AGAMBEN AND THE POLITICAL POSSIBILITIES OF TRADITION

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This chapter focuses upon a specific question – namely, what could politics be today? As Agamben himself has written, politics exists because human beings cannot be defined through vocation or identity.[[1]](#endnote-1) In approaching this question, attention is focused upon the interplay between politics and law. This focus is quite deliberate. Here, law, and specifically the role of precedent and tradition in the common law of England and Wales, can be used as a foil to consider what this belonging could look like. Crucial to this task is to challenge the mythic foundation of politics, and the mythic nature of ‘progression’, and place them in opposition to a messianic idea of politics.

**A POTENTIAL BEGINNING**

To quote Peter Fitzpatrick, ‘beginnings are always desperate’.[[2]](#endnote-2) This is even more apposite when considering the potential of Agamben’s thought – where should such an investigation start? In order to see the potential in Agamben’s thought, it is necessary to see that Agamben’s thought is about potential. Potentiality: this is how to view Agamben’s engagements with politics. In so investigating this potentiality, we are led to a debate with a history as long as Western philosophy: how do we conceive of potentiality?

How we re-approach potentiality is heavily influenced by the *avoidance* of questing for origins, or foundations, found throughout Agamben’s writings. Potentiality, and its consequences, needs to be thought apart from foundations. A focus upon origins, or a foundation, implies a before, an original condition that existed, yet has become fractured and lost. Just as Michel Foucault’s genealogy eschewed searching for origins, so Agamben’s writings avoids such quests.[[3]](#endnote-3) There is no golden age waiting to be discovered and returned to. Moreover, the idea of a foundation, or origin, is bound up in myth. Jean-Luc Nancy saw stories of origins, of beginnings, and of the beginnings of narratives, as myths.[[4]](#endnote-4)

These origins are located in a special way, made sacred by being set apart, made transcendent and beyond profane experience. Through locating the profane world in a sacred sphere, reality becomes perceived and lived by, and through, mythic origins. These myths connect to both ultimate origins and ultimate identity; the myth becomes the source and foundational force of all that is.[[5]](#endnote-5) Origins provide a foundation and ultimate reference. Fitzpatrick notes that Christian mythology places the idea of the sovereign creator (the King of Kings) who rules over and maintains the universe in accordance with his laws.[[6]](#endnote-6) The creative force, itself a myth, acts upon a formless and limitless chaos, bringing order into the world. As such, myths describe the *breakthrough* of the sacred into the world.[[7]](#endnote-7) The sacred structures and renders possible human existence. It is through partaking in the sacred that persons and things are made real.[[8]](#endnote-8)

Connected to the myth of origin is the idea of progression; the idea that we are always-already ‘on the way’ from the origin to a better place, an improved way of living. The profane world uses the sacred, mythic origin as a yardstick to measure its progress. As Foucault wrote in The Order of Things, with reference to man being a finite creature of limits:

[M]an’s finitude is outlined in the paradoxical form of the endless; rather than a limitation, it indicates the monotony of a journey which, though it probably has no end, is nevertheless perhaps not without hope.[[9]](#endnote-9)

Agamben’s thought follows Foucault in eschewing origins and the idea of a telos, and question both sacred origins and mythic progressions, turning a focus onto the profane world in which we dwell. Nevertheless, this presents a challenge: to shun the idea of both a beginning and an end as mythic calls into question exactly how to approach the idea of ‘potentiality’.

It is a particular understanding of potentiality which has acted as just such a mythic foundation, and it is Aristotle who bequeathed this myth to Occidental philosophy. Agamben, in his engagement with Aristotle’s writings on potentiality, states that the utterance ‘I can’ marks the hardest experience possible: the experience of potentiality.[[10]](#endnote-10) What is this experience of potentiality, the experience of saying ‘I can’? To appreciate the importance of this question, we need to accept that Aristotle’s conceptions of potentiality and actuality inform our most basic assumptions about biological life.[[11]](#endnote-11) We conceive of life, and its political consequences, in terms of a mythic narrative of progression from potentiality to actuality.

