

‘I Would Prefer Not To’: Giorgio Agamben, Bartleby and the Potentiality of the Law

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Abstract In *Homo Sacer*, Giorgio Agamben suggests that Herman’s Melville’s ‘Bartleby the Scrivener’ offers the ‘strongest objection against the principle of sovereignty’. Bartleby, a legal scribe who does not write, is best known for the formula with which he responds to all his employer’s requests, ‘I would prefer not to.’ This paper examines this formula, asking what it would mean to ‘prefer not to’ when the law is in question. By reading Melville’s story alongside Aristotle’s theory of potentiality and Walter Benjamin’s theses on history, it suggests that Bartleby’s interest, for Agamben, lies in his challenge to dominant conceptions of the relation between potentiality and actuality, which, he believes, are rendered indistinct in sovereignty. By reflecting critically on Agamben’s depiction of Bartleby as a ‘new Messiah’, this paper examines Agamben’s understanding of what it would mean to *fulfil* the law, and what form of political task this would entail.

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‘I can see that figure now...It was Bartleby!’ (Melville 1997)

‘I was thunderstruck. For an instant I stood like the man who, pipe in mouth, was killed one cloudless afternoon long ago in Virginia, by summer lightning; at his own warm open window he was killed, and remained leaning out there upon the dreamy afternoon, till someone touched him, when he fell’ (Melville 1997, p. 57). With these words, the narrator of Herman Melville’s *Bartleby the Scrivener* recounts his

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paralysis when faced with the realisation that his inscrutable employee had failed to heed his words of the previous day—‘The time has come; you must quit this place’ (Melville 1997, p. 57). Upon finding Bartleby still occupying his office, the narrator—after his return from the dead—descends the staircase and walks around the block, contemplating a series of equally unsatisfactory responses: ‘Turn the man out by an actual thrusting I could not’; he muses; ‘to turn him away by calling him hard names would not do; calling in the police was an unpleasant idea; and yet permit him to enjoy his cadaverous triumph over me—this too I could not think off’ (Melville 1997, p. 57). Finally, after imagining he should enter his office, and ‘pretending not to see Bartleby at all, walk straight into him as if he were air’, he decides on a second attempt at reasoned dialogue, which, faced with Bartleby’s silence, gives way almost immediately to a sudden passion: ‘Will you, or will you not, quit me?’ the narrator pleads. ‘I would prefer *not* to quit you’, Bartleby replies, sending the narrator into such a resentful rage that memories of an unfortunate colleague, driven to murder in a similarly private office, spring immediately to his mind.

What is the power of Bartleby’s phrase—‘I would prefer not to’—that it could create such resentment, while absolutely immobilising his employer? In recent years, Bartleby has been depicted as everything from a beautiful soul, who must ‘continuously tread on the verge of suicide’ (Hardt and Negri 2000, p. 302) to a ‘new Christ’ (Deleuze 1998, p. 90). In this paper, I will reflect on the reading offered by Giorgio Agamben, for whom Bartleby’s ‘I would prefer not to’ is ‘the strongest objection against the principle of sovereignty’ (Agamben 1998, p. 48). While understanding this claim will require an examination of Agamben’s reading of Aristotle’s metaphysics, I would like to read Bartleby’s enigmatic formula in the context of his work as a scrivener, a legal scribe. What, I will ask, does the statement, ‘I would prefer not to’ do to the law? What does it mean to ‘prefer not’ when the law is in question? For Bartleby, it means, firstly, a withdrawal from the work of copying that makes up the daily routine of the legal firm in which he is employed. While, at first, Bartleby copied ‘by sunlight and candlelight’, he soon ceases his work. He no longer writes—he prefers not to, and he repeats his single formula in response to all his employer’s requests. ‘It is not seldom the case’, this employer muses, ‘that, when a man is browbeaten in some unprecedented and violently unreasonable way, he begins to stagger in his own plainest faith. He begins, as it were, to vaguely surmise that, wonderful as it may well be, all the justice and all the reason is on the other side’ (Melville 1997, p. 35). In a broader sense then, Bartleby’s gesture, in Agamben’s reading, challenges our faith in the law’s capacity to embody and administer justice.

If Bartleby presents a challenge to the law, however, the nature of this challenge is not easy to categorise. Bartleby does not copy the law, but neither does he oppose it in the name of another law, a natural law, or a more just law that could be instituted in its place. He is neither an exemplar of civil disobedience, nor a revolutionary. He does not actively resist; he simply prefers not to. This, I will suggest, is precisely what draws Agamben to this scribe who has stopped writing. In Bartleby, Agamben sees an approach to the law that escapes the dialectic of constituent power and constituting power, and makes possible an escape from sovereignty. While Agamben’s account of

sovereign power has been the subject of much critical engagement, his more enigmatic suggestion that the law is in need of *fulfilment* has received less attention.¹ In what follows, I will examine Agamben's reading of *Bartleby*, in order to elucidate this unconventionally antinomian aspect of his thought. To do this, I will reflect on the 'philosophical constellation' in which Agamben places *Bartleby* (that of Aristotle's *Metaphysics*) and interpret his formula in the context of an examination of a *potentiality* that is, most importantly, the potentiality of the law.

