Can Terrorism Be Fought within the Boundaries of the Rule of Law? – A Review of Recent Literature in Political Philosophy

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Terrorism poses a threat, not only to the legal system of a constitutional order, but also to its underlying fundamental principles. This may be the main reason why terrorism is often seen as the opposite of what liberal democracies stand for. As Ignatieff writes: ‘Terrorism is liberal democracy’s nemesis, bequeathing it and deforming it even when terrorism goes down to defeat.’ Yet, is this more than a political statement? Do we actually know what we are talking about if we use the term ‘terrorism’? It is tempting to define this phenomenon like a US Supreme Court Justice once did with respect to pornography: ‘I know it when I see it.’ But perceiving something as an act of terror or someone as a terrorist has severe consequences, far more so than pornography – for the terrorists as well as for the society that finds itself at war with terrorism. Therefore, Derrida’s warning to be ‘very careful using the term “terrorism” and especially “international terrorism”’ is not only a remark about a theoretically loose concept; it implies a distinct practical and ethical perspective: because of terrorism – whatever it is and however it can be defined –, people are willing to give up their basic freedoms that once

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seemed to constitute liberal democracy. Hence, from a theoretical as much as from a practical standpoint, the question is: Can a safe society be a free one? Basically, there are two ways of understanding this question. The first one stresses the empirical dimension. ‘Can’ means in this context: what kind of actions and sanctions are necessary to preserve freedom in a society that is facing the strains of terrorism? The second understanding is related to the ethical dimension of such actions. Here, ‘can’ refers to questions like: is it possible to have a common understanding of a ‘free’ society? And by what means is it allowed, normatively speaking, to defend its freedom? What makes it so difficult for free societies to fight terrorism is that these two different aspects – necessary actions and normative considerations and limitations – are closely interlinked with each other. No doubt, terror should be fought in the framework of the rule of law, but is this possible? Does terrorism constitute such an exceptional state of affairs that politicians are allowed, ethically speaking, to suspend the rule of law temporarily, or can terrorism be fought within the boundaries of the rule of law? Can there be rules that cope with exceptions in a legal way? These questions will inevitably haunt Western societies for the years to come.

In the following, we will investigate whether terrorism can be fought in accordance with basic requirements that follow from a broad conception of the rule of law: infringements of citizens’ liberty by a state should be based on general laws; these laws should be presented to Parliament before their promulgation; they should be sufficiently clear and may not violate fundamental rights such as the freedom of speech and privacy; citizens have the right and possibility to challenge law applications in concrete cases before an independent court, and so on. Since ‘terrorism’ is very difficult to define, the law has serious problems in fighting it without compromising its acclaimed principles. There are several useful starting points for addressing this topic in the history of political philosophy, in the works of – among others – Hobbes (Leviathan), Hegel (Vorlesung über die Philosophie der Geschichte),

4 Art. 1 of the EU’s Framework Decision on Combating Terrorism 2002 provides, for example, that terrorist offences are certain criminal offences set out in a list comprised largely of serious offences against persons and property which, ‘given their nature or context, may seriously damage a country or an international organisation where committed with the aim of: seriously intimidating a population; or unduly compelling a Government or international organisation to perform or abstain from performing any act; or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.’ By using vague terms such as ‘seriously intimidating’, ‘unduly compelling’ and ‘seriously destabilising’, this definition defies the requirement of legal security.
and Kant (Zum Ewigen Friede). However, in this review article, we will primarily focus on what we consider to be the most important recent contributions to this topic, namely the texts written by Agamben, Derrida and Habermas. These three authors represent three possible positions in the contemporary philosophical debate on terrorism: the decisionist, deconstructionist and deliberative position, respectively. In this debate two questions recur: Does the anti-terror policy ultimately lead to a state of exception, possibly even on a permanent basis? And is the friend-enemy distinction the core of contemporary politics? After having dealt with these questions in the following two sections, we will discuss whether the three positions are capable of providing a suitable approach – that is, an approach that is both ‘workable’ and normatively defendable – to the topic at hand: Does the fight against terrorism have to break the boundaries of the rule of law?

1 State of Exception

The notion of ‘state of exception’ is very much present in the recent literature on terrorism. Hardt and Negri, for instance, claim that the present situation of the globalized world can be best understood as a permanent state of war that has reshaped the international arena into a lasting state of exception, thereby referring to Carl Schmitt’s Political Theology. Building on Schmitt’s argument, Giorgio Agamben has come up with another much debated theory dealing with the state of exception.

