OUTLAWS AND SPIES
LEGAL EXCLUSION IN LAW AND LITERATURE

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Introduction

Article six of the Universal Declaration of Human Rights declares that ‘everyone has the right to recognition everywhere as a person before the law’. Implicit here is the idea that the law offers protection; article six states that availing of such protection is an automatic condition of being human. The Universal Declaration dates from 1948, and does not in itself have legal force; the right to recognition as a person before the law is a right that has often been ignored in the years before and since. This book is about the practice that article six seeks to abolish: exclusion from law. It discusses some of the ways in which individual persons, groups, places, states and nations have been considered to exist outside the law, and offers readings of a range of literary texts in English, from the Middle Ages to the present day, that represent such exclusion.

In the English legal system, from early medieval times until relatively recently, a person could be placed outside the law, deprived of the law’s protection, through a legal process that declared them an outlaw. An outlawed person became a fugitive, and the word outlaw had the related senses of a person banished, or proscribed, or in exile, or of a person who lived without regard for the law, a person on the run. There is a sense of the outlaw being bestial in being compared to the wolf: the outlaw ‘bear(s) the wolf’s head’. Outlawry bears some similarity to the related concepts of exile and banishment, both long-standing legal punishments. Its ecclesiastical equivalent is excommunication.

2 OED, s.v. outlaw, n., A. 1a.
3 OED, s.v. outlaw, n., A. 1c.
4 OED, s.v. outlaw, n., A. 1b.
6 Bracton, ed. Woodbine, trans. Thorne, II, 361, says that to be outlawed is to forfeit the country and the realm.
Legally, outlawry is now an historical phenomenon. In English law, outlawry was abolished for civil proceedings in 1879, and for criminal proceedings in 1938. But it was not entirely moribund in the centuries before its abolition. As we shall see, outlawry in its strict legal sense was still in use against bushrangers in nineteenth-century Australia, where the New South Wales Felons Apprehension Acts of 1865–99 and related legislation in Victoria and Queensland allowed outlawed persons who were armed (or believed to be armed) to be apprehended alive or dead by any person. The formal abolition of outlawry notwithstanding, the discussion below will argue that the practice of placing individuals outside the law is very much an enduring tactic of state power.

Ever since Aristotle’s Politics, it has been possible to classify exclusion from law in two ways: exclusion above the law, and exclusion below it. Exclusion beneath the law is exclusion from the law’s protection, as when someone is declared an outlaw. Exclusion above the law is exclusion from legal punishment. In Aristotle’s discussion, humans, in general, are deemed to be within the law. Gods (or men deemed akin to gods) are excluded from the law as being superior to it, and animals (or humans considered to be subhuman) are excluded from the law as being beneath it. This double sense of exclusion (taken up again most recently by Jacques Derrida in The Beast & the Sovereign) remains a useful model for thinking about the limits of law and what lies outside it. And so this book considers exclusion from law in both of these senses – exclusion from the protection offered by law, and exclusion from the reach of its chastisement – arguing that these are related concepts, usefully discussed together, and sometimes seen to work in tandem.

There is a long-standing historical idea that may be investigated here: the notion of sovereign immunity. Here the sovereign (akin to a god in Aristotle, divinely appointed by God or acting as his substitute in medieval political thought) is declared to be above the law, immune from legal action, and able

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8 Æthelred 42 describes the excommunicate as ‘God’s outlaw’: Gesetze der Angussachsen, ed. Liebermann, I, 218.
10 Felons Apprehension Act (NSW) 1865.
12 Derrida, The Beast & the Sovereign.
to suspend the law if required. The notion that the sovereign was above the law was, of course, also a contested idea, and the discussion below contrasts historical arguments for sovereign immunity with competing discourses against tyranny.

While sovereign immunity continues to have standing as a legal concept today, its scope is reduced from historical examples where it represents a line of absolutist thinking about monarchy and government: many democratic governments may now be sued in court by their citizens, for instance. But even in a modern republic such as the United States, where the people, not the President, are sovereign, the President enjoys immunity from damages predicated on his official acts. Modern political theory also suggests that in a state of emergency, the sovereign may act extralegally (John Locke, Carl Schmitt and Giorgio Agamben propose very different versions of this idea). The discussion below suggests that in fact contemporary states continue to license themselves to act extralegally in a number of ways, not only at moments of extreme crisis when the state faces an existential threat, but also in ways that are far more regular and institutionalised.

The actions of the state outside the law are of course most visible in those totalitarian states governed primarily by other means than the rule of law, where exception from the law is the rule. There are some extreme examples from the twentieth and twenty-first centuries. As Ai Weiwei wrote in 2012, following his two months of secret detention the previous year:

China has not established the rule of law and if there is a power above the law there is no social justice. Everybody can be subjected to harm.

In Nazi Germany, the creation of a ‘state of exception’ which left the constitution in place but ineffective, created a space without law, both in theory (as discussed by Giorgio Agamben), and in practice (as described by Tony Judt):

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13 The Crown Proceedings Act 1947 allowed civil actions to be brought against the UK government for the first time (the monarch remains immune).

14 The Supreme Court ruled in *Nixon v. Fitzgerald* (1982) that the President enjoyed absolute immunity from damages predicated on his official acts. Dissenting opinions suggested that ‘attaching absolute immunity to the Office of the President, rather than to particular activities that the President might perform, places the President above the law. It is a reversion to the old notion that the King can do no wrong’. Questions on the President’s legal immunity or otherwise are again topical at the time of writing: see Feldman, ‘Crooked Trump’.