While this 'philosophical constellation' will enable us to grasp the ontological foundations of Agamben's critique of sovereignty, however, deciphering what he terms the 'fulfilment' of law will require an engagement with another 'constellation'—one whose time of legibility, Agamben believes, has finally come: that of messianism—specifically, the messianism of Paul's Epistle to the Romans and Walter Benjamin's 'On the Concept of History'. The Messiah, in Agamben's view, is primarily the figure through which religion confronts the law. Far from being solely a religious problematic however, messianism, in Agamben's view, 'represents the point of greatest proximity between religion and philosophy', both of which are constitutively involved in a reckoning with law (Agamben 1999, p. 163). This proximity is certainly present in Agamben's own philosophy, which identifies a profound relation between the status of the Torah in the messianic age and the legal condition of our own time. Indeed, in his clearest formulation of the link that binds his analysis of the messianic to his more widely discussed works on contemporary politics, Agamben—evoking both the Schmittian state of exception and Benjamin's thesis that this exception has become the norm—writes 'in the days of the Messiah, which are also "the 'state of exception' in which we live"', the hidden foundation of the law comes to light, and the law itself enters into a state of perpetual suspension' (Agamben 1999, p. 162). If the state of exception in which we live is also the 'days of the Messiah', then an examination of the status of the law in the messianic age may help us to decipher the nature of the law that survives this normalisation, and to understand what it would mean to 'reckon' with it.

The Law is an Empty Canal

The problem of the status of a law that remains in force after the arrival of the Messiah is a central preoccupation of Paul's Epistle to the Romans, yet, despite this centrality, the Pauline critique of *nomos* remains enigmatic. While Romans stresses that 'a man, is justified by faith without the deeds of the law' (Rom 3:28), Paul urges obedience to the constituted authorities, and is adamant that the law not be simply abolished. In a passage that is particularly significant for Agamben's own account of the law, Paul writes, 'Do we then make void the law through faith? God forbid: yea, we establish the law.' (Rom 3:31.) In his seminal work on Romans, Karl Barth provides one way—'the church way', Jacob Taubes has suggested²—to understand

¹ An important exception to this is Mills (2007).

² Jacob Taubes, in his own book on Paul, suggests that it 'would be worth the trouble to collect all the negative reviews' of Barth's book, but nonetheless, cannot avoid a sustained engagement with it. See Taubes (2004) at 62.

Paul's approach to the law, which can also help to clarify Agamben's understanding of the status of the law in messianic time. The law, he writes, is 'a dry canal which in a past generation and under different conditions had been filled with the living water of faith and of clear perceptions' (Barth 1968 p. 65). It is possible that Barth has in mind here that river, which, Genesis tells, once 'went out of Eden to water the garden', and nourished both the tree of life, and the tree of knowledge of good and evil. (Gen. 2:10) The dry canal, however, which in Barth's reading of Paul, was formed by the rushing water of revelation, is no longer nourished by it and the tree of life no longer grows alongside the tree of knowledge. While the men who have the law inhabit this empty canal, tending its banks, oblivious to the fact that it has run dry, 'the living water fashions its own course', leaving them behind in the dusty riverbed (Barth 1968, p. 65). The law and religion are an 'impress of revelation', which provides those who tend to it with the 'form of an experience that had once been theirs' (Barth 1968, p. 65). Yet to fail to notice that this impress of revelation (and the status it grants) remains in force as pure form, was, in Barth's view, the plight of those Jews who refused to accept Jesus as the Messiah. 'What does it avail at the judgement that thou dost dwell on the banks of the canal if the canal be empty?' he asks. 'Can the possibility that the water has been cut off be ruled out?' (Barth 1968, p. 72). While, at this point, Barth poses this as a question, it becomes clear that, in his interpretation, Paul does indeed believe that the water to which the empty canal bed bears witness will no longer flow through it. In a direct challenge to circumcision, the key marker of covenant and inclusion in the law, Barth argues that the 'form of holiness is holy only in its form; and no attempt to spiritualise it can protect such holiness from ever increasing vacuity' (Barth 1968, p. 65) The law that remains in force after the messianic event, in Barth's reading, is an empty law, a vacuous law devoid of life and content.

In Agamben's view, such vacuity and emptiness characterise the law in the state of exception that has become the norm—a law stripped of transcendent authority and with no substantial claim to legitimacy. In attempting to grasp the status of such a law, Agamben turns to a letter in which Gershom Scholem writes to Walter Benjamin that the law in Kafka's stories can be understood as the *Nothing of Revelation*, by which he means, 'a state in which revelation appears to be without meaning, in which it still asserts itself, in which it has validity but no significance' (Scholem 1989 p. 142). This *being in force without significance* that Scholem describes, is, in Agamben's view, precisely the structure of the empty law that subsists in the state of exception, the pure potentiality of the law, which is not the application of a rule but what Agamben, borrowing Jean-Luc Nancy's term, calls *abandonment*. In his essay 'Abandoned Being', Nancy suggests—in line with the old Germanic origins of the term *ban*, which referred both to the insignia of the sovereign and to the expulsion from the community—that the one who is abandoned is both banished and *held* in a ban. To be abandoned is to be exposed to the severity of a law that better resembles a Kafkaesque trial in that it is neither a subpoena to appear before a court nor the jurisdiction of a particular law but simply a compulsion to appear before the law *as such*. The banished one, Nancy suggests, is completely outside the jurisdiction of the law, and yet the law continues to be applied in its very withdrawal, subjecting him to its absolute power. Abandonment

is not a state without law, but the 'other side of the law, which constitutes the law' (Nancy 1993, p. 44). More frightening than the law that is applied, is the law that exists only in potentiality and, through its own suspension, captures all of life in its ban. Today, Agamben argues, we live in the ban of an abstract and indeterminate law that retains its force despite its lack of content. 'All societies and all cultures today (it does not matter whether they are democratic or totalitarian, conservative or progressive)', he writes, 'have entered into a legitimation crisis in which law...is in force as the pure nothing of revelation' (Agamben 1998, p. 51). Like the men who live on the banks of Barth's empty canal, we live in the ban of an empty law that remains in force without content.

