

The Collapse of the Rule of Law

The Messina Earthquake and the State of Exception

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1 Preliminary

Recent tragic events in this *debut de siècle* years have reminded us of the extent of the challenge that law faces in the founding of what is assumed to be the normality of societal and political relations. Contemporary emergency situations, in which war and enemies are – so to say – deconstructed into a diffused presence and threat, make the challenges that law faces in situations of emergency again an important topic for institutional deliberation and theoretical debate. The question of the state of exception, the German *Ausnahmezustand* is the topic of this article, seen however through the looking-glass of a special historical event, the Messina earthquake of 1908. This case is carefully circumscribed but at the same time of such gross proportions that its study can help to better understand our contemporary predicament.

Messina, a prosperous Sicilian town at the beginning of the twentieth century, was devastated by an earthquake in the early morning of 28 December 1908. Nearly all buildings in the town fell down and around sixty thousand people died out of a population of one hundred thousand. It was an hecatomb. Stricken by this unfathomable disaster, Messina's institutions and civil society collapsed and a wild natural state replaced the rule of law. There was pillage and robbery everywhere and the rule of the stronger prevailed, though forms of mutual aid among destitute and weak people were not entirely absent. Into this situation came the Russian Czarist navy, providing emergency assistance but also immediately introducing and enforcing rigid and arguably cruel emergency measures. The Italian army followed, an 'emergency situation' was formally declared and ordinary rights were suspended by the King.

The events in Messina and the several exceptional measures taken by the government led to a debate in Italian legal doctrine about the legality and the conceptualization of those exceptional measures. In the following I will try to reconstruct the historical context and the content of that debate and, in a broader perspective, thematize how law could be brought to meet the breaking of normality and ordinary life by an unexpected and catastrophic event whose morality, as it were, is also a matter of concern for those who are confronted with it.

The breaking of normality (which is of course an ontological presupposition of any normative order) through an exceptional, though not intentional event (as is clearly the case in an earthquake), brings about what can be interpreted as a radical challenge to law's claim to bring order and justice to human life and society. It

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sometimes seems that law's response to the exceptional situation cannot be based on ordinary perceptions and criteria of justice and due process. There is a sense in which the inner morality of law is put on trial by the exceptional situation and by the following reshaping of the law in terms of a 'state of exception'. This article attempts to follow this path without turning away from the extent to which the rupture of normality may in itself test the implicit assumption that ontological and legal normality are necessarily connected to a higher benign perspective towards the fragility of the human condition. How can law do without this benign approach? In which manner could law (and its presupposed ontology) handle a form of radical evil that we are not authorized to impute to any sort of agency?

I will start with a historical picture, then I will give an aperçu of the tragedy and the collapse of the rule of law that followed. I will also briefly introduce a few reflections on the possible means of giving moral sense to the unintentional infliction of evil. Finally, I will discuss how legal theory (actually in this case Italian public law scholarship) has attempted to cope with the way in which the suspension of the rule of law seems to many as the demise of law, rather than its strongest prove of vitality.

2 Progress and Its Failure

The late nineteenth century is often depicted as a gilded age, a 'proud tower'.¹ That fin de siècle idea brought a sense of pride and a thousand hopes, all of which were projected onto the new century to come. The myth of progress which liberalism had fed on was such that the twentieth century was regarded as the completion of the nineteenth century, a time in which that century's greatest expectations and grandest designs would be fulfilled. Thus it is that the first decade of the twentieth century was experienced, and still is viewed, as an outgrowth of the nineteenth century.

The break with the nineteenth century would come about in most dramatic fashion in August 1914, with the outbreak of the Great War, World War I. This conflict seemed in certain respects a fated event, a natural disaster: it was in fact essentially 'unmotivated' and 'automatic' – an involuntary manslaughter, one might call it –, a chain of events that developed independently of the intentions of all the players on the stage, played out by the great powers. The ultimatum issued to Serbia by the royal-imperial government based in Vienna; the mobilizations that this prompted on the part of Russia, Germany, and France; and then the ill-famed Schlieffen Plan, under which the army of William II was to go into war. These were, in the words of Karl Kraus, 'the last days of humanity'.² 1 August 1914, then, marks the beginning of the twentieth century as a century, with its

1 Cf. Barbara W. Tuchman, *The Proud Tower: A Portrait of the World Before the War, 1890-1914* (New York: Macmillan, 1966).

2 The reference of course is to Karl Kraus, *Die letzten Tage der Menschheit* (Frankfurt am Main: Suhrkamp, 2006).

own distinctive, pregnant historical unity: this was to be the ‘short century,’ as Eric Hobsbawm would call it, or more simply ‘le Siècle,’ in the words of Alain Badiou.³ If the lights of European civilization, or of the liberal world, did not definitively go out on that day, certainly those of the bourgeois nineteenth century did.

The twentieth century, however, has many birthdays. Just as the 1912 sinking of the Titanic created waves of disconcertion across Europe and the so-called civilized world, the events of a few years earlier in Messina had an effect just as powerful, if not more so – and this takes us back to 1908.⁴ Here, too, we are met with the unexpected, the exceptional, and even the ‘irrational,’ when a dreadful shaking of the earth and a powerful wave unleashed their force onto a helpless population, catching it unawares: men, women, and children were sacrificed by a nature that revealed itself to be anything but benign. At the same time, this nature was too dense and obscure for the light of progress to cut through it: the philosopher’s light neither illuminated nor corrected Messina at 5:20 AM on the morning of 28 December. Even more disturbingly, this light was not able to illuminate or guide the humans sucked into that motion of natural energies breaking loose from the ground, without any regard for human life. Humans succumbed to the forces of nature, but in doing so, they appeared to take down their civilization with them. By striking hard, nature reduced human beings to their status as entirely physical beings – all flesh – and hence as private beings: the public sphere was undone in a matter of minutes.