15 For differences between Locke and Schmitt’s versions of the exception, see Gross and Ni Aoláin, *Law in Times of Crisis*, pp. 119–23, 162–70.

16 Ai, ‘Ai Weiwei: to live your life in fear’.

For most Europeans in the years 1939–45 rights – civil, legal, political – no longer existed. The state ceased to be the repository of law and justice; on the contrary, under Hitler’s New Order government itself was the leading predator.\textsuperscript{18}

While acknowledging the very real differences between totalitarian states and the democracies of the contemporary West, the discussion below proceeds on the basis (after a suggestion of Jacques Derrida, discussed in more detail below)\textsuperscript{19} that in fact all states act outside the law.

One of the most obvious and significant ways in which the modern state moves to institutionally embody its ability not only to exclude people from law, but also itself to act extralegally, is in the creation of secret services. Such agencies may play a particularly important role in totalitarian states,\textsuperscript{20} but they are also near-ubiquitous: Wikipedia lists intelligence agencies for more than 120 contemporary states.\textsuperscript{21} But the activities, and in some cases existence, of these services are at some remove from legal norms, in ways that are discussed in detail during the argument below. If the first part of this book, then, is broadly concerned with outlawry, where individuals are excluded from the protection of the law, the second is broadly concerned with espionage, where the state may licence itself to act extralegally with impunity.

In its discussion of both outlawry and espionage, this book is concerned with exclusion from law as a method of support for sovereign power; as a means through which the state seeks to maintain or extend its reach (I use the word ‘state’ here in a qualified sense, conscious that the modern concept is an emergent one in the medieval period, and that the medieval uses of \textit{status}, \textit{état}, \textit{estate} reflect a broader, but relevant, set of concepts).\textsuperscript{22} It argues that the state’s exclusion of individuals from the protection of the law is usefully read in relation to other forms of legal exclusion. It also takes the position that outlawry is only notionally an historical phenomenon: that legal exclusion in various forms remains an enduring tactic of state power.

Before turning to the discussion proper, however, it may be useful to briefly survey some of the most influential contemporary studies of outlawry and legal exclusion within the humanities.

\textsuperscript{18} Judt, \textit{Postwar}, p. 38.
\textsuperscript{19} Derrida, \textit{Rogues}, p. 102.
\textsuperscript{21} ‘List of intelligence agencies’ and cf. ‘List of secret police organizations’.
\textsuperscript{22} Harding, \textit{Medieval Law and the Foundations of the State}, pp. 1–9.
Eric Hobsbawm and the ‘Social Bandit’

A substantial part of the literature on outlawry has come from disciplines such as history, literary studies and folklore studies, and has tended to focus on the figure of the outlaw hero as a challenge to the authorities, and the qualities characteristic of such a figure. The work of Eric Hobsbawm has been influential in setting the terms for these discussions.

In a short book first published in 1969, Hobsbawm defined ‘social bandits’ as ‘peasant outlaws whom the lord and state regard as criminals, but who remain within peasant society, and are considered by their people as heroes, as champions, avengers, fighters for justice, perhaps even leaders of liberation, and in any case as men to be admired, helped, and supported’.23 Hobsbawm’s social bandit is an archetypal figure who represents justice for his community, and who exhibits certain defining characteristics. The social bandit is criminalised as the result of an injustice, or an action which the authorities (but not the community) regard as criminal; he rights wrongs; he takes from the rich and gives to the poor; he kills only in self-defence or revenge; if he survives, he returns to his community as an honourable citizen; he is admired and supported by his people; if he is defeated, it is by means of betrayal; he seems invisible and invulnerable; and finally, he does not oppose the sovereign and the sovereign’s justice, but rather the oppression of local enforcers.24 Walter Benjamin argued in ‘Critique of Violence’ that the secret admiration of the public for a ‘great’ criminal arises not from his deeds, but from the violence involved. The law conventionally seeks to appropriate violence to itself: the spectacle of someone transgressing this norm and challenging the claim that the state and the law make for their own monopoly on violence arouses admiration from the populace.25 But for Hobsbawm’s reading of the outlaw, the public’s admiration is based rather on the bandit’s commitment to social justice in contrast to the oppression of the authorities.

Hobsbawm’s work initiated a large amount of subsequent work on bandits and outlaws, and his social bandit archetype has remained influential. In 2011, Graham Seal (whose own work on outlawry is influenced by Hobsbawm) wrote that ‘Hobsbawm’s basic contention that certain individuals transcend the merely criminal to be accepted by their own social group, and so are to some extent justified in their violence and defiance of authority,

23 Hobsbawm, Bandits, p. 20.
has stood the test of time as a seminal and still valuable approach to a broad socio-political phenomenon.\(^{26}\)

Hobsbawm’s model of the ‘social bandit’ has also been subjected to modification and critique from a number of different perspectives. Anton Blok argues that Hobsbawm’s model omits various categories of bandits from consideration, ignores the ways in which bandits may help to support existing power structures, and places an emphasis on social protest that Blok sees as intrinsic to the mythology of banditry, but not necessarily its reality.\(^{27}\) Gillian Spraggs constructs a cultural history of robber heroes in England over many centuries which suggests ideological roots in aristocratic codes of behaviour, not peasant protest.\(^{28}\) Hobsbawm, in turn, acknowledges that his ‘social bandit’ is not representative of all outlaw behaviour, and in particular acknowledges a tradition of bandit gentry distinct from the social bandit tradition.\(^{29}\) Spraggs also argued that the work of Hobsbawm and subsequent work by Seal presents a syncretised view of the outlaw hero: she suggests that not all characteristics of Hobsbawm’s archetypal social bandit are simultaneously present at any given time.\(^{30}\) In particular, she argues that the motif of taking from the rich to give to the poor, associated with Robin Hood, may be a late development, perhaps as late as the sixteenth century.\(^{31}\)

