

# Sex offender as homo sacer

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## Abstract

The political and legal theory of Giorgio Agamben, specifically his concept of homo sacer, can be usefully deployed to understand the regulation and treatment of sex offenders. It is argued that the sex offender can be conceived of as a non-citizen or bare life – the homo sacer – and that this elucidates the degrees of violence and forms of abjection visited upon sex offenders in western societies. Through the institution of laws aimed at protecting communities from sex offenders, specifically community notification and civil commitment laws, there is the production of a *ban*, whereby the sex offender is displaced into a lawless space – a *camp*. In this ‘camp’, the sex offender is subjected to GPS electronic monitoring, surgical/chemical castration and various other forms of sovereign violence at the hands of professionals and anti-paedophile vigilante groups. This article shows that in the exertion of sovereign power, where the sex offender is placed in the ambiguous terrain of the camp, there is a restoration of order and maintenance of the sacred.

## Key Words

Agamben • bare life • sacred • sex offenders • sovereign power

Sex offenders receive remarkable levels of attention from populist groups, media and federal and state-level governments, especially in the English-speaking West.<sup>1</sup> Such signifiers as ‘animals’ or ‘monsters’ have been attached to these offenders, since they are perceived as posing a nefarious threat to children. Concomitant with the emergence of neo-liberal culture in the early 1980s, there has been an intensive and widespread persecution of sex offenders. With respect to the legal rights-bearing, neo-liberal citizen, for which state intervention is seen as restricting the freedom of the individual (Rose, 1999), the sex offender is an aberration: the irredeemable subject. Neo-liberalism focuses on, generates and prefers subjectivities or selves that are flexible, reflexive, that have a capacity for change and self-constraint. Antipodal to this figure is the sex offender. They are the rigid, unchangeable pariah in such a system, depicted as being gripped by a nature or biology that is completely depraved and thus, intolerable. Consequently, severe measures must be taken at state and local levels to regulate their movements and existence. Such actions have led to the overturning of penal values that have been held

sacred since the Enlightenment – no double jeopardy and fixed and finite punishments – with little to no resistance to such developments in the USA, Canada and Britain.

Numerous criminological explanations have been posited for such extreme responses to sex offenders such as moral panic (see, for example, Jenkins, 1998; Crichton, 2002), the New Penology (see Simon, 1998) and populist punitiveness (see Lynch, 2002). While illuminating, these approaches either suffer from being ahistorical and unable to account for shifts in strategies in response to sex offenders (moral panic) or in the latter two explanations, they are focused on a single dimension of the regulation of sex offenders. One of the more holistic explanations is Simon's (2000; Simon and Leon, 2007) governing through crime approach. This approach shows how various roles are constituted and played out in relation to the issue of sex offenders. Simon shows how sex crime victims come to be constituted as the subjects of democratic polity, the sex offender as a risk to children and the State as expert on danger, endowed with the power as risk predictors and risk communicators.

This article is complementary to and an elaboration upon existing explanations of the regulation of sex offenders, specifically Simon's governing through crime approach. Giorgio Agamben's (1998, 2005) legal and political theory serves as an analytic to understand the various dimensions of the regulation of sex offenders covered by the aforementioned approaches but also explores the relationship between sovereign power and the sacred, a facet that has received little attention in current penological explanations. Agamben's theory has the added value of offering an anthropological sensibility to the sociology of punishment insofar as he discusses larger historical systems of meaning as they relate to forms of punishment, an aspect that Durkheim (1995 [1912]) was concerned with at the turn of the 20th century but which has been, to some extent, absent in recent penological literature. While some of the sociology of punishment remains ahistorical, Agamben's work unpacks the primordial connection between community, sovereignty and the sacred. An Agambenian analysis lends to the sociology of punishment a perspective for understanding the utilization of states of exception by governing bodies and the sovereign suspension of law, as seen in the eschewing of ex-post facto and double jeopardy laws in relation to the regulation sex offenders (also an ever-present tendency in the post-9/11 era). It also contributes to our understanding of the way in which through the exertion of sovereign power there is a restoration of order and maintenance of the sacred.

In this article, the legal and political theory of Italian philosopher Giorgio Agamben, specifically his discussions of sovereign power and bare life, are utilized to offer a theoretical basis for understanding the regulation, and treatment of, sex offenders in the United States, Canada and Great Britain. Agamben's theory has been used in reference to the city (Diken and Laustsen, 2002), the detention of refugees (Bauman, 2003; Rajaram and Grundy-Warr, 2004; Pratt, 2005) and disabled persons (Overboe, 2007a, 2007b) in the production of bare life. This article argues that the sex offender can be conceived of as *homo sacer* – that is, life without form and value, stripped of political and legal rights accorded to the normal citizen. Through community notification and civil commitment laws, statutes dedicated to restricting the movement or exclusion of sex offenders from communities, respectively, there is the production of a *ban*, whereby the sex offender is displaced into a lawless space – a *camp*. In this 'camp', the sex offender is subjected to GPS electronic monitoring, surgical/chemical castration and various

other forms of sovereign violence at the hands of professionals and anti-paedophile vigilante groups.

Hereafter this article is organized in five sections. In the first section, I offer an overview of Agamben's political and legal theory. The second section provides a historical overview of the use of banishment as a punitive response to specific offenders and how the use of Agamben is apposite for the analysis of sex offenders in the English-speaking West. This is followed by an articulation of the sex offender as homo sacer. In the fourth section, I discuss the institution of community notification and civil commitment laws in the production of a *ban* towards sex offenders. The last section explicates the production of the *camp* and considers the use of GPS electronic monitoring, surgical and chemical castration and violence towards sex offenders.

### GIORGIO AGAMBEN'S LEGAL AND POLITICAL THEORY

Born in Rome in 1942, Giorgio Agamben completed his doctoral studies in Law and Philosophy. He has taught and held visiting positions at several universities in Europe and the United States and currently holds the Baruch Spinoza Chair at the European Graduate School. Agamben blends literary theory, continental philosophy, political thought, art and religious studies. He is most noted for his writing on aesthetics and political theory. Agamben is guided theoretically by the work of Walter Benjamin, evident in Agamben's engagement with the force of law and language and representation. Over the last three decades, he has become one of continental philosophy's most radical political theorists, impacting numerous disciplines in the Anglophonic intellectual world.