Aristotle provides us with an intimate relation between potentiality and actuality.[[12]](#endnote-12) In the Metaphysics, Aristotle distinguished between two types of potentiality. The first is a generic potentiality, the potentiality of acting and of being acted upon,[[13]](#endnote-13) what is meant when we say that a child has the potential to become the head of State.[[14]](#endnote-14) The second form of potentiality is ‘in the agent’ and already existing.[[15]](#endnote-15) Agamben writes that this form of potentiality was of interest to Aristotle, namely the potentiality that belongs to someone who has knowledge or ability.[[16]](#endnote-16) For example, the poet has the potential to write poems. This existing potentiality is contrasted to the generic potentiality of the child. Whoever already possesses knowledge, like the poet, does not need to suffer an alteration, as they are already potential thanks to a ‘having’ on the basis of which they can also not bring their knowledge into actuality.[[17]](#endnote-17)

Aristotle bequeathed to Western philosophy this opposition, and interconnectivity, of actuality and potentiality. Unlike the Megarians, who only recognised becoming in act, Aristotle gave a positive existence to potentiality; potentiality can never be absorbed into a determinate actualisation.[[18]](#endnote-18) Crucially however, Aristotle places primacy upon actuality: ‘the good actuality is better and more valuable than the good potentiality’.[[19]](#endnote-19) What is more, potentiality can only be discovered and understood through its being brought into actuality.[[20]](#endnote-20) Thus potentiality becomes actuality unborn, something which must be completed and can be improved upon, made better through actualisation. Potentiality forms the beginning which is connected to the ultimate identity of the individual.

The drawing upon of opposing philosophical terms in Aristotle’s writings is a familiar part of Agamben’s methodology. Most famously, Agamben’s completion of Foucault’s hypothesis of biopower relies upon an interrogation of the fact that the ancient Greeks did not have one word for life. In the classical world, *b*ios refers to qualified life, be it political life, or the life of the philosopher. It is bios which determines the bare substance of zoē.[[21]](#endnote-21)

What I argue here is that the opposition Agamben draws between potentiality and actuality is connected to the opposition he draws between bios and zoē. To summarise Agamben’s argument: zoē denotes the basic fact of living common to all living beings, be they animals, men or gods. This unqualified existence is contrasted to living qualified in terms of an end.[[22]](#endnote-22) This qualified life, bios, is the form or way of living proper to an individual or group.[[23]](#endnote-23)

This relation between zoē and bios is not an opposition. Every bios, the proper end of man, is built upon and held in relation to zoē, simple existence. Agamben sees Aristotle as excluding natural life from the political sphere, confining natural life to the oikos, the domestic sphere.[[24]](#endnote-24) It is this exclusion of zoē from the political sphere that is at the same time an implication of natural life in the political sphere; politics is the place where natural life has to transform itself into politically qualified life.[[25]](#endnote-25)

It is this gesture of inclusive exclusion which Agamben sees as characteristic of the Western political tradition.[[26]](#endnote-26) The relation of bios and zoē and actuality and potentiality are relations of inclusive exclusion. This limit relation implies that one term is included in the other by virtue of its exclusion. Bios cannot exist without zoē but it is excluded from the sphere of natural life. Actuality cannot exist without potentiality but it in no way remains as potentiality.

Where Agamben takes up these paradoxes within his writings, he contends that these relations of inclusive exclusion create zones of indistinction or zones of undecidability. It is to these zones that we must turn our focus. Agamben’s methodology openly embraces the finding of such zones in oppositional distinctions which seem to allow for no such indistinction:

When you take a classical distinction of the political-philosophical tradition such as public/private, then I find it much less interesting to insist on the distinction and to bemoan the diminution of one of the terms, than to question the interweaving. I want to understand how the system operates. And the system is always double; it works by means of opposition. Not only as public/private, but also the house and the city, the exception and the rule, to reign and to govern, etc. but in order to understand what is really at stake here, we must learn to see these oppositions not as “di-chotomies” but as “di-polarities”, not substantial, but tensional. I mean that we need a logic of the field, as in physics, where it is impossible to draw a line clearly and separate to different substances. The polarity is present and acts at each point of the field. Then you may suddenly have zones of indecideability or indifference.[[27]](#endnote-27)

A zone of indistinction is a point where two opposing terms interweave and become completely indistinct. Being able to situate this zone allows not just for a questioning of the opposition itself, but it also allows for the consequences of the opposition to be called into question.