Other writers have suggested that while outlawry is inevitably the result of conflict, more nuance is required in determining the nature of the conflict at stake in each particular instance. A recent study of medieval outlawry by Timothy Jones, while acknowledging Hobsbawm’s work, argues that there are ways in which its focus needs to be expanded: rather than primarily representing economic injustice and dissatisfaction, outlaws and outlaw narratives may ‘embody all sorts of conflicts and appeal to all sorts of frustrations in a variety of potential audiences’.\(^{32}\)

While Hobsbawm and other cultural historians of outlawry have been primarily (though not exclusively) concerned with the figure of the outlaw,

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\(^{26}\) Seal, *Outlaw Heroes*, pp. 3–4.

\(^{27}\) Blok, ‘The Peasant and the Brigand’, 494–503. Hobsbawm continued to defend his original thesis. Blok’s original article is followed by a reply from Hobsbawm, and the fourth edition of *Bandits* contains a postscript defending Hobsbawm’s position against this and other criticisms (pp. 167–85).

\(^{28}\) Spraggs, *Outlaws and Highwaymen*, p. 278.


\(^{30}\) Spraggs, *Outlaws and Highwaymen*, p. 278.


\(^{32}\) Jones, *Outlawry in Medieval Literature*, p. 4.
and particularly with the outlaw as a hero figure who challenges the authorities, from the 1990s onwards there has also been a line of discussion coming from philosophy which has looked at outlawry in relation to questions of sovereignty and the state. These discussions give much more substantial consideration to the implications of outlawry for our thinking not only about the individual who is placed outside the law, but about the workings of power within the state that excludes them.

Giorgio Agamben’s *Homo Sacer*

In a book published in 1995 (translated into English in 1998), Giorgio Agamben offered an examination of sovereign power defined in terms of exception and exclusion, a study which took as its focus the figure of the *homo sacer*, an enigmatic figure from Roman law, who is called *sacer*, ‘sacred’, and yet may be killed by anyone, but not sacrificed. Agamben sees the *homo sacer* as defined not by the ‘originary ambivalence of the sacredness that is assumed to belong to him’, but rather the double exclusion of his violent death from the categories of homicide and ritual sacrifice. Violence against the *homo sacer* subtracts itself ‘from the sanctioned forms of both human and divine law’.  

The *homo sacer* is excluded from the protection of the law, and akin therefore to the outlaw or bandit of ancient Germanic and medieval law (and the related figure of the werewolf). But he also resembles two other figures. One is the sovereign himself, who Agamben sees (drawing on Carl Schmitt) as occupying the paradoxical position of being ‘at the same time, both outside and inside the juridical order’, because the sovereign is defined by his ability to suspend the law, to create a state of exception. And the second figure the *homo sacer* resembles is the occupant of the twentieth-century concentration camp, the camp being a space that is made possible only through the creation of a state of exception to the law which then becomes the rule.  

Agamben’s reading of the person excluded from the law as a *homo sacer* or bandit is very different from that of historians and cultural critics who read the outlaw as a challenge to the authority of the state. For Agamben, the outcast is an abjected and vulnerable figure:

> His entire existence is reduced to a bare life stripped of every right by virtue of the fact that anyone can kill him without committing homicide; he can save himself only in perpetual flight or a foreign land. And yet he is in a

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33 Agamben, *Homo Sacer*, p. 82.
continuous relationship with the power that banished him precisely insofar as he is at every instant exposed to an unconditional threat of death.\textsuperscript{37}

Agamben’s argument seeks to build on the work of Michel Foucault (while also drawing substantially on Walter Benjamin and Hannah Arendt). For Agamben, Foucault’s work on power followed two lines of enquiry: one into the political techniques through which the state begins to concern itself with ‘care of the natural life of individuals’, and a second through which technologies of the self ‘bring the individual to bind himself to his own identity and consciousness and, at the same time, to an external power’.\textsuperscript{38} Agamben seeks to build on Foucault’s work by looking for what he terms ‘the zone of indistinction (or, at least, the point of intersection) at which techniques of individualization and totalizing procedures converge’, or, in another formulation, what Agamben suggests should be ‘the hidden point of intersection between the juridico-institutional and the biopolitical models of power’.\textsuperscript{39}

\textit{Homo Sacer}, then, treats exclusion from the law, the creation of a state of exception, not in any way as an archaism or an historical phenomenon, but as a fundamental part of the workings of political power. In the three theses that Agamben offers as provisional conclusions to the volume, he argues that the ban is the original political relation; that the fundamental activity of sovereign power is the production of bare life; and that the camp is the fundamental biopolitical paradigm of the West.\textsuperscript{40} Exclusion, exception, the creation of persons and spaces outside the law, then, are for Agamben not just historical phenomena, but rather sit at the heart of and form the basis for contemporary political structures. Such thinking about outlawry and sovereignty would come to seem timely given the turns taken by global politics in the late twentieth and early twenty-first century.

