thinking the law, the aim of a study of law as an experience, and as ever as a continuous social experiment that can never eliminate doubt, disagreement and change.

That is, as such legal thought would suggest finding not a way out of ignorance, but the right relationship with ignorance or non-knowledge (see Agamben, 2010b, pp. 113–14). While this is not yet another programme for better care and subtlety in the study and application of law (though that remains always useful), neither is it an antithetical programme for the fetishization of the contingently other or the 'critically' different that lies 'outside' the law (as in some forms for critical legal studies). Instead the right amount of modesty and interventionist distinction is needed, since no thought is remarkable unless it registers its contingent imagination in its particular experience, while it proceeds to dismantle archaeologically the matter of the situation in which it happens to find itself, not as an event, but as a life that, above all, does not obsess over its normative self-worth and meaning.

It should perhaps be noted that modesty is here understood not as a personal attribute to thought or the thinking-subject, but as a modality of thought, a modality of neither identity nor difference (since for thought neither identity nor difference are ever self-sufficient). Instead, thought finds itself in the middle of a modality of some degree of necessity in the midst of knowledge's inherent contingency. In this regard, Watkin (2013), in what is probably at the moment the best study of Agamben's thought, has shown extensively the importance of the notion of indifference in Agamben's writing. In this sense, modesty's aim is not some kind of humility or self-restraint, but instead the indifferent end of modesty as a mediator of identity and difference, or the common and the proper. Agamben insists that difference is as much a composite in the system of metaphysics as that of identity. Identity as much as difference (as philosophical structures) is historically contingent (that is, not logically necessary) and neither of them can claim to be prior to the other, foundational and so forth. Identity and difference are instead a bipolar structure of the same. In this sense they can be understood to form a common state of in-difference as their plane of structuration. When then Agamben claims to render these inoperative he thinks through the ways in which key oppositional (or differential) machines like that of *zoē-bios*, or sovereignty-*oikonomia* are to be suspended in order for their exposed indifference to be suspended in itself without ever being able to be reconstituted as some kind of indifferent unity or totality of possibility ever again.

By studying the *how* we know what we know, the aim becomes to avoid knowing things in what may appear as the only sanctioned manner, in order to suspend indifference itself and open the field to new uses of the law. Equally it becomes necessary to avoid being simply opposed to this or that and be caught in the bipolar relation between identity and difference over an empty throne of power (whether conformist or revolutionary). It is to render, in fact, thought indifferent to indifference. Avoiding polemics, the stakes are unexpectedly higher, than they seemed when in a state of opposition. What would it mean to render indifference intelligible and in this way indifferent to itself? There is no pure state of nature or bare life to which one can return away from the polemic politics, for nature as much as bare life is the construct of the *polis* and of the law. In a similar sense there is no pure glory of the unconditioned to which one aims at, at the end of one's life of struggle, for the unconditioned is itself a construct that attempts to deny the contingent conditions of one's life (Watkin, 2013). What does it mean then to think indifference as indifferent to itself than to think without negative origins and absolute ends?

In *Homo Sacer* Agamben (1998) following his method of philosophical archaeology traces the structuring of the concept (or, in his terms, the signature) 'life' through its claim to a foundational scission between a common bare life (an original life without qualities, naked) and a life of qualification (of properties, actualities, identities and differentiations). Agamben then exposes the machine of anthropogenesis that is the motor of bifurcation or bipolarization at the centre of this scission, and which presupposes and reproduces constantly this scission in order to be able to defend a particular actuality of qualified life (such as, for instance, the Western concept of citizenship) as if it were a common universal 'nature' signed by life 'as such' (bare life). Exposing this machine of negativity (see Agamben, 1991) (since in this structure an infinitely replenishable commonality that is naked or empty remains as a reservoir to the actual qualification of life that is posed as proper), requires the study of extreme cases, the exceptions that reveal the limit-drawings of the rule and so Agamben has ever turned his attention to the margins of the logic of such anthropogenesis.

From the margins (bare life, the camp, etc.) Agamben is able to expose philosophically how this alleged universality and necessity of the proper life is historically constructed, contingent and founded on a scission that is, in reality, a state of constant indifferentiation, a threshold of indistinction as Agamben often calls it. Such indistinction or indifferentiation, when exposed, suggests that the concept of life as presupposed and reproduced by this anthropogenetic machine is unnecessary, catastrophic and a form of capture that needs to be transposed into what really lies at its place: an immanent, free and common, plane of power of which no one knows what it is capable of. Human beings have no essential origin or destiny, and the Ideas of law, freedom and *ethos* are the most difficult and joyful experiences. What remains is a life as living.