It was not just the scale of death that gave cause for outrage, although the sheer numbers of dead must have cast doubt on the possible progress of things and about the good that this could bring and ensure. The event was troubling as well for those who believe and have faith in an omnipotent but benevolent and merciful god. There are some, like Kant, who hold that natural disasters are God’s way of helping humans gain a better understanding of the laws of nature, and this also teaches humans that the earth is not just the realm of their desires. But, one may object that such a lesson is too harsh, and indeed cruel. It will be observed at this point, by way of a reply, that God is inscrutable and that God’s design and goodness surpass our understanding. But can an unpredictable and implacable teacher still be a good teacher?

This question tormented Voltaire,⁵ who could not come to grips with it. Explanation and understanding are not enough in the face of extreme suffering; instead

3 See Eric J. Hobsbawm, *The Age of Extremes: A History of the World, 1914-1991* (New York: Vintage Books, 1996) and Alain Badiou, *Le Siècle* (Paris: Seuil, 2005). Cf. also Michael Stolleis, *Der lange Abschied vom 19. Jahrhundert* (Berlin: de Gruyter, 1997).

4 Cf. Eric J. Hobsbawm, *The Age of Empire, 1875-1914* (London: Abacus, 2007), 328.

5 See his ‘Poème sur le désastre de Lisbonne,’ in Voltaire, *Oeuvres Complètes* (Paris: Institut de France, 1876), vol. 12, 509–23. For an insightful and thorough discussion reconstructing the underlying question (that of ‘natural evil,’ or ‘Übel,’ as opposed to ‘Böse’) and its treatment in philosophy beginning with the very debate that unfolded in the wake of the Lisbon earthquake of 1 November 1755, see Susan Neiman, *Evil in Modern Thought: An Alternative History of Philosophy*, new edition (New York: R&T, 2004).

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we need justification and approval. Indeed, evil is at its most radical – even more so than that which can be imputed to a conscious subject, to wickedness and cruelty – when it proves to be without foundation, or to have no reason for being. We could elect to ascribe such radical evil to the very essence of divinity, but this would involve us in an act of the highest blasphemy. Mortal sin does not justify the choosing of victims, and it can hardly make right the death of a child. So too, the finalistic explanation over the long haul – or ‘in the long run,’ as Keynes would have said and as John Finnis does say⁶ – has no use for us in the here and now. There is suffering and there are horrors that cannot be quantified or made up for or otherwise redressed or redeemed.

One could give a further turn to the providentialist argument. Human beings are like members of an audience who enter a film house to watch a film that has already started and will leave before the story ends. Such individuals cannot grasp the sense of what they see; they are lost and must remain so, because they are unable to follow the ‘whole.’⁷ This is unfortunately the human condition in the face of history: we come too late and always leave too early. We are not good film watchers. But there is an intuitive objection to such an argument: in life we are not just spectators to history. We do not simply watch; we experience our life. We are not an audience in history, we are actors, though usually with minor roles. We are concerned by the story; this is our story, and we do not have anything else or any other story to watch. Where we cannot find sense in it, there is no consolation and perhaps no excuse.

‘Deus ex malo semper maius bonum elicit, ... in comparatione ad universum, cuius pulchritudo consistit ex hoc quod mala esse sinuntur’ – so says Aquinas.⁸ But where is the ‘pulchritudo,’ the greater good, to be found (or what does it consist in) in a world that encompasses and tolerates the pain and suffering of so many innocent ones? There is all the more reason to ask this question considering the generally accepted view that there is no limit to the evil the world has in store and may bring. In what way can a world that permits such evil and perhaps even determines it be said to be good or beautiful? Evil is an imperfection; it thus acts as an impediment to the completeness and flourishing of the person affected by it. But isn’t gratuitous or unjustly inflicted pain a crack in an edifice, regardless of how coherent and compact this edifice may be on the whole? Does it not create a permanent mark on an otherwise unblemished and brilliant surface?

But, one may still argue, isn’t the very fact of our being (as opposed to our non-being) in itself a good to be cherished? ‘I am turning to all creatures ..., exhorting

6 Significantly, it is with this expression (‘in the long run’) that John Finnis ends his book *Moral Absolutes: Tradition, Revision and Truth* (Washington, D.C.: The Catholic University of America Press, 1991), 106, defending an absolutist moral theory centred on faith in divine providence.

7 Cf. Franz Werfel, ‘Die arge Legende vom gerissenen Galgenstrick,’ in idem, *Erzählungen* (Frankfurt am Main: Fischer, 1963), 113.

8 Thomas Aquinas, *Commentum in librum II sententiarum*, d. 29, q. I, a. 3, ad 4; quoted in Finnis, *Moral Absolutes*, 15: ‘Divine providence involves the permission of evil (of any and every kind) only so that out of it God may draw a somehow greater good.’

them to exclaim, “Hurrah, we are!” Kant wrote in an academic proslution he would later disavow.⁹ But how does one get the dead to give forth a ‘Hurrah!’ for an existence that has inflicted violence upon them? Maybe it is only as a ‘whole’ that being can still claim its rights. As Kant says, ‘Everything is good in relation to the whole.’¹⁰ However, this can be argued only from what might be described as the external point of view, where being is not made up of different beings, cannot be reduced to such beings, and does not take up their perspective: it can only be said of an abstract being, or of being ‘as a whole.’ If we take up the internal point of view of a situated being – of our existence or ‘being-here,’ of our being in particular – we will see that this is inextricably connected with the fragility of the sentient condition and with our perception, however much beclouded, uncertain, and confused, that we each have of our own irreducible individuality. For those who die, it is as if they had never existed to begin with. For those who are stricken with extreme suffering, the world contracts around a single point, and nothing remains except a subjectivity in pain. When we find ourselves in a condition of excruciating pain, our being is reduced to a sensation. This mode of being is something we may well be inclined to escape at any cost, even at the cost of our not being.

On another interpretation still, God only permits evil without intending it, and permits it as a ‘side effect’ of a good that, by contrast, is directly willed. Evil, where God is concerned, is a *praeter intentionem* effect of God’s own sacred and free choice.¹¹ But as Finnis himself recognizes, an unintended consequence is still a fact to which moral responsibility may attach.¹² It is conceivably a lesser responsibility, to be sure, but still a responsibility: someone will still be responsible or blameworthy, or at fault, in the same way as happens under the law with involuntary manslaughter or negligent homicide, which may not carry so heavy a punishment as deliberate or criminal homicide (murder), but this does not mean its perpetrator will go unpunished (nor will such punishment be lenient). If there is no moral responsibility for a natural disaster, so it could be argued, the normality of the rule of law should not be applied to it either.

