Outlaws, barbarians, slaves
Critical reflections on Agamben's *homo sacer*

Magnus FISKESJÖ, *Cornell University*

Agamben's political philosophy of state power as founded on the expulsion of outcasts, who are embraced as key components of the system precisely by virtue of their potential exclusion, strangely omits such cardinal and long-familiar figures of sociopolitical inequality as the slave and the barbarian. These are neglected despite how they, together, stare us in the face from the very same pages in Aristotle from which Agamben derives his theory of bare life, and despite their key historical role in imperial state ideology and in the formation of empires. Agamben instead resurrects the obscure figure of *homo sacer,* an ancient Roman form of outlaw interpreted as bare life, mainly for the purpose of rethinking and debating citizenship, exclusion, and the ruse of the "rule of law" in the modern Western state form. As a transhistorical-paradigmatic figure it leaves aside not only its obvious counterparts—slaves and barbarians (whose real-life referents, like homo sacer, are also both historical and contemporary)—but also the pre-state and pre-law excommunication of outcasts. In this article I discuss the historical and political anthropology of outcasts and outlaws, slaves, and barbarians, what is obscured by homo sacer, and what this "limit figure" can bring to light.

Keywords: outcasts and outlaws, slaves, barbarians, state power, Agamben

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It is curious that Giorgio Agamben chose *homo sacer* as our preferred guide to the riddle of sovereignty and state power founded on the principle of exclusion (Agamben 1995, 1998, 2003, 2007)—and not either "the slave" or "the barbarian." The slave is a quintessential paradigm of social inequality, whose radical exclusion from social and political life has been captured in the phrase "social death" (Patterson 1982). The barbarian, too, is a long-standing, formidable paradigm of exclusion that would be at least as "good to think" as the slave, for Agamben's purposes. Both the concept of the slave and that of the barbarian involve the denial of equal membership in society, and a reduction to something less than human, which could then be exploited outside normal law. Yet instead Agamben chose to resurrect homo sacer, the now-famous but previously long-forgotten figure of ancient Rome—which was an obscure figure already in the early texts from which

Agamben resurrected this mysterious character, and has previously concerned only small numbers of scholars of ancient Roman law and society.

Why? Could it have been to avoid the aspect of how power and domination are always in a process of formation? The classic figures of the slave and the barbarian are both tools deployed in this very process: The figure of the slave has historically been used to redefine people as property and objects of naked exploitation, and the figure of the barbarian has been deployed to justify their subjugation as the object of civilization. The two paradigmatic figures are also closely linked, and in effect have formed a two-pronged tool for such subjugation and exploitation by which people first defined as barbarians are reduced to and exploited as slaves—a pattern repeated today when "illegal migrants" are dragged down into (illegal and hidden) slavery.

Yet this entire barbarian–slave complex and its contemporary relevance are passed over by Agamben in favor of the description of state power as something like an immobile structure that is maintained, above all, by the internal threat of exclusion of its own subjects. Because his focus is really on the present, this neglect of historical parallels is not a concern for Agamben—who himself presents an eloquent, and in some ways powerful, defense of his own (and Foucault's) explicitly ahistorical method of "working with paradigms" (see Agamben 2002a).

But while we must recognize the pressing relevance, the undeniable productivity, and the profound insights that have been generated in Agamben's work, we must also investigate what is lost with this ahistorical approach. I suggest it deflects attention from the barbarians and slaves of the past, and also, in consequence, from today's continuities with that past. In the following, I will raise questions about the comparative relevance of these alternative figures of otherness. I will also reach further back into history to point out that the exclusionary punitive measures Agamben highlights actually appear as institutions of outlawry in pre-state societies, before the paradigm of state-organized Law that is privileged in Agamben's intriguing writings. I suggest that these exclusionary measures must be discussed not only as a hidden mechanism in the modern state, but also in relation to state formation as a historical process. These are the key questions addressed in this article. They force us to reopen once again the questions of state power and sovereignty.

The contemporary relevance of "archaic" homo sacer

The term homo sacer itself once referred, in ancient Rome, to a person excommunicated from society, removed from the safeguards offered to its normal members so that his biological life subsequently could be taken by anyone with impunity. It meant, explains Agamben (1995), that normal political rights and legal safeguards were stripped away, so that the homo sacer was reduced to the mere naked, or bare, life (*vita nuda* in Agamben's terminology) of a human being alive only in a biological but not in any political sense, since he has none of the usual rights of a member of society. Agamben also insists that in this act of exclusion, the bare life that may seem at first natural, unmarked, and apolitical is itself produced anew in this act and is thus in itself profoundly political, so that "the production of bare life is the originary act of sovereignty" (1998: 93).[1]

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1   This point has profound significance for any discussion of the supposed sacredness of life, pro-life political movements, the politics of death, etc., in today's society.

