Chapter 103
The Borders of Corruption:
Living in the State of Exception

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ABSTRACT

The U.S. has been in a state of exception now for many years, and there appears to be no end in sight. There exists an entire generation who has know life under only this form of government, one that, as Giorgio Agamben explains, takes "a position at the limit between politics and law…an ambiguous, uncertain, borderline fringe, at the intersection of the legal and the political." In the name of security, the characteristic limiting of constitutional rights, the sanctioning of torture, and the proliferating of NSA surveillance are fast becoming the norm. Recently, much has been written concerning the bio-political consequences of an endless state of exception in which the executive power trumps the judiciary, and a new legal order emerges. This chapter will consider the relationship between corruption and the permanent state of exception.

While the U.S. has been in various states of emergency since its beginning, the conflicts in the middle east - and especially since September 11th, 2001 - have resulted in a substantial increase in these emergencies. For example, on May 19, 2015, President Barack Obama renewed the National State of Emergency that was instituted by President Bush at the start of the Iraq war in 2003.This continuation is one of thirteen annual notices of limited emergency states published in the Federal Register so far. There appear to be twelve more in the queue, including the crucial *Continuation of the National Emergency With Respect to Persons Who Commit, Threaten To Commit, or Support Terrorism*, originally declared in 2001. By executive order, each limited state of emergency comes equipped with presidential directives, all in the service of security. Some of these appear to compromise civil liberties and, thus, represent an abuse of power. One of the most controversial examples of this was section 215 of the Patriot Act, which allowed massive metadata collection on U.S. citizens. Though it is now slightly amended by the USA Freedom Act, such data collection continues. The philosopher Giorgio Agamben writes that such emergency rule employs " juridical measures that cannot be understood in legal terms…at the limit between politics and law" (Agamben, 2005). He further suggests that, in the name of security, contemporary e-surveillance has

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destroyed the separation between the public and private space, a separation essential to the preservation of any democracy. This chapter will explore the history of emergency rule and some of the bio-political consequences of governing in a continuous state of exception, including the emergence of a virtually unstoppable surveillance-industrial complex.

The concept of emergency rule has a number names, each with its own history and nuance: the Germans tend to favor State of Exception, the French and Italian - Emergency Decree or State of Siege, and the Anglo-Saxons - Martial Law or Emergency Powers. The terms all connote situations in which state power legally withdraws rights and entitlements during exceptional situations. However, only the German term, State of Exception, seems adequate for the particular investigation of this paper. Emergency Decree, State of Siege, Martial Law and Emergency Powers all connote war and a temporary, lawful reaction to it. State of Exception expresses the "suspension of the juridical order itself; it defines law's threshold or limit concept" (Agamben, 2005). When a State of Exception is declared, the law allows lawlessness. But, how does the juridical order withdraw itself when necessity requires the suspension of core human rights, for example? How could such anomie inhabit a juridical system? One way to explore these troubling questions is by considering the State of Exception in its historical context.

The political "arcanum" or "secret" is one of the earliest forms of this concept, according to the theorist Carl Schmitt, whose text *Dictatorship* was the first devoted entirely to the examination of emergency powers. Arcana have been used at least since Tacitus described the ingenious politics of Tiberius in the first century CE. Tiberius' "arcana imperii" his "secrets of state power" and his "arcana dominationis" his "secrets of rulership" worked together to maintain his ultimate power. Secrets of state power were those that kept the people pacified, by "conjuring the impression of freedom, simulacra or decorative occasions." But secrets of rulership were powers "concerned with the security and defense of rulers in extraordinary events." They were understood as the necessary means of any government of the state. These two types of arcana were directly opposed to the "iura imperii", the right to pass laws, and the " iura dominationis", the right to rule. The right to pass laws and the right to rule, the iura, were finite and could not be hidden. They were public, in full view. Conversely, the arcana were those hidden plans and practices that helped to maintain the distinct right of sovereignty. According to law, in situations of emergency, the sovereign was first bound to divine law, "ius divinum." Divine law was superior to man-made law and in fact was the constituting force that allowed human beings to form lesser laws. The sovereign thus had ordinary rights, based on man-made law, and he had extraordinary rights, based on divine law. Since only the sovereign had access to the constituting force of the divine, only the sovereign could know when and in what manner divine law should be invoked. Written within human law, then, was the law of exception giving the sovereign the right to declare an emergency situation, to disregard aspects of man-made law, and to follow divine law, known only via arcana dominationis, the secrets of rulership.

Human laws were constituted based on the constituting power of divine law; when humans faced emergency situations that threatened to destroy the state, their only recourse was to the original lawmakers, the divine, and their only conduit was the sovereign. The sovereign, then, held ultimate power since he was the one who could declare the state of exception and invoke the secret powers of divine law. One such example was the iustitium edict issued in dire situations such as the one Cicero warned against in a speech before the senate in 56 BCE. During the iustitium, the administration of justice could be suspended, the treasury closed, and the courts pushed out of the way. In this particular instance at least, the dire situation was the wrath of the gods because of bad omens and profanation, not threat of war or other tumult.