

# Deviance or Homo sacer? Foucault, Agamben and Foetal Diagnostics

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**ABSTRACT** *This article compares the perspectives of Foucault and Agamben on biopolitics. The dichotomy normality/deviance is central to Foucault's analyses of modern subjectivities, while the Sovereign/Homo sacer dichotomy has a similar position according to Agamben. Are modern subjectivities shaped by a disciplining power, operating through some rather stable and fixed standards and norms, or are they exposed to continuously defined states of exceptions, in which the moral and social order are declared irrelevant and not valid? Agamben states that in modernity the distinction between the normal and the exception is fundamentally blurred, and therefore the normal human condition is to be held hostage to a sovereignty making pure, immanent decisions without any references to stable, recognizable criteria. Are we therefore inscribed into normality, producing ourselves in a machinic way, or are we exposed to complete uncertainty, stripping our social existence down to bare human life or the status of Homo sacer?*

There is striking flexibility and plasticity in defining human deviance – not only from the perspective of the last century, but from that of the last ten years. This is far from trivial, both for the individuals who are placed within the historical floating categories and for society; there is much at stake. The expertise operates directly on human bodies by conferring or removing value, and cuts into psychologies by categorizing existential conditions such as deviance. This means that they no longer have something important or privileged to tell us, but become defect misunderstandings. At the same time professional gazes become fundamentally unpredictable because of their shifting and roaming character. We do not know how or what they will see next year – what categories that will spring up, their scope or how they will be practised. This leads to a common feeling of being exposed. Who will be captured next time, in what way and by what consequences? Nobody is in a position to answer these questions. When the borderline between normality and deviance is continually redrawn and with new dimensions, nobody can be assured of remaining on the right side of it. Instead we become nascent and vulnerable.

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Michel Foucault has written the most influential story about these epistemic and cultural processes. First in *Histoire de la folie à l'âge classique* (Foucault 1972), where the great expulsion, which at the same time was a detention, of madness in the classical age deprived it of its voice and extraordinary knowledge. This was strengthened in the 19th century. Madness lost its freedom in the exclusion and became object of many "orthopaedic" strategies aimed at bringing it back to reason. This thematic was followed up in *Discipline and punish* (Foucault 1979). Here, however, the gaze was moved from the periphery to the centre, or from unreason to reason. This implies that the distinction between normality and deviance becomes crucial. Within the new prison-like institutions there are produced imperfect human subjects representing a wide range of deviances from normality. They are surveilled from the outside, but foremost from within or by themselves. This creates a never-ending anxiety and feeling of being a failure and wrong sort of existence.

It remains, however, to a large degree an open question as to where this power of normality comes from in Foucault's perspective. He focuses on the new human sciences and expertise. This is linked to a range of other levels, especially architecture, where the ordering of space coincides with the scientific categories. But the share penetrating power of the expert gaze remains to some degree unexplained. Foucault tells us that it is overwhelming, but it is difficult to see how. His strategy is to show how the new institutions envelop the individual so that they may never rest or escape. Foucault draws a picture in which the share density of the surveillance is crucial. It is the volume that penetrates the human subject. Even if this is important, we suspect that this is a quantitative answer to a qualitative question. In addition, it is not known why the expertise is able to spin such a dense net around the human.

At the same time there is something static about the normality/deviance dichotomy in *Discipline and punish. The birth of the prison* (Foucault 1979). Ever new experts and human sciences arrive at the social field, but they do not move this dichotomy. Instead we are left with the impression that they deepen, refine and systematize the division between normality and deviance. We get no picture of radical transfers or flow. In the first volume of *The history of sexuality* (Foucault 1978), however, this cracks. Within the new compulsion to talk, the human subject has to confess a lot of new and surprising perversions hiding deep in their nature. The expert-interrogation produces a stiff current of psychological and medical categories tendentially finding new directions all the time. While the modern forming of humans looks like a relative unified and standardized process in *Discipline and punish*, it has the character of a violent excess in the first volume of *The history of sexuality* (Foucault 1978). A rather stable functionality is replaced by something unpredictable. Only fantasy is the limit of what may be revealed of dark tendencies and lusts in the depths of human sexuality.