It was from Aristotle that Agamben derived the key terminological duo of "bare life" (*zoe*) as the biological prerequisite for, yet distinct from, a citizen's political life (called *bios*),[2] with *zoe* becoming Agamben's profoundly political bare life, which parallels the Hobbesian default-state of nature, against which politics is deceptively set (see Sahlins 2008). Aristotle, and especially his concern with potentiality, continues to be one of Agamben's most important references in philosophy. Yet we must note that the inspiration for bare life came from the *very same* infamous pages in the *Politics* where Aristotle set out his theory of "natural slavery"—the supposedly innate suitability of the barbarian Other for enslavement under the Greeks as an *andrapodon*, a "man-footed creature," reduced to a subhuman status and denied participation in political life (cf. Bradley 2000; Cambiano 1987; Meillassoux 1991; and Fiskesjö 2011). This whole arrangement was guaranteed by the force of state power, like any large-scale slavery, and Aristotle's defense and justification of it as natural and predetermined by the limited potential of those enslaved remains one of the most awkward and contradictory aspects of his writings. His theory has frequently been used by slaveholders to help justify their crimes; and has been debated at length, especially in recent centuries. And yet, despite this obvious connection, Agamben's discussion of the more obscure figure of homo sacer includes no mention of either the "natural" appropriateness of the barbarians as potential slaves, or of the slaves that they became.

Agamben (1995) instead positions the homo sacer outlaw or outcast as the hidden antithesis of membership in the political life of society, lorded over by the sovereign or by sovereignty, by virtue of this logic. In many ways, this idea is most productive, and profoundly relevant today. Modern citizens of rich countries in the global North do identify as members of society subjecting themselves to its laws, and simultaneously accept the exclusion of those outlawed from the protection these laws ostensibly offer, because this appears to guarantee their rights and security—as when polls of the U.S. electorate now lean heavily in favor of the perpetual maintenance of extralegal camps like Guantánamo; or as when citizens of Europe or the United States begin to convince themselves that illegal migrants are lawbreakers who must not be granted any rights. Yet by the same logic the politics of the society to which these citizens belong becomes but a false biopolitics, a spectacle of identity that conceals for those inside it how they, too, really are governed as the raw material of sovereign power. For Agamben (1990) a true politics could only come about in what he calls "coming communities" where people would refuse these mechanisms of identification and rule. To get there, which would mean recovering the true potential of human beings, we would refuse the concept of borders and throw away our passports, as well as all other "conditions of belonging"; we would evade the fingerprinting and other forms of what Agamben calls "bio-political tattooing" now used to herd us around (such as Facebook facial identity tracking or the soon-to-come Google implants); but above all we would start by freeing our minds through the "profanation" of those false sacred concepts that dominate us. Thus he says, "the profanation of the

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2   For a philological critique of Agamben's use of these terms (one which misses the validity of Agamben's point about how a citizen's rights are stripped to reveal nothing but a naked biological body), see Dubreuil 2006; also the summary dismissal meted out by Jacques Derrida (2005)—Agamben's sparring partner and fellow Heidegger heir.

unprofanable is the political task of the coming generation" (Agamben 2005, also 2007).

It is thus clear that despite his impressive Classical learning, Agamben resurrects homo sacer not as empirical, historical fact, but mainly as a heuristic guide meant to reveal the present situation. As the Classicist Michèle Lowrie says, "the explanatory power of homo sacer resides not in its historicity, but in its being 'good to think with' "—incidentally, she shows this was true also for Agamben's native city in ancient times: In antiquity, the *exemplum* was a favored form of Roman rhetoric (Lowrie 2007: 32–3, 2010: 172).

The key item on Agamben's provocative agenda is to warn that the constitution of the ostensibly democratic states of the West is built on the mechanism that produced homo sacer, and is not fundamentally different from that which enabled Hitler's concentration camps. He is less concerned with the historical making of state power than with showing to the citizens of modern states, to those already safely holding membership in present-day Western societies, how the built-in threat of their own exclusion from its protections and their acquiescence in this order of things (such as the acceptance of government and corpocratic surveillance; the "black prisons" and Guantánamo as a permanent state of exception) is the foundational mechanism of power in these modern states, and that this means it is no surprise that Hitler's camps have already been reopened in new form.

For this purpose, an ahistorical homo sacer was better to think with than either the slave or the barbarian, which barely figure in any of Agamben's texts.[3] The reason might be that such figures' otherness and exclusion from equal political rights are conceptualized, precisely, as already justified. Their exclusion is already a given, accepted by the civilized slaveholders, and (today) by modern citizens, as a prerequisite for their own inclusion and protection; while citizens could not as easily dismiss the contemporary threat that every one of them could face as a homo sacer expelled *from within* their own ranks. From this perspective, even though barbarian or slave identity is of course also not preordained, but similarly created in historical context,[4] it can perhaps become partly understandable why Aristotle's slaves and barbarians do not play prominent roles in Agamben's account.

Agamben's unmistakable focus on the present-day West has also led some anthropologists to dismiss him as hopelessly Eurocentric. But even though some might say that we should not, I for one am willing to forgive Agamben: Both for not explicitly admitting his Eurocentrism, and for engaging in it, as he and other contemporary would-be heirs to Aristotle and Heidegger obviously would; as well

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3   Agamben 2002b (cf. 2004: 37) includes a brief reference to "the slave, the barbarian, and the foreigner, as figures of animals in human form," so configured in the pre-modern version of the "anthropological machine" that defines the human by its distinction as nonanimal.