More importantly, this zone of undecidability is explicitly connected to the anti-foundational thought reflected in Agamben’s writings. Agamben views these oppositions as foundational to Western politics; in questioning the foundation, Agamben’s thought questions the mythical narratives which underpin Western conceptions of political belonging.

This questioning is not a search for an alternative origin, nor is it a search for a better answer (for to do so would admit of an ineffable telos). Rather, this questioning focuses in upon the ‘point of emergence’ of any given phenomenon. This exercise in ‘philosophical archaeology’, as Agamben refers to it, allows for a non-foundational grasping of a phenomenon, such as life, or potentiality.[[28]](#endnote-28) The point of emergence allows the phenomenon to ‘confront itself anew’. It is this process of ‘confronting anew’ which can properly be described as messianic in nature.

**A MESSIANIC POLITICS**

The messianic signifies the move from bondage to liberation, from sin to salvation, divine intervention to save a flawed world.[[29]](#endnote-29) Messianism exists in both Christian and Jewish theological traditions, and in both religions this messianism is closely connected to redemption. However, Christian messianism conceives of redemption as an event in the spiritual, unseen realm, reflected in the soul.[[30]](#endnote-30) Gershom Scholem makes the point that Augustine’s City of God reflects this; it is a community of the mysteriously redeemed within the unredeemed world. Judaism views messianism as a concept of redemption which takes place publicly, ‘on the stage of history and within the community’.[[31]](#endnote-31) Messianism occurs in the world and cannot be thought apart from its visible appearance.

Scholem considered that Jewish messianism has had two intertwined tendencies which have developed its content: the restorative and the utopian. The restorative is directed to ‘the return and recreation of a past condition which comes to be thought of as ideal … Here hope is turned backwards to the re-establishment of an original state of things and to a “life with the ancestors”’.[[32]](#endnote-32) Contrarily, the utopian aims at a state of things which has never yet existed. The two tendencies are intertwined and cannot be separated as ‘even the restorative force has a utopian factor, and in utopianism restorative factors are at work’.[[33]](#endnote-33) The restorative tendency has a utopian impulse projected upon the past, rather than the future. However, despite this focus upon restoration and utopianism, Scholem is clear that elements creep into a restoratively oriented utopianism which are not restorative and which derive from a new state of the Messianic world.[[34]](#endnote-34) This new order has elements of the old order which are transformed and transfigured.

It is the attempt to bring the restorative and utopian traditions of messianism together which characterise Agamben’s messianism.[[35]](#endnote-35) Agamben notes that in the Jewish tradition the figure of the Messiah is double. The Messiah ben Joseph is a Messiah who dies, vanquished in the battle against the forces of evil; the Messiah ben David is the triumphant Messiah who restores the kingdom.[[36]](#endnote-36) Messianism belongs to historical time, but also puts an end to it; it comes not to destroy, but to fulfil.[[37]](#endnote-37) This is why the figure of the Messiah is double.[[38]](#endnote-38) However, this fulfilment restores the world to a point it never knew. In Language and Death Agamben quotes a poem by Giorgio Caproni which talks of a return to such a place:

I returned there

where I never had been

Nothing had changed from how it was not.

On the table (on the checkered

tablecloth) half-full

I found the glass

which was never filled. All

had remained just as I never left it.[[39]](#endnote-39)

This restoration is more modest than revolutionary. Agamben’s messianism does not seek a revolution, or a profound change in the way we think. The modest restorative utopian nature of messianism is clear from a passage Agamben cites from Ernst Bloch. Here, the messianic kingdom is very similar to the current world, and requires only a slight shift in thinking:

The Hassidim tell a story about the world to come that says everything there will be just as it is here. Just as our room is now, so it will be in the world to come; where our baby sleeps now, there too it will sleep in the other world. And the clothes we wear in this world, those too we will wear there. Everything will be as it is now, just a little different.[[40]](#endnote-40)

What is this ‘slight difference’? This messianism is a partial gesture. It is both incomplete and one-sided.[[41]](#endnote-41) This move involves thinking beyond the logic of means and ends. We can see a parallel in Georges Bataille’s idea of ‘inoperativity’, which he saw as expenditure, coined as a response to capitalist logics of exchange and production.[[42]](#endnote-42) Inoperativity deactivates the ends of politics; expenditure is inoperative as it withdraws from the reciprocation of exchange.[[43]](#endnote-43) However, the fact of expenditure’s incompleteness does not imply the necessity of its completeness.[[44]](#endnote-44) Like Bataille, this messianism insists upon an incomplete nature. That is to say, it is seeking no perfect, complete world to come. This slight difference can be found in thinking of phenomena, including the experience of living, without recourse to foundations or origins.