### **Camp or Prison?**

At this point we may turn to the Italian philosopher Giorgio Agamben. In his book *Homo sacer* (Agamben 1998) he poses the question as to why Foucault never wrote about the institution which most clearly and extremely highlights the dilemmas of modernity: the camp. Contrary to the prison, military, school, hospital, etc. everything is possible within the camp. There are no limits to what the guardians may do to the internees: they may be starved, tortured, beaten, put to work, experimented with or killed. In contrast to the panoptic institutions there is no surveilling gaze so systematic that the inmates can understand the guiding logic behind it, so that they may be able to internalize it and turn the gaze on themselves, as self-surveillance. In the camp the guardians were free to follow any impulse, no matter how perverse. The guardians became totally sovereign in relation to the internees and did not need to legitimize or explain their actions to anyone.

By comparison the surveillers of Foucault's prison-like institutions are grey and rather powerless persons. They are totally interchangeable, and are themselves surveilled so that they are subject to the same logic as the inmates. The surveillers are anonymous executors of a larger and very systematic project of producing and shaping humans – towards which they are continuously and totally responsible. Punishment is therefore a potential threat to them too, and the distinction between surveiller and surveilled tendentially becomes erased. In the camp, however, this distinction could not possibly be more fundamental. The guardians may do whatever they want to the internees without risking punishment. They are sovereign and define the situation themselves. Conversely, the inmates are exposed to something completely unpredictable. They are not systematically fabricated and shaped, but kept in an absolute and uncertain vulnerability.

It is not only the empirical focus that separates Foucault from Agamben. Their association with different types of institutions has great theoretical implications – and it is their different perspectives that move them to analyse the camp, or not. While the prison is a paradigmatic example for Foucault of what happens to the human subject in modernity, the camp holds this position for Agamben. In different, opposing ways these institutions condense and concentrate tendencies and processes that are very general. They point far beyond themselves. Even if the perspectives of Foucault and Agamben overlap on important aspects, they diverge radically on others. To see and understand the implications, we have to make a detour.

### **The Sovereign**

Agamben analyses the biopolitical field, and utilizes many aspects of Foucault's concept of biopolitics, but he links this to a field which Foucault never really enters: the explicit political. Agamben does this by using Carl Schmitt, and this relationship transforms the concept of biopolitics in important ways.

Agamben takes Schmitt's perspective on the Sovereign as a point of departure (see especially *Politische theologie* (Schmitt 1996)). It is a figure that is both outside and inside the juridical-political order. Even if the Sovereign stands outside, they belong to the order because it is they who decide whether the constitution may be suspended in its entirety or not. This duality is decisive. If the Sovereign were simply inside, they would not have fundamental power over the law, but would be merely another consequence of it. However, if the Sovereign were only outside, they would be irrelevant for the law.

Every law presupposes a regular, ordered social and cultural condition within which it becomes relevant. This is not something external, but an immanent part of the law. If this condition dissolves, the same happens to the juridico-political order. The fundament is gone, and the law is no longer applicable. There are no juridico-political rules for chaos. And the Sovereign is the one who decides whether the ordered and stable social and cultural condition – or the very fundament of the law's validity – is present or not. This is the essence of the state-authority in Schmitt's perspective. It rests on the pure decision, outside any regulation, and the state neither needs the law to create or abolish the law. This makes the exception a more interesting and privileged point of departure than the regular to study order.

Through Foucault we may see the great confinement of madness in the classical age and afterwards as a manner in which society controls excesses. However, this presupposes an intact order. Therefore Schmitt's exception is more radical because it represents a total suspension of the juridico-political order. On the other hand, however, this is also about knowledge, cognition and understanding according to Foucault's perspective. The expulsion from society shows that madness no longer has anything important to tell us about human existence, on the personal, political or cultural levels. It becomes a negation of our ability to think and understand. The Sovereign, however, does not transgress any such limit. The pure decision, which also determines how a situation should be understood and conceptualized, sets its own limits. The Sovereign may not be part of normal reason, but neither are they totally outside it, because they construct it. From this perspective the great expulsion of madness may be the most radical process.