4   The work of Aristotle himself is a desperate attempt to establish a moral justification for slavery (as "natural"), but even he is forced to admit that mistaken enslavement happens (see Cambiano 1987); Classical literature also features the citizens' anxieties in the face of the threat of "mistaken" reduction to barbarian enemy status, or to slavery, famously so in Apuleius' *Golden Ass*, in which a free man is mistakenly reduced to an ass (a slave!) (Bradley 2000).

as for his use of a transhistorical homo sacer as his guide; and the presentation of historically specific conceptions of life, as universals. Even if we apply fail-safe anthropological caveats on these points of Eurocentrism, ahistoricism, and false universalism, there is undeniable heuristic usefulness and productivity in his provocative contributions—indeed also for understanding state power outside of Europe.[5] Perhaps most intriguingly, in only a few pages on China, on the infamous 1989 Tiananmen crackdown (1993: 85–7), Agamben provides a deeply insightful reading of the events.[6] Rejecting all the easy answers for why the ruling Communist Party had to impose such a violent repression of the peaceful demonstrations, Agamben instead directs our attention to how people in China stopped playing the part of The People, as in the orchestrated identification crucial to state power. The state power elite could not tolerate that the people, in Agamben's words, began to "co-belong without any representable condition of belonging" as they had previously, when they were recognized only as "the Workers," "the Chinese People," etc. Thus in the self-governing people of Beijing's May 1989 streets (who peacefully took over directing traffic, etc., as the armed agents of the state temporarily absented themselves), Agamben recognizes the "coming community" he has been hoping for. In this brief text, Agamben does not even mention homo sacer—but such a figure also became apparent, in those demonstrators who were reduced to vermin, to be shot on sight, when the desperate Party officials imposed martial law on the demonstrations. Their interpretation of the peaceful demonstrations as dangerous disorder was enshrined in the Orwellian state propaganda version, which still remains the sole permitted orthodoxy.

Indeed, while Agamben may be accused of Eurocentrism, Flora Sapio, in her recent groundbreaking work on law and society in China (Sapio 2010), shows how his work inspires new insights about China. She observes how the authorities constantly redeploy a similar state of exception for anyone on the street, who can be stripped of their citizen's legal rights and sent off to extralegal camps that effectively institutionalize an exception built into the legal system. While disappointing to Western legal scholars who have long dreamt that China is slowly introducing a Western-style "rule of law," this further underlines the value, for the study of Chinese ideologies and practices of power, of Agamben's work on the key significance of the mastery of the exception in state power, and how it is organized around the sovereign exception. It also notably returns the question to the issue of the nature and limits of the "rule of law" in the West itself and to the unquestioned assumptions about this rule of law on the part of the legal scholars who took it for granted.

The disavowal of the slaves

But even if homo sacer thus unquestionably can serve as a valuable guide in places far from Europe and far from its own time, we must not let homo sacer lead us too far away from the slave and the barbarian—and not only because of Agamben's

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5   Though beyond the scope of this article, a comparison with the fate of Foucault's Europe-centered ideas inevitably suggests itself (see, e.g., Kaplan 1995; Mbembe 2003; Young 1995).

6   For more comprehensive accounts, see, e.g., Cunningham 2009; Pieke 1996.

failure to alert us to slavery in Aristotle's Greece but also because this would distort our understanding of how states are built.

In ancient Rome—the source of Agamben's homo sacer—slaves were everywhere. Many were "barbarians" captured and enslaved in so-called "just wars," and many others were the descendants of those already enslaved (Finley 1998; Bradley 1996, 2000). The oft-cited *Institutes* of Gaius, dating to around 161 CE, identified as the most important "distinction in the law of persons ... that all men are either free or slaves" (cited in Gardner 1993: 3), and slaves, as excluded from Roman citizenship, were direct, living evidence of the very same mechanism of inclusion-through-exclusion and the definition of citizenship in the institution of the noncitizen, which Agamben illustrates with homo sacer. This was vividly apparent to citizens, not least since they too could be reduced to slaves, as punishment (Burdon 1988). Overall, slaves lived under the gross pretense of being reduced to things, as property, and in this sense too, slaves continuously illustrated an Agambenian idea of bare life. Not just their name but also their life station, their bodies, and very existence could all be altered or snuffed out at will, by their "owners"—they were living-dead, un-people laboring without pay on penalty of the cruelest punishments, including death.[7] Slavery was a massive presence guaranteed by the state, in ancient Rome as well as in the other "slave states" (Finley 1998) of recent centuries, like the United States of America and Brazil, and it was constantly a top issue of the day. At one point the Roman Senate debated whether to require a particular clothing style for slaves so that they would be instantly recognizable in the streets, simplifying everyday interaction. But the proposal was abandoned—it would show the slaves how numerous they were, which might incite them to rebellion (DuBois 2009).

The blatant injustice of slavery meant rebellion was constantly in the air. It was only because of the brutal repression holding the institution in place—in effect a continuation of the war that made the original slaves—that few slave rebellions in history were ever successful. Even Spartacus went down in failure, having presented no real alternative to the reigning order (Shaw 2001). But there are major exceptions, such as the independent maroon societies of the Americas, notably including Brazil's famous Republic of Palmares (Anderson 1996; also Price 1996). This independent polity, often labeled (or mislabeled) either a "state" or a "Republic," lasted a hundred years or so on its own, before it was vanquished by the armed forces of the colonial slaveholding power, Portugal. Regrettably, we know little about the political philosophy of its supporters and members, or of their approach to the problem of identity and belonging: Was it a "coming community" that arrived before Agamben defined the term? Or did it merely replicate African or Portuguese models of kingship and state governance?