3 Earthquake and State of Exception

A hundred years ago, the residents of Messina were treacherously and indiscriminately thrashed and battered in their sleep and without any warning. We will never know whether this was a voluntary act or an unintentional one, though the earthquake is experienced by the victim ‘as a permanent individual entity’ and as an act carried out with intention, with malice, something which ‘came ... directly

9 Immanuel Kant, ‘Versuch einiger Betrachtungen über den Optimismus’, in idem, *Akademie Ausgabe II, Vorkritische Schriften II*, 35.

10 Ibid., 178.

11 On which see Finnis, *Moral Absolutes*, 74ff.

12 The underlying view is so encapsulated by Finnis: ‘Certainly one has moral responsibility for what one thus knowingly and “deliberately” causes or brings about’ (*Moral Absolutes*, 72; cf. *ibid.*, 81).

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to me.¹³ On that night, the sea had been restive and it swelled with rollers; the wind was blowing hard, and doors and windows had been tightly closed to keep out the cold.¹⁴ When the blow came, the warm beds and rooms turned into death traps.

What vanished on 28 December 1908 in Messina was not just the houses and the streets: it was civil society itself, or, if one prefers, society *tout court*. The survivors' disorientation was not just spatial. In fact, the city is a shared context of collective action, a shared universe; we are at once its product and its bearers. We have inherited its idiom, we perpetuate its history, and to some extent we project ourselves into its future beyond our own death. The city is as familiar to us as our own homes, and its streets take us on their own to our destination; we walk them like we amble into the warm rooms of our childhood. Its smells, sounds, colours, and flavours form the backdrop to our every thought. Losing all this, and all at once, is among the biggest misfortunes that can befall us, perhaps the biggest. As Simone Weil once remarked, 'the greatest misfortune that can happen among men [is] the destruction of a city.'¹⁵

A distinction was made in classical Greece between the *asty* – the city of walls and houses, the urban conglomerate – and the *polis*, the city built on rules and enclosed within a common sphere of mutual expectations and a shared discourse. The two entities, *asty* and *polis*, do not necessarily coincide: the former is no guarantee of the latter. But in the Messina earthquake, the end of the city of walls and houses brought with it the end of that other city, too, the city of the commonweal. This brings us to the state of exception, curiously taken by some to be the matrix of law and of the whole situation framed by law: encapsulated here, in Messina in 1908, in a few bold strokes is the state of exception and what one can expect from it. Moreover, it illustrates, not without particulars, the relation that holds between politics (and law) and violence. For some more or less sincerely romanticizing scholars (notably Walter Benjamin and Carl Schmitt), violence is always law-producing or law-preserving.¹⁶ But there is no violence more incalculable than that of an earthquake. And the Messina earthquake was indeed long and mighty, reiterative and destructive, like few others have been. If we take Schmitt at his word, then, we should expect to see in Messina an epiphany of politics and law.

Earthquakes have similar effects to war; or rather, their aftermath does conjure up this impression. It really was like war, as we learn through eyewitness accounts: "The cityscape offers the spectacle of a battlefield, all of it rubble,

13 William James, 'On Some Mental Effects of the Earthquake,' in idem, *Memories and Studies* (Rockville, Maryland: Arc Manor, 2008), 87.

14 These circumstances are described at the outset of Maxim Gorki's contribution to *Im zerstörten Messina*, Hrsg. Wilhelm Meyer and Maxim Gorki (Berlin: J. Ladyschnikow Verlag, 1909), 45.

15 Simone Weil, 'L'Iliade ou le poème de la force,' in idem, *La source grecque* (Paris: Gallimard, 1953), 37; my translation.

16 Walter Benjamin, 'Zur Kritik der Gewalt,' in idem, *Zur Kritik der Gewalt und andere Aufsätze, with an afterword by Herbert Marcuse* (Frankfurt am Main: Suhrkamp, 1965), 45.

strewn with corpses and abandoned to its own fate.¹⁷ The 'war-torn' face of the event is something that some commentators seized on at the time to invoke immediately the need for an iron fist and a state of siege (martial law). For example, the socialist Leonida Bissolati: 'The earthquake has acted like an enemy that cuts off communications, prevents victualing, and for the most part bombs the residential areas. Hence we are in a state of war, and we consequently need to set up a state of siege.'¹⁸ It was like 'a grand Sedan.' But unlike a battlefield, the earthquake's victims were not combatants but hapless civilians caught unawares in their sleep. It was a holocaust. Then, like vultures, came the warships of the international powers: the Russian team led by Rear Admiral Livtinov, the British team, and then finally the cruisers of the Italian Marine Corps. While they came to the survivors' rescue and saved lives, they also established the law of war in Messina – the state of siege – which at first was enacted merely as a *de facto* state of affairs, the most absolute form this sort of rule can take.

There was an air of madness that drifted through the ruins. People were half-naked; bemoaning those buried alive or struck dumb by the loss of everything: their belongings, their loved ones, their space, their past and future. The effect on those struck by the tragedy – by the death of a child, parent, or spouse – was to immobilize them. An uncanny apathy thus took hold among the survivors, who seemed unresponsive, in that the loss of everything they held dear was experienced by them as a fated event, as something against which it is useless, even impious, to resist or fight. The only flurry of activity was that of those who had taken to looting; the rest sat motionless, huddled in a corner, wandering amid the corpses, without any specific destination, in the maze of trails and walkways running through the houses that had collapsed onto one another.¹⁹

There were some who saw in the tragedy the hand of God: the city had sinned, had turned away from God, and so it was right that the city had been severely punished. In such a scenario, it is not possible to oppose or object to the punishment, and so the only possible behaviour is to accept your just deserts. What thus prevailed were fatalism, resignation, and a religious fervour coloured with a streak of fanaticism. People walked through the ruins in improvised processions; they erected crosses and carried on their shoulders votive images and statues of saints. Between blasphemy and prayer, it was the latter that seemed to have the upper hand. The survivors' immobility can thus be explained in religious terms, too, as if every movement signified for them a will to escape their due punishment, a fleeing from God, a sin to be counted on top of those unspeakable sins for which the Lord had pounded his fist hard down upon them, without mitigation.