In his discussions of sovereignty, biopower and life, Agamben primarily draws from Foucault, Arendt, Benjamin and Schmitt. He brings together Arendt and Foucault through his discussion of totalitarianism and the concept of biopolitics, respectively. In Foucault's (1978) work, biopower operated as a hypothesis, whereas in Agamben's work, biopower functions as a thesis (Genel, 2006). Agamben's thesis concerns the structure of power, the origin of which is directly related to life. He bases the connection between power and life on the assertion that, in contradistinction to Foucault's formulation, life has always been intimately connected to politics. The basis of this assertion is his review of Aristotle's (1978) *Politics* and the distinction he makes therein between bare life and the good life. Agamben's examination of the incidents of bare life can be seen as a radical extension of Arendt's (1966: 300) discussion of totalitarianism and the stripping of political rights and the creation of 'a man who is nothing but a man that has lost the very qualities which make it possible for other people to treat him as a man'. Lastly, Agamben appropriates Schmitt's (1985) account of sovereignty to assert that sovereignty is not singularly a moment in the rise of the nation-state, rather an expression of the inner dynamics of the logic of politics. Likewise, following Schmitt (1985: 5), he argues that the sovereign is 'he who decides on the state of exception'.

In *Homo sacer: Sovereign power and bare life*, Agamben (1998) begins his genealogy with an elucidation of the Greek differentiation between *zoe*, the simple living common to all living beings, and *bios*, the form of living appropriate to human individuals or groups. The importance he gives to this distinction is in the identification of *bios* as the production of politicized life, in the form of citizenship, which is the common

understanding of humanity in contemporary states. Based on this distinction, he argues that modern biopolitics is characterized by a double articulation, in that the original creation of politicized life also produced an excess, a *bare life*. A term extrapolated from ancient Roman law, *homo sacer* (or bare life), is differentiated from the legal and political rights-bearing citizen in that this form of life is without the rights bestowed on persons within a state by virtue of their humanity. The *homo sacer* is not fully synonymous with bare life, as it embodies bare life in so far as it is included within the political order. In other words, the inhabitants of the camp, those in exile, or those who have otherwise been removed from the proper jurisdiction of law, are transformed into *homo sacer* because, despite being forced outside of the law and its protection, they maintain an extra-legal relationship with the law by having been excluded from it (Agamben, 1998: 181–8; DeCaroli, 2007). *Homo sacer*, therefore, is situated in the zone of indistinction and is life stripped of rights associated with *bios* and reduced to *zoe*. Agamben argues that what is overlooked in Foucault's analysis of modern biopolitics is the exemplary places of modern biopolitics, that is, where bare life is most clearly articulated: the concentration camp and the structure of the great totalitarian states of the 20th century (Agamben, 1998: 4). In these cases, death in the name of the populace becomes the instrument of biopower.

Concomitant with the production of the modern politicized person then, is the production of an 'Other', who is the person without rights as a citizen, and is thus outside the protection of law. However, sovereign power remains in force, insofar as it maintains its potential to act outside and above the law (Agamben, 1998: 46–52).<sup>2</sup> *Homo sacer*, or 'bare life', is the body outside the law, in which there is a ban on its sacrifice, yet this life can be killed with impunity. In other words, this individual cannot be executed bearing the rights of a legal citizen, but can be killed without the commission of homicide (Agamben, 1998: 183). Therefore, it is only by the mercy of the sovereign and the flight of the *homo sacer* that this bare life is maintained. Sovereignty is to be understood as both in its potentiality to act and to not act, to exact death or not (see Agamben, 1999).

The notion of the sacred is fundamental to an understanding of the relation of sovereignty to *homo sacer*. Something or someone might be sacred because it represents a divine law or principle, or because it is a set of rituals expressive of the highest human relation to the divine (see Connolly, 2007). Those who defile the sacred are found to be worthy of punishment because of their engagement with the sacred in a blasphemous manner. There is an ambivalence of the sacred insofar as that which is defined as sacred is antipodal to that which is constituted as dirty or unclean (cf. Durkheim, 1995 [1912]). With respect to the figure of the *homo sacer*, the ambivalence of the sacred is revealed insofar as the *homo sacer* stands accused of defiling that which is considered pure but exists as that which is impure and must be expunged (Agamben, 1998: 75–80). Those that defile the sacred come to embody that which is antipodal to the sacred and therefore must be expunged from the group, community or society.

Agamben (1998: 104–5) considers this situation as productive of the figure of the outlaw, stripped of legal and political rights, that is forced into a state of nature. Through sovereign enactment of a *ban*, the outlaw or werewolf and the zone of lawlessness are created. Through a sovereign ban, there is the creation of the distinction between

civilization and a state of nature. As such, against the backdrop of the endowing of citizens with rights and social contracts, from the point of view of sovereignty ‘*only bare life is authentically political*’ (Agamben, 1998: 106, emphasis in original). It is in the distinction of *that* or *whom* that is to be excluded from citizenship rights that is an entirely political sovereign act.

The *camp* was formerly a specific place ingrained and delimited with secrecy. Particular examples of this are the concentration camps in Austria–Hungary during the First World War and of the Nazi regime in Germany during the Second World War. For Agamben, in the contemporary production of life without form and value – that is, the life that is in the zone of indistinction and reduced to *zoe* – the spatial distinctions between inside and outside of the camp disappear. The logic of the camp has become generalized throughout society and is not confined to a fixed spatial arrangement (Agamben, 1998: 20, 174–5). This *state of exception* becomes the generalized rule in the abandonment of bare life by the law. In a paradoxical manner, the state of exception confirms the sovereign, insofar as the individual that decides the state of exception *is* sovereign (Agamben, 2005). Within the state of exception, sovereignty is without restraint and openly enacts violence on bare life (Agamben, 2005). The care of the life of the population associated with biopolitics converts to its antipode thanatopolitics as the sovereign decides on the death of the homo sacer and the political space of the camp becomes delimited.