\textbf{Outlaw States and the ‘War on Terror’}

Following the end of the Cold War, US administrations, beginning with the Clinton administration and continuing with the Bush administration, began to describe certain states which it opposed as ‘rogue states’, ‘outlaw states’, or ‘pariah states’: states which consistently acted outside the accepted norms of international law and politics.


\textsuperscript{38} Agamben, \textit{Homo Sacer}, p. 5.

\textsuperscript{39} Agamben, \textit{Homo Sacer}, p. 6.

\textsuperscript{40} Agamben, \textit{Homo Sacer}, p. 181.
As President George W. Bush’s 2002 State of the Union speech put it:

Thousands of dangerous killers, schooled in the methods of murder, often supported by outlaw regimes, are now spread throughout the world like ticking time bombs, set to go off without warning.

Bush then named three of these outlaw regimes – North Korea, Iran and Iraq – going on to say, in a famous phrase, that:

States like these, and their terrorist allies, constitute an axis of evil, arming to threaten the peace of the world.\(^{41}\)

In US foreign policy of the late twentieth and early twenty-first century, then, the concept of outlawry applies not just to individual persons, but to states. As rogues, these states are inherently dangerous. As outlaws, they can (and perhaps should) be attacked with impunity. And as we shall see, such tactics are not entirely novel: the non-recognition of the sovereign status of other nations, territories and legal systems has a long-standing role in the service of state power.

The Clinton/Bush notion of ‘rogue states’ was subject to contemporary critique, not least by Noam Chomsky and Jacques Derrida, both of whom argued that the United States was itself in many senses a rogue or outlaw state. In a book entitled *Rogue States*, Chomsky suggested that the term had two uses: ‘a propagandistic use, applied to assorted enemies, and a literal use that applies to states that do not regard themselves as bound by international norms’.\(^{42}\) Chomsky agreed that Iraq under Saddam Hussein was indeed a criminal regime, but argued that the United States itself could be described as a rogue state in this second sense of the term in its disregard for international institutions and norms, in particular the United Nations and the Universal Declaration of Human Rights.\(^{43}\)

In a pair of essays from 2002 that builds upon the arguments of Chomsky among others, published as a book under the title *Rogues*, Jacques Derrida contended that the US tactic of accusing others of being ‘rogue states’ was effective from the end of the Cold War up to 11 September 2001. In doing so, the US itself acted as a rogue state. As, he suggests, do all other states:

As soon as there is sovereignty, there is abuse of power and a rogue state …

There are thus only rogue states. Potentially or actually. The state is a voyou, a rogue, roguish. There are always (no) more rogue states than one thinks.\(^{44}\)

\(^{41}\) *The Iraq Papers*, ed. Ehrenberg et al., p. 60.


\(^{44}\) Derrida, *Rogues*, p. 102.
Derrida contended that on 11 September 2001, it became clear that non-state actors could pose an existential threat to state power, and so what he calls the ‘epoch’ of the rogue state – the rogue state, that is, in Chomsky’s first, propagandistic, sense – came to an end.\(^{45}\) Derrida’s argument here is from 2002, and so precedes the 2003 invasion of Iraq, the justification of which would seem to be constructed firmly upon the idea of the ‘rogue state’. In any case, it is not this first, propagandistic, sense of ‘rogue state’ (or ‘outlaw state’) that concerns us, but rather the second. If Agamben suggested in *Homo Sacer* that exclusion and exception were at the heart of contemporary political structures, Derrida now suggests in *Rogues* that all states are rogue or outlaw states in this sense of acting outside legal norms.

**Giorgio Agamben, *State of Exception***

In 2003, Agamben published a further study in his *Homo Sacer* series, entitled *State of Exception*.\(^{46}\) Starting from Carl Schmitt’s definition of the sovereign as ‘he who decides on the state of exception’, Agamben argued for the importance of the state of exception in understanding the nature of sovereignty. He also argued for the contemporary relevance of such a discussion given President Bush’s order of 13 November 2001 authorising the indefinite detention and trial by military commission of non-US citizens suspected of involvement in terrorist activities.\(^{47}\)

For Agamben:

> What is new about President Bush’s order is that it radically erases any legal status of the individual, thus producing a legally unnameable and unclassifiable being. Not only do the Taliban captured in Afghanistan not enjoy the status of POWs as defined by the Geneva Convention, they do not even have the status of persons charged with a crime according to American laws. Neither prisoners nor persons accused, but simply ‘detainees,’ they are the object of a pure de facto rule, of a detention that is indefinite not only in the temporal sense but in its very nature as well, since it is entirely removed from the law and from judicial oversight.\(^{48}\)

Detainees were held at Guantánamo Bay in Cuba, where the United States exercises territorial control and operates a naval base, originally established in 1898 during the Spanish-American War, and continued under treaties of


\(^{46}\) The *Homo Sacer* series now has several additional volumes: Agamben, *The Use of Bodies*, has been announced as the last of the sequence.

\(^{47}\) Bush, ‘Military Order of November 13, 2001’.

1903 and 1934, despite the objections of the Cuban government subsequent to the country’s mid-century revolution.

The force of Agamben’s analysis would only be strengthened by subsequent events. The detention of captured Taliban at Guantánamo in an effort to place them outside the law would in fact be only one of the ways in which the United States would seek to place both its own actions, and the status of its opponents in the ‘War on Terror’ outside the law. From 2001 onwards, the CIA operated programmes of ‘extraordinary rendition’, transferring detainees to the custody of foreign governments whose legal protections differed from those of the United States. They also operated a secret prison programme at ‘black sites’ outside the United States, ‘designed to place detainee interrogations beyond the reach of the law’. Further to this, the US would engage in targeted killings of its opponents, a programme expanded under the Obama regime, which would eventually include the targeted killings of US citizens.