17 Goffredo Bellonci, 'Una nave greca impedita di recare aiuto,' *Il Giornale d'Italia*, 7 January 1909; my translation.

18 Leonida Bissolati, 'Lo stato d'assedio,' *Avanti!*, 15 January 1909; my translation.

19 See Salvatore Pugliatti's recollection in his *Il diritto ieri oggi domani: Ultima lezione* (Milan: Giuffrè, 1993).

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There is no doubt, then, that the ancient belief in the idea of the earthquake as a signal from God, as God's way of forcing sinners into redemption, found its place even on that tragic occasion in 1908. However, there were also those who were lost to madness. There were those who took their own lives. These persons were the 'conquered,' the losers in the battle of destiny: 'Many men of respectable circumstances wearing women's clothes – such was the most appalling image of the torment: a father who lost his numerous family sobbed and nibbled at a piece of bread which I could still hand him; others roamed to and fro in a crazed state, laughing. A youth holding in his arms a beautiful creature of twenty years, her hips cracked, at once threw himself into the sea with her.'²⁰

Axel Munthe recalls 'thousands of half-naked people running about in the streets like lunatics, screaming for food.'²¹ It is also true that 'vultures' of a wholly different sort also swooped down on Messina. All at once, with the stronger shocks having subsided, and the air everywhere pierced by the cries of those who had survived or been buried alive, the place became alive with predators, wretches robbing and looting homes and shops, and who, armed with saws and knives, would cut off ears and fingers from the dead and wounded so as to 'extract' from them a piece of jewellery. Brawls and gunfire were not unusual.

It became common practice in the days following the earthquake for survivors to scavenge and rob amid the corpses, and even to kill. Civilization seemed to have come apart by natural force, to have been reduced to the brute state of a telluric movement. As the houses collapsed, so did the rules. 'All the dwellings, all the forms and relations that had sustained the industrious and civil life of a large collectivity had been wiped out, altered, shaken; and people felt primordial instincts and emotions taking hold, all of them going in opposite directions.'²² And so survivors took refuge: the 'rule' most suited to an absence of rules seems to consist in claiming a power which itself is rule-less. Such is the state of siege, which has all the makings of a state of war.

The Russians proceeded *iure manuum*. The various militaries were granted a licence to kill, a privilege which they promptly asserted. It became the norm to shoot at the 'vultures,' but also at anyone digging in the rubble to find a beloved one or to recover some personal belongings. There were many hungry and dehydrated people scavenging to feed themselves and find something to wear. They, too, came under martial law: 'The truth is, unfortunately, that people are murdered in great numbers by the soldiers.'²³ But the paradox is that even the militaries were engaged in sacking, as were the forces sent in to maintain law and order amid the ruins. They had no food supplies with them, and so they turned for their

20 Arnaldo Cipolla, 'I vinti,' *Corriere della Sera*, 3 January 1908; my translation.

21 Axel Munthe, *The Story of San Michele* (London: John Murray, 2004), 283.

22 Pugliatti, *Il diritto ieri oggi domani*, 3; my translation.

23 Sandro Attanasio, *28 dicembre 1908 ore 5,21 terremoto* (Catania: Bonanno, 1988), 144; my translation.

victualing to the city's abandoned shops, breaking and entering and taking what supplies they needed.²⁴

Brute nature and existential and moral disorientation is answered with force and with executions. What manifests itself here is 'raw' political power, which, however, precisely because it is 'raw' is not so much political as it is apolitical, without politics, that is, without any sharing of rules and without any control. Violence begets violence – as happens in war – were it not that, in this case, the first blow was struck by earth, by nature itself, in response to which came revolvers and rifles, and cannons would soon thereafter be deployed. The minister of public works, Bertolini, who was among the first people on the scene of the disaster, suggested that the city be wiped off the geographic map. 'There is carnage, fire, and blood here,' says a telegram that the King (who was on the scene on 30 December) sent to Italy's then-premier, Giovanni Giolitti. It sounds just like a prelude to war.

4 The Rule of Law Challenged

The war analogy was drawn again by the Italian King in his royal decree of 3 January 1909. This resemblance to the state of war was underscored by Santi Romano, one of the most influential Italian public lawyers of his day, who devoted to decree-laws and to the state of siege one of his most insightful comments: 'The situation brought about by the cataclysm,' he noted in parallel to the royal decree, 'was in certain respects identical to that which comes about in a state of war, and in certain other respects even graver than this latter situation.'²⁵ Santi Romano, however, saw in the earthquake something more than a situation of war, and the state of siege imposed by royal decree – though it had already been in place in virtue of the fact's normative force – is something he used to discuss the relation between law and necessity. To begin with, Romano challenged the thesis advanced by Oreste Ranalletti, who in his day was among the leading scholars of public law, and who argued that the state of siege should properly be classified as a state of war and should consequently be governed by the military penal code.²⁶ An earthquake is more serious and dramatic than war, and so its analogy to the state of war fails on grounds of proportionality: it is too understated.

What Romano took exception to, above all, is the idea of the state of siege as something that is reached by applying the exemptive circumstance consisting in the state of necessity. It was Ranalletti's view that certain provisions that appeared at first sight to be *contra legem* (contrary to law) find their justification precisely as devices through which one copes with a situation of necessity. There are cases where that situation legitimizes the disregarding of the law; and where

24 See Giorgio Boatti, *La terra trema: Messina 28 dicembre 1908* (Milan: Mondadori, 2004), 132-33.

25 Santi Romano, 'Sui decreti-legge e lo stato d'assedio in occasione del terremoto di Messina e di Reggio Calabria,' now in vol. 1 of *Scritti minori*, ed. G. Zanobini (Milan: Giuffrè, 1950), 290; my translation.