Thus potentiality can be thought of without recourse to an origin and as something other than unactualised actuality. Political existence can be thought of without recourse to its foundation in the unactualised political potential of natural life. Agamben’s crucial move in his writings focuses upon this idea that existence can be thought of without being defined by its foundation, its origin, or its telos. This leads to a focus upon the idea of ‘singularity’.

To develop this idea of singularity, we can turn back to Agamben’s distinction, drawn from Aristotle, between generic and existing potentiality. Aristotle’s two conceptions of potentiality – generic and existing – both view potentiality as a ‘faculty’. Agamben asks what it means ‘to have a faculty’?[[45]](#endnote-45)

Potentiality must be more than unactualised actuality. A faculty must mean more than the potential to bring something into existence – if the potentiality for vision could only exist in the actuality of the light, we would never see darkness.[[46]](#endnote-46) The existence of potentiality is primarily the existence of non-Being, the presence of an absence.[[47]](#endnote-47) Humans have no essence or destiny which they must enact.[[48]](#endnote-48)

It is this which Agamben translates from Aristotle as ‘impotentiality’, and can be understood as potentiality’s point of emergence. To be potential is to be capable of impotentiality.[[49]](#endnote-49) An existence as potentiality is not the potential to do something but the potential to not-do, the potential not to pass into actuality.[[50]](#endnote-50) This potential not to be is capable of being and not being:

Every potentiality is at one and the same time a potentiality for the opposite; for, while that which is not capable of being present in a subject cannot be present, everything that is capable of being may possibly not be actual. That, then, which is capable of being may either be or not be; the same thing, then, is capable of being and of not being.[[51]](#endnote-51)

It is this move which marks impotentiality as messianic. This is why this passive, messianic potentiality is always-already held in relation to its own privation. This is both the origin of human power, good and bad, and the root of human freedom:

Other living beings are capable only of their specific potentiality; they can only do this or that. But human beings are the animals who are capable of their own impotentiality. The greatness of human potentiality is measured by the abyss of human impotentiality.[[52]](#endnote-52)

‘Freedom’ is properly understood neither as the power to do an act, nor the power to refuse to do an act, but to be free is to be capable of one’s own impotentiality, to be free for both good and evil.[[53]](#endnote-53)

It is this impotentiality which underpins the existence of any singularity. To deny a telos for humanity does not imply that humans cannot choose whether to be or not to be, or to pick and choose their own destinies. Humans do have to be something, but this something is the fact of one’s own existence as possibility or potentiality; one’s own existence as impotentiality.[[54]](#endnote-54) Impotentiality is therefore not simply an originary potential waiting to be actualised. Impotentiality is a *freedom*, properly understood as a freedom to be, and a freedom not to be.

It is this grasping of impotentiality as singularity which connects to messianic political belonging. This impotentiality is not a withdrawal from politics, or from political struggles. Rather, like Bataille’s expenditure, impotentiality subtracts from that which helped unite a prior system of meaning.[[55]](#endnote-55)

**THE MESSIANIC FORM-OF-LIFE**

‘The coming being is whatever being.’[[56]](#endnote-56) Whatever-being is a singularity, and its singular existence is messianic. Whatever-being is a singularity that is exposed as impotentiality. The key question for Agamben relates to what form of political existence can be conceived that would provide for whatever-being: ‘what could be the politics of whatever singularity?’[[57]](#endnote-57)

This politics of whatever singularity cannot focus on a particular property. The idea of identity politics falls back into the Aristotelian schema of potentiality as actuality unborn. In this scenario, belonging is defined through defined characteristics, or faculties, which an individual either possesses or does not. If an individual possesses said characteristic, then in order to belong to the set the individual would have to actualise the characteristic’s potential. We would once again fall into the realm of origins.