One of the reasons for the revival of Schmitt’s political thinking – his so-called decisionism – is the fact that, in politics as well as in political theory, national sovereignty is the object of debate. Schmitt’s theory of the state of exception was highly influenced by the turbulent times of the Weimar Republic, and reflected the shortcomings of the political system and its Constitution. Article 48 of the Weimar Constitution regulated the state of exception.10

7 Benjamin R. Barber, Fear’s Empire. War, Terrorism, and Democracy, New York: W.W. Norton & Company 2003, p. 75.
exception that enabled the President to take all necessary actions – including the right to suspend fundamental rights – to restore the political order. Yet, the same article also called for the promulgation of a law to define and limit the ample powers it enabled the President to take into his hands. But since such a law was never adopted, Schmitt was led to write in 1925 that ‘no constitution worldwide has so easily legalised a coup d’état as the Weimar Constitution’. In the light of these challenges to the Weimar Constitution, Schmitt approached his subject – the state of exception within the frame of the legal order – in two studies: Die Diktatur (1921) and Politische Theologie (1922).

In his first study Schmitt portrayed the state of exception as an essential precondition of dictatorship, distinguishing two forms of dictatorship: provisional dictatorship (kommissarische Diktatur) and sovereign dictatorship (souveräne Diktatur). In the former, the application of the norm is temporarily suspended, but the norm remains, formally, in force. In contrast, in the sovereign dictatorship, the legal order is suspended in order to create the conditions conducive to a new legal order, to a new constitution. Whereas, in the past, these two forms could be differentiated, in modern times – according to Schmitt – the German executive, in its reiterated recourse to Art. 48, as well as the Marxists, in the widespread theories of Lenin’s dictatorship of the proletariat, strived to combine (or even confused) these two types a dictatorship. In Schmitt’s view, this was a trend that put at risk the consistency of the legal-political order. It would be a misunderstanding, though, to see Schmitt’s analysis only as a systematic attempt to review the history of political ideas as a contribution to the interpretation and application of Art. 48 Weimar Constitution. He was less concerned with the Weimar Constitution,

10 Art. 48 of the Weimar Constitution states: ‘If public order and security are seriously disturbed or endangered within the Federation, the President may take all necessary steps for their restoration, intervening, if need be, with the aid of the armed forces. For the said purpose he may suspend for the time being, either wholly or in part, the fundamental rights described in Articles 114, 115, 117, 118, 123, 124, and 153 […]’

11 Carl Schmitt, Staat, Großraum, Nomos, Berlin: Duncker & Humblot 1995, p. 25 (our translation). As Agamben (2005, p. 14-15) notes, during the period of the republic, Article 48 was invoked to justify the implementation of ‘urgent measures’ in more that 250 cases. Among the urgent measures were economic measures to cope with the devaluation of the Mark, the arrest of hundreds of political dissidents and the establishment of special courts competent, among other things, to mete out the death sentence.


13 Schmitt 1989, p. 201-205 and passim.
but argued in favour of political unity and stability – a purpose for which the provisional dictatorship could be an effective instrument.  

In response to an article written by Walter Benjamin on the concept of ‘pure violence’, Schmitt again analysed the state of exception, this time in a more theoretical approach focusing on the relation between the state of exception and sovereignty. By suspending the norm, Schmitt argued, the state of exception discloses the features not only of a specific legal instrument but also of the concept of law as such, the decision. In his perspective, political order is derived from a sovereign decision, while the decision itself is born out of the blue – a *creatio ex nihilo*. Here, it becomes clear that Schmitt’s argument is based on the supremacy of power over law – with the sovereign at the end of both power and law. In times of constitutional crisis, the sovereign guarantees the link between the state of exception and the legal order: he is outside the legal order but he nevertheless belongs to it, as he is responsible for the decision to suspend the constitution. This idea bears theoretical consequences. Firstly, it differentiates the legal order from the legitimacy of the order. Secondly, legitimacy is absorbed by the sovereign; what counts is not the rule but the ruler and his sovereignty: ‘The sovereign authority does not need to have the legal competence of lawmaking in order to make laws.’

The split between the legal system and the legitimate order underscores how much Schmitt’s concept of law is related to the state of exception: in ordinary times, statutory law and case law support the rule of law. Yet, in crisis situations, the question of what ought to be done can no longer be answe-


16 Schmitt 2004, p. 69 (see also p. 19 and 37 ff). Schmitt’s main sources of reference in this context are, of course, Bodin and Hobbes; and he praises Bodin explicitly as the first who acknowledged the state of exception as the key element for modern sovereignty by stating that the commitments made by the sovereign towards the estates or the people are non-binding, ‘*si la nécessité est urgente*’ (Schmitt 2004, p. 16).