The introduction of Schmitt and the Sovereign makes us able to reformulate the contrast, or even contradiction, between camp and prison. Agamben says it is typical for our historical epoch that the exception comes ever more into the foreground, almost as a rule. The camp most dramatically illustrates this, being an institution where irregularity, or the exception, has a permanent place and space. Within the camp there is no punishment according to law, but transgression and suspension of law. Therefore, the camp, and not the prison, discloses the fundamental juridico-political structure of modernity. Sending people to a camp means sending them outside ordinary law. More generally, the camp becomes a sign of fundamental uncertainty about the law: whether it is valid or not, where it is valid and in what way.

From Schmitt's perspective the law comes into being because there is something outside – the Sovereign – which creates a frame of reference in real life: where and under what conditions the law is valid and in force. This points towards violence as the first and original lawmaker. At the same time the feeling of guilt shows the pure and inscrutable power of law: something may always be brought inside or outside of law without any possibility of knowing or predicting the conditions of this movement. Kafka's *The Trial* (Kafka date?) deals with this uncertainty: the law has no specific significance. It is in force, but is impossible to understand and becomes a "Zero Point" of knowledge. The implication of the exception and sovereign decision is two-fold: we all risk being pushed outside the order and put under ban – without knowing why. Therefore, the ban – and not the direct application of law – is the original, juridical relation to life.

In an ironic way Kafka and Kant's ethics, e.g. in the newer version of Habermas (see *The theory of communicative action*; Habermas 1987), coincides in this perspective. We are subjugated to a totally non-substantial ethics. The process becomes fundamental, and not the concrete content. The law is reduced to pure form, and it is to be filled by a faculty that nobody can account for. The Kantian "respect" expresses this relation to the non-substantial law, and we acquire a sublime moral feeling directed towards something undetermined and beyond our understanding. Agamben means this forecasts the conditions of both modern mass-democracy and totalitarian states: we have a law in force, but without significance. It is akin to the exception, where the most innocent forgetfulness and deeds may have fatal consequences – as when a little knock at the door of Josef K signifies the start of a never-ending, impenetrable trial.

This is what Agamben puts into relation with biopolitics. In Kafka life and law become indistinguishable: the life of Josef K becomes the trial. The relationship to the problematic of sovereignty and exception transform biopolitics – separating Agamben from Foucault in important aspects. In *Discipline and punish. The birth of the prison* (Foucault 1979) we are close to a functionalism, becoming general through the internalization of the surveillance in tendentially all the social subjects. The uncertainty is linked to the exact position of the individual in relation to the norm, and what possibilities it has in correcting the deviance. All take place within a given order, defined by a network of experts on the human. In the biopolitics of Agamben, however, uncertainty becomes more fundamental. Neither the status of the norm – if it is in force or not – nor its content and logic, is within reach of human knowledge. We may say that discipline replaces total suspension as social existence.

### **Homo sacer**

In addition to the Sovereign, there is another figure that is central in Agamben's perspective: Homo sacer. He cites Pompeius Festus, writing about the holy man: "It is not permitted to sacrifice this man, yet he who kills him will not be condemned for homicide". Here we find two contradictions. First,

even if the man is holy, killing is authorized. It was forbidden to offend the sacred, but this does not mean that you may not kill the sacred man. And second, even if the holy man may be killed, the killing may not be ritualized. This makes the sacred enigmatic and difficult to grasp. Agamben means that this figure was obscure for the Romans themselves.

According to Agamben, the Romans gave two different explanations of these contradictions. First, the sacred was impure and therefore represented a taboo. This might explain the absence of sacrifice, because the sacred man already belonged to the gods of the underworld. You may not give them what is already theirs, but then it becomes incomprehensible why he may be killed without any danger. The risk of pollution should be great. The second explanation said that killing without trial was a remnant from the archaic sacrifice of the sacred, but this is contradicted by the fact that killing was impossible as a ritual or as sacrifice. Therefore, both explanations are self-undermining.