The most famous exception to the general rule of the failure of slave revolts in history is, of course, known to us in rich detail: The 1791 Haitian Revolution, which abolished slavery and led to the 1804 independence of Haiti, previously one of the most profitable of Europe's Caribbean slave colonies—but now welcoming

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7   On these aspects of Roman law also see, e.g., Bauman 1996; Burdon 1988; Girard 1901; Gjerstad 1972; Stein 1999; Tellegen-Couperus 1990.

all slaves from elsewhere, as free persons.[8] This event, one of the most momentous in world history, pointedly called out before the entire world the hypocrisy of both the American and French declarations of universal human rights, as well as the hypocrisy of the racialized justifications of slavery reinforced in the presumptions of the United States, France, and other countries that sought to continue the heinous crimes of slavery even after raising the flag of "liberty" (including, in the case of the U.S.A., coming to France's aid in attempting to suppress the Revolution, which threatened the survival of its own institutionalized and legalized slavery). This hypocrisy (on which also see Trouillot 1995) remains, of course, the major reason why the Haitian antislavery Revolution has been thoroughly silenced, even "disavowed" (Fischer 2004, 2010) in world history as a whole. This disavowal is one in which Agamben, too, is arguably complicit, or, at the very least, it is one into which he has unwittingly been led. This fate he shares with many others—including Hegel, as revealed by Fischer (see too Buck-Morss 2009): The German philosopher of the Master–Slave dialectic was so much in awe of Napoleon as an icon of progress that he suppressed any mention of the vicious attacks that this emperor launched on the Haitian Revolution. In Agamben's insightful, critical discussion of how "human rights" conceal the way in which those granted these rights become entangled in the web of state power (Agamben 1998: 126–35), nothing is said about the momentous Haitian challenge, and the Haitian revolutionaries' grappling, in drafting their own modern-state constitutions, with the issue of the possibility of truly universal human rights.

Human sacrifice and the barbarian as limit figure

In stark contrast to the ubiquitous slave, homo sacer was revived by Agamben from the ambiguous account of an etymological dictionary recompiled and abridged from an even older work by Verrius Flaccus somewhere in the first century CE.[9] Already then, the term homo sacer was obscure, and the glosses were fragmentary notes on ancient times. As Lowrie (2007: 34, 2010: 183) points out, the revisions of the ancient term over time are not discussed by Agamben, who prefers to offer homo sacer as an ahistorical, hidden concept recovered by himself, as an exemplum.

The glosses passed down to us note in terse language that older Roman legal traditions mentioned homo sacer as a person condemned for a crime, declared "sacred" in a public vote, and then, "if anyone were to kill that one who in a common referendum [plebei cito] has been declared sacred, it will not be regarded as murder." Moreover, such people "could not be sacrificed" (see Lowrie 2010: 172). In discussing these passages, Agamben equals the legal impunity of killing of a homo sacer with apparently religious prohibitions on its sacrificial use (as a victim consecrated to some god, in a "religious" ceremony), and identifies the space in

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8   For more on the Haiti Revolution, see the works by C. L. R. James, Michel-Rolph Trouillot, Laurent Dubois, and many others; e.g., Dubois and Garrigus 2006; Gaffield 2007.

9   This was *De verborum significatione* [On the significance of words] compiled by Festus c. 200 CE (Festus, Sextus Pompeius Festus, or Festus grammaticus 1846, 1994, 1997; see also the Festus Lexicon Project website, www.ucl.ac.uk/history2/research/festus/), which was an abridgement of an earlier, now lost, dictionary by Verrius Flaccus. Also see Bennett 1930 and the detailed discussions in Fiori 1996 and Garofalo 2005.

which the sovereign can kill with impunity and without sacrifice, "a zone of indistinction between sacrifice and homicide," as the defining sphere of sovereignty (Agamben 1998: 82–3).

But the abandonment of homo sacer to his fate can also be seen as a form of sacrifice—only it was not permitted to be recognized as such in the late period in which it was recorded for posterity (as I will discuss shortly). The declaration of certain persons or offenders as "sacred" can be understood as having such offenders set apart from (or, banned from) their original home society's protections, so that their fate would no longer be decided by its members but left to whatever end they would come to, while lacking those protections. This would include the possibility of their being killed with impunity by former peers, as if they were animals, no longer recognized as members of human society. Such abandonment to fate or to the gods shares with many sacrifices the fundamental, mystified aspect of symbolically efficacious renouncement. Indeed, as Valerio Valeri has pointed out (2000, 2001),[10] some animal sacrifices also take the form of abandonment, not direct slaughter—in effect, the symbolic removal of the victim from normal human use. In terms of social function, this form of renouncement, just like ceremonial slaughter, can also serve either to authorize the socially ordered partaking of desired resources or to help establish a desired social and moral order, as the case may be. The only difference is that the killing of the victim is not immediately part of the ritual, as the prospects of the victim are ostensibly left undecided.