Agamben (1998: 169–71) acknowledges the paradoxical nature of both the institution of the ban and the camp itself. As a result, the ban and the camp take on an ambiguous character as law and fact become indistinguishable. In the diffusion of the camp throughout society, there is the creation of an indistinction between exclusion and inclusion, resulting in an inclusive exclusion of the homo sacer. That is, due to the political position of the homo sacer, this bare life is physically in the community, but is constituted as not *of* the community. The homo sacer is held in the lawless space of the camp. The camp is a state of exception where bare life can be held and violence and death can be exacted upon it. In this state of exception, there is a mutual constitution of the sovereign and homo sacer, as ‘homo sacer is the one with respect to whom all men [*sic*] act as sovereigns’ (Agamben, 1998: 84).

## OUTLAWRY AS A CRIMINAL SANCTION

The practice of banishment as punishment dates as far back as the Hammurabic Code, where it was prescribed against incest (DeCaroli, 2007). The utilization of banishment continued on in western civilization as both civil and common law allowed for the revocation of citizenship rights based on certain forms of misconduct, often the desecration of the sacred (Pugh, 1983; Prassel, 1993). In Cesar Beccaria’s (1963 [1764]) *On crimes and punishments*, we find that banishment is tantamount to civil death. In Germanic and Roman law, the effect of an outcast becoming an outlaw was that s/he was removed from the community, denied human association and those that sheltered the outlaw were subject to criminal sanction (Eliot, 1953; Zippelius, 1986). Furthermore, the outlaw was without protection of the law, positioned in opposition to the community, and was subject accordingly to the vengeance of the community. To kill an outlaw, therefore, was viewed as a praiseworthy act.

The use of outlawry as a particular technique for controlling unruly individuals continued on into the 19th century. For example, in English law, it was not until 1879 with the institution of the Civil Procedure Act that outlawry was officially abolished (Prassel, 1993: 17). Outlawry was viewed as incommensurate with the tenets of the welfare sanction and its precursors beginning in the 19th century (Garland, 1981). Being an essentially punitive sanction, outlawry did not seek to discipline and normalize the offender. In the welfare model, breaches serve as a point of access, an opening for disciplinary intervention, an inclusionary space for personalized forms of regulation that would bring the offender into normality (Garland, 1981, 1985).

While there were still residual forms of outlawry in the welfare era, in the contemporary post-welfare period there has been the emergence of a paradoxical form of outlawry. Pratt (2000a) has argued that as part of a broader set of penal reforms, there has been a focus on incapacitation in relation to level of risk. This has enabled penal authorities the ability to suspend basic civil liberties and indefinitely detain dangerous offenders, primarily sex offenders, after the completion of their sentence (see also Simon, 1998, 2000). In conjunction with this change, there has been a considerable increase in the public involvement in the process of punishment, seeking and often gaining the right to know of the location of criminals and have them removed from communities (Bottoms, 1995). The victim (actual or potential) is repositioned in an authoritative role, resulting in a responsabilization to protect themselves from the predation of dangerous (sexual) offenders. The community is envisaged as the site of governmental strategies of risk management (Levi, 2000), but it also becomes the source of expressions of popular will that create moral order through the expulsion of unwanted offenders (Evans, 2003; see also Lynch, 2002).

In sum, this form of outlawry or banishment, in classic fashion, positions the sexual offender as antipodal to the community, but paradoxically, at the same time this offender is never completely outside the circuits of control (Deleuze, 1992) and is held indefinitely. Within the modernist period there has been numerous examples of sex offenders being reduced to bare life (for example, homosexuals in Nazi Germany). With the relatively recent institution of laws like Megan's Law (see later), there has been an intensification and proliferation of the state of exception with respect to sex offenders. It is for this reason that Agamben's political and legal theory is apposite for explicating the position of sex offenders in western societies. In what follows, Agamben's conceptualization of homo sacer or bare life will be used to describe the constructions and position of sex offenders as veritable outlaws in the English-speaking world and how through the institution of a ban, the space of the camp is produced. Through the perspective put forward in this article, I advance understandings of the constructions of sex offenders, laws pertaining to sex offenders, the various (corporeal, emotive and legal) punishments that these offenders are subjected to and the implication these have for sex offenders themselves and society more broadly.

### **SEX OFFENDER AS HOMO SACER**

Homo sacer for Agamben (1998: 78–9) is the life deemed impure, dirty or accursed. This accursed life is that which no one can touch without dirtying oneself. Homo sacer is the universal unclean being, in Douglas' (1966) terms, that serves as the distinct

opposite of the clean citizen (cf. Lynch, 2002; Petrunik and Weisman, 2005). The implication of this distinction is the separation of bare life from the rights-bearing citizen that is most emphatically illustrated in the conceptions used to describe sex offenders. Over the course of the 20th century, the sex offender has been conceived of as the accursed being with a permanently depraved soul, though there has been variation in terms of who was subsumed under this label. In the welfare period, those deemed in the English-speaking world as sexually deviant faced the greatest level of persecution and demonization (Pratt, 1997: 95). In this period, homosexuality, psychopathy and paedophilia were conflated to construct the figure of the ‘middle-aged sex fiend’ or ‘dirty old man’, with children as his target. Most importantly, in the concern for the regulation of homosexuality, the State acted as a guardian of morals and society as a whole (Pratt, 1997: 95–7). In the 1980s, the most dangerous individual became the rapist and the ‘dirty old man’ came to be seen as less dangerous. In the 1990s, the ‘dirty old man’ returned to replace the date rapist in this role and there was the production of the manipulative and merciless ‘paedophile’ as the most dangerous offender from whom the public must be protected (Kitzenger, 1999; Cowburn and Dominelli, 2001).