Instead of thinking of the figure as an historical remnant from earlier stages, Agamben makes *Homo sacer* into an interesting border-concept in Roman law – at the intersection of two exceptions. The fact that he may be killed places *Homo sacer* outside juridical law. But the second fact, that he may also not be sacrificed, places him at the same time outside religious law. As in Schmitt's logic of exception, this makes *Homo sacer* an original political figure, existing prior to the distinction between the sacred and profane – or the religious and juridical.

Agamben attacks the traditional anthropological, sociological and psychoanalytical theories about the sacred. They stressed the ambivalence of the concept, saying that it consisted of very diverse elements pointing towards different groups of society: the elevated or dignified (e.g. the priests), the temporarily polluted (e.g. women giving birth) and, finally, the banned, who should be totally destroyed. This was the reason why the sacred raised such diverse feelings as respect, contempt and horror. Agamben, however, is of the opinion that these perspectives mix religion with psychology, indicating that the social sciences have lost contact with the sacred. The category has been emptied, so that it may be filled with almost anything.

Instead of expressing the ambivalence of the sacred, Agamben thinks that *Homo sacer* at the same time represents a double exception and inclusion. That everybody may kill *Homo sacer* without risking punishment pushes him outside juridical law. The sacred have not committed certain crimes for which they must be persecuted. They have a more fundamental function by showing how every border or demarcation-line may be cancelled, and thereby what constitutes juridical order. In the same way *Homo sacer* is excluded from religious law because he may never be the object of ritualized killing. However, this suspension expresses what religious order altogether presupposes or builds upon. Therefore the exclusions are also inclusions.

The parallel between Schmitt's perspective on the political Sovereign and Agamben's on *Homo sacer* is obvious – and this is a very central point. But these two figures do not overlap at all. Instead they are at opposite borders of the same process and presuppose each other, according to Agamben. *Homo*

sacer is the original category of life subjected to the sovereign exception. The figure shows what it means to be put at ban by the Sovereign, by the pure decision. Therefore both are necessary parts of the exclusion establishing the political dimension of society, but in opposing ways.

Agamben turns the common view of the nature and genesis of politics upside down. It is not about individuals building a common social and cultural project on the basis of mutual respect, sentiments of belonging or agreement expressed by a contract. On the contrary, politics comes into being when life is bare, because it is subjected to a power so all-embracing that it becomes power over death. Politics is not constituted by the sum of the acts of will, but the exposure of the whole human being. Therefore we might say that Agamben is an expansion of Shmitt. The original exception includes the totality of human life in the political order by exposing it to the possibility of being killed. The constituting political act is not to establish borders around the individual or the city, but on the contrary, to negate them by making the human totally vulnerable.

Agamben shows that in Roman law life means to be subjected to a deadly power. The relationship between the Sovereign and Homo sacer therefore acquires a strategic significance from his perspective. It expresses the first and original political relationship. But there is another implication that is equally central. Contrary to Foucault, Agamben does not delimit biopolitics to later, historical times or to an epoch largely beginning in the 19th century. Politics has always been biopolitics, even if many intensifying processes and historical shifts have taken place. This is because politics first arises when the totality of life is put on stage in power-relations.

It might appear that not many members of society may be the Sovereign or Homo sacer. Both figures, in opposite ways, give the impression of being exclusive, and only for the few and chosen, even if the social and political effects of them might be unlimited. However, this is not true according to Agamben. Both figures tendentially enrol everybody. The reason is the way they relate structurally: for the Sovereign all humans are potentially Homo sacer – and faced with Homo sacer everybody may act as a Sovereign. Thereby everybody potentially enters both figures by the creation of politics. They signify radically different power-aspects, or a fundamental doubleness, in biopolitical life. We are all exposed, but at the same time we may do whatever we want to the exposed.