26 Oreste Ranalletti, *La polizia di sicurezza* (Milan: Società Editrice Libreria, 1904).

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the situation presents itself as extending over a certain period and investing a collectivity, it also legitimizes the enactment of new provisions having full normative force. Such enactment, however, would be incidental and indirect, for it is essentially an exception. The term 'state of exception' marks out the nature of such a state as precisely an exception to the rule, as a 'special case,' and a factual one at that (a special fact), but not as an *extra ordinem* normative capacity. In other words, rather than depriving the law of its force, the state of exception would, on this construction, reaffirm such force precisely by virtue of the exception recognizing its own exceptional or special status along with that of the rules by which it is framed. The state of exception would be an exception to the rule and no more: no empirical, necessary, or conceptual relation exists that would bind a rule to an element of necessity. Here a 'state of exception' is equated in a sense with the regular necessity justifying clause; it is a sort of state of necessity justification applied not just to one rule or a special regulation but to the whole of the legal order – which remains conceptually and normatively unrelated to the necessity marked by the 'exception.'

Romano, by contrast, anticipating in certain respects Carl Schmitt's later formulations, held that the relation between law and necessity is, so to speak, ontological, in that a primigenial foundation bearing a connection to the state of necessity is inherent to law. Here, a 'state of exception' is no longer equated to the regular necessity clause; it is something profoundly different. It marks such a general and radical necessity that the legal order as normally defined is drastically and wholly abrogated. In doing so, the 'state of exception' gives rise to an alternative regime that reveals the hidden source and motor of the normal rule of law itself. What comes to bear in this regard, according to Romano, is an analogy to custom: this too is a 'fact,' to be sure, but one that, when certain conditions obtain, morphs into a norm, or at least acts as one. It, too, cannot be construed as an exception to a specific regulation; on the contrary, it entails an exceptional law-creating form that is an original form of law-making force.

A view that Santi Romano likewise took exception to was that of Ettore Lombardo-Pellegrino, an eminent constitutional lawyer from the University of Messina, who, in the provisions through which the state of siege is given effect, saw no more than mere factual measures: these may be *contra legem*, and may certainly be justified, but they fell nonetheless outside the precincts of the law.²⁷ Contrary to Ranelletti therefore, for whom these provisions are fully legal, Lombardo-Pellegrino took a more restrictive and legalistic view in this regard – in fact, he took what might be described as a 'juridicist' view, in which what we are dealing with in a situation like Messina is a sort of suspension of law in which law has no further force and is incapable of grounding or producing any further normativity. Romano, by contrast, drawing freely on German theory and in particular on the work of Georg Jellinek, set out to defend the normative force of necessity. However, he makes a significant departure from Jellinek, who in speaking of the

27 See Ettore Lombardo-Pellegrino, 'Il diritto di necessità nel costituzionalismo giuridico,' *Archivio del diritto pubblico* 2 (1903), 3ff.

‘normative force of the factual’ seems to also include under its scope the force of the *fait accompli*, understood as a *contra legem* sovereign decision exemplified – as he sees it – through the figure of the usurper (a figure discussed in his magnum opus, the *Allgemeine Staatslehre*). Unlike the *fait accompli*, the ‘fact’ invoked by Romano has all the makings of the necessary, of what is imposed by necessity, and in this way he tempers the decisionism implicit in Jellinek’s usurpation thesis.²⁸

This difference only becomes clearer later, with the publication of Romano’s book on public rights entitled *La teoria dei diritti pubblici soggettivi*.²⁹ These rights are grounded here in part in a pre-juridical sphere, in the manner of Jellinek, and yet the basis for them is no longer made to consist in a negative state (*status subjectionis*), in our total subjection to a decider, in a sort of unconstrained sovereign, but in an unspecified materiality allusive to the needs and ‘exigencies’ of the people. Necessity, not need, is the true agent of law’s binding force and validity; hence, ‘that necessity can overcome the law is something which derives from the very nature of law.’³⁰ Further, ‘[i]n order for necessity to remain within the sphere of positive law, it need only manifest itself ..., in the sense of showing itself to be a force which defends and protects the current legal system, and which translates into commands of the state ... Necessity can thus give place to legal provisions, and can do so even when these are contrary to law.’³¹ The state of necessity is not, for Romano, an empty space in the law but is rather law at its fullest: the law is filled with necessity, is overflowing with it and spreads it all around; necessity is not a ‘suspension’ of law but its fullest accomplishment, its moment of ‘perfection.’

However, one could ask whether it is not contradictory to ‘defend and uphold the legal system’ by way of provisions that are ‘contrary to law.’ Here, as Giorgio Agamben observes, we have the paradox whereby ‘enforcing a rule ... makes it necessary to suspend its enforcement.’³² ‘Under the state of exception, in other words, the rule is severed from its application so as to make the latter possible.’³³ Yet this serves more the ends of power than those of law: ‘What the “mystery” of power (*arcanum imperii*) holds at its core is the state of exception.’³⁴ In this way, we wind up with yet another paradox, this one involving political power: the paradox is that the more political power approaches its original and ‘natural’ core, thereby revealing its essence, the more it must drive politics back to the fringes of its experience (where politics is understood as the sphere of the conventional, the

28 See Georg Jellinek, *Allgemeine Staatslehre*, 3rd ed., 8th reprint (Darmstadt: Wissenschaftliche Buchgesellschaft, 1960), 340.

29 Santi Romano, *La teoria dei diritti pubblici soggettivi* (Milan: Società Editrice Libreria, 1912).

30 Romano, ‘Sui decreti-legge,’ 299; my translation.

31 *Ibid.*, 300; my translation.

32 Giorgio Agamben, *Stato di eccezione* (Turin: Bollati Boringhieri, 2003), 54; my translation. For a similar point, see Jacques Derrida, *Force de la loi. Le ‘fondement mystique de l’autorité’* (Paris: Editions Galilée, 1994).

33 Agamben, *Stato di eccezione*, 49; my translation.

34 *Ibid.*, 110; my translation.

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artificial, the transpersonal), and in this way political power is compelled to make itself impolitic, a brute and hence a non-institutional fact. So the paradox is that the fullest political power is the least political, or the power having the least *Macht* in it, as Hannah Arendt understood this concept:³⁵ it is the power having the least capacity for collective action and communicative rationality.