These measures were possible because the Bush administration determined that the War on Terror could occur within what Gabriella Blum and Philip Heymann have called ‘a No-Law Zone’:

The Bush administration adopted a theory of ‘no law’ for detention: it began with the determination that only the law of war, as opposed to any constitutional or domestic law, was relevant to the detention of terrorists … and it then proceeded to conclude that there was no law of war literally applicable to the detention of terrorists, as the latter did not meet the conditions of lawful combatancy. It thus left detainees stripped of all legal protections …

The Bush administration also argued that the nature of this conflict with terror groups as a war also gave the President, as Commander-in-Chief at

49 Globalizing Torture, p. 5.
50 Scahill, Dirty Wars discusses US covert actions post-2001, focusing on the story of Anwar Awlaki and his son Abdulrahman, US citizens killed in separate incidents in 2011. Anwar Awlaki’s daughter was later killed in a US raid in Yemen in 2017. Scahill quotes a 2012 speech by Pentagon general counsel Jeh Johnson which argues that US practices of ‘capture, detention and lethal force’ should be ‘viewed within the context of conventional armed conflict’ and are therefore legal (Scahill, Dirty Wars, p. 519, quoting from Wittes, ‘Jeh Johnson Speech at the Oxford Union’).
51 Blum and Heymann, Laws, Outlaws, and Terrorists, p. xiii.
a time of war, the power to act outside the law. The Office of the Attorney General assured President Bush that his powers under Article II of the US Constitution were sufficient to override statutory prohibitions in time of war, and Congress did not have competing powers to limit his actions.\footnote{Blum and Heymann, \textit{Laws, Outlaws, and Terrorists}, pp. 11–12.}

All of these measures that the United States has taken to place its opponents outside the law – the detention programme at Guantánamo, extraordinary rendition, black sites, assassinations – would seem to represent the return of outlawry in a new and extraordinary sense in the twenty-first century.

\textbf{Jacques Derrida, \textit{The Beast \& the Sovereign}}

These discussions by Chomsky, Derrida and Agamben published in the decade between 1995 and 2005 may be supplemented by Derrida’s \textit{The Beast \& the Sovereign}, the title for seminars given at the \textit{École des hautes études en sciences sociales} in the academic years 2001–2 and 2002–3, but published only after Derrida’s death, with a two-volume English-language edition appearing in 2009 and 2011. Here Derrida argues that the beast and the sovereign resemble one another in that both may be seen to reside outside the law: ‘both share that very singular position of being outlaws’.\footnote{Derrida, \textit{The Beast \& the Sovereign}, I, 32.}

The first volume of \textit{The Beast \& the Sovereign} meditates at length on the figure of the wolf (Derrida refers to this seminar more than once as a \textit{genelycology}),\footnote{Derrida, \textit{The Beast \& the Sovereign}, I, 96, 98; Derrida, \textit{Rogues}, p. 69.} who is of course a beast, and a dangerous one. The wolf is traditionally an excluded figure, a figure associated with the outlaw. But the wolf is also a figure for the sovereign, particularly in the text that Derrida opens with, La Fontaine’s fable of the Wolf and the Lamb. Its opening lines read:

\begin{quote}
The reason of the strongest is always the best  
As we shall shortly show.\footnote{Derrida, \textit{The Beast \& the Sovereign}, I, 7. La Fontaine’s French text is ‘La raison du plus fort est toujours la meilleure: | Nous l’allons montrer tout à l’heure’. In the fable, the Wolf deploys various arguments for taking the Lamb’s life; the Lamb refutes them all, but to no avail, for the Wolf is strong enough to impose his will.}
\end{quote}

The problematic of sovereignty, and the related issues of force and right, form a substantial concern in Derrida’s seminar (among a wide range of others, impossible to summarise here). In discussing a broad range of texts that bear upon this dynamic of the beast and the sovereign, Derrida makes reference also to contemporary events, suggesting (in line with the argument he makes around the same time in \textit{Rogues}) that:
It is the most powerful sovereign states which, making international right and bending it to their interests, propose and in fact produce limitations on the sovereignty of the weaker states, sometimes, as we were saying at the beginning of the seminar, going so far as to violate or not respect the international right they have helped institute and, in so doing, to violate the institutions of that international right, all the while accusing the weaker states of not respecting international right and of being rogue states, i.e. outlaw states, like those animals said to be ‘rogue’ animals, which don’t even bend to the law of their own animal society? Those powerful states that always give, and give themselves, reasons to justify themselves, but are not necessarily right, have reason of the less powerful; they then unleash themselves like cruel, savage, beasts, or beasts full of rage. And this is just how La Fontaine describes the sovereign wolf in the fable.57

The exercise of sovereign power, then, on the part of the strongest, can be less about reason and law,58 than it is about strength:

The sovereign (or the wolf in the fable) acts as if he had reason to judge just and legitimate the reason he gives because he is the strongest, i.e. because, in the relation of force that here makes right, that here gives reason, the strongest one, the sovereign, is he who, as we say in French, a raison des autres [prevails over the others], who wins out over the less strong, and treads on the sovereignty or even the reason [or sanity] of the others.59

For Derrida, then, the power of the sovereign is not constrained by law: the powerful bend reason to their will, and act outside the law. All states are, in some sense, rogue states. But also, he suggests, sovereignty is also not as all-powerful as it pretends to be: sovereignty is ‘said and supposed to be indivisible but always divisible’.60 Derrida’s discussion, then, like Agamben’s, sees the sovereign and the outlaw as related figures, who exist outside the law.61

57 Derrida, *The Beast & the Sovereign*, I, 208–9. As the translator notes elsewhere (I, 16 n. 22), French *droit* can mean both ‘law’ and ‘right’, and as is clear from the next quotation to ‘have reason’ (*avoir raison*) can also mean to ‘prevail over’. Cf. also the discussion at I, 70–6, where Derrida discusses Carl Schmitt’s claims that humanitarian interventions that seek to override nation-state sovereignty always do so from hidden political motives; Derrida exercises a certain caution (I, 75) regarding Schmitt’s argument here.