### **Father of the People**

Life is both sacred and political when it is caught in the sovereign exception. Therefore both these dimensions have common origin and meaning. This Agamben puts into the context of the Roman father-son relation, which is both outside of and independent of law. The father may kill the son without being punished. This is very different from the role of the father within the law, which is being in charge of the wife, servants, animals and the rest of the household. In this regard he is part of the normal order and there are many limits to his actions. But in relation to the son, he is in the position to make

pure, unlimited decisions and acquires the status of political Sovereign. Therefore, the father killing the son because of treachery or deceit, becomes a central mythology of power. This relationship suspends politico-juridical order, as when the tribune Caius Flaminius was dragged from the rostrum by his father, the consul Spurius Cassius, while he was trying to supersede the authority of the Senate (Agamben 1998:88).

The father-son relationship points far beyond itself. When Brutus had his son killed, he “had adopted the Roman people in their place”. By the image of adoption, the deadly power is transferred to the whole people – in relation to the son becoming *Homo sacer*. And this is the original meaning of the expression “father of the people”. The father’s absolute power over the son, expanded to the people, becomes a genealogical myth of sovereign power. The doubleness is again central to Agamben’s perspective: we are all potentially sons of the people, which is our father – and we are all potentially fathers of the sons of the people. The implication is that we are both totally sovereign and vulnerable at the same time.

Only the son could place himself between the magistrate and the lictors who always accompanied him bearing the terrible insignias of power, because the son was already subject to the power over life and death. This was a sign of something more general: every male citizen participating in public life was immediately in a state where he could be killed. They were *sacer* with respect to the father and the Sovereign, and this was the price they had to pay in order to be involved with political power. Political life can only enter the city by a double exclusion: the citizens may be killed, but not sacrificed. They are neither political *bios* nor natural *zoe*. These categories are mingled, and there arises a zone where no possibility exists of making a distinction between them. Such a perspective is in sharp contrast to the most common in political philosophy, where politics is made possible by the very introduction and practice of the distinction between *bios* and *zoe*. This also indicates that the relationship between father and son, or the Sovereign and *Homo sacer*, is more fundamental than the social pact and positive, juridical law.

### **The Use of the Romans: Continuity or Rupture?**

In the third volume of *The history of sexuality* (Foucault 1990) Foucault writes about the Romans. But in many ways it appears that Agamben and Foucault have opposite intentions for the use of Roman history. While Agamben wants to show a fundamental, historical continuity in the field of biopolitics, the ruptures are in the forefront of Foucault’s perspective. Foucault’s main thesis states that the Romans practised the same kind of regime as the Greeks, although they systematized, intensified and tightened the rules surrounding the bodies and persons. But this regime of sexuality was founded on radically different presuppositions than the later Christianity. Neither the Greeks nor the Romans had any absolute interdictions in the field of sexuality; no actions or relations were negative by themselves. The main criteria were whether they were practised in a competent way and in the right context. Christianity, however, introduced a whole battery of evil sexual drives

and acts. Therefore, an historical gap in the regulation of sexuality came into being. This involved several, interwoven dimensions: the contextual was replaced by the absolute, the distinction competent/incompetent by good/evil, etc. Christianity created a new and threatening horizon of sexuality, where the main risks of bodily drives were no longer social shame and delegitimization as man and master of the household, but eternal punishment and suffering.

Foucault uses the Greek and Roman regimes of sexuality as contrasts to the later occidental, making it possible for us to discover and explore radically different social and cultural horizons of comprehension. By contrast, Agamben highlights the fundamental, political elements we share with the Romans. But at the same time he uses a strategy of alienation. Unconscious, suppressed and non-realized dimensions of western societies are represented by historically remote figures such as *Homo sacer*. The resulting mental distance makes us capable of recognizing these dimensions. The text places us on the outside, although we are living on the inside. This doubleness is a possible road to self-understanding on the societal level.

There are, however, other differences between Foucault and Agamben that are equally important. Foucault tells how humans meet and handle drives they understand as originating from a nature outside of and prior to society; either they are evil or not. Vulnerability is caused by something Greeks, Romans and Christians grasped as radically non-social. Agamben, however, writes about a bare and exposed existence – by historical ways of thinking linked directly to the original, political relationship – where life itself was subjected to the pure and sovereign decision.