Aristotle and the Origins of Sovereignty

In *Homo Sacer*, Agamben writes that the paradox of sovereignty, which refers to life by withdrawing from it, is witnessed most clearly in the problem of the relation of constituting power to constituted power. While today, he argues, 'fewer and fewer are willing to claim that constituting power is originary and irreducible', Agamben is unsatisfied with the position of the 'democratico-revolutionary tradition', which affirms precisely this uncontainable nature of constituting power (Agamben 1998, p. 39). Equating constituting and constituted power with Benjamin's law-founding and law-preserving violence, Agamben writes:

if constituting power is, as the violence that posits law, certainly more noble than the violence that preserves it, constituting power still possesses no title that might legitimate something other than law-preserving violence and even maintains an ambiguous and ineradicable relation with constituted power (Agamben 1998, p. 40).

Agamben's thought thus starts from the Benjaminian conviction that as long as this *relation* remains, every act of foundation and every law that is established and then preserved, is, as Werner Hamacher suggests, subject to a more powerful law—a law of 'historical change and internal structural transformation' perceived on the model of a dialectical oscillation between law-founding and law-preserving—in which the degradation of one is bound up with the continuation of the other (Hamacher 1994, p. 112). To escape this dialectic, Agamben suggests, we need to reformulate completely the problem of constituent power and sever the nexus between means and ends.

While this task is already a daunting one, Agamben goes beyond Benjamin to argue that escaping the sovereign relation requires nothing less than a confrontation with the way in which metaphysics has constructed the problem of modality. The 'unresolved dialectic between constituting power and constituted power', he writes, 'opens the way for a new articulation of the relation between potentiality and actuality, which requires nothing less than a rethinking of the ontological categories of modality in their totality' (Agamben 1998, p. 44). Such a rethinking becomes necessary because, for Agamben, sovereignty is not simply a juridico-political structure, but an ontological one or, better, politics and ontology are simply two

sides of the sovereign ban. It would certainly be possible to question the relation of politics and ontology implicit in Agamben's suggestion that, in examining the structure of sovereignty, we run up against 'the ontological root of every political power'—a suggestion that tends to displace the political events he analyses from the specific political contexts in which they occurred, locating their conditions of possibility in the very structure of metaphysics (Agamben 1998, p. 46). Given the complexity of his argument, however, I will begin by outlining his attempt to re-think modality, which, like much of his critique of Western politics, proceeds by way of a critical re-reading of Aristotle.³ Only by understanding Agamben's claim that Aristotle, in his formulation of potentiality, 'actually bequeathed the problem of sovereignty to Western philosophy', can we understand why he sees in Bartleby the strongest objection to sovereign power.⁴

Agamben's account of potentiality proceeds through a reading of Book Theta of Aristotle's *Metaphysics*—to which Martin Heidegger devoted a lecture course that is of the utmost importance for Agamben's reading (Heidegger, 1995).⁵ Here, in opposition to the Megarians, for whom 'a thing *can act* only when it *is acting*', Aristotle suggests that to ensure the independent existence of potentiality, and prevent it passing immediately into actuality, all potentiality must also be *potentiality not to (adynamia)* (Aristotle 1999, p. 1046b29). 'What is potential', Aristotle writes, 'can both be and not be, for the same is potential both to be and not to be' (Agamben 1999, p. 182).⁶ The difficulty of this attempt to think the potential stems from the fact that what Aristotle is attempting to think is the very existence of a privation. 'To be potential', Agamben writes, 'means: to be one's own lack, *to be in relation to one's own incapacity*' (Agamben 1999, p. 182). This is clearest in the case of what Aristotle refers to as an 'effective potentiality', which—in contrast to the 'generic potentiality' of a child, who may grow up to become any number of things—belongs to the one who remains in full possession of a capability while it is not in use. Here, Heidegger uses the example of the capability to make pots of the potter who is off work, at the tavern, asking, 'does he leave this capability at home

³ This is true of his argument, which appears most prominently in *Homo Sacer*, that Western politics increasingly takes the form of biopolitics, because it has not succeeded in healing the fracture between mere life and forms of life, or *zoe* and *bios*, that was central to Aristotle's account of the *polis* and of the human.

⁴ Agamben's characterisation of Bartleby seems to become slightly less enthusiastic as he becomes more concerned with the concrete aspects of sovereign power and the state of exception. In *Homo Sacer*, he recognises that while Bartleby is the strongest objection against the principle of sovereign power, he, nonetheless suggests that none of those who have 'pushed the aporia of sovereignty to its limit' have managed to 'completely free themselves from its ban' (Agamben 1998, p. 48).