On the one hand this means that when law, government and power assume an ahistorical Law, Sovereignty and Power that founds and legitimates them, what is in fact shown instead is that these foundations are a product of their contingent existence, rather than a transcending of pre-existing limits. Instead, sovereign power is shown to presuppose and require an *oikonomic* or administrative power and the two polarities are in a functional unity or indifferent relation. On the other hand, this means further that to stand opposed, to resist (at least in that sense) in the name of a cult of contingency becomes more and more insufficient in the longer term, when shown to be non-differential as a result of its reformist reactiveness or nihilism, despite, or especially because of, its supposedly self-sufficient differential claim to another law (of contingency), truth or power, without challenging or exposing the bifurcated structure of power that it itself relies upon in the first place. Between transcendence and immanence, the common and the proper, to refer to traditional metaphysical terms, Agamben suggests the existence of an *oikonomia* (an economy in the sense of management or government) of every dominant conceptual-discursive form in the Western canvas of conservative, as well as more radical, political and legal thought.

The intelligibility of law is thus concealed as indifferent, above all else, in the signature of a Law that wishes to manage identity as well as difference. Yet when the relational and at the same time divisive manner of their historical contingency is shown, thinking the law becomes an experience that could expose indifference as such; and the signature Law could cease its supposedly necessary negation of its self in each of its others, and vice versa (as for instance, in the age old battle between positivism and natural law). This turn of law's intelligibility to an experience, does not aim at the return to some pre-divisive state of grace, nor at some

synthetic and/or neutral intelligibility of some totality or a justice to come. The singularity of an experience, a thought or a *casus* (case) in this manner never transcends its singularity, but learns to read itself as an exemplar of indifference suspended: as a power (*potentia*) that is not exhausted in its actual guise, here or there. Only such suspended indifference has no original example or law to refer to any longer than its own ultimate suspension of propriety; and so the free use of the proper becomes the hardest thing as Agamben often repeats, reciting Hölderlin.[2]

The suspension of indifference points not to an essence but to an existence, not a what, but a how something is taken to be a determination, a consistency or a limit. And the how something is, is never a thesis or a hypothesis, but instead a paradigmatic exposition in the constellation of irreparable existence, it is a parasite not a solid ground. In this regard it is crucial for new as well as experienced readers of Agamben's work to read his *Homo Sacer* series after considering his book on method (see Agamben, 2009). Neutrality is not possible since philosophical archaeology, Agamben's central method, is defined in the following manner:

> Provisionally, we may call 'archaeology' that practice which in any historical investigation has to do not with the origins but with the moment of a phenomenon's arising and must therefore engage anew the sources and tradition. It cannot confront tradition without deconstructing the paradigms, techniques, and practices through which tradition regulates the forms of transmission, conditions access to sources, and in the final analysis determines the very status of the knowing subject. The moment of arising is objective and subjective at the same time and is indeed situated on a threshold of undecidability between object and subject. It is never the emergence of the fact without at the same time being the emergence of the knowing subject itself. (Agamben, 2009, p. 89)

Yet the image of experience here is one that 'comes about every time as a shuttling in both directions along a line of sparkling alternation on which common nature and singularity … change roles and interpenetrate' (Agamben, 1993, p. 20), and the same image of experience can be transposed to law so that the positions of a singular case and a common law can interpenetrate at least within the study of legal thinking. If the aim of legal study is the intelligibility of the justice of whatever there is, and not the application of this or that law, then justice could be understood in Agamben's thought as neither memory nor forgetting, but as the experience at the threshold of their suspended indifference: a life. A life or an immanence where the transcendent *is* the taking place of the entities, as their innermost exteriority. The suspension of the division between matter and form, not in the name of some pure formlessness or pure materiality but instead as a thought, the experience of a taking place. That is, perhaps, a way to name justice. The intelligibility of what there is, which encounters the non-intelligible and the unthought, beside itself.

The Collection in Outline

In this collection of already published work on Agamben's thought that bears a wide (as well as direct) relation to law, gathered from within the legal field and theory in particular, it

[2] 'The free use of the proper is the most difficult', in Hölderlin's famous letter to Böhlendorf, in *Hölderlin Werke und Briefe* (1969, II, p. 941, my trans.).

has been aimed to offer an exemplary range of varied readings, reflections and approaches of different intensity and merit, compiled in one reference volume to aid especially the researcher of Agamben's work in relation to his reflections on law, as well as those of some of his readers. It has to be noted that the literature available on Agamben's thought is already vast and this compilation in no way claims to be exhaustive.[3] It could also be noted that the current state of legal, in particular, scholarship on Agamben's thought is energetic but remains in a nascent state and perhaps the current collection will provide questions and paths for fresh and better attempts.