Concerning the Christian epoch, we might say that Agamben replaces both God and the Devil with the Sovereign. He has the same power to install order, but also to suspend it at any time. Agamben makes the sacred very worldly. It is not linked to any spiritual dimension, but to the fundamental political relationship. *Homo sacer* is subject to a constant threat of being killed, but, after all, not eternal punishment and suffering in the hereafter. Although Agamben introduces basic cruelty in political life, he dismantles the dark heaven above the Christian episteme, which is central to Foucault's perspective. Plainly speaking, Agamben does away with the religious dimension in western biopolitics.

To Foucault modernity represents a fundamental epochal shift. Human life is ever more included into the calculations and mechanisms of social power. Gradually life itself is at stake in politics. The perspective of Agamben, however, is more dual. In the original, political relationship life became bare and totally vulnerable, subjected to the pure and sovereign decision. This condition he traces historically and mythologically back to the Roman figure *Homo sacer*. However, modernity also brings something fundamentally new. This is tied up with the distinction between order and chaos, and the question of when the politico-juridical law is in force and when it is suspended by the Sovereign. Agamben thinks it is typical of modernity that this distinction is dissolved. Tendentially we have a political and social condition where the normal and the sovereign exception are mixed, making it impossible to tell them apart. Therefore, modernity is a new zone of indistinction.

**Modernity: Fuhrerbefehl?**

Agamben uses a central, historical example from Nazi-Germany. After 1933 ordinary law was suspended. The empty space was filled with commands from the leader, or the so-called “Fuhrerbefehl”. In this period a juridical perspective was developed in Germany, stating that the words of the “Fuhrer” automatically acquired the status of law. This did not imply that juridical law as such was out of force. It was, however, subject to a floating and incalculable power. Instead of order being suspended, it became almost completely dynamic and flexible. At any time order could be changed by Hitler. “My word is law” obtained a formal-juridical status, explained by juridical theory.

“Fuhrerbefehl” is both a central, historical reality and an extreme example, but the diffuse logic, dissolving important distinctions, is continued in modern democracies on several levels, according to Agamben. On the constitutional level, legitimacy and respect for law is not attached to any lasting substance, but to an incalculable parliamentary process, which might produce any substance of law whatsoever.

The importance of the “Fuhrerbefehl”-logic on the level of expertise is perhaps even more interesting and thought provoking. In the same way as Foucault, Agamben attaches great importance to the development and proliferation of the new groups of experts on the human. Their perspectives on the function and power of the expertise, however, differ in fundamental aspects. Foucault described a dense network of knowledge, standardizing and normalizing humans. Agamben, however, says that the new experts are in a position to continually issue local “Fuhrerbefehl” on human life. Both of them describe modern, biopolitical power as very decentralized and dispersed. However, instead of maintaining and refining a firm order, the experts of Agamben are all the time able to create and introduce new criteria of evaluating and ruling human life. The result is a double insecurity – not only about where each individual is situated in relation to normal, but also about what will be normal in the near future.

The question of death-criteria is illustrative of the new condition. Traditionally a person was considered dead when the heart stopped beating. This was, however, undermined by brain research and the growing interest in brain functioning. The locus of death-criteria partly moved from the heart to the brain. People earlier considered dead, became alive – and most importantly: people earlier categorized as alive, became dead. A new, disturbing group arose: respiratory patients with a beating heart, but a brain showing no or few signs of activity. They were neither dead nor alive, but belonging to an undetermined zone in between. Doctors may decide to let them live, but also to turn off their life-functions without risking any penalties, because these people were already in some way outside life. They are pure *Homo sacer*, because their life and death are decided by shifting and floating criteria, subjecting them to pure and sovereign decisions by the doctors.

### **Abortion and Foetal Diagnostics**

There is a close, but difficult parallel to the question of death-criteria, which Agamben does not analyze. This is the field of abortion and foetal diagnostics. Partly the classical abortion-theme is about the vulnerable and exposed human being. Historically both the criteria and legal borders of abortion have been dynamic, and they differ between nations. At the same time there are zones, e.g. periods of pregnancy, when much is left to pure and unforeseeable decisions.