Instead, the belonging of whatever singularity reflects an inessential commonality, or solidarity without an essence. As Agamben writes:

Taking place, the communication of singularities in the attribute of extension, does not unite them in essence, but scatters them in existence.[[58]](#endnote-58)

In thinking of an inessential commonality we cannot consider one property above all others. This commonality cannot be represented as it works against the very idea of representation, the idea that a body is collectivised and foundational modes of representing that community are produced. It is ‘in-difference’ to properties which individuates singularities.[[59]](#endnote-59) Nor can this community but thought of as final in any sense. The ‘small shift’ Ernst Bloch invoked in recalling the stories of the Hassidim opens up whatever-being to its possibilities, but it is these very possibilities which mean an inessential commonality can never be reduced to a series of components or features. As Agamben writes in The Coming Community:

[T]he passage … from common form to singularity, is not an event accomplished once and for all, but an infinite series of modal oscillations. The individuation of a singular existence is not a punctual fact, but a linea generationis substantiae that varies in every direction according to a continual gradation of growth and remission, of appropriation and impropriation …The being that is engendered on this line is whatever being, and the manner in which it passes from the common to the proper and from the proper to the common is called usage – or rather, ethos.[[60]](#endnote-60)

Crucially for our purposes here, and our focus upon the ethos of whatever-being, we need to distinguish between tradition and foundations. The messianic world does not do away with tradition. It only challenges empty foundations. It is this separation which, I contend, marks the ‘small shift’ of messianism; the separation of tradition from foundations is the messianic event which takes the world to a point it never knew. The messianic event allows focus onto the ethos of whatever-being, away from ideas of progression. Whereas foundations form a mythic origin, to recognize the political, the ground of belonging for whatever-being, is not, and cannot be unconnected to tradition. To speak of potentiality is not to abandon tradition. Instead, tradition needs to be considered separately from origins and foundations.

Heidegger understood this when he wrote that Dasein’s understanding of the world guides its own potentiality for being.[[61]](#endnote-61) The projection of Dasein’s understanding, which Heidegger termed interpretation,[[62]](#endnote-62) is always grounded upon things Dasein has in advance, sees in advance and grasps in advance respectively.[[63]](#endnote-63) The already existing world into which Dasein was thrown helps structure Dasein itself.[[64]](#endnote-64) Tradition here refers to the cultural history and fabric of the world. The cultural fabric of the world is worthy of respect, as it is into this world that whatever-being is thrown.[[65]](#endnote-65) It is from within this world that the unique singularity of whatever-being is forged. Whatever-being, such-as-it-is, gives itself to itself from within a world that always-already exists. The cultural fabric of this world is continuously changing and responding to the actions and influences of singularities.

In seeking to analyse this ethos, I wish to draw a connection to what Jean-Luc Nancy has called ‘the political’; the place of community, of being-in-common.[[66]](#endnote-66) The politics of whatever-being is *the politics of the political*, a politics of being-in-common. The commonality of ‘belonging without identity’ is not tied to a transcendent essence of a community.[[67]](#endnote-67) Rather, it posits multiple whatever-beings living-in-common. It is this being-in-common that the politics of singularity seeks to focus upon, as being-in-common reflects and gives rise to the ethos of whatever-being. As Agamben states in *Nudities*:

The desire to be recognised by others is inseparable from being human. Indeed, such recognition is so essential that, according to Hegel, everyone is ready to put his or her own life in jeopardy in order to obtain it. This is not merely a question of satisfaction or self-love; rather, it is only through recognition by others that man can constitute himself as a person.[[68]](#endnote-68)

Singularities show that humans ‘co-belong without any representable condition of belonging’, without reference to a foundation or origin.[[69]](#endnote-69) It is recognition which constitutes the singularity of whatever-being, the ‘new figure of the human’ which is ‘beyond personal identity’.[[70]](#endnote-70)

This recognition, vital to the constitution of any singularity, cannot be sought through any mythic legal order. Mythic law is equated with judgment, guilt and responsibility. Agamben sees the judgment as the ultimate end of juridical regulation,[[71]](#endnote-71) and also equates the sphere of law with the assumption of responsibility.[[72]](#endnote-72) What we can see here is a distinction being drawn between *recognition* and *responsibility*. This reflects Agamben’s antinomical messianism – the desire to ‘think a human community that would not have (only) the figure of the law’.[[73]](#endnote-73)