This fatal outcome does not escape Agamben, who himself feels a close affinity with Carl Schmitt. And so, in an ambiguous formulation – having said that ‘politics has long been in eclipse, for it has been tainted with law,’³⁶ and having melted into a single outcome what law and violence are each bound to lead to – Agamben quite undramatically concedes that ‘true politics ... is no more than that action which breaks the bond between violence and law.’³⁷ A conclusion so conceived moves us away from the constricted province of Schmitt’s decisionism – paradigmatically encapsulated in his statement that ‘the sovereign is he who decides on the state of exception,’³⁸ and who accordingly makes free use of such a state – and we wind up embracing politics understood as the sphere not of emergency and of all-out conflict, but of collective and public action.

Where human coexistence acquires meaning as the sphere of the political, the question of the ‘vicissitude’ incident to ‘newness’ immediately arises, which in turn issues from the very simple fact that the sphere of human existence is always going to be peopled with new individuals. This seems to suggest a way of making sense of natural disasters like earthquakes: these do not so much wedge a radical ‘newness’ into human existence as they mark a reiteration of the law of nature whereby there is no novelty, no breaking of the chain of causation, no ontological alteration, no ‘principle’ making the counterfactual possible and understandable. The law of nature holds nothing but factuality. And with an earthquake, the law of nature (which is not the *jus naturale*, for it has nothing to do with normativity) turns against the ‘novelty,’ the ‘principle,’ of the vicissitude of human action: here human action shrinks under the duress of survival and of the lifecycle, always identical to itself. There is no more room for politics, or for any sense or meaning beyond that of human life and its basic functions. All that can happen now is labour or work, but not ‘action.’³⁹

In decisionism, action is such only if the fact of willing inevitably brings about, or determines, a corresponding effect: without determinism, decisionism would be a shadow of itself. The same can be said of power and violence. The most compelling ‘argument’ in their favour is that they ‘work’: they are effective, in the sense of their bringing about certain effects and doing so with certainty. This is what in

35 *Macht* (political power) is distinguished from *Gewalt* (power as violence), a distinction that Hannah Arendt presents in *On Violence* (New York: Harcourt, 1970).

36 Agamben, *Stato di eccezione*, 122; my translation.

37 *Ibid.*, 112; my translation.

38 Carl Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität*, 6th ed. (Berlin: Duncker & Humblot, 1993), 13.

39 The source to turn to on the distinction between ‘labour,’ ‘work,’ and ‘action’ is Hannah Arendt, *The Human Condition* (Chicago: The University of Chicago Press, 1958).

large part is suggested by the recent justifications of torture offered by the neo-imperialist theorists of the state of exception: whether it is John Yoo or Eric Posner offering such justifications⁴⁰ or others, they all conceive of torture through the lens of its alleged effectiveness, which makes it indistinctly one among any number of other available means of institutional action. Yet the relationship between a fact and its effect in law is discursive; it is not causal but ascriptive. A fact acts not as a cause but as a reason for an effect; that such an effect should come to be is proper and just. Indeed, this *ought to*, but *must not* be the case, and it can be so – this ‘ought’ makes conceptual sense – precisely because things could deterministically turn out in a different way (in a way other than what the ‘must’ calls for). When conceived as an *arcanum imperii* – a mystery more than simply a secret and a final resource at the same time of dominion – the state of exception is far from a sweeping novelty but is rather a causal reaction to a material or natural fact, reiterating the facticity by which the relations of reality are bound. Politics, law, and the public sphere unfold as an alternative to this coercive chain of causation. It is for this reason that the entering of nature into the public sphere is tragic and ruinous for politics. Rules are traced to and equated with what is normal, or regular, and any reshaping of this state of affairs spells doom for them: instead of reasserting rules, the storming in of nature as an exceptional situation and a necessity seems to undermine their deontological foundation, controverting the assumption that what binds facts to one another is a rule, and that the connection among them is established by way of discourse and deliberation.

The decisionist view generally assumes that once the public laws are no longer applicable, exception and necessity find themselves before a normative void, which is precisely what on this view would justify resorting to a strong discretionary power.⁴¹ The German Jesuit Friedrich von Spee (the author of that most per-

40 See John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11* (Chicago: The University of Chicago Press, 2005), which theorizes a somewhat ‘liberal’ version of Schmitt’s *Führer schützt das Recht* (‘the leader protects the law’), encapsulating the principle under which the president of the Union is the sovereign interpreter of law and the ultimate and conclusive decider on the ‘state of war,’ and hence on the state of exception. And by Eric Posner you can see the telling and quite explicit book co-written with Adrian Vermeule, titled *Terror in the Balance: Security, Liberty, and the Courts* (Oxford: Oxford University Press, 2007), making the claim (among others) that ‘in times of emergency, judges should get out of the government’s way’ (p. 12), and celebrating the primacy of executive power.

41 This is, too, the argument underpinning the defence of torture put forward in the ill-famed memoranda written by John Yoo as deputy assistant attorney general in the administration of President George W. Bush: having ‘established’ that international treaties and domestic law do not apply to the case at hand (to the ‘harsh interrogation techniques’ then in use), the memoranda proceed as if anything is permitted (see John C. Yoo, ‘Memorandum for William J. Haynes II, General Counsel of the Department of Defense, March 14, 2003’, and Jay S. Bybee [though it is Yoo who actually wrote this opinion], ‘Memorandum for Alberto R. Gonzales, Counsel to the President, August 1, 2002’, both to be found in the *Torture Papers*, ed. by Karen J. Greenberg, Joshua. L. Dratel, and Anthony Lewis (Cambridge: Cambridge University Press, 2005). A gap in the law seems thus to open the door – so to say – to full lawlessness. This point is aptly made by Jeremy Waldron, observing that from Yoo’s perspective, ‘when we run out of text, we revert to the default position, which is that we can do anything we like’ (Jeremy Waldron, ‘Torture and Positive Law: Jurisprudence for the White House,’ *Columbia Law Review* 105 (2005): 1693).