⁵ While Agamben's reading of Aristotle's metaphysics owes much to Heidegger's 1931 course, Agamben attempts to find in Aristotle's writings the basis for problems as diverse as contemporary medical decisions about what constitutes death and the detention of so-called enemy combatants at Guantanamo Bay. What brings these diverse themes together, in Agamben's view, is the problem of sovereignty and what, following Gérard Maitre, Agamben terms the 'ideology of potentiality' that sustains it.

⁶ Heidegger writes that the Megarian thesis is 'thought in a good Greek manner'—that is, on the basis of Being as presence. In contrast, Aristotle's novelty consists in his attempt to think the existence of that which, as he puts it, does not exist in 'complete reality', i.e. in actuality (Heidegger 1995, p. 154; Aristotle 1999, p. 228).

when he goes to have a beer?' (Heidegger 1995, p. 146). For our purposes, Avicenna provides a more pertinent example of what he terms a 'complete' or 'perfect' potentiality—'the scribe who is in full possession of the art of writing in the moment in which he does not write', a figure embodied in Melville's scrivener (Agamben 1999, p. 246).

Such perfect potentiality remains capable of the act in withdrawing from it, and so 'maintains itself in relation to the act in the form of its own suspension' (Agamben 1998, p. 44). Thus, the view that potentiality must 'constitutively be the potentiality not to' provides the ontological underpinning for both Agamben's theorisation of law's application as predicated upon its suspension in the state of exception and for his understanding of language, whose reference he sees as predicated on its ability to exist in suspended form, independently of any concrete act of enunciation.⁷ We can better understand this if we turn to the already-mentioned theory of sovereignty most provocatively stated in the searing words with which Schmitt begins his *Political Theology*: 'Sovereign is he who decides on the exception' (Schmitt 1988, p. 5). In Schmitt's view, there is 'no norm that is applicable to chaos' and thus the law presupposes the possibility of its own suspension and the anomic reproduction of the normal conditions that would enable the reintroduction of the (legal) norm. The sovereign, he argues, has the absolute power to decide that the state was in danger and to suspend the legal order and take the 'necessary measures' to restore order. Schmitt was thus less interested in the codification of positive law, than in the conditions of *possibility* of legal order, which he was firmly convinced must be located in law's potential not to apply. This means, Agamben suggests, that for Schmitt, 'the state of exception represents the pure and ordinary form of the enforcement of the law' (Agamben 2005, p. 105). It is this ban structure, through which law secures its application by way of its suspension, subjecting life to its power *not to* apply, that Agamben traces to Aristotle. 'For the sovereign ban, which applies to the exception in no longer applying', he writes, 'corresponds to the structure of potentiality, which maintains itself in actuality precisely through its ability not to be' (Agamben 1998, p. 46). The role of the sovereign is thus to ensure the possibility of a *passage* between the *anomic* production of a factually normal situation and the law through a decision that temporarily renders them indistinguishable.

This question of the passage, or the *actualisation* of potentiality, is central to Agamben's account of Aristotle. In what he terms 'one of the most acute testimonies to his genius', Agamben finds the possibility of such a passage in Aristotle's suggestion that a 'thing is said to be potential if, when the act of which it is said to be potential is realized, there will be nothing impotential (that is, there will be nothing able not to be)' (Agamben 1999, p. 183). By rejecting 'traditional interpretations', which take this to mean that the possible is that with respect to which nothing is impossible, Agamben re-orientes the problem of modality; if, in the passage to actuality, nothing is able *not* to be, he argues, this does not suggest the

⁷ Unfortunately, given space constraints, I am unable to address the importance of language to Agamben's account of potentiality (and law), but it would be worthwhile to examine his reading of Bartleby's previous employment in the dead letter office, alongside his theorisation of language, in which every letter is, in a sense, a dead letter, relying on the abandonment of the pure potentiality of language.

nullification of the potential not to, but rather its complete *realisation* in the act.⁸ If the formula of sovereignty first appears in Aristotle, this, Agamben argues, is because the passage to actuality is not the *destruction* of the potential not to be, but its *realisation*, a ‘gift of the self to the self’, which is possible only to the extent that potentiality and actuality are rendered indistinguishable. Agamben’s insistence that the ‘potential not to’ is preserved not destroyed in actuality goes further than the following passage from *De Anima* that he cites as evidence:

To suffer is not a simple term, but is in one sense a certain destruction through the opposite principle and, in another sense, the preservation [*soteria*, salvation] of what is in potentiality by what is in actuality and what is similar to it. For he who possesses science [in potentiality] becomes someone who contemplates in actuality, and either this is not an alteration—since here there is a gift of the self to itself and to actuality [*epidosis eis eauto*]*—*or this is an alteration of a different kind. (*De anima*, 417b, 2-16) (Agamben 1998, p. 46).

Here, Agamben writes, Aristotle describes the passage to actuality ‘not as an alteration or destruction of potentiality in actuality but as a preservation and ‘giving of the self to itself’ of potentiality’ (Agamben 1998, p. 46). In another essay, Agamben cites this passage again, arguing that in contrast ‘to the traditional idea of a potentiality that is annulled in actuality, here we are confronted with a potentiality that conserves itself and saves itself in actuality’ (Agamben 1999, p. 184). While these glosses tend to erase the ambiguity in Aristotle’s account of the passage from potential to act, they serve to stress what Agamben sees as the central characteristic of this passage: its proximity to the Schmittian schema of the exception, in which the application of the law does not nullify its constitutive impotentiality, but preserves it in the form of the incorporation of the sovereign decision to suspend the law into the juridical order.