If the declaration of a person as sacred and his (or her) abandonment to an unknown fate is actually not something radically set apart from "religious" sacrifices, but is instead closely related to such rituals, it must be investigated, like them, with reference to the social context of both pre-state and state societies. Agamben's limited focus on the significance of such a ban in the scheme of state sovereignty and kingship obscures the fact that such a punishment by abandonment (which could be termed a "sacrificial" mystification of the community's power) was already first practiced in pre-state communities. In my concluding section, I wish to say more about such polities, which probably preceded Rome in distant antiquity and also have existed in later historical times. But first, let us consider the question of the social context of the early Roman state and empire.

When Agamben cites the interdiction on using homo sacer as a sacrificial victim, he says nothing to suggest what sacrifices could have been carried out with a human-made-sacred as the victim. Actually, to consider the question of human sacrifice at Rome is more illuminating than might be expected. Few human sacrifices are known from Rome, whether before or after it became an empire, in 31 BCE; most scholarship on ancient Rome instead emphasizes as vastly more significant the same context that I have already pointed to—that of state-building, institutionalized mass slavery, and imperial expansion, as well as the deployment of categories such as barbarians and slaves, in those processes. This actually included veritable campaigns *against* human sacrifice, waged from Rome to persuade "barbarian tribes" on the empire's peripheries to put a stop to such primitive practices; the same rhetoric is deployed in accusations of secretive child offerings

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10 Note that the latter includes cogent rebuttals of the rather reductionistic theories of Réné Girard and Walter Burkert as regards sacrifice and abandonment.

made against Christians and other self-confessed heretics, sectarians, or suspect *magi*, likewise perceived to threaten the state and therefore likewise condemned as "un-Roman," in the name of civilization (Beard et al. 1998, I: 233–5, II: 159).

Such accusatory rhetoric in defense of civilization made perfect sense for an expanding Pax Romana, much in the same way that latter-day colonialism justified itself in terms of a civilizing mission eradicating gruesome primitive customs. Of course, it could still hide Roman sacrifices in yet earlier times—but the general absence of human sacrifice in Rome itself makes sense if we consider the issue comparatively. We may compare the first emergent empires of ancient China, organized in about the same era as Rome. (These two "world empires" are often said to have been aware of each other's existence.) In early imperial China, as in Rome, the emphasis was on making use of people as means to the end of furthering state power. Thus in China, too, we find propaganda in favor of abolishing human sacrifice so as to civilize the "primitive" periphery. But in China, there is clear evidence that human sacrifices did occur in the core areas of civilization—in the early stages of state-building. The most obvious case is the late pre-imperial ostentatious mass sacrifices of victims buried as servants of the deceased kings of competing polities—practices that were abolished in the subsequent empire and replaced there with artificial figurines, as in the famous terracotta army at the tomb of the First Emperor (late third century BCE). We have no similar empirical record from Rome of such a sequence, in which the state is created in an orgy of violence that includes human sacrifice. But even so, I suggest that the pattern holds worldwide, for both China and Rome: Human sacrifice was invented in the context of the buildup of the very first states and kingdom, as part of the formation of a kingly monopoly on violence; only later, as these states became entrenched, was history rewritten and such sacrifices were condemned as "primitive."[11]

In imperial Rome, just as in imperial China, subdued enemies were more useful as live slaves producing wealth, and as live soldiers charged with expanding the reach of the state and the empire—a greater violence covered up by the rhetoric accusing the yet-to-be-conquered barbarians of primitive, excessive violence such as human sacrifice, to be quelled in the name of civilization. Against this background, it seems likely that the note on how homo sacer could not be sacrificed was not a reference to the historical practice of the sacrificial killing of humans, but instead was an injunction not to invent it anew.

This interpretation is supported by both the scarcity and the nature of human sacrifice in ancient Rome (monarchic, republican, and imperial). Certain enigmatic rituals, such as the annual ritual of puppets thrown off a bridge in Rome by the Vestal Virgins, have been described as using substitutes for what was once human victims (see Dumézil 1970: 448–50). But this is unconvincing, and not only for lack of positive evidence. The principle of substitution is central to sacrifice to begin with, and need not represent a historical sequence of one thing substituted for another (Valeri 2001): The puppets may have substituted for live people

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11 This also will account for the astonishment and disbelief of both Roman and Chinese ancient authors in the face of the apparent inconsistency of older practices with the ideals of their own time (cf. Beard et al. 1998; Fowler 1911: 58). On the development of the early Chinese state see, among many others, Lewis 1990, 2007.

symbolically, and not actually, ever since the Vestals and their rituals were first instituted. There were occasional house foundation sacrifices, in which the victims' identity is less clear, and offending Vestal Virgins could be buried alive. Another most famous and much-debated human sacrifice was that of foreigners, newly invented in the third century BCE: In 228, 216, and 113 BCE, two pairs each of Gaul and Greek victims were buried alive in Rome (Beard et al. 1998, I: 80–2, II: 158–9; Dumézil ibid.). Dumézil (1970: 449) notes that Roman authors themselves described this as a troubling novelty. These sacrifices were made using not citizens (or even slaves) but foreigners; and they were not construed as the exclusion of Romans from Rome. They appear as a novel ritual of wartime defense-magic directed against foreign powers—thus of a piece with the cause of state-building.[12]