Life and Sovereignty

In the first part of this collection – 'Life and Sovereignty' – I have collected in no particular order four essays that approach the key question in the eight volumes of the *Homo Sacer* series of Agamben's: that of what the relation may be between life and sovereign power or law more generally. The first essay titled 'The Fading Memory of *Homo non Sacer*' by Anton Schütz (Chapter 1), is a text that offers unique insights into understanding Agamben's study of biopolitics in close but differentiated juxtaposition to Foucault's; along the lines of crucial observations on Agamben's method. The second essay titled '*Homo Sacer* and the Politics of Indifference' by William Watkin (Chapter 2) is a key chapter taken from the author's impressive book on Agamben's thought (Watkin, 2013). In this essay Watkin offers a remarkable rereading of *Homo Sacer* in relation to what Watkin has called Agamben's philosophy of indifference. In doing so Watkin, like Schütz, offers a significant corrective to the many misreadings of Agamben's study of *Homo Sacer*. The third essay titled 'The Rule of the Norm and the Political Theology in "Real Life" in Carl Schmitt and Giorgio Agamben' by Kirk Wetters (Chapter 3), offers a useful critical reading of political theology and life in Schmitt and Agamben, by rereading Agamben's work in the context of normative discourse with particular reference to Kurt Hildebrandt, and Georges Canguilhem through a biopolitical reading of the juridical norm. In the final essay Mathew Abbott in his 'No Life Is Bare, the Ordinary Is the Exceptional: Giorgio Agamben and the Question of Political Ontology' (Chapter 4) offers a rereading of the notion of bare life and Agamben's work more widely with a particular interest in understanding what is a political ontology.

State of Exception and Government

In Part II – 'State of Exception and Government' – I have gathered contributions by five authors who write on various aspects, rather awkwardly collected under a single banner here, of Agamben's thoughts on the state of exception, security and government. Steven DeCaroli, in 'Boundary Stones: Giorgio Agamben and the Field of Sovereignty' (Chapter 5), rereads what he calls the field of sovereignty in order to begin to conceive, through a reading of Agamben's critique of the tradition of sovereignty, of a political community that does not presuppose it. It

[3] Selecting a sufficiently indicative representation of various approaches and intensities of understanding and critical engagement was admittedly a hard task. To those not included here who may feel undeservedly excluded please accept my apologies in advance. I hope the bibliographical note at the end offers some compensation in this regard, though it also remains a non-exhaustive list of a continuously proliferating secondary literature.

may be an impossible task but DeCaroli sets his sights on what certainly appears possible as a first step. In order to do so he traces in a rich analysis the concept of banishment and the ways-of-life subject to it, through the Greek context and the Roman republic with close reference to the juridical context. The second essay by Daniel McLoughlin titled 'Giorgio Agamben on Security, Government and the Crisis of Law' (Chapter 6), connects Agamben's earlier critique of sovereignty and banishment with the state of exception as a normalizing technique of government. He traces earlier fragments of Agamben's references to government, even though he did not have the benefit at the time of writing, of referring also to Agamben's most recent work, in relation to the earlier volumes of the *Homo Sacer* series, in what is now a clearer connection between all the volumes of the series as to the bipolarity between sovereign power and government. The third essay by Bruno Gullì titled 'The Ontology and Politics of Exception: Reflections on the Work of Giorgio Agamben' (Chapter 7) offers a reading of the notion of the exception through a reading of Agamben's philosophical tools of the neither/nor and the normalcy/exceptionality structures of double negation in relation to one of Agamben's major investigations into the concept of power (potentiality), his reading of Paul and his fundamental critique of the concept of the will. In the fourth essay, Jessica Whyte's '"The King Reigns but He Doesn't Govern": Thinking Sovereignty and Government with Agamben, Foucault and Rousseau' (Chapter 8), offers a rethinking of sovereignty in conjunction with government in Agamben's thought, via Foucault, and interestingly via Rousseau also, providing a political rereading of key presumptions in legal, political and philosophical theories as to the bifurcation between Kingdom and administration. In the final essay, 'Imperatives without *Imperator*' (Chapter 9), Anton Schütz offers another illuminating approach to Agamben's radicalization of Foucault's study of government, with his archaeology of *oikonomia*, by tracing key implications of Agamben's crucial contribution to legal and political theory that forms, as the author writes, a change of epistemic paradigm.

Law, Violence and Justice

In Part III titled 'Law, Violence and Justice', five essays are collected that offer different readings and analyses on the relationship between law and violence, law and life and law and politics. In the first essay by myself, titled 'On Justice' (Chapter 10) I propose a preliminary reading of Agamben's fragments of thoughts on justice through an analysis that takes its cue from Teubner's relatively recent work on justice and the ideas of justice in Benjamin and Agamben. The second essay by Mathew Abbott titled 'The Creature before the Law' (Chapter 11) offers a reading of *Homo Sacer* through an engagement with Benjamin's reflections on violence and Agamben's appreciation of them in his work. The third essay by Catherine Mills titled 'Playing with the Law: Agamben and Derrida on Postjuridical Justice' (Chapter 12) offers one of the relatively earliest notable reflections on the 'debate' between Agamben and Derrida as to Justice. The fourth essay by Tom Frost titled 'The Hyper-Hermeneutic Gesture of a Subtle Revolution' (Chapter 13) is a reading of the key idea in Agamben's critique of community, that of whatever being, in relation to its political and ontological implications with a special emphasis on the analysis of exemplarity that Agamben provides as a key move to understanding what he calls – the politics to come (see Agamben, 1993). The final essay of Part III is by Paolo Bartoloni, titled 'The Threshold and the Topos of the Remnant: Giorgio Agamben' (Chapter 14). Bartoloni's essay centres its exploratory focus on another key concept