It is this structure of suspension that Agamben finds in Aristotle: if every potentiality is constitutively an impotentiality, he argues, then this must be true even of impotentiality itself, which must maintain the potential to *not* not be. As Daniel Heller-Roazen suggests, ‘Agamben’s analysis of potentiality leads to the recognition that actuality is nothing other than the self-suspension of potentiality, a mode in which Being can *not* not be’ (Heller-Roazen 1999, p. 21). Thus, Agamben re-interprets actuality as what Heller-Roazen terms a ‘potential to the second degree’, and thereby complicates every attempt to distinguish rigidly potentiality from actuality (Heller-Roazen 1999, p. 21). In Agamben’s view, this complication is already present in Aristotle’s text, and he insists—against Aristotle’s stated position that ‘actuality is prior to both power and potency’ (Aristotle 1999, p. 242)—that it is never clear to an

⁸ In an essay devoted to Aristotle’s conception of potentiality, Agamben suggests that if Aristotle had meant only to suggest that the possible is that in regard to which nothing is impossible he ‘would then have uttered a banality or a tautology’ (Agamben 1999, p. 183). Nonetheless, the ‘traditional interpretations’ are given weight by the fact that Aristotle devotes the following chapter, entitled ‘Impossibility’, to refuting this very tautology. Here he writes, ‘if we are to suppose that something which is not but which is possible either exists or has come into being, we must make sure that nothing impossible is involved’. (Aristotle 1999, p. 229) For instance, Aristotle suggests, we cannot say it is possible to calculate the diagonal of a square from the side because this is impossible.

'insightful reader' whether Aristotle grants primacy to potentiality or actuality. Nonetheless, Heller-Roazen is right to suggest that, in his reading of Aristotle, Agamben is able to 'propose a new account, not merely of potentiality but of the genesis of actuality' (Heller-Roazen 1999, p. 18).⁹ Central to this *new* account—which is indebted to Heidegger's desire to avoid the 'metaphysical' thinking of possibility 'solely in contrast to "actuality"' (Heidegger 1993, p. 220)—is the *indistinction* of potentiality and actuality; 'at the limit', Agamben writes 'pure potentiality and pure actuality are indistinguishable' (Agamben 1998, p. 46). What is this limit? It should come as no surprise to readers familiar with Agamben's use of 'limit figures'—the camp, the *homo sacer*, etc.—that this point of indistinction is nothing other than the sphere of *sovereignty*. An 'act is sovereign', he suggests, 'when it realizes itself by simply taking away its own potentiality not to be, letting itself be, giving itself to itself' (Agamben 1998, p. 46). This gift of the self to the self is, in Agamben's account, the sovereign self-grounding of Being, which is preceded by nothing but its own impotentiality, and of which potentiality and actuality are the two faces. That which is sovereign is therefore that which is able to maintain itself in suspension, to survive its own privation; in Aristotle's words, 'some non-existent things exist potentially; they are non-existent inasmuch as they do not exist in complete reality [i.e. actuality]' (Aristotle 1999, p. 228). It is such a sovereign structure that Agamben identifies in phenomena as diverse as Scholem's 'Nothing of revelation', Nancy's abandonment, and Schmitt's sovereign exception, each of which premises power's grasp on life on its ability not to apply.

This reformulation of potentiality is central to Agamben's critique of both the aforementioned approaches to the problem of constituent power. While he compares the Megarians to 'those politicians today who want to reduce all constituting power to constituted power', (Agamben 1998, p. 48) his argument that, at the (sovereign) limit, potentiality and actuality cannot be distinguished informs his dismissal of those, like Antonio Negri, who wish to affirm the radical alterity of constituent power. While Negri bases his argument that constituent power is irreducible to constituted power on the fact that it is neither derived from the constituted order nor limited to instituting it, the consequence of Agamben's reading of Aristotle is that these are also characteristics of sovereignty, which, as the potential not to apply, is prior to the constituted order and can maintain itself indefinitely in the absence of such an order. In the sovereign ban, Agamben argues, constituting and constituted power, means and ends, potentiality and actuality can no longer be distinguished, as the 'violence exercised in the state of exception clearly neither preserves nor simply posits law, but rather conserves it in suspending it and posits it in excepting itself from it' (Agamben 1998, p. 64). While this offers us an initial insight into why Bartleby, who neither preserves the law nor founds a new one, is attractive to Agamben, to understand really why Bartleby offers the strongest objection to sovereignty we will need to turn to Agamben's attempt to think this indistinction of potentiality and actuality outside of the paradigm of sovereignty. While this could

⁹ As Heller-Roazen suggests, this is, nonetheless, an account that is heavily indebted to Heidegger's 'project to conceive of the "quiet power of the possible"' as, not the possibility of a particular actuality, but as Being itself.

productively be pursued through a reading of Agamben's relation to Heidegger, here I would like to approach the problem from another direction, which will bring us back closer to the problem of the law. After all, Bartleby is both a legal scribe and, according to Agamben's reading, a 'new Messiah'. Thus, in what follows, I will position Bartleby alongside two figures who are crucial to Agamben's thinking of both messianism and the law—Walter Benjamin, and the Apostle Paul.