58 On the interrelation of reason and law from Cicero through the Middle Ages, see Alford, ‘The Idea of Reason in *Piers Plowman*’, pp. 200, 201, 204 and n. 24.

59 Derrida, *The Beast & the Sovereign*, I, 208. As the translator notes, Derrida uses the French word *raison* here in several senses: *raison*, ‘reason’; *avoir raison*, ‘to be right’; *avoir raison de*, ‘to prevail’ (I, 208, n. 3).


61 Because the dynamic in Derrida’s analysis is between the beast and the sovereign, not the
although he rejects Agamben’s argument (after Foucault) for a biopolitics (or zoopolitics) as something new, arguing that this is a notion already present in political theory as early as Aristotle.62 The discussion below is concerned with legal exclusion, rather than these larger questions of biopolitics and its origins, though I am inclined to agree with Derrida (against Agamben and Foucault) that the biopolitical itself is likely neither modern nor new, though new things may manifest within it over time.63

Despite their differences, what these works by Agamben and Derrida offer us is a series of recent studies where exclusion from law (whether above or below) is read as being bound up with questions of sovereignty, power and the state. In contrast to the work of cultural historians, these studies are focused less on the outlaw as an individual who challenges the authority of the state and embodies certain characteristics in doing so, but rather on the implications of exclusion from law for questions of sovereign and state power. These are also studies that engage with recent events in global politics in ways which suggest that far from being an idea of purely historical interest, outlawry – exclusion from law – in several senses is very much in force today.

This Book

The discussion here begins from a point of agreement in Derrida and Agamben – that exclusion from law is a tactic of sovereign or state power. It proceeds from this starting point to engage in readings of a variety of texts, primarily literary texts in the English language, from the Middle Ages to the present day. In doing so, this discussion seeks to identify the ways in which the state uses exclusion from law, in a variety of forms, to further its own interests, and to explore how such actions are represented across a range of texts. In approaching these texts from this perspective, this study differs from

outlaw and the sovereign, he is also greatly concerned with the figure of the beast, definitions of the bestial, and issues of animal rights in a challenge to Cartesian thinking and its derivatives that falls outside the scope of our discussion here. For a recent discussion of exclusion and animal rights, see Creed, Stray.

62 Derrida, The Beast & the Sovereign, I, 305–34, 348–9. For Foucault, biopolitics is a new form of power over life, beginning in the seventeenth century, a break with what Aristotle means in his definition of man as a politikon zoon in the Politics (Foucault, History of Sexuality, pp. 139–43; Foucault, ‘Society Must Be Defended’, pp. 239–64). Agamben, arguing for a distinction between two Greek words for life, constructs an opposition between zoē, ‘bare life’, and bios, ‘the form or way of living proper to an individual or a group’, and draws on Foucault’s identification of biopolitics with modernity in his construction of a dynamic between zoē and bios, bare life and political existence, exclusion and inclusion (Agamben, Homo Sacer, pp. 1, 8).

most previous readings of outlaw literature. Hobsbawm’s own work acknowledged that the history of banditry could not be understood except as part of the history of political power, though, like others, he emphasises banditry as a consequence of the weakness of state power – a ‘weak state’ thesis challenged in the discussion below.64 There have also been readings of banishment and outlawry in literary texts that have drawn on or engaged with Agamben’s work (I am particularly conscious of Ruth Evans’s discussion of Sir Orfeo, Helen Phillips’s introduction to the essay collection Bandit Territories, and Joseph Taylor’s reading of A Gest of Robyn Hode).65 However, it is still the case, I think, that discussion is generally focused around the figures of individual outlaws, and has not generally approached the question of outlawry as one of a range of tactics designed to expand or maintain state power.

This is primarily a book about literature, rather than a discussion of politics, history or law (much as it may draw on these subjects in the discussion below). It focuses on two extensive bodies of literature in English: the literature of outlawry, which extends from the Middle Ages to the present day, and the literature of espionage, which emerges in the twentieth-century from roots in detective fiction and the nineteenth-century literature of terrorism. These are two reasonably coherent bodies of literature, not conventionally discussed in tandem; in treating them together, the discussion here suggests they share a concern with the subject of legal exclusion and its consequences.

Outlawry has a substantial literature across a long time period and a range of cultures. While this book in no way attempts to survey the literature of outlawry, it does take a long view, longer than is conventional in contemporary scholarship. There are gains as well as risks in looking across a long timeline, however, and there have been moves in that direction elsewhere: Jo Guldi and David Armitage’s book The History Manifesto recently argued the case for the return of the longue durée as remediation for a short-termism that has come to dominate so many aspects of contemporary thinking.66 Taking a long view, however, does not mean neglecting historical difference, and the discussion below also takes a broadly historicist approach: legal exclusion and its representation are seen to be enduring, but by no means unchanging.