There was also an ancient practice of dedicating criminal death penalties to a god, including to ancestor-gods (i.e., the Menes; cf. Bauman 1996; Beard et al. 1998, II: 156–8), which possibly preserves "archaic" forms of sacrificial mystification (placing the fate of humans in the hands of their gods, and conceptually displacing community agency). These forms might well have been appropriated and modified by early Roman monarchs, but, if so, this is largely lost to history. However, this would parallel those documented cases in which citizens suspected of sedition against the state were killed outside of any legal framework, as with the (real historical) homo sacer Spurius Maelius, killed in 439 BCE for plotting (transgressing!) against the sanctified state (Lowrie 2010). If we had better records of such instances of foreigners and criminals killed as sacrifice (historical, or archaeological) for the sake of furthering the state in its incipient stages, it would make for an even more sustained comparison with China, where emergent Bronze Age states developed the ideology of criminalizing any opposition to state-building and to the inclusion of new, formerly self-governing populations as subjects under the state. As I have discussed elsewhere (Fiskesjö 1999), enemies resisting state-building by refusing to be subjugated (for the purposes of taxation, exploitation in nonreciprocal conscripted labor, military service, etc.) were in effect the first barbarians, and the ritual killing of such opposing enemy combatants was dedicated to ancestor-gods.

The threat to the state was the primary issue, and indeed in both the Chinese and Roman empires we find that the basic formula justifying the conquest of the barbarian's land and the enslavement of those who dared resist is the same, even if the framing language is slightly different—Rome developed the theory of "just war," which was to be revived by John Locke and other British and Spanish writers justifying the post-1492 conquest and enslavement of the Americas; while in China insubordinate barbarians were framed somewhat differently as "rebels" obstinately refusing to fold into the growing body of the empire. Both enslaved their war captives, though in China for public (state) works rather than for private *latifundia* producing for commercial markets, which dominated Roman slavery (see Finley 1998; Fiskesjö 2011).

In both Rome and China the label "barbarian" was a condition that the process of "civilization" could remove, particularly through voluntary submission to

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12 Actually, the same may be true for the Vestal puppets, since, as Dumézil points out, that ritual too is called "Greek"—here probably to be understood as a general term for "foreign power."

conquest. It was thus something radically different from the conception of fixed essences that shines through in Aristotle's account of natural slavery. "The barbarian" is not a fixed people, much less does it refer to people with innate characteristics, as Aristotle would have imagined, but a moving target. Frontier peoples were made to stand for and instantiate this idea for both Roman and Chinese empire-builders, in the ideological self-delusion that they developed and deployed to further their conquests and define themselves in the same process (which can be repeated in any would-be empire, even today). Borrowing the Aristotelian concept of potentiality (of close concern to Agamben), we can say that "the barbarian," in this understanding—which is also the key salvageable aspect of the idea of homo sacer, as a perpetually available idea—represents the rhetorical limit of the law (in both the case of the barbarian and homo sacer). It indicates where potentiality ends and law supposedly begins. People beyond this limit, awaiting the encounter with state expansion, are not yet split into those who will submit without a fight, and those who must be vanquished while resisting or enslaved as punishment. The barbarian advertises both of these aspects, while slavery represents the actualized punishment of the others' attempt to resist conquest. Even a later individual manumission from slavery, which might take place in another, subsequent generation, will extend the original "victory," for it creates Romans (or, Chinese)—which was the original objective.

Such state-furthering "justice" is the "main event" of Roman state-building in motion, affecting many millions of people, but strangely omitted from Agamben's discussion. This is what is lost in his illuminating focus on the mysterious homo sacer as a limit figure. Because he declines to engage with the state and the empire as historical process, [13] Agamben is prevented—by himself—from considering European and other forms of colonialism and imperialism, which would otherwise be a logical next move.

The "coming community" *avant la lettre*?

The preceding discussion has consequences for the understanding of Agamben's original concerns with state sovereignty at home, in Europe, as well as his conception of a "coming community." Looking to history, we find punishments similar to homo sacer's exclusion from a home community noted from many places across Europe. However, they are everywhere firmly associated with a situation in which judicial institutions guaranteed by state violence do not exist; instead such banishments appear as the self-policing of nonstate communities without maintaining a police or military force commanded by a king or an emperor to enforce institutionalized law, and its judgments.

These communities and their circumstances often enter into written history just about the time that the agents of new royal and state power strive to encompass and co-opt such popular political bodies—and because of this we often are confused about the sequence. But these nonstate and pre-state self-governing communities are documented from many places, not only from places far from Europe (see Gibson and Sillander 2011) but also, not least, from Europe, from

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13 Including as reversible process, such as in the decline of empires, the collapse of slavery, or the reinvention, as something else, of whoever played the part of the barbarians.