**A MESSIANIC LAW**

The non-messianic law recognises who is responsible and who is not by delimiting classes and introducing distinctions between individuals and groups. It equates recognition – legal identity – with accompanying duties and responsibilities. In doing so, the law effaces the *ethos* of whatever-being, all the while reinforcing its own mythic foundations. The law claims its authority to recognise from its ineffable origins, and the individual is no longer defined through their own way of being, but through a legal decision. This is why Nancy claimed that the law, *jus*, is the very ‘right to say right’.[[74]](#endnote-74) Referring to the Latin term jurisdiction, literally juris-diction, the very saying of law, Nancy argued that the law must always affirm its own boundaries and foundations. This can only be done through a diction, a saying, logos.[[75]](#endnote-75) The law establishes its own viable perimeters and protocols through the saying of the legal judgment.[[76]](#endnote-76) As Agamben has stated:

The law can speak of everything, on the condition that it remains silent on the fact that it does so.[[77]](#endnote-77)

There is silence as the very saying of the judgment imposes a line beyond which law subtracts itself from further exposure. This is a line beyond which further argument has no sway because it has arrived too late.[[78]](#endnote-78)

The legal order institutes a continual decision-making routine; the very pleading of particular cases legitimates the jus of judgment. The law requires constant judgment in order to set its own limits, which in turn are set as foundations that justify each judgment.[[79]](#endnote-79) Thus legal responsibility is not an opening to a singularity, which can be constituted through recognition. Responsibility is the acceptance of one class of human beings and the implicit, or explicit, exclusion of others. The law recognises classes through the exclusion of other classes – the very structure of the exception.[[80]](#endnote-80) Contrarily, Agamben sees ethics as recognising neither guilt nor responsibility:

[E]thics, politics, and religion have been able to define themselves only by seizing terrain from juridical responsibility – not in order to assume another kind of responsibility, but to articulate zones of non-responsibility. This does not, of course, mean impunity. Rather, it signifies – at least for ethics – a confrontation with a responsibility that is infinitely greater than we could ever assume.[[81]](#endnote-81)

Ethical existence is *non-responsible* because recognition does not imply legal responsibility which must be assumed in order to be recognised. An ethics of non-responsibility has no imperative to act. There is no law commanding action, or providing a definition of life or existence. As David Kishik has argued, humans are unredeemable. The attempt to complete this imperfect human condition through consigning man to a universal truth, defining his essence, fitting him into a fixed narrative or directing him toward an original unity will abolish ethics and politics, as all that needs to be done is to follow the user manual for life.[[82]](#endnote-82) As Kishik maintains:

Agamben’s point, therefore, is not that we need to do away with all classes and identities ... by repressing or dissipating or transcending them. Since no identity is sacred, the ethical task is actually to profane it, use it, play with it, examine it, struggle for and against it, or even render it completely inoperative within our life, but without trying to resolve the matter once and for all.[[83]](#endnote-83)

Thus ethical recognition is non-responsible, without judgment or responsibility. However, it must be kept in mind that this antinomical messianism does not affect the *existence* of institutions in the world. In order for messianism to reflect a ‘small displacement’ that Agamben and Benjamin speak of the world must not be radically changed. Messianism entails that such institutions can no longer rely upon any notion of a community, or any foundation, in order to act and justify both their acting and their decisions.

The need for institutions to remain is not just reflected in Agamben’s thought. When Emmanuel Levinas developed his observation that the I has an ethical responsibility to the other, he declared that this responsibility for the other becomes a problem when a third party arrives.[[84]](#endnote-84) The third party is other to the other and the I.[[85]](#endnote-85) Levinas argues that the other stands in a relationship to the third party that the I cannot answer. The other and the third party put distance between the I and the other and the third party, the properly Other.[[86]](#endnote-86) The implication of this is that one individual cannot be absolutely and uniquely responsible for more than one other. We can see something similar in Agamben’s drawing of an analogy between the singularity of whatever-being and the form of love (although Agamben would not accept Levinas’s focus upon ‘responsibility’):

Love is never directed toward this or that property of the loved one (being blond, being small, being tender, being lame), but neither does it neglect the properties in favour of an insipid generality (universal love): The lover wants the loved one *with all of its predicates*, its being such as it is.[[87]](#endnote-87)

Just as the lover accepts the loved as they are, and does not focus solely upon certain predicates of the loved, so whatever-being is a being not determined by particular qualities, such as sex, gender or political persuasions, but by itself as such. This is why Levinas contended that the ‘intelligibility of a system’ is required to mediate and make intelligible the relations with multiple others.[[88]](#endnote-88) A method for making sense of multiple relations with others is needed in order to explain how multiple ethical relations relate to one another and exist in common.[[89]](#endnote-89)