However, the question of abortion partly transgresses the problematic of Agamben. It is uncertain where the limits of the very category of human may be placed. The question is not primarily about humans that may be killed without legal punishment, but whether the foetus may be considered a human being at all. The problem is not only human vulnerability, but also about ontology, or the existential status of being. However, the floating and shifting ontology, politically decided upon in an historical accidental way, has clear parallels with the relationship between *Homo sacer* and the political Sovereign. There is a space for pure decisions on life and death. In addition technology intervenes in an ambiguous way. Due to the development of ultrasound, we may obtain clear images of the foetus at early stages of pregnancy – long before the legal abortion time limit. After not so many weeks we may discover something looking like a complete human, with head, limbs, toes, fingers, reactions to disturbances, etc., enhancing the feeling of chaos. We are placed in a situation outside normal order, the existential implications being indefinite.

The new foetal-diagnostic practice may be analysed within the perspective of Agamben.<sup>1</sup> Most deviances are detected late in pregnancy – well beyond the legal limits of self-determined abortion.<sup>2</sup> Even if technological development makes it possible to detect defects at earlier stages, the most vital question is not about the possible human status of the foetus, but rather the status of the potential life after birth. A foetus without any deviances points towards a life inside the juridico-political order. This is not so, however, if defects are discovered. Then the foetuses tell us stories about highly unclear futures – and these are subjected to a lot of local, sovereign decisions. A host of experts may intervene: geneticists, doctors, specialists on different diseases, psychologists, family therapists, social workers, pedagogues, priests and even economists. They issue different judgements, opposing each other and building on very diverse premises and perspectives. But their words have immediate consequences, establishing order and valid criteria of deciding upon life and death. Therefore, the field of foetus-diagnosis exhibits a complex of local “*Führerbefehl*”, producing *Homo sacer*, or life that may be killed without risking legal punishment.

Due to relatively late detection of deviances in pregnancy, women may not formally decide themselves upon selective abortion. Nevertheless, they most often have the last and final word. How can this be understood? There are a lot of indications that they need the “*Führerbefehl*” of the expertise to gain legitimacy, especially in the question of how serious the defect really is.

Women first and foremost have to think and talk about future sufferings – their own, the family’s and those of the children that might be born. The degree of imagined suffering depends heavily upon different, contradictory expert judgements. Nevertheless, this category points towards the women and partly towards families as Sovereigns. Suffering may not be measured, calculated or subjected to any systematic order, it can only be felt. We may take into consideration some quasi-objective aspects of children having, for example, Down’s syndrome: how much attention and work the children will demand and need. But whether one can bear the thought of this is quite another question. The emotions gain centrality, and they may not be accounted for, neither to oneself or any other. Nobody can demand full understanding of the emotions of others in order to take them seriously or to recognize them as the last, decisive instance in these matters. And there are no claims on the subjects having any deep insight into their own mental and psychological dimensions. Therefore suffering becomes a black box beyond reflection and social accountability. This condition expresses sovereignty, or the reign of pure decisions on behalf of the women and families within the field of selective abortion.

Both public debate and the practice of selective abortion confer a special status of being on humans having deviances. It is close to what Agamben tells us about the Roman Colosses, erected for soldiers sacrificed in war, but still surviving. They should have gone, but nevertheless existed. The Colosses symbolized people living beyond their own death, making them *Homo sacer*. The “battle” which people with deviances have survived, consists of tests, diagnostic results, expert-interpretations and advice, doubt and pain of the women and families, or the fact that these deviant people were never searched for or detected during pregnancy. However, they are not like everybody else, whose physical and psychological properties and characters were never a reason for abortion. Thus we often witness parents, brothers and sisters relating that these people have taught them something fundamental about social and cultural conditions of existence. It might be interpreted as an insight deriving from the constellation *Homo sacer*/the Sovereign. By representing exceptions from normal order, deviant people show us its presuppositions: inclusion of human life into the order is based on pure decisions.