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ceptive work *Cautio criminalis*) recoils, and with good cause, from this shutting-out and law-deactivating power claimed for the state of exception, a power encapsulated in the principle under which *ordo est ordinem non servare* (the only rule is not obeying any rules). As Spee forthrightly tells us, even with *crimina excepta*, or exceptional crimes, such as those committed by witches, ‘even if we should concede just for the moment (although it would be false, as we have said elsewhere) that one may rush beyond the boundaries of the law, nevertheless one may not therefore rush beyond the boundaries of right reason.’⁴² In such cases, indeed, it does not immediately follow that it is legitimate to derogate not only from law but also from morality: if witches do not fall under the scope of positive law, they are nonetheless situated within natural law (which admits of no exceptions), and the morality and charity of Christianity will always apply to them. Beyond the threshold of positive law, then, we find not the abyss of a normative void – as the decisionist likes to think, for whom the only handhold is the sovereign command – but we find a (valid and applicable) rich and full menu of ethical principles and criteria of rationality and common sense.

In sum, there are generally two kinds of views espoused in legal theory as concerns the special powers invoked in connection with the ‘state of exception’: monistic views and dualistic ones.⁴³ What distinguishes the former is that they understand the state of exception as falling entirely within the normal bounds of the legal system: the exceptional situation does not amount to or justify our stepping outside the normal constitutional order. Yet, these monistic theories take two entirely different attitudes when it comes to evaluating or qualifying the state of exception. On one side, paradigmatically with Carl Schmitt but also evidently with Santi Romano, what explains the state of exception as being always internal to the law is its constituting the truth of the law, so to speak, or its true source. The state of exception reveals the effective sovereign, meaning the situation producing the basic norm for an efficacious, and hence valid, order. On the other side, if the state of exception always lies within the framework of the law, it is thought to do so through the law’s ability to handle any situation within its normal jurisdiction, no matter how serious the situation. In fact, this is precisely what grounds law’s justification: law is justified to the extent that it is set up not to forsake its own constitutional values and standards when the temptation to suspend them is strongest. Here the legal system’s normality is owed to its being programmed also to cover such cases as would seem to threaten or subvert the same normality. On this latter understanding of the state of exception as con-

42 Friedrich Spee von Langenfeld, *Cautio criminalis, or A Book on Witch Trials*, trans. Marcus Hellyer (Charlottesville: University of Virginia Press, 2003), 143.

43 See Pasquale Pasquino, ‘Urgence et État de droit: Le gouvernement d’exception dans la théorie constitutionnelle,’ *Cahiers de la Sécurité Interieure* 51 (2003): 9-27, and John Ferejohn and Pasquale Pasquino, ‘The Law of Exception: A Typology of Emergency Powers,’ *International Journal of Constitutional Law* 2 (2004): 210-39. For an overview, with ample reference to the history of institutions and of political thought, see François Saint-Bonnet, *L’état d’exception* (Paris: Presses Universitaires de France, 2001). And ever-useful is the now-classic study by Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies, with a new introduction by W.J. Quirk* (New Brunswick: Transaction Publishers, 2002).

tained within the law, where we have a constitutional state founded on certain basic rights, these would remain valid and in effect under exceptional circumstances in such a way that their effect would permeate the entire spectrum of governmental action, even in a state of exception.

Dualistic theories, by contrast, draw a bright line separating the normality of the legal system and the constitutional order from the situation of emergency. A situation of this sort would permit us to step outside the system, and indeed would justify us in doing so: it would justify us, for example, in derogating from and even abrogating certain basic rights for the entire scope and period of the emergency, and for as long as it proves necessary to breach the system's 'ordinary' rules. Here too we find these theories taking either of two alternatives, in this case on the question of how to go about conceptualizing and treating the 'derogation' from the ordinary rules: for some (such as Ranelletti), this move is entirely legal and so does not pose a problem, proving to be *ex ante licit*; for others (and I would count Lombardo-Pellegrino among them), the move of derogating from the system's rules is essentially justified on moral and political grounds, and so on extra-systemic grounds, and it is thus only *ex post* that a derogation can be made legal, assuming it can be at all.

5 Necessity and Weakness of Rules

The nineteenth century as a time of 'civilization' and 'progress' can be said to have come to an end in Messina on that early morning during the Christmas holiday: all memory of what had gone before was seemingly lost, sucked into the abyss of death and mourning. The nineteenth century, with its naive enthusiasm about the progressive development of history and about civilization in social relations, ran aground and sunk in the waters shaken by the seaquake in the Strait of Messina. Its rationalism blanched at the horror of streets filled with cadavers and with processions of desperate souls seeking salvation from a terrible and unfathomable God. There was a backsliding, a sudden relapsing from the civil state to the state of nature. Any other condition among the survivors was secondary and accidental.

The state of exception records all this and aggravates it, makes it legal and legitimate, passes it on as a rule for the concrete case, and radicalizes the violence of the elements by making such violence its own, by making it political. Nature has declared war on us, and to that we respond with war. *Homo homini lupus*: man is a wolf to man; and if that is the case, then why should law and power not be wolves, too? One who invoked this Hobbesian image was Leonida Bissolati, a socialist, and among the first people to call for a state of siege and an iron fist. He wrote, 'in San Francisco, California, the practice was to summarily execute plunderers by hanging: we say that, in cases like these, the defence of society can legitimately be carried out with volleys of rifle fire. Men who take to looting at a time like this are

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not men but wolves – and as such they must be treated.⁴⁴ Indeed, nothing could be further from the brotherhood of the primitive state of nature envisaged by Rousseau: it seems that as the ‘superstructures’ of ‘civilization’ break down, so does the ‘natural’ inclination toward mutual help. What unfolds before the spectator is not so much a Rousseauian scenario as a Hobbesian one, or rather we see both – a chequered landscape broken up by intermittent patches of one scenario and then the other according to an irregular and unpredictable pattern. And yet mutual support among derelicts itself emerges strongly and quickly: ‘Those who had got hold of any clothing or food were always glad to share it with those who had not,’ Munthe remembers with gratitude.⁴⁵ Optimism and pessimism must therefore coexist in the spectator; what is certain, in any event, is that Rousseau’s idyllic vision proves tenuous at best, as does his faith in the provident and providential design of the natural order. On the other hand, we find in the Hobbesian scenario that the construction of the ‘state of exception’ as a legal regime (or, if you like, as an anti-legal one) is integral to it, and this only exacerbates the incommunicability and ruthlessness characterizing that scenario.