Scandinavia and Germany where Agamben, other than in Rome, finds his own examples of outlaws. But he neglects the fact that in Europe, the pre-state body-politics that grew out of these traditions of community self-governance were later either accommodated with new restrictions or canceled outright, by the new state sovereigns, the kings of the later European nations-to-be. Our confusion about this arises from the historical fact of how the kings imposed themselves on and appropriated these pre-state political forms—which historians have struggled to label with terminology borrowed from later state-defined contexts, either as "peasant republics," or as "peasant anarchies" (Ekerwald 2004: 124) since everyone had the right to attend and speak except those excluded by excommunication.

By far the most famous such parliament is the Althing on Iceland, founded in 930 CE (Jóhannesson 2006; Thorláksson 2000; also Arter 2004; Breisch 1994) and in due course mired in the competition between emergent local chieftainships (Sigurðsson 1999). But numerous other less-known *ting* (deliberative and governing bodies; sometimes called meet, as in "meetings") are known from the threshold of written history. One fascinating example was northern Sweden's Jamtamot, the "meeting of Jamte people" convened on the island of Frösön at least since the tenth century, but probably earlier (Ekerwald 2004).[14] Many of these political formations are doubtless lost to that written history commissioned by the kings, history's victors. Yet these same developments probably also unfolded in distant, archaic Rome, long ago, before it was the Rome of the kings and before it became the imperial state; still, the obvious question about how ancient legislative and judicial bodies survived in co-opted form under Agamben's modern State, and what happened to their practices of exclusion as self-policing, is one that Agamben seems to ignore completely as he skips imperceptibly to his admittedly brilliant observation that the Hobbesian state of nature is one invented in the course of the making of this State "in which everyone is bare life and a homo sacer for everyone else" (1998: 106; cf. Sahlins 2008).

The self-policing quality of nonstate communities explains why the old Russian word for rural settlement, *mir*, means both "community," and "peace"; and this is why in so many contexts across the Germanic and Scandinavian world the technical terminology for the ban, or "out-lawry," or exclusion of a member of the community turns on how the excluded person is made "peace-less" (G. *friedlos*, Sw. *fredlös*, etc.),[15] when deprived of the peace provided by community membership. Fatefully alone in the forest, he is understood to have no more peace than a wild animal constantly threatened by death. As a created Other deprived of his former social security, individual community members can now kill him with impunity, since even so he is seen as dying at the mercy of the gods, who will decide his precise fate.

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14 Also see "Jamtamot," http://sv.wikipedia.org/wiki/Jamtamot (a Swedish-language page, with basic information on this rarely- discussed "Republic").

15 On the peace-less (*fredlös*, banished) of pre-state Scandinavia and Germany, see Åqvist 1989; Breisch 1994; Fiori 1996: 75–9; Hellquist 1980; Magnus 2001 [1555]; Munktell 1943; Ström 1942; Wennström 1933; Winroth 1889; on their distinction from thralls, the permanent house slaves of old Scandinavia, see Nevéus 1974.

It is easy to see how this punishment may be construed as if its victim is being dedicated to whatever gods are recognized (Agamben 1998: 71 ff.; cf. Ström 1942).[16] This may also be what is surviving in Roman death penalties, but the original sense of the Roman word *sacer* should be "to be set apart for a fate decided by the gods" as opposed to by the remaining members of society who cannot arrange to slaughter such a victim since that would be to usurp the prerogative of the gods, to whom the criminal's fate had been turned over, in this act of *mystifying* displacement. In the Rome we know, the term homo sacer was used only as a distant survival of practices associated with pre-state, self-governing communities of the past, reappropriated in the new historical context. Lowrie points out that even in the Roman procedure, the several steps to excommunication are taken not by sovereigns but by popular bodies of justice, which are surviving vestiges of pre-state institutions persisting in a new context of state power (Lowrie 2007: 36).[17]

The appropriation by emergent kings of the privilege to expel a subject from society is reflected, in Scandinavia, in the terminological transformation from *fredlös* to *edsöre*, which signifies the relocating of the power to expel (and to confiscate property of those expelled) to the kings. This usurpation at once drew on and redefined the terminology and forms of earlier "peacelessness" (banishment) (Schlyter 1891; Åqvist 1989). Just as with dynastic kingship in itself, this appropriation represented a usurpation which is a key element of the making of the state monopoly of violence. (The same ruse is also perpetrated whenever kings try to present "their" parliaments as gifts made to their own People!) In the special case of banishment, which was devised in a world without prisons and guillotines, this usurpation is of an ancient form of self-policing and self-deception devised by pre-state communities, which the kings usurp as part of an array of new royal privileges (to imprison, punish, or execute, or to expel, but now as exile from the kingdom; or, later, deportation, from the modern nation-state).

In this historical perspective, the originary relation Agamben proposes between homo sacer and the state sovereign appears as a fictional reconstruction, and an untenable reconstruction, however well it serves his latter-day purposes. It also leads us to pass by the question of the nature of pre-state or "peasant anarchy" communities and their self-devised powers to expel their own—a question separate from and yet more fundamental than the question of kingship and state power. Drawing on Agamben himself, it can be formulated thus: Can a community be founded on anything other than the principle of belonging?

Concluding remarks

It makes much sense that homo sacer was so obscure in the early dictionaries: by the time of their compilation, the State (with its newly assumed powers to judge, jail, exile, or kill in its name and in the name of its newly appropriated or refashioned gods) had already become a long-established fact. And it is this very presence of

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16 Agamben's dismissal of older theorizations of taboo, brought in as strawman anthropology, is misguided; cf. Valeri 2000; and, especially, Song (n.d.).