Past Contingent

The question of the autonomous existence of potentiality is ultimately that of contingency and human freedom. If potentiality passed immediately into the act, then each act would be necessary. Humans could therefore be defined by a vocation, a fact, by a biology that was our destiny. In contrast to other living beings, which 'are capable only of their specific potentiality' humans, Agamben argues, are free because we are also capable of our own impotentiality, which ensures we are capable of being other than we are—that we are beings of pure potentiality, irreducible to biology, identity, or vocation. This affirmation of contingency, however, has always been a conditional one. 'If Being at all times and places preserved its potential not to be', Agamben writes, 'the past itself could in some sense be called into question, and moreover, no possibility would ever pass into actuality or remain in actuality' (Agamben 1999, p. 261). In order to mitigate such a possibility, Aristotle relied on two principles, which Agamben terms the principles of '*conditioned necessity*' and the '*irrevocability of the past*' (or the unrealizability of potentiality in the past) (Agamben 1999, p. 262). The first of these—'what is necessary as long as it is, and what is not necessary as long as it is not'—means that what has happened cannot *not* have happened, as (while potentiality is both the potentiality to do and the potentiality not to) in the moment at which something occurs, it cannot be otherwise (Agamben 1999, p. 262).¹⁰ The second, on the other hand, concerns the status of the past, which it frames as complete and unchangeable. 'This', Aristotle writes, 'is why no one wants Troy to have been sacked, since no one decides what happened but only what will be and is possible' (Agamben 1999, p. 262). The principle of the irrevocability of the past ensures that the past is fixed and closed, and that what is done cannot be undone. In an essay on language, written three years before the Bartleby essay, Agamben states the fundamental intention of his engagement with Aristotle's theorisation of potentiality in the following terms:

¹⁰ Agamben's analysis seems to suffer from his earlier reduction of the ambiguity in Aristotle's account of the status of impotentiality after the passage to the act. In the Bartleby essay, he suggests of the principle of conditioned necessity that 'Aristotle himself seems to belie it', citing as evidence Aristotle's claim that what is potential can be or not be. Central to the principle of conditioned necessity is whether that which is happening is capable of not happening (or of happening otherwise), and thus it is closely linked to the question of the status of *adynamia* in the passage to actuality. Interestingly, in describing the principle of conditioned necessity, Agamben seems to depart from his central argument that Aristotle's formulation leads to the preservation, *not the nullification* of impotentiality in the act; once more citing Aristotle's 'A thing is said to be potential if, when the act of which it is said to be potential is realized, there will be nothing impotential', Agamben asks: 'how is one to understand this *nullification* of the potential not to be?' (Agamben 1999, pp. 262–264).

is it possible to grasp contingency otherwise than as 'something that could have been'? Is it possible, in other words, to call into question the principle of conditioned necessity, to attest to the very *existence* of potentiality, the actuality of contingency? Is it possible, in short, to attempt to say what seems impossible to say, that is: that something is otherwise than it is? (Agamben 1999, p. 76).

Two key things are at stake in this attempt to assure the actuality of potentiality: firstly, if we are always able to be other than we are, this destabilises the attempt to found state power on the representation of a fixed substantive identity. Secondly, the re-potentialisation of the past, by granting possibility to what *is* or *has been*, disrupts the tradition, and its codification in law, that is premised on the erasure and forgetting of manifold un-actualised possibilities.

It is here that Agamben positions Bartleby. In the formula 'I would prefer not to', he sees a liminal zone suspended between affirmation and negation, being and non-being, predicated on the renunciation of any will or reason to choose either option. Thus, Bartleby, he argues, conducts an experiment in what can either be or not be, an experiment in potentiality itself, which requires the overturning of the principle of the irrevocability of the past. If conducting such an experiment makes Bartleby a new Messiah, Agamben argues (in what is the most original, if also the least textually grounded aspect of his reading of Melville's story) this is because it 'inaugurates an absolutely novel *quastio disputata*, that of "past contingents"' (Agamben 1999, p. 267). Thus while, for Deleuze, Bartleby is 'the new Christ' (Deleuze 1998, p. 90), Agamben's Bartleby comes 'not to redeem what was, but to save what was not', to redeem those broken promises, unrealised potentials and forgotten struggles that are covered over by tradition and law, by renouncing the copying that presupposes and repeatedly affirms their forgetting (Agamben 1999, p. 270). Thus, Bartleby, in Agamben's reading, responds to what in *Time That Remains*, he terms the 'messianic modality'—*exigency*. In exigency, Agamben locates the demand of the forgotten, but this demand is not simply to be remembered and inserted into a new tradition, nor to be frozen in commemoration, but 'to remain with us and be possible for us in some manner' (Agamben 2005, p. 41). The messianic modality, which Agamben finds in Bartleby, is thus one in which potentiality does not precede actuality but follows it, restoring it to contingency and enabling the forgotten to act on the present.