If the subject of outlawry has a long literary history, that history is also a diverse one. Something of a canon of outlaw texts for medieval England was established by Maurice Keen’s book The Outlaws of Medieval Legend, first

64 Hobsbawn, Bandits, pp. 11–17.
66 Guldi and Armitage, The History Manifesto.
published in 1961. Well-known post-medieval examples of outlawry include British highwaymen (of whom Dick Turpin remains the best-remembered example), and the outlaws of the American West and their representation in twentieth-century American cinema. Some outlaw figures have remained culturally potent, with their stories reworked over and over again across long periods of time. But those outlaw figures who are well known in modern Anglophone popular culture – Robin Hood from medieval England, Dick Turpin from eighteenth-century England, Jesse James and Billy the Kid from the nineteenth-century American West, Ned Kelly from nineteenth-century Australia – may be supplemented with less well-known outlaws from the same contexts, and with outlaw figures from a variety of other cultures. And while the cultural representation of outlawry is conventionally associated with popular forms such as the oral ballad and, in the contemporary era, the cinema (particularly the Western), the subject of outlawry appears in the work of a wide range of writers and a variety of forms, extending from medieval romance, through Walter Scott’s portrayals of Rob Roy and Robin Hood, to contemporary literary works such as Michael Ondaatje’s The Collected Works of Billy the Kid and Paul Kingsnorth’s reworking of the Hereward story in The Wake. Despite its diversity, there are some visible continuities to be found across this literature of outlawry. If the medieval literature of outlawry offers a vision of solidarity and resistance akin to that of Hobsbawm’s ‘social bandit’ (albeit with qualifications), Ned Kelly’s self-representation centuries later draws on the enduring cultural archetype of the outlaw to portray himself in recognisably similar terms.

The opening three chapters of this book offer a series of case studies that seek to discuss the continuities, contrasts and tensions within various representations of outlawry, grounded in specific historical circumstances. Texts considered include a variety of texts from medieval England (and, to a certain extent, its neighbours), the second tetralogy of Shakespeare’s history plays, and finally various versions of the story of Ned Kelly, particularly Kelly’s own Jerilderie Letter and Peter Carey’s True History of the Kelly Gang.

These opening chapters outline a diversity of ways in which outlawry is represented. If medieval legal texts offer a view of the outlaw akin to Agamben’s homo sacer, medieval literary texts offer us a view closer to Hobsbawm’s ‘social

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67 Keen, Outlaws of Medieval Legend.
68 For a long view of the Robin Hood phenomenon, see Knight, Robin Hood: A Mythic Biography; for Ned Kelly, see Kelly Culture.
69 Outlawed; ed. Weber, offers a broad view.
70 Scott, Rob Roy; Scott, Ivanhoe; Ondaatje, The Collected Works of Billy the Kid; Kingsnorth, The Wake.
bandit’. The actions of the real outlaw gangs of medieval England, we dis-
cover, are different again. Elsewhere, we find outlawry employed as a political
tactic against the medieval English crown’s political opponents across the
archipelago, where leaders with genuine claims to sovereign authority are
reduced to the status of outlaws. We find the outlaw’s exclusion beneath
the law doubled by the sovereign’s exclusion above it, though we also find the
monarch’s claim to extralegal status repeatedly challenged by a tradition of
writing against tyranny. And, as in Derrida and Agamben, we find a parallel
drawn between the sovereign and the outlaw in a variety of outlaw texts – a
parallel found at the heart of Shakespeare’s *Richard II*.

As well as this motif of double exclusion, above and below the law, these
early chapters further suggest that the exclusion of individuals from legal
recognition may also intersect with broader tactics of legal exclusion: the
non-recognition of the sovereign status of other nations, territories and legal
systems. This application of the concept of outlawry not just to individual
persons, but also to entire states, familiar from the contemporary discussion
of ‘rogue states’, is visible in the English crown’s actions from medieval
Britain and Ireland to colonial Australia.

From Chapter 4 onwards, the discussion below turns away from the
historical practice of outlawry to consider legal exclusion in the contemporary
literature of espionage. This book is not the first to argue that legal exclusion is
an important feature of espionage and its literature. Timothy Melley describes
the covert as ‘the institutional sedimentation of what Giorgio Agamben calls
“the state of exception” – the paradoxical suspension of democracy as a
means of saving democracy’.

Eva Horn likewise argues that the modern secrets of the state ‘amount to an ongoing state of exception, a permanent
(self-) suspension of the rule of law that introduces the possibility of pure,
“extralegal” violence’.

Espionage literature has its origins in both detective fiction and a liter-
ature concerned with terrorism. Detective fiction evolves from the 1840s
in the work of Edgar Allan Poe, Wilkie Collins and Arthur Conan Doyle.
‘Terrorism’, though it has its precursors, dates as a term from the late eight-
eenth century, and as a systematic practice from the second half of the
nineteenth. Even at this early stage, the term covers a variety of forms of
political violence; later, ‘the term has been used in so many different senses

71 Melley, *The Covert Sphere*, p. 5.
72 Horn, *The Secret War*, p. 95.
74 Laqueur, *Terrorism*, p. 11.
as to become almost meaningless’. With the growth of the phenomenon of terrorism in the second half of the nineteenth century comes a literature of terrorism, which in English includes as early examples Henry James’s *The Princess Casamassima*, Joseph Conrad’s *The Secret Agent* and *Under Western Eyes*, and G. K. Chesterton’s *The Man Who Was Thursday*. Indebted to – and sometimes crossing over with – both of these genres, the espionage novel is generally considered to emerge in the early years of the twentieth century with the publication of Rudyard Kipling’s *Kim* and Erskine Childers’s *The Riddle of the Sands*. The genre’s emergence in English in the early twentieth century is roughly contemporary with the formation (and perhaps influences the growth) of the modern British intelligence services. There have been an enormous number of spy thrillers produced in the years since, and the subject has influenced a wide range of writers.