In contemporary media, populist and governmental descriptions, the sex offender is inherently recidivist, beyond the capacity for rehabilitation. The sex offender is incurable, so depraved that normal cognitive-behavioural programmes are unable to curb these individuals’ insatiable desire to commit sex crimes (Brown, 2005). The sex offender is viewed as interchangeable and synonymous with ‘the paedophile’ (Jenkins, 1998; Cowburn and Dominelli, 2001; Bell, 2002; Kitzenger, 2004; Brown, 2005). Images of the child rapist and killer serve to *delineate* the ways by which the sex offender is interpreted (Cross, 2005).<sup>3</sup> Despite the variation of offences that can be classified under sex offences (rape, indecent assaults on a female or male, etc.), there is a continual *conflation* of sex offender with child molester or paedophile despite the latter being strictly a clinical definition of a specific group of people that may engage in adult–child sexual behaviour. Therefore, in the remainder of this article, the term sex offender will be used in relation to the regulation of paedophiles, despite the actual polysemy of the term ‘sex offender’.

Media and populist constructions of the sex offender *qua* paedophile are such that he (always understood as male) is seen as an ‘outsider’. This outsider is an irredeemable evil monster, stricken with a perverted disease for which there is no cure (Simon, 1998; Zevitz, 2004). This social pariah is an outsider in a double sense insofar as he is not seen as of the family or the community. In the latter sense, as Cowburn and Dominelli (2001: 408) argue, ‘this distancing occurs through the process of “othering” the sex offender on the basis of his dangerousness. This “othering” casts him as non-human different from and outside the community of “normal” men’. In the former sense, irrespective of feminists’ best efforts to show the predation of women and children within the family unit by fathers, stepfathers or other familial members, the dominant discourses of the paedophile is a figure outside the home who presents the main danger to children (Stanko, 1990; Bell, 2002: 87).

The 2000–1 campaign against paedophiles of the British newspaper, *News of the World* reveals a specific example of this distancing from the home and community of the paedophile. As part of the ‘naming and shaming’ of convicted paedophiles in the summer of 2000, the newspaper featured the photographs, offences and current location

of 49 largely male paedophiles (Critchler, 2002: 523). Almost on every page, both visually and verbally, the paedophile was presented as the evil killer in contradistinction to their innocent child victims (Critchler, 2002: 525). This media portrayal of the paedophile served as a template of a predatory prowler on the street ready to pounce on unsuspecting child victims (Kitzenger, 2004). The *News of the World* anti-paedophile campaign also presented the paedophile as the 'outsider', not of the community, but preying upon it (Cross, 2005: 291).

Another depiction of sex offenders *qua* paedophile is as a monstrous animal in need of permanent restriction (Simon, 1998). A news story in Canada's *Globe and Mail* entitled 'Handlers shadow pedophiles' featured the case of Shaun Deacon (Freeze, 2005). Despite never being declared a dangerous offender, British Columbia corrections officials set a precedent by designating a handler for Deacon who would shadow the convicted paedophile wherever he goes. However, what is particularly interesting is the language used to describe the supervision of Deacon. The article describes the condition of his release to be based on him being 'kept on a very short leash' and that he would 'have handlers shadow him whenever he goes out'. A practice usually associated with dogs, Deacon is to be put on a leash and treated as an animal, too monstrous to be left alone.

The portrayal of sex offenders in media and populist constructions as a monstrous animal, as well as their placement outside the home and community, is exemplary of Agamben's conception of homo sacer as the werewolf (Agamben, 1998: 105). The werewolf is a bandit who resides in the zone of indistinction between animal and man, who is abjected from civilization. The werewolf *qua* sex offender is the life that is without value and does not deserve to live (see Agamben, 1998: 138). He serves as the instantiation of the opposite of that which is sacred and stands accused, by his very existence, of defiling the sacred.

In the many discursive constructions of the sex offender, he is the incurably lost, totally depraved, evil being unable to redeem himself and, as such, deserves to be banned. He is among the community, but not of the community. The various portrayals of the sex offender deliberately produce the justification for the expulsion of sex offenders and the ban and the camp are the ambiguous result.

## THE BAN

In the institution of a ban, the sovereign declares a state of exception where law is suspended and bare life is abandoned by the law. The sovereign exception is a suspension of the juridical order, which is instituted in order for the sovereign to operate outside the law on bare life (Agamben, 1998, 2005: 23). For Agamben (1998: 110), the *ban* is the force of concurrent attraction and repulsion that links together the two poles of the sovereign exception: 'bare life and power, homo sacer and the sovereign'. It is through the ban of the homo sacer from the community that the sovereign, acting on homo sacer, reveals its power and its authentically political nature: 'What has been banned is delivered over to its own separateness and, at the same time, consigned to the mercy of the one who abandons it – at once excluded and included, removed and at the same time captured' (Agamben, 1998: 110). The sovereign–bare life relationship resides in the zone of indistinction of inclusion/exclusion as the homo sacer is excluded



through the ban but is included by virtue of its relationship to the sovereign (Agamben, 1998: 107). In the following section, I will look at the processes of civil commitment and community notification statutes by which law is suspended and the bare life of sex offender is produced.

### **Civil commitment statutes**

According to Pratt (1997), the focusing and intensification of arrests and indefinite detention of offenders for sexual assaults was produced by the shift from concern with dangerous classes to dangerous individuals at the turn of the 20th century. This shift saw the institution and development of the first sexual psychopath laws in the United States in the 1930s (Pratt, 1997; Janus, 2000). These laws aimed at treating and incapacitating sex offenders in mental health institutions. Incapacitation in the form of civil commitment was reserved for offenders considered too sick or mentally unstable to be released into the public (Janus, 2000; Farkas and Stichman, 2002). The target of sexual psychopath laws often moved beyond those designated as mentally unhealthy and often included voyeurs, exhibitionists and homosexuals (Pratt, 1997; Farkas and Stichman, 2002).

The 1980s saw the renewed interest in the civil commitment of sex offenders based on the perceived inability of corrections to rehabilitate and protect communities from sex offenders (Janus, 2000; Alexander, 2004). The current rationale for the civil commitment of sex offenders in the United States is based on the perceived need to punish, incapacitate and control sex offenders in order to protect children from their predation. These civil commitment statutes allow for the indefinite commitment of sex offenders upon release after serving a state-mandated sentence or if they stood trial and were acquitted based on an insanity or mental defect. Once civilly committed, offenders are rarely or never released back into the community. For example, since 1990, Washington and Minnesota have never released civilly committed sex offenders (Janus, 2000). By 2001, civil commitment procedures were adopted by at least 16 states (Simon and Leon, 2007). The permanence of sex offenders' commitment reveals the construction of the sex offender *qua* homo sacer as an irredeemable subject that must be separated from the community.