The political implications of this are made clearer when Agamben positions Bartleby in terms of the redemptive role assigned by Walter Benjamin to *remembrance*, which 'can make the incomplete (happiness) complete, and the complete (pain) incomplete' (Agamben 1999, p. 267). In his *Theses on the Philosophy of History*—which serves as a critique of a teleological view of history that was prepared to build its monuments on the graves of the forgotten—Benjamin counterposes the time of memory to the homogenous and empty time presupposed by theories of progress (Benjamin 2003). Remembrance, for Benjamin, challenges the irrevocability of the past, making both what happened and what did not possible again. If Benjamin sees remembrance as intimately bound to redemption, this is because redemption, in his view, is not a passage through empty time to a brighter future, but a

relation between the present and its past, in which the struggles of the past are seized and re-actualised in the ‘time of the now’ (*Jetztzeit*). In *The Time That Remains*, Agamben writes that the memory that is at stake in messianism is concerned exclusively with the ‘economy of salvation’ (Agamben 2005, p. 77). And yet, he asks, could this not be true of every memory? It is within such an ‘economy’ that Agamben positions Bartleby (Agamben 1999, p. 267). And yet, while, for Agamben, every memory holds the possibility to take hold of the past, fulfilling it and making it possible again, the memory Benjamin evokes in the theses is not a purely individual memory, but the memory of ‘the struggling oppressed class’, that seeks to re-actualise the hopes, defeats and promises of past generations in order to transform the present (Benjamin 2003, p. 394).

In *The Arcades Project*, Benjamin poses the problem of redemption in terms of a ‘figural’ relation in which a moment of the past comes together with a moment of the present to form an *image* (Benjamin 1999, p. 463). ‘It is not that what is past casts its light on what is present or what is present its light on the past’ he writes. ‘Rather, image is that wherein what has been comes together in a flash with the now to form a constellation’ (Benjamin 1999, p. 463). These concepts of figure, image and constellation, which enable a moment of the past to be grasped and *fulfilled* in the ‘time of the now’, are central both to Agamben’s reading of Paul, and to his understanding of the relation of the Messiah to the law. In *The Time That Remains*, he discusses the importance, for Paul, of figural relations between moments of the past and messianic time (such as that between Adam and Jesus), in which past events come to prefigure or foreshadow those of the present (Agamben 2005, p. 74). What is most significant about this figural conception of history, he suggests, is not simply the fulfilment of the past in a future event to which it gestures, but the ‘tension that clasps together and transforms past and future, *typos* and *antitypos* in an inseparable constellation’ (Agamben 2005, p. 74). For Agamben, the messianic is neither of the terms in the typological relation, but the *relation* between them, which transforms temporality itself, enabling ‘another world and another time’ to make themselves present in this world and in this time (Agamben 1999, p. 168).

Jacob Taubes has argued that just such a figural relation clasps together Paul and Moses (Taubes 2004, p. 3).¹¹ If Paul is the *antitypos* of Moses, then, for Agamben, this relation must be understood in terms of the law that was carried from Mount Sinai by Moses, and, according to this reading, fulfilled by Paul. Such fulfilment is central to Agamben’s own reading of the law in force without significance, and provides him with a way to think beyond the reactionary desire to re-instil law with a lost meaning, the nihilistic embrace of law’s emptiness, and the dialectic of constituent and constituted power.¹² ‘Justice without law’, he writes in *The Time That Remains*, ‘is not the negation of the law, but the realization and fulfilment, the

¹¹ Paul, Taubes suggests, faces the same problem Moses faced after the iniquity of the golden calf, and the breaking of the original tablets; like Moses, Paul is faced with a people who has sinned, a people who, in Paul’s case, has rejected the Messiah. Yet, while Moses ‘rejects, twice rejects the idea that with him begins a new people and that the people of Israel should be eliminated’, this role, the founder of a new people of God, is, in Taubes’s view, precisely the one that Paul accepts.

¹² Agamben sees such a nihilistic embrace of law’s nothingness in deconstruction, which, he argues, reveals the entirety of tradition to be in force without significance, but maintains this empty form in place.

pleroma of the law' (Agamben 2005, p. 107). But how are we to understand such fulfilment? And what has it to do with Aristotle's formulation of potentiality? In an early treatment of potentiality, Agamben cites Aristotle's description of *pleasure* as that which is fulfilled in every instant. From this, he writes, it follows that potentiality is contrary to pleasure: it is 'what is never enacted, what never achieves its end. It is, in a word, pain' (Agamben 1995, p. 71). This reading of potentiality has political implications that return us to Barth's empty canal and prefigure Agamben's treatment of the law that remains in force after the exception has become the norm. Power, Agamben writes, 'is the isolation of potentiality from its act, the organization of potentiality. Power bases its authority on this upgathering of pain, it literally leaves the pleasure of man unfulfilled' (Agamben 1995, p. 71). There is no better way to understand what Scholem termed the 'Nothing of revelation', than as an organisation of potentiality, which is detached from its act and remains in force, unable to find fulfilment.

In attempting to think such fulfilment, against the sovereign ban, Agamben distinguishes between two forms of messianism, or nihilism (an equivalence about which both Benjamin and Scholem agree). While 'imperfect nihilism', which Agamben sees not only in Scholem but in Schmitt, Nancy and Derrida, nullifies the law then leaves the empty law in force without significance, the second is 'a perfect nihilism that does not even let validity survive beyond its meaning but instead, as Benjamin writes of Kafka, "succeeds in finding redemption in overturning the Nothing"' (Agamben 1999, p. 71). Benjamin's suggestion for overturning the Nothing takes a directly political form in the eighth of his theses on history. After noting that the state of exception has become the norm, he writes that once we have realised this, 'we will clearly see that it is our task to bring about a real state of emergency' (Benjamin 2003, p. 392). This real state of emergency, which deposes the law that remains in force in the state of exception, disrupting the sovereign gesture that utilises the exception as a means to consolidate the legal order, is central to Agamben's own conception of the fulfilment of the law. 'This paradigm', he writes, 'is the only way in which one can understand something like an *eskhaton*—that is, something that belongs to historical time and its law and, at the same time, puts an end to it' (Agamben 1999, p. 174). To overturn the Nothing and fulfil the law is to disrupt the sovereign organisation of potentiality through the creation a life in which potentiality cannot be isolated from actuality, a 'happy life' in which 'I am not always already and solely enacted, but rather delivered to a possibility and a power', a life that is *necessarily* potential (Agamben 2000, p. 9).