17 Lowrie makes no mention of such procedures possibly deriving from pre-state tradition (at most, she says, they are "ancient"), but merely identifies them as "popular" in their contemporary context.

state power that renders homo sacer obscure. Whatever lingering forms the later kings and emperors of Roman states or in the later European states may preserve of either a ban such as that of homo sacer, or of the pre-state bodies that originally enacted such bans, the punishment named homo sacer is not a secret formula originating state power. If anything, it is the originary principle of power founded on the very belonging or membership that Agamben pinpoints. This is so even if this principle may, later, be *appended* to the schemes of state power by scheming sovereigns, as in the Roman excommunication of citizens deemed a threat to the state in the form of "exile," or their destruction following their removal "from the protection of the law";[18] and as Agamben (1995: 104–11) goes on to illustrate in his discussion of the "special proximity of werewolf and sovereign" and the king's fascination with the wolf of the forest—the wilderness that the king now claims to own.

I admit and emphasize that Agamben's discussion of the logic of the imaginary homo sacer usefully reveals key aspects of the spectacle of contemporary sovereignty. But because of Agamben's failure to recognize that homo sacer-type excommunication is not originally a state procedure, his alternatives seem to be to either provide an explanation that reclaims it as such (for this, he would have to refute the historiography that associates this punishment of exile with self-governing communities), or, he would have to altogether set aside the problem of the State (so central to his contemporary critique of modern Western nation-state) and build a more general-encompassing theory of power (or sovereignty) that includes such pre-state politics, and show us that already there, identity and power are inextricably co-formed with procedures similar to those he identified with kings and states. But if so, that pre-state communities were "sovereign" without kings, and in their solution to the problem of asociality, excommunication, *already* had formulated the final solution of Nazi camp construction. But such a pessimistic argument about historical pre-state human societies as self-enclosed and likewise formed on an "originary" state of exception induced by the logic of sovereignty will also attract objections from ethnographers referring to the obligatory inclusive hospitality toward strangers widely believed in, and practiced, in numerous smaller-scale societies found even today on the margins of states (as discussed by Shryock 2008 and others; also see Fiskesjö 2010), as well as, and in earlier history, in the stateless communities that once were. Perhaps there is still time to reconsider those pre-state political formations, together with Palmares, Haiti, and so on, as models for the present, whether as republics or "anarchies," and to question if they could be "coming communities" in Agamben's sense, of freely associating people refusing the principle of belonging on which sovereign power feeds.

Acknowledgments

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18 Lowrie illustrates this from Rome with the *exemplum* of first Gaius Gracchus (2007: 31 ff., 54), and then Maelius (2010); on whom also see Mustakallio (1994).

the editors and anonymous reviewers of *HAU: Journal of Ethnographic Theory*, as well as Hoon Song, Jakob Rigi, Oren Falk, and many others. All shortcomings remain my own.

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Hors-la-loi, barbares et esclaves. Réflexions critiques sur l'*homo sacer* d'Agamben.

Résumé : La philosophie politique d'Agamben du pouvoir d'Etat en tant que fondé sur l'expulsion des exclus — éléments clés du système en raison précisément de leur exclusion potentielle — omet étrangement ces figures pourtant cardinales et familières de l'inégalité sociopolitique que sont l'esclave et le barbare. Ces deux figures sont négligées, alors qu'elles sautent aux yeux à la lecture des mêmes pages d'Aristote qui ont inspirées à Agamben sa théorie de la vie nue, et alors qu'elles ont joué un rôle historique essentiel dans l'idéologie de l'Etat impérial et dans la formation des Empires. Agamben ressuscite en leur place la figure obscure de l'*homo sacer*, une forme romaine ancienne du hors-la-loi, interprétée comme « vie nue », principalement dans le but de repenser et de débattre de la citoyenneté, de l'exclusion, et de la ruse de la « règle de droit » au sein de l'Etat moderne occidental. En tant que figure paradigmatique transhistorique elle laisse de côté non seulement ses évidents homologues — exclus, esclaves et barbares (dont les référents réels, comme l'homo sacer, sont à la fois historiques et contemporains) — mais aussi les excommunications précédents l'Etat et le droit. Cet article aborde l'anthropologie historique et politique des exclus et hors-la-loi, des esclaves et des barbares, ce qui est obscurci par la figure de l'homo sacer et ce que cette « figure limite » peut mettre au jour.

Magnus FISKESJÖ has taught anthropology and Asian studies at Cornell University, since 2005. He was educated at universities in his native Sweden, and also in Denmark, China, and at the University of Chicago, where he received a joint Ph.D. in Anthropology and East Asian Languages and Civilizations, in 2000. In 2000–2005, he served as director of the Museum of Far Eastern Antiquities, in Stockholm, Sweden. His research mainly concerns historical and political anthropology and Asian ethno-politics, as well as museums and heritage issues. Recent publications include "The reluctant sovereign: New adventures of the US presidential Thanksgiving turkey" (in *Anthropology Today*, 2010), and "The animal other: Re-naming the barbarians in 20th-century China" (in *Social Text*, 2011).