### **Sex offender registries and community notification statutes**

The 1990s in the United States saw the intensification of concern for the regulation of sexual offenders. Primarily in reaction to public concern about the release of convicted sex offenders from prison, at federal and state level, laws were enacted to necessitate the notification of local jurisdictions where sex offenders would be living (Levi, 2000; Zevitz, 2004). The pivotal moment in the development of community notification statutes occurred on 13 September 1994 when the United States Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act. This law required the notification of whereabouts and registration of sex offenders with local criminal justice authorities (Farkas and Stichman, 2002).

The most well-known and recognized of state-level community notification laws in the USA are 'Megan's Laws'. Beginning in 1994, New Jersey passed Megan's Law, requiring public notification of the release and whereabouts of convicted sex offenders. This law is named after Megan Kanka, who was sexually assaulted and murdered by their

family's neighbour, Jesse Timmequedas, who had been previously convicted of violent sex crimes. Because the family had not been aware of the presence of a sex offender living in their neighbourhood, they and their supporters embarked on a state and eventually federal-level movement to institute sex offender laws to enhance the level of awareness to communities through a publicly available sex offender registry (Simon, 2000).

In 1996, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act was amended at a federal level. This amendment called Megan's Law provided the requirement of disclosure of information about registered sex offenders to the public. The federal government threatened to withhold 10 per cent of a state's funding if they did not comply with the act (Petrunik, 2005). Hence, community notifications spread across the United States, with the primary aim of these laws being to raise community knowledge of sex offenders in order to protect their children. Community notification statutes have been adopted in every state in the United States (Simon and Leon, 2007). Despite corrections' focus on community reintegration (Zevitz and Farkas, 2000b; Brown, 2005), protecting the public and punishment of sex offenders is mainly the aim of community notification statutes (Pratt, 2000b; Simon, 2000). The institution of risk tiers reveals the punitive and preventative nature of Megan's Law as, after completing their sentence, sex offenders face continual supervision and restrictions based on their perceived risk to the community (Levi, 2000: 583; for further discussion of Megan's Law, see Levi, 2008).

In Britain the implementation of a sex offender registry was later than the United States. In 1997, facing a growing concern over the release of sex offenders, the Conservative government passed a Sexual Offences Act which instituted a national level sex offender registry. This act was later put into practice by the new Labour government in 1997 and provided that all sex offenders register their whereabouts with local criminal justice authorities. Later in 2000–1, largely precipitated by the 'name and shame' campaign of the *News of the World* (see earlier), and the reaction of pressure groups, this act was amended. This politics of paedophilia (Cross, 2005: 284) saw the intensifying of the debate around the control of sexual offenders and the convergence of these two groups lobbying for increased public notification of sex offenders similar to Megan's Law in the United States. Entitled Sarah's Law, supported by populist movements, the *News of the World* presented revisions to the existing Sex Offender Registry Act. The newspaper's petition and an opinion poll purporting to show large majorities in favour of indeterminate sentences and Sarah's Law, had the political effect of bringing the proposed revisions to the existing act to a head (Bell, 2002; Critcher, 2002; Cross, 2005). In 2001, aside from continued controlled access to the sex offender registry, the remaining 13 measures advocated in Sarah's Charter were granted. Provided in the many revisions made to the existing Sex Offender Act was that sex offender registration would occur within 72 hours at designated police stations and would be repeated at pre-determined intervals with accompanying penalties for non-compliance increased to five years' imprisonment. Also, offenders could be supervised for up to 10 years and their mobility and habitation was to be considerably restricted (Critcher, 2002).

In Canada, the community protection movement emerged in the 1980s and, analogous to the United States, intensified during the 1990s with media coverage of predator child killers like Joseph Fredericks and Clifford Olson (Petrunik, 2002, 2003).

According to Petrunik (2002, 2003; Petrunik and Weisman, 2005), it was the abduction, rape and murder of 11-year-old Christopher Stephenson by Joseph Fredericks in 1988 that stimulated the lobbying effort to develop legislation aimed at community protection. In 1995, the province of Manitoba introduced the first legislation allowing the police to notify the community about the release of high-risk sex offenders.<sup>4</sup> Ontario, Alberta, Saskatchewan, British Columbia and Newfoundland followed this initiative. At the present time in most provinces, 'notification is carried out by the police or specially designated committees on an exceptional "as needs" basis' (Petrunik, 2003: 56). More recently on 15 December 2004, a Sex Offender Information Registration Act was implemented creating Canada's first national sex offender registry.

Both community notification laws and civil commitment laws have been challenged on the grounds of constitutionality in the United States (Alexander, 2004; Petrunik, 2005). With respect to civil commitment statutes, in the 1997 case of *Kansas v. Hendricks*, a convicted sex offender, Leroy Hendricks was civilly committed indefinitely to Social and Rehabilitation services after completing his sentence. The civil commitment of Hendricks was challenged based on the belief that it violated the Constitution of due process, double jeopardy and ex post facto clauses (Alexander, 2004: 365–6). The US Supreme Court upheld the sentence of Hendricks and stated that it was not a violation of due process: on legal, not medical grounds, there was belief that he was dangerous to himself and others, which was enough to hold Hendricks. In the case of the perceived violation of ex-post facto and double jeopardy laws, the court ruled that Hendricks was being held not on criminal, but civil grounds because he was believed to be a threat to the community. It is in this sense, that the homo sacer *qua* sex offender is banned from the community. By juridical/institutional decision, the laws protecting his constitutional rights are suspended so that the sovereign can act upon the sex offender. The sex offender is abandoned by constitutional laws in order for the production of bare life. The Supreme Court by juridical decision institutes a ban and excludes the sex offender by virtue of the commitment to incarceration, but includes this bare life by the enactment of this sovereign act.