It is through the messianic law that we can consider this new form of non-responsible political belonging which eschews foundations but not tradition. It is worth remembering that this law must be an unredeemed law, which does not seek to solve the problem of the human once and for all. This is reflected in Agamben’s writings, when he writes of messianism:

The essential character of messianism may well be precisely its particular relation to the law … the messianic event above all signifies a crisis and radical transformation of the entire order of the law.[[90]](#endnote-90)

Levinas’s system of intelligibility is the *messianic* law. This is a law which decides non-responsibly, and whose decisions will form part of the tradition of the world which in turn will constitute whatever-being.

**PRECEDENT AND TRADITION**

This tradition is nowhere more clearly expressed in the law than in the doctrine of stare decisis, the doctrine of precedent, as it exists in common law jurisdictions. The law and precedent can be used as a lens to show how institutions would operate messianically.

Precedent leads the common law to look backwards, to past and previous decisions of courts within the judicial hierarchy,[[91]](#endnote-91) serving as ‘a strong tie which the future has to the past’.[[92]](#endnote-92) Unlike civil law systems, common law systems are not codified. Tradition takes the place of codification for the common law. This is why Lord Hailsham stated that precedent’s importance relates to the fact that ‘in legal matters, some degree of certainty is at least as valuable a part of justice as perfection’.[[93]](#endnote-93) Stare decisis operates not just to preserve tradition; precedent, as it currently operates in common law jurisdictions seeks to preserve the mythic foundation of legal and political authority. In 1966, the House of Lords practice statement summarised this view, thinking precedent as:

An indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.[[94]](#endnote-94)

This foundation is found in the notion of ‘time immemorial’, time before legal memory. The Statute of Westminster I 1275 arbitrarily fixed the commencement of legal time and legal memory at 6 July 1189, the date of accession of Richard I to the throne.[[95]](#endnote-95) Such a date is after the traditionally ascribed beginnings of the development of the common law by Henry II in 1154. This was reinforced by the Prescription Act 1832, which redefined legal memory as no more than forty years.[[96]](#endnote-96)

The authority of the common law is derived from a mythical, self-referential foundation. Using Nancy as a foil, the origins of the common law, transmitted through stare decisis, serve to reinforce the law’s authority through its juris-diction. The common law’s authority is drawn from its self-referential origins in time immemorial, and this authority is affirmed as a boundary and foundation through a diction, a saying of law.[[97]](#endnote-97) Examples of the self-referential authority of the common law can be found throughout the English common law in relation to testamentary capacity,[[98]](#endnote-98) as a justification for proscribing as criminal unprovoked violence,[[99]](#endnote-99) and for granting a right to market stall holders to trade.[[100]](#endnote-100) In each case, the common law’s foundations, and the jurisdiction of the law maker, are reinforced through reference to this immemorial foundation.[[101]](#endnote-101)

Within the messianic law, precedent does not have recourse to such origins. How, then, can this law operate? I wish to make a connection between the act of ‘repetition’, and the writings of Jacques Rancière on ‘dissensus’. We first turn to a text on repetition that Agamben wrote, which focused on the films of Guy Debord:

Repetition is not the return of the identical; it is not the same as such that returns. The force and the grace of repetition, the novelty it brings us, is the return as the possibility of what was. Repetition restores the possibility of what was, renders it possible anew; it’s almost a paradox … To repeat something is to make it possible anew.[[102]](#endnote-102)

Repetition here does not bring similitude, but rather novelty. This view is in contrast to Gilles Deleuze, who contended that law is a discipline where repetition remains impossible, as the pure subjects of law as being particulars who are unable to be subsumed under law‘s generality.[[103]](#endnote-103) Deleuze saw law’s generalities as being repeatable, but only as repetitions of the same.[[104]](#endnote-104)

Rather, I wish to conceive of repetition as incomplete. Referring to Guy Debord’s concept of the ‘constructed situation’, a moment of life, the collective construction of a moment, Agamben makes the point that such a construction is a zone of undecidability between a uniqueness and a repetition.[[105]](#endnote-105) Constructing a situation involves constructing something that can be repeated and yet is unique. This repetition is forward looking. This repetition is without reference to an origin in the past, and focuses on the effect of that repetition for the future.