With this perspective, the contrast between Foucault and Agamben can be reformulated. Disciplinary power is integral to social and cultural order. The abundance of local “*Fuhrerbefehl*”, however, marks a zone where it is no longer possible to tell order from exception. The commandments suspend order, but all the same gain immediate ordering-consequences. The penetrating and intense power of “*Fuhrerbefehl*” is based on the fact that they are not accountable to anybody or anything, but are sovereign. At the same time they do not inscribe us into a human normality, but make existence uncertain and impenetrable. They are sovereign decisions not really creating chaos, but a political condition without any distinctions between chaos and normality.

### Order or Zone of Indistinction?

What do historical experiences from the field of selective abortion tell us? On the one hand there are clear links to the mid-war period. The “feeble-minded”<sup>3</sup> were the main targets of sterilization and eugenic politics more generally, and persons with, for example, Down’s syndrome and Klinefelter obviously would have belonged to the core of this category. In many ways mental deviances are the most important reasons for selective abortion nowadays. Pure physical defects, however, are to a large degree tolerated, if they are not deadly by themselves. From Foucault’s perspective we might say that physical deviances do not push one very far from normality. However, it is possible to trace a strong and important continuity on the mental level, such defects depriving people of their fundamental status as humans. There is an obvious connection between the great detention of classical age, depriving madness of its voice and special knowledge, and the meaning and implications of mental deviances nowadays.

However, the concept of “feeble-mindedness” is gone without anything else filling the space. Instead there are a lot of specific, technical diagnoses without any normative connotations, in addition to shifting and short-lived psychological and pedagogical concepts and perspectives. There are no longer any operative concepts as embracing, value-permeated, normative, long-lived and central, both on the level of expertise, politics and society in general, as “feeble-mindedness”. The reason might be that the gap between a euphemistic, official language and an implicit practice has widened – so much that they have lost contact. There are so many things that we are not allowed to express anymore. If this is so, the practice is all the more powerful, because the untold is more difficult, or nearly impossible, to criticize.

However, from Agamben’s perspective, we might tell a different story. The whole field of human defects is floating much more than in the period up to around 1970. Therefore, a solid and dominating order-concept such as “feeble-mindedness”, with far-reaching institutional consequences, is replaced by a host of local “Führerbefehl”. If this is so, society no longer produces human deviances from normality, but Homo sacer – that is bare life exposed to a nomadic power. As a consequence, people are no longer inside or outside, but in a zone of indistinction.

### Death Present in Life

There are some important parallels between Agamben’s perspective and the existential philosophy of Jean-Paul Sartre (*Being and nothingness* (Sartre 1977)). The category “being-for-others” arises in the real or potential gaze of the others. It is totally impenetrable for the subject because this form of being is subjected to the freedom of the others. They might choose whatever they want us to be. We lack criteria to understand “being-for-others” because their freedom is not bound by anything. In principle there are no limits to the kind of alien life-projects in which we might be included. However, we sense the gaze because we stiffen and lose our own subjective dimension. Therefore, it

is not by accident that both Agamben and Sartre use the novels of Kafka as central references.

Contrary to Sartre, Agamben does not operate on the individual, but on the social-political level. This is one of the reasons why the Sovereign replaces freedom. In addition, Agamben does not write about general forms of human existence (as Sartre does), but historical, human conditions. However, they share the perspective on death – or more precisely: how death is already present in life. “Being-for-others” is an omen of death and a smaller version of it. From Agamben’s perspective, Homo sacer is a person who may be killed by anybody without risking legal persecution, because, in important respects, he/she is already dead.

## Notes

- <sup>1</sup> The observations and perspectives on foetal-diagnostics draws on the project “Contexts of choice” at the Rokkan-Centre, University of Bergen. Sølvi Risøy has a doctoral scholarship and the author is project-leader. Risøy has interviewed women who have chosen selective abortion.
- <sup>2</sup> This applies to Norway and the 12th week limit. In Sweden, however, the free-abortion limit is the 18th week of pregnancy.
- <sup>3</sup> There is a lot of literature on this theme. Two relevant books are: Koch (1996) and Kirkebæk (1997). The first is mainly about the political level and the second about institutional practise.

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