In the case of community notification laws and the registration of sex offenders, the courts have generally upheld any challenges to such laws (Petrunik, 2005). Responses to challenges are such that community notification is deemed a regulatory measure to protect the public, not intended to punish sex offenders, giving this measure a legally ambiguous character. The constitutional basis for the contesting of community notification laws and sex offender registries has been based on procedural due process, in that a sex offender cannot contest community notification, and allegations of ex post facto and unusual punishment. The courts in the United States have generally held that the rights of the community take precedence over those of the individual offender (Logan, 1999; Simon, 2000; Farkas and Stichman, 2002). The upholding of community notification statutes by juridical distinction reveals the political nature of the sex offender *qua* homo sacer. In the *original* sovereign distinction and suspension of the ex-post facto and due process, through the subsequent initiation of sex offender laws and the proffering of the rights of the community over the sex offender, the law protecting the sex offenders' rights is suspended and they are abandoned by the law. In the abandoning of the sex offender by community notification laws, the sex offender is held in relation to the law by virtue of their capture through these laws.

The relation between sovereign power and the sacred comes into acute focus in the case of community notification statutes. Insofar as the laws are, in close to all cases, named after children that were victims of sex offenders, they symbolize the sanctified image of the pure child. Any challenges to these laws stand as challenges to the moral order and hence, result in the exertion of sovereign power. In this manifestation of sovereign power, the suspension of law occurs both as a punishment for the defilement of the sacred, for the sake of restoration of order and the maintenance of the sacred. The acts of sex offenders stand as challenges to the moral order and incite public outrage (see for example, Evans, 2003) and as such, the institution of community notification laws serves as a sovereign return to order.

### **THE CAMP**

Agamben (1998: 168–9) evinces that the camp is the space that is opened when the state of exception begins to become the rule. It operates outside the law and therefore, is a lawless spatial arrangement (Agamben, 2000: 39). That which is in the camp is still captured outside the law by the nature of its exclusion (Agamben, 2000: 40). The camp is a space that:

inasmuch as its inhabitants have been stripped of every political status and reduced to naked life . . . [it] is also the most absolute biopolitical space that has ever been realized – a space in which power confronts nothing other than pure biological life without mediation. (Agamben, 2000: 41)

In the camp, violence can be committed against bare life without it being considered a crime. The present-day camp is displaced onto the whole social body and not confined to a fixed spatial location. Rather, in the state of exception, the camp finds itself assigned from time to time and space to space in *different* spatio-temporal co-ordinates (Agamben, 1998: 19). In the subsequent sections, I will consider the production and instantiations of the camp in relation to sex offenders and the violence that is enacted upon the bare life of sex offenders in various spatio-temporal co-ordinates.

### **GPS electronic monitoring and spatial confinement**

Originally developed for military use, Global Positioning Systems (GPS) electronic monitoring is increasingly used as a criminal justice technology. GPS electronic monitoring is often heralded as a cost-saving alternative to prisons (Tonry, 1998; Payne and Gainey, 2000; Renzema and Mayo-Wilson, 2005). Recent technological advancements have led to the utilization of GPS satellite-based electronic monitoring systems. NAVSTAR Global Positioning Satellites utilize 34 US military defence satellites and can triangulate the position of a Portable Tracking Device (PTD) attached to an offender to track the location, speed and direction of this offender in real time (Nunn, 2001). This technology can designate inclusionary zones (those areas for which offenders are allowed to enter) and exclusionary zones (those areas where offenders are not allowed to enter) (Cotter and de Lint, 2005). Movement within exclusionary zones is flagged and information regarding the location of the offender is communicated to a parole officer who in turn, physically locates the subject (Nunn, 2001: 23).

Currently, electronic monitoring is being used or piloted for use on every inhabited continent. In the United States, 100,000 offenders are being electronically monitored and 150,000 offenders are being electronically monitored in Europe (Renzema and Mayo-Wilson, 2005: 215). Despite the initial aims to place low-risk offenders on GPS electronic monitoring as a way to alleviate overcrowding in prisons, high-risk sex offenders are being placed on GPS electronic monitoring (Renzema and Mayo-Wilson, 2005). In a study conducted on the use of GPS electronic monitoring, Cotter and de Lint (2005) found that of the 19 responses from 16 states across the USA,<sup>5</sup> specific categories of offenders were targeted. They found that sex offenders represented the most concentrated population with 55.6 per cent of the programmes identifying sex offenders (as opposed to other groups, like burglars, etc.) as a targeted offender group (Cotter and de Lint, 2005).

The circumscribing of the inclusionary and exclusionary space of sex offenders vis-a-vis GPS electronic monitoring is an example of the displacing of the camp onto society. GPS electronic monitoring places the sex offender under surveillance and proactively prevents sex offenders from entering exclusionary zones. The tracking of the spatial location of sex offenders in real time is a way for the operation of the parole officers to maintain the spatial fixity of sex offenders. This creation of a camp through GPS electronic monitoring allows for continual capture of the bare life of the sex offender so that sovereign violence can be acted upon his body. In the next section, the various forms of violence against sex offenders afforded through the circumscription of spatial movement of sex offenders will be considered.

### **Chemical and surgical castration**

The use of surgical castration on sexual deviants has a long and dubious history. In the late 1800s, Dr Harry Sharp of Indiana surgically castrated nearly 180 male prisoners with the goal of reducing their sexual urges. In an effort to curb the recidivism of 'mental defectives' and due in large part to Dr Harry Sharp's experiments, Indiana became the first state to legalize the sterilization of sexual offenders (Miller, 1998; Scott and Holmberg, 2003: 502). Well into the 20th century, there existed laws in the Southern United States that called for the physical castration as punishment for black males that were convicted, or simply suspected, of raping white women (Meyer and Cole, 1997: 3). In addition, in the first half of the 20th century, women in the USA were castrated at a rate comparable or greater than men (Carey, 1998).<sup>6</sup> Between 1934 and 1945, under the Nazi regime, Germany instituted the Nazi German Act, which allowed the involuntary castration of sex deviants (Weinberger et al., 2005). During this period, 2800 sex offenders were castrated. Most of these surgeries were carried out under 'the auspices of "experimentation" with poor methodology, with no benefit for or consent from the individual, and for the purpose of assembly-line sterilization of undesired populations' (Weinberger et al., 2005: 27).