Repetition makes the political impotential. The non-responsible messianic law is repetitious, opening up to the new, the possibilities of existence. The messianic law must think the singularity of whatever-being within a community of whatever-beings, each of whom maintain an ethical obligation of non-responsibility over one another. The correct question to ask in every case, in every decision, is not what the law is, but what the law can be.

Precedent, representative of tradition, and freed from reference to an origin, has a part to play in this messianic common law. Precedent is part of this cultural fabric of the world. As such precedent forms part of the background in which whatever-being constitutes itself. This world is also shaped by other whatever-beings, as it is these others who help maintain and create the world’s cultural fabric. The cultural world, including precedent, forms the background in which multiple whatever-beings experience ethical relationships with one another. To uphold a past precedent is not to uphold an identical judgment, nor is it to uphold a fictive foundation. Repetition is not the return of the identical. To uphold a past precedent, a past law, a past rule – to repeat a past decision – is to create something anew.[[106]](#endnote-106) To repeat a precedent is not to do an injustice to whatever-being. It is to reinforce and make possible the cultural fabric of the world that whatever-being can use to affirm its own singularity.

The position of each court is difficult as they would no longer have recourse to recollecting self-referential foundations in precedent. However, this difficulty is what reflects the ethical nature of this non-responsible decision-making. There is no easy user manual to be applied to reach an ethical decision. This is why this form of precedent outlined is properly profane. It is profane as it is opened to new uses with every case that is decided by the law. This precedent returns to common use the potentiality that power had seized and precluded.[[107]](#endnote-107) This potentiality can be used by whatever-being to found its own freedom.[[108]](#endnote-108) As Agamben states:

The freed behaviour still reproduces and mimics the forms of the activity from which it has been emancipated, but, in emptying them of their sense and of any obligatory relationship to an end, it opens them and makes them available for a new use ... The activity that results from this becomes a pure means, that is, a praxis that, while firmly maintaining its nature as a means, is emancipated from its relationship to an end; it ... can now show itself as such, as a means without an end.[[109]](#endnote-109)

This messianic law neutralises the partitions of the law which divides and attempts to order humanity.[[110]](#endnote-110) Here I wish to connect this discussion of repetition to Rancière’s ‘dissensus’. Rancière may be a controversial figure to choose. He is sceptical of Agamben’s diagnosis of modern politics.[[111]](#endnote-111) However, I read the idea of dissensus as pointing a possible path to how a messianic politics and law seeks to exist.

Dissensus is not consensus. It renders consensus incomplete. Consensus manages the sensible, in Rancière’s terms, by deciding who or what is visible and can be counted.[[112]](#endnote-112) Politics for Rancière exists in dis-agreement. Dissensus insists that agreed boundaries of thought are contested, and takes a given form and re-uses it differently, opening it to an alternative thinking.[[113]](#endnote-113) In any attempt to introduce a consensus, a decision, there will be a remainder: ‘Politics exists whenever the count of parts and parties of society is disturbed by the inscription of a part of those who have no part’.[[114]](#endnote-114) This remainder can challenge the hegemony of any order, and remind us that there can never be an ideal community waiting to be discovered, or a perfect Justice waiting to be instituted. Dissensus disputes what is given, and contests the frame, the boundaries, within which we see something as given. Even here, dissensus depends upon the idea of repetition opening up novelty:

Politics exists as long as singular forms of subjectification repeat the forms of the original inscription of the identity between the whole of the community and the nothing that separates it from itself – in other words, the sole count of its parts. Politics ceases wherever this gap no longer has any place, wherever the whole of the community is reduced to the sum of its parts with nothing left over.[[115]](#endnote-115)

Freed from its mythic foundations, tradition (in the form of precedent) is made open for a new use, a dissensus which has no answer but only possibilities. Most crucial of all, this law, and politics, is entirely profane, as Zartaloudis has so eloquently stated:

This means that legislative practice will continue to fail, at times, to provide good laws and that juridical justice (judgment) will also be, contingently or intentionally, unsuccessfully *observed*, and that, for once whatever power, impotence and failure there is will be ours alone.[[116]](#endnote-116)

The politics to come has no user manual. It is a difficult, ethical struggle.

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