The discussion below does not attempt a survey of the literature of espionage, any more than it attempts such for the literature of outlawry. It extends beyond the boundaries of the spy thriller in offering readings of texts by four very different contemporary English-language writers – John le Carré, Don DeLillo, Ciaran Carson and William Gibson – only one of whom (le Carré) is what we might call an espionage novelist. These texts play out against different historical contexts, including the construction of the Berlin Wall; the exposure of the Cambridge spy ring; the Kennedy assassination; the Northern Ireland Troubles; the Iran hostage crisis; the rise of the internet; and the War on Terror. But there are recurring themes to be found nonetheless.

We find state agencies acting outside the law throughout. Such actions range from le Carré’s description of murder, kidnapping and blackmail as common currency in the early days of the Cold War to the suggestion of state collusion with terrorists in Carson. They extend through the use of extraordinary rendition to allow the secret torture of suspected terrorists in le Carré and DeLillo to the secretive deployment of mass surveillance in both Carson

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77 Kipling, *Kim*; Childers, *The Riddle of the Sands*.

78 Andrew, *Defence of the Realm*, pp. 4–21, discusses in passing the role of Kipling in promoting the myth of a British intelligence network, and of William Le Queux in propagating a fear of German espionage that contributed to the creation of the modern secret services. Espionage is not, of course, a twentieth-century invention, and espionage in seventeenth-century England is briefly discussed in Chapter 2 below.
and Gibson. All of these works, then, are interested in extralegal action by the state, its agencies, and its contractors, as a tactic of power.

We also encounter a wide range of marginalised and excluded figures. Alec Leamas in *The Spy Who Came in from the Cold* is an agent exiled and abandoned, as vulnerable as any *homo sacer*. In Don DeLillo’s *Libra* it is ‘an outlawed group’ of CIA agents that plots the assassination of President Kennedy. William Gibson’s hacker protagonists are described as ‘high-tech outlaws’. If some of these marginal figures are, as in Hobsbawm, figures of resistance, there are also repeated attempts here by the powerful to co-opt the marginal. Here, too, the medieval parallel between the sovereign and the outlaw, excluded above and below the law, is reconfigured as parallels are drawn between the spy and the terrorist, the political assassin, the hacker and the refugee.

Overall, then, this book pursues two broad lines of enquiry. The first is the theme of legal exclusion as an enduring tactic (or, rather, a set of tactics) of state or sovereign power. This involves the exclusion of individuals from legal protection via a range of measures, from outlawry to extraordinary rendition. These tactics of exclusion beneath the law may be paired with the related practice of exclusion above it. Here, the sovereign or the state claims the ability to act with legal impunity, by a variety of means, from the historical notion of sovereign immunity, executive approval of covert actions by modern-day intelligence agencies, or the implementation of emergency powers. Furthermore, the exclusion of individuals from legal recognition may be usefully compared and aligned with circumstances where the legal status and legal practice of other nations or states are disregarded.

Our second line of enquiry investigates the enduring role of literature in both representing and critiquing such legal exclusion. The literature of outlawry and the literature of espionage do, of course, create a certain mythology and mystique for their archetypal protagonists, the outlaw and the spy. But as the discussion below argues at length, both bodies of literature also serve an important purpose in representing and critiquing the state’s enduring use of legal exclusion as a tactic of power. A desire for justice is a key characteristic of Hobsbawm’s ‘social bandit’. As we shall see, there are many reasons to qualify this suggestion: historical studies suggest that real outlaws are enmeshed in power relations in complex ways, and may be participants in the corruption of law, rather than ethical outsiders. But if Hobsbawm’s comments cannot always be upheld for the practice of outlawry, they have a certain validity when applied to its literature. As the discussion below suggests, outlaw

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literature’s critique of the medieval English justice system aligns these works with the very extensive tradition of medieval satire and complaint and that tradition’s critique of injustice. The contemporary literature of espionage, in turn, plays an unusually important role in both portraying and questioning the workings of the state, given both the secrecy that surrounds such activities, and the state’s ongoing efforts to influence, censor or suppress factual accounts of its extralegal actions.

In pursuing these two broad lines of enquiry, the discussion here makes four key arguments. First, it suggests that these various forms of legal exclusion – the exclusion of individuals from the law’s protection, the exclusion of the state’s own actions from legal punishment, and the non-recognition of the sovereign status of other nations, territories and legal systems – are related means of defending, consolidating or extending state or sovereign power. Secondly, it argues that legal exclusion, far from being an historical curiosity, is an enduring phenomenon that is alive and well in disturbing new combinations in the twentieth and twenty-first century West. Thirdly, it seeks to show that exclusion from law is a shared concern for the literatures of outlawry and espionage, and hence a key theme in writing about the state and its actions at the heart of a wide range of literary texts in English from the Middle Ages to the present day. Finally, it suggests that the role of literature in relation to such exclusion is often to offer critique, a critique that implicitly carries within it a demand for justice.