The effort to legitimize the breaking of rules and of the law sometimes involves analogizing the exceptional situation to a shipwreck; in fact, this is rather the example typically adduced here, the paradigmatic case, and paradoxically it serves to illustrate and justify at once the principle *Necessitas facit legem* (necessity makes law) as well as the opposite principle *Necessitas non habet legem* (necessity has no law). A shipwreck represents that which is opposite to the normal circumstance: it represents the danger through which what would otherwise be criminal is legitimized. A shipwreck – where life quite literally hinges on our being able to hold on to a buoyant object – can break that hold, and indeed is entitled to do so, making the object change hands even as both of the persons involved count on it for their survival. There is a certain subtlety about the discussions in this regard: a distinction is drawn between situations in which, on the one hand, the buoyant object has already been clutched by someone from whom it is forcibly taken away, and on the other, the object is free-floating (has yet to be claimed) and force is used against one of the two contenders going for it. This latter use of force is generally recognized as legitimate, whereas the former is not. It is generally not considered legitimate to strip someone of the protection already being afforded by a buoyant object.

But how should we judge a case in which two shipwreck survivors are both already holding onto a wooden board that would better serve only one of the two, giving this one person a better chance at survival?⁴⁶ Would a prudential course of conduct, in which one survivor pushes the other off the board, be justified here? And if we suspect that we might be the target of the other survivor’s plan to leave us stranded at sea, is it not admissible that we act preventively, wrestling the possi-

44 Leonida Bissolati, ‘Contro gli sciacalli umani,’ *Avanti!*, 31 December 1908; my translation.

45 Munthe, *The Story of San Michele*, 280.

46 Cf. Hans Blumenberg, *Die Sorge geht über den Fluss* (Frankfurt am Main: Suhrkamp, 1987), chap. 1.

ble rival and enemy off the board? For Kant these acts are in every case unjust and illegitimate; but still, where the act is done in a state of necessity, it may prove 'non-punishable,' 'because the punishment, with which the law would threaten he who is guilty, could not be greater for him than the loss of life.'⁴⁷ 'And yet there can be no necessity that can make legitimate that which is unjust.'⁴⁸ For Kant, necessity is not enclosed within the opposites of making the law and defending it: necessity can more straightforwardly resolve itself into plainly breaking the law. Yet in an exceptional situation proportionality and fairness do not cease to retain their normative force.

And yet an earthquake is an event even more exceptional than a shipwreck. A shipwreck retains at least some relation to normality – the *terra firma* – landing on which will mean that the danger and the state of necessity have passed: to be shipwrecked is to see the *terra firma* from afar and be temporarily unable to reach it, rather than to see it vanish into inexistence. With an earthquake, by contrast, the relationship to the *terra firma* is not one of distance but of full-out negation, such that what was once firm is now quaking; what was hitherto a solid and safe foundation and foothold now morphs into a moving element akin to the rolling and waving of the sea. In an earthquake, the earth liquefies and becomes a bottomless vortex, in which there is no longer an essential difference between the expanse of water making up the seas and the land: there is no longer any safe ground to aim for. The experience of danger and disorientation provoked by an earthquake is thus much more radical and intense than that provoked by a shipwreck.

It is true that earthquakes do not generally last long, but the accompanying experience of bottomlessness is such as to stretch time. Moreover, survivors have no way of knowing when the next shaking of the earth will come: the quakes reproduce themselves. Thus when an earthquake strikes, it shakes our firm belief in the fixedness of the earth, in the very notion of the *terra firma*. As Hegel says in section 288 of his *Encyclopedia of the Philosophical Sciences in Outline*, it is the 'the negativity of being in itself' that manifests itself in an earthquake. For all of these reasons, the state of exception takes on an even stronger connotation of extremity, if not one of absoluteness, so much so that we come to doubt the very ideas of body and of being such as we know them: we end up no longer associating these ideas so confidently with those of stability and impenetrability. It could be said, without too much strain, that the experience of an earthquake attacks the ontology of common sense, leaving us bereft of that basic rule afforded us by a certain unreflective reliance on the compactness of the things which make up our surroundings and thereby constitute our world. An earthquake, it seems, breaks down our ability to experience being and our being-here.

And yet it is not just common sense – our sense of the world and the way things are – that was dealt a hard shock in Messina: the blow was dealt to the myth of

47 Immanuel Kant, *Metaphysik der Sitten*, ed. Karl Vorländer (Hamburg: Felix Meiner, 1983), 41.

48 Ibid.

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progress, which dissolved along with our hope for the earthly ransom of the masses (be they of republican, catholic, or socialist faith). It was the very rule of law that fell like a house of cards. These walls afforded a beautiful view, as did the rule of law, the one and the other alike inviting comparison to an amphitheatre, which in earlier, carefree times and on days of festivity would come alive. But when the moment came for those walls and that rule to offer the protection that those inside were expecting, they failed to rise to the occasion and showed themselves to be as fragile and illusory as cardboard. What remained of this architecture was no more than broken bricks, shards of laws, fragments of sovereignty, principles in ruin – all of it waiting to be razed to the ground. Just as the human rights of the twentieth century, so the older nineteenth century protections lacked the might and mettle needed to counteract the turmoil and disarray of the state of necessity. Such necessity pulls us back into the state of nature and into the law of the strongest, and to the primitive fight for survival.

Perhaps there was something of the public space and the sense of citizenship that could have been saved even in the face of extreme catastrophe. Or, in other words, there was nothing about the earthquake itself that meant the public sphere had to dissolve, as if such a thing was already written to happen: it was not destiny that the rule of law should die, but only a possibility and an easy temptation. If this can be any consolation, the ‘state of exception’ is not a necessity but, more prosaically, a norm, since an exception to a norm as a norm can ever be only another norm. This may, or may not, must not however, be laid down.