Currently, surgical castration is not the standard or only treatment for sexual recidivism. The predominant form of treatment facing sex offenders has been the cognitive behavioural method (Brown, 2005). More recently in the United States laws have been instituted for the chemical, and to a lesser extent surgical, castration of sex offenders. Both chemical and surgical castration 'treatments' reduce testosterone in the aim of reducing recidivism through curbing the sexual urges and fantasies of sex offenders.

In 1996, California became the first state to authorize *and* mandate use of chemical or surgical castration for sex offenders being released into the community (Meyer and Cole, 1997). Since then eight additional American states have passed laws that allow for some form of castration for offenders convicted of a sex offence or being considered for probation or parole. States vary in terms of whether castration is discretionary, mandatory or voluntary (Scott and Holmberg, 2003). Louisiana and Oregon mandate chemical castration for first time offenders, five of these nine states mandate chemical castration for designated repeat sex offenders and three allow discretion by the court as to whether castration will be required. While Texas requires complete voluntary consent for surgical castration (Scott and Holmberg, 2003: 503), the California castration bill permits the physical castration if the offender refuses chemical castration (Meyer and Cole, 1997). In four states, sex offenders refusing chemical castration can face varying punishments from revocation of probation (Louisiana) to incarceration for up to 100 years (Scott and Holmberg, 2003: 503).

The 'voluntary decision' to undergo surgical or chemical castration is called into question when considering that the individual is being detained in a psychiatric hospital or prison. In the hopes of being released, convincing psychiatrists and the courts that he is cured, the sex offender is arguably coerced into undergoing surgical castration (see Scott and Holmberg, 2003; Weinberger et al., 2005). In the chemical castration of the sex offender, he is deprived of his reproductive capacity to engage in sexual interaction and therefore, to procreate (see Kleinhans, 2002). The experimental nature of surgical and chemical castration, specifically the fact that the long-term effects of Depo Provera<sup>7</sup> are not known, makes even cases of sex offenders consenting to injections questionable. In such scientific experiments, for Agamben (1998: 157), to:

speak of free will and consent in the case of a person sentenced to death or of a detained person who must pay serious penalties is, at the very least, questionable. And it is certain that even if similar declarations had been signed by the people in the camps [Jewish concentration camps], the experiments that took place would not have been considered ethically admissible.

Therefore, the castration of the sex offender as *homo sacer* is not an ethical decision to destroy the reproductive capacities of the sex offender. Rather, in Agamben's (1998: 142) terms, the reduction or extermination of the reproductive capacities of the sex offender is a political act, whereby sovereign power is enacted. It is in the biopolitical distinction to decide that the bare life of the sex offender is without value – to destroy the possibility of procreation of the sex offender – biopolitics necessarily turns into thanatopolitics (Agamben, 1998: 142). It is in this distinction that the sex offender resides outside the law in a more ambiguous terrain, and thus can be acted on in this space. It is in this locus that the physician emerges as sovereign and enacts the violence of castration (see Agamben, 1998: 143). Castration is a sovereign act that, both literally and symbolically, serves as a purification ritual of the sex offender deemed as profane.

### **Homo sacer and violence**

Heightened by the aforementioned *News of the World* 'naming and shaming' of convicted paedophiles in England, analysts have noted that, up to when the revisions

were made to the existing sex offender registration laws, there was a period of lawlessness in which the child sexual abuse issue became figured as a nation under siege (Cowburn and Dominelli, 2001; Bell, 2002; Evans, 2003). Part and parcel of this state of lawlessness were vigilante groups engaging in violence towards sex offenders. Subsequent to this campaign, reports revealed that vigilante groups gathered outside the home of a 'known' paedophile, Victor Burnett, in Portsmouth and performed symbolic hangings. Also, with the leaking of the whereabouts of convicted paedophiles by police officers to anti-paedophile vigilante groups, these groups advocated the physical removal of sex offenders from the community (Cross, 2005: 285–91). Some sex offenders committed suicide as a result of vigilante groups surrounding their homes (Bell, 2002) and violence was committed against men who have not been convicted of a sex offence, but were believed to have been by the vigilante groups (Kitzenger, 1999). These groups are like Canetti's (1973: 55–9) baiting crowd, as their *raison d'être* is for expulsion and/or collective killing.

With the posting of the name, age, height, weight, address, city and pictures of sex offenders on websites (see, for example, <http://www.isp.state.il.us/sor/sor.cfm>; <http://ncfindoffender.com/>), actions taken physically to remove sex offenders are not much different in the United States, as neighbourhoods often band together and engage in vigilantism to remove sex offenders from the area or to punish them further (Freeman-Longo, 1996; Lieb, 1996; Prentky, 1996; Edwards and Hensley, 2001; Zevitz, 2004). While not officially sanctioned, this exposure of sex offenders' whereabouts and identity offers an informal licence to vigilantes to expel sex offenders physically from communities.

The families of sex offenders are also stigmatized for their affective associations with their convicted family members. In a study by Zevitz and Farkas (2000a), sex offenders expressed the humiliation endured in their lives and the negative effects on their family members in being ostracized by neighbours and friends, and also, being harassed and threatened by neighbourhood residents and strangers. Finding housing and employment for sex offenders is also a difficulty for probation and parole officers (Zevitz and Farkas, 2000b). Petrunik (2005: 70) found that in some cases offenders are forced to live in trailers on the grounds of correctional facilities or in special state-provided rooming houses for sex offenders. In a recent case, sex offenders in Miami, Florida were forced to live under a bridge because local residency laws left them unable to find housing (Vasquez, 2007).<sup>8</sup> The sovereign act of the expulsion of sex offender from the community signifies the separation of the dammed figure of the sex offender as homo sacer from the community.

Sex offenders also face vilification in prisons as they are at the bottom of the inmate hierarchy. Singled out for serious abuse by other inmates, sex offenders often have to be sequestered into protective custody (Akerstrom, 1986; Presser and Gunnison, 1999; Kleinhans, 2002: 242). Sex offenders are over-represented as victims of bullying in the form of physical violence, which can cause fear of death and ultimately, stress to the extent to drive them to commit acts of self-destruction or suicide (Blaauw et al., 2001). Probably the most notorious of Canadian cases of violence against a convicted sex offender is Joseph Fredericks. While awaiting the appeal of his first degree murder conviction, Fredericks was murdered by Daniel Poulin, a fellow inmate. According to Petrunik and Weisman (2005: 87), 'so loathed was Fredericks by prison staff and

inmates that a story, perhaps apocryphal, circulated that some guards at the prison where the murder took place rewarded Poulin by giving him a cigar'.