It is worth noting here that, in contrast to Scholem's depiction of messianism as the 'real anti-existentialist idea', which compels a life of waiting, a 'life lived in deferral' (Scholem 1995, pp. 3, 5), Benjamin poses the creation of a real state of emergency as a political *task*. In a similar vein, Agamben posits that the Messiah must confront a law that is in force without significance and that this 'is also the task with which we, who live in the state of exception that has become the rule, must

Footnote 12 continued

Deconstruction, thus, is in his view, a 'thwarted messianism', in which there can be no fulfilment (Agamben 2005, p. 103).

reckon' (Agamben 1999, p. 171). To conclude, I would therefore like to offer some critical comments about Agamben's depiction of Bartleby as the paradigmatic figure of such a task. After all, while Bartleby drives his employer to quit his premises and relocate his law firm, his peace is short lived. In a final act of frustration—prompted by complaints about the man left behind—Bartleby's former employer returns with an ultimatum: 'Now one of two things must take place', he tells Bartleby. 'Either you must do something, or something must be done to you' (Melville 1997, p. 68). Before Bartleby is able to respond that, presumably, he prefers neither option, the decision is made for him. The police arrive and remove him to the tombs as a vagrant. Alone, and silent, condemned to incarceration and death, Bartleby is an unlikely saviour. For Agamben, however, echoing Bartleby's employer, 'the walled courtyard [where Bartleby meets his end] is not a sad place' (Agamben 1999, p. 271). Referring to Origen's heretical doctrine, again developed via a reading of Paul, Agamben sees the jail as the site of an *apokatastatis panton*—a universal salvation (Agamben 1999, p. 271). But what kind of salvation does Bartleby offer? At the very end of his most significant treatment of Melville's scrivener, Agamben refers to Bartleby as a 'new creature' (Agamben 1999, p. 271). The new creature Agamben has in mind here is no doubt the one that appears at two particularly significant moments in Paul's letters. In the letter to the Galatians, the new creature is what remains after Paul has nullified the divisions of the law: 'For in Jesus Christ', he writes, 'neither circumcision availeth anything, nor uncircumcision, but a new creature'. (Gal 6:15) In the second letter to the Corinthians, it appears as a figure of the new life in the messiah: 'If any man is in Christ he is a new creature.' (2 Corinthians 5:17) Bartleby, we can surmise, is thus a figure of the deactivation of the law of works, and its messianic fulfilment in faith.

In this Pauline reading we hear an echo of Scholem's depiction of the situation of the first Christians as split between 'the apparent reality which knew nothing of any Messianic transformation of the world and their Messianic faith which daily expected the return of the Messiah in his glory' (Scholem 1995, p. 63). Such a split is clear in Barth's suggestion that while, in the messianic age, 'the reality of our present existence continues as it is', the power of God offers a 'a lookout, a door, a hope' (Barth, 1968, p. 38). In Barth's view, the power of the gospel offers an *internal* transformation that leaves the world intact, while utterly altering it: 'The prisoner', he writes, 'becomes a watchman. Bound to his post as firmly as a prisoner in his cell, he watches for the dawning of the day' (Barth 1968, p. 39). Without such a faith in the power of God, however, it is hard to reconcile Agamben's message of salvation with the narrator's picture of 'the wasted Bartleby', 'strangely huddled...knees drawn up', his dim, open eyes the only sign that he is not sleeping and, so, will not wake (Melville 1997, p. 75). Bartleby, who offers the strongest objection to sovereignty Agamben can find in either history or in literature, dies alone while the tomb continues to hold others in its grasp, and his employer, no doubt, returns to his new chambers to continue his 'snug business amongst rich man's bonds, and mortgages, and title deeds' (Melville 1997, p. 20). Negri, writing with Michael Hardt, has suggested that Bartleby, in his solitary withdrawal, is representative of a form of 'social suicide' (Hardt and Negri 2000, p. 204). Indeed, by repeating his formula even in response to the grub man's 'disagreeable' offer of dinner, Bartleby

seems to suggest that only a withdrawal from life itself will free us from the grip of the sovereign ban. In the final threshold of the *Time That Remains*, Agamben reads Walter Benjamin's thesis that each generation is endowed with a 'weak messianic power' on which the past has a claim as a disguised quotation of 2 Corinthians 12:9, 'Power realizes itself in weakness' and argues that Paul is the hunchback theologian who guides Benjamin's historical materialism (Agamben 2005, p. 97). The weak messianic power, on which, Benjamin suggests the past has a claim, however, does not lead, like Pauline weakness, to 'much patience, in afflictions, in necessities, in distresses, in stripes, in imprisonments', (2 Cor. 6:4) but to the recognition that alive in class struggle are 'confidence, courage, humour, cunning, and fortitude', which call into question *past* victories of the rulers (Benjamin 2003, p. 390). If we are to confront the state of exception that has become the norm and live a life of possibility, it is on these resources that we must draw.

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