The life of the homo sacer is one of constant flight. In the camp, the werewolf or outlaw lives his life as a bandit and he can save himself only by perpetual flight (Agamben, 1998: 183) as he faces at every instant the threat of violence and death. As noted by Agamben (1998), in the innately political being of the homo sacer, the *nomos* dictates that he is faced with constant threat. It is only in flight and the mercy of the sovereign to withhold death or violence that there is a preservation of bare life. In the carrying out of violence on the body of the homo sacer, all act as sovereign and decide on the life of homo sacer. An analogous exposure to violence is in the posting of their locations and identification on the Internet, as there is an exposure of the sex offender to sovereign violence. In the violence exacted upon the bare life of sex offenders, vigilante groups temporarily act as sovereign (see Agamben, 2000). In the camp, sovereign power *circulates* through bodies and reveals the threshold between the sacred and the profane and citizen and non-citizen. Without permanent residence, the sex offender lives his life in perpetual flight, fleeing from this form of sovereign violence. Even in the state of confinement, the sex offender is exposed to violence and death by fellow inmates. In the case of Fredericks, the prison staff exposed the bare life of Fredericks to the sovereign violence of Poulin. In the carrying out of sovereign violence against individuals that have not engaged in sex offences and the stigmatization of the families of sex offenders, there is a slippage creating an indistinction between the citizen and the bare life of the homo sacer (see Agamben, 1998: 170). It is at this indistinction, the chaos and violence of the camp reveals itself. The bare life of the sex offender is exposed to violence and there is a sovereign return to order.

## CONCLUSION

The utilization of Agamben's legal and political theory allows for a connection between camps as they have been used historically for the detention and extermination of Jews and other immigrant groups in the last two centuries and the current treatment of sex offenders. Through an examination of the constructions of the paedophile as a permanently depraved monster, the institution of civil commitment and community notification statutes, and the techniques used to exact violence on and to regulate the movement of sex offenders, this article has shown how sex offenders can be conceived of as a form of outlaw, as homo sacer in the Agambenian sense. The political pressure of state-level actors, media sources and anti-paedophile groups proved to institute a ban on sex offenders, and in so doing, created a incompatibility between the community and the sex offender, offering an informal licence to vigilantes to expel sex offenders. In addition, this ban served to forsake the sex offender beyond the law and to displace this bare life in the ambiguous terrain of the camp. Through the utilization of GPS electronic monitoring, the camp is diffused onto the community as the homo sacer *qua* sex offender is held in an inclusive exclusionary space. In the surgical and chemical castration of sex offenders, the sovereign power to decide on life without value – the point where biopolitics converts to thanatopolitics – finds its purest expression. When vigilante groups act as sovereign, willingly presenting themselves as executioners, they demonstrate in the end their original proximity to the sex offender (see Agamben, 2000: 107).



It has been shown that the sex offender as homo sacer serves to embody the opposite of that which is sacred and stands accused of defiling the sacred. In the case of community notification statutes being named after child victims of sex offenders, these legal regimes are given a pure sanctified face and any opposition to such laws are challenges to the moral order. It was shown that this results in the exertion of sovereign power where the sex offender is placed in the ambiguous terrain of the camp and there is a restoration of order and maintenance of the sacred. Sovereign power circulates through the bodies of individuals and groups reacting to the sex offender and there is an enactment of sovereign violence upon the bodies of sex offenders and the reduction of these offenders to bare life or non-citizen.

Through the use of Agamben, this article has highlighted and contributes to an understanding of the critical role of the law in the creation of lawless spaces of the camp. An Agambenian approach to sex offenders has provided an elucidation of some of the broader consequences of the creation of states of exception and the figure of the homo sacer, a propensity that, according to Agamben (2005) defines this historic moment. As stated, these consequences include the overturning of penal values like no double jeopardy and fixed and finite punishments and therefore, challenge some of the long-held fundamentals of western legal systems. Future studies in the sociology of punishment would benefit from the utilization of Agamben in examining the role of law in the creation of lawless spaces, insofar as the prevalence of camp-like spaces has increased in the post-9/11 era.

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### Notes

- 1 In this article I am focusing specifically on Britain, the United States and Canada – the English-speaking West – due to the affinities between the countries in terms of their regulation and treatment of sex offenders.
- 2 This reflection on sovereign power's position within democratic states has been echoed by Jean Jacques Rousseau, Carl Schmitt, Franz Kafka, Paul Ricoeur, Hannah Arendt, Jacques Derrida and Gilles Deleuze. In plain, the rule of law in a state is enabled by a practice of sovereignty that rises above the law (see Connolly, 2007).
- 3 Brown (2005: 2) reveals that in 2003–4, of the half a million recorded sexual offences, there were 26,709 indecent assaults on a female, 1942 incidents of gross indecency with a child, 13,276 rapes (93 per cent of which were rapes of a female) and 4070 indecent assaults on a male in Britain. Despite the considerable lower amount of sex offences committed against children, Brown (2005: 3) asserts that paedophile is continually used interchangeably with sex offender.
- 4 The province of Manitoba has since posted their sex offender registry on the Internet, which includes a description of the offender's crimes, the height, weight, ethnicity and pictures of convicted sex offenders (<http://www.gov.mb.ca/justice/notification/agreement.html>).

- 5 To clarify, some states included in this particular study had more than one GPS electronic monitoring service provider.
- 6 In this era, working-class women were castrated for having consensual heterosexual sex before marriage.
- 7 Depo Provera is only FDA approved for use as contraception for women. As of yet, cases of osteoporosis and extreme depression have been noted as side-effects of Depo Provera use in men.
- 8 A recent 'international' example of the enforced flight of a sex offender was the case of Malcom Watson. Watson, an American, was exiled to Canada after being convicted of a sex offence.

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