red by the legal system; it becomes a question of power – and sovereignty. In Schmitt’s own words: ‘Sovereign is he who decides about the state of exception.’ However, there is little doubt that the sovereign is also characterized by his power to decide within a state of exception and by his capacity to create a new stabilized order. Schmitt was aware of the limits of law and the legal order in a state of exception; according to him, situation-based policy cannot be regulated by law. It demands a decision, even if the rule of law does not provide an answer to the question of how to decide. The limits of the legal order are echoed in Schmitt’s concept of politics that underlies his legal decisionism. For him, politics results from an agonistic structure separating friends and enemies in organized groups prepared for war. In this respect, politics provides for a worst-case scenario that manifests itself in times of intense (violent) conflicts when law can no longer contribute to a peaceful solution of the different parties. Therefore, political decisions are ultimately a matter of fact, or of power, and it is impossible to justify them by higher law, truth, etc. No doubt, this perspective is a clear break with tradition. Schmitt deliberately leaves out the idea of the good life as a guideline for politics. Having eschewed the ethical dimension of politics, he did not need to talk about topics like stable relationships as a precondition for institution building, reciprocity as an element of stabilizing social and legal norms, or peaceful behavior as the aim of interpersonal and transpersonal communications and actions. In Schmitt’s view, this close relation between politics and ethics seemed to be a pure illusion. Dismantled by every dimension that could add sense to human life (like culture, ethics, religion), fragile human existence appeared to be in itself some sort of an exception, because it is able to survive in a world in which life is permanently or potentially endangered by the state of exception. What is left is mere existence, bare life, as the only criterion that matters. This comes very close to Agamben’s *homo sacer*. Like Schmitt, Agamben argues that the state of exception is a suspension of the legal order. He also agrees that the state of exception is not an instrument to regain a good life in peace after existential crisis situations. However, unlike Schmitt, he perceives this state as a permanent structure of modern times; for Agamben, it is a structure at the edge of the legal order.

itself. The state of exception does not result from a sovereign decision, but from a ‘non-decision’. The state of exception is a lawless space. People living in this kind of twilight zone are abandoned; they belong to the legal system only through the ‘ban’, a relation of indifference, a permanent situation in which no one can tell legally the difference between right or wrong, rule or exception, norm or fact. The suspension of the legal order does not empower the sovereign to act; it sets him free to do whatever he wants to do. In this respect, the sovereign is the state of exception: in the same way that his will is unpredictable, so also the norm underlying his action is indefinable.

Whereas Schmitt sees the state of exception as a temporary split between political actions on the one hand, and the legal frame for such actions on the other hand – a split that makes law possible in the first place –, Agamben understands the state of exception as an emanation of the original split that the law institutes at one blow within itself between law and violence. Agamben argues that the common legal framework of Western political systems consists of a two-sided structure. One is a normative juridical structure (potestas, law, or nomos), the other an anomic and metajuridical element (auctoritas or anomy). According to Agamben, the elements of this two-sided structure depend on each other in a dialectic way: the normative element needs the anomic one in order to apply to life; the latter corresponds to the potestas which, by means of violence, validates and implements nomos, but, at times, also suspends it. As they are complementary yet anti-nomical (to some extent contravening), these elements are at the basis of a necessarily unstable equilibrium, the legal-political order. However, in the state of exception, anomy and nomos, life and law, auctoritas and potestas, become confused as one, but without any substantial articulation. These two separate entities are articulated artificially by means of a human action which goes under the name of politics. But instead of mediating between life and law, politics appropriates the law, is ‘contaminated’ (or even poisoned?) by law, and then turns into a sort of pouvoir constituant.

For the concept of power as non-decision making, see Peter Bachrach & Morton S. Baratz, ‘Two Faces of Power’, American Political Science Review, 4 (52), 1962, p. 947-952.

Agamben 2005, p. 50-51.


Agamben 2005, p. 32-35. The paradigm of this structure is Auschwitz. And the archetype for the modern state of exception is not the ancient dictatorship, as it is for Schmitt, but the iustitium (Agamben 2005, p. 41-42).

anomic element and nomos, potestas, and auctoritas is complete, becomes common practice, the precarious equilibrium of the constitutional order comes to an end. Agamben, in fact, explicitly acknowledges that ‘the machine [...] has continued to function almost without interruption from World War One, through fascism and National Socialism, and up to our time. Indeed, the state of exception has today reached its maximum worldwide deployment.’ Today, however, such a system has reached its acme: a permanent state of exception.\textsuperscript{29} Under these conditions, the formal constitution, which imposes limits on the state’s executive power, is replaced by a material constitution heading back towards the model of absolutism. In short, the state of exception has become a paradigm of violence as a constituent element that belongs to and structures the legal order from the very beginning.\textsuperscript{30} In this respect, the state of exception can be everywhere; and, following Agamben, nobody should be surprised to find the state of exception also in political systems with a rule of law. However, this kind of diagnosis raises some doubts about the theoretical merits of Agamben’s analysis. Firstly, the concept of exception, which refers to the complex relation between legal rules or principles on the one hand, and social life on the other, is different from the state of exception that is a normative decision about a crisis. These two concepts must not be confused with each other. Agamben seems to understand exceptions as an emanation of the state of exception, and vice versa. However, this diffusion endangers the concept of law, because every normative standard of rules and principles is then to some extent ‘diseased’ with its own opposite, the non-normative, arbitrary, and therefore violent side. But from what point of view can we actually see this ‘darker side’ of law? And what kind of criteria do we have to evaluate the split inside the law? As Ian Loader and Neil Walker state in their critique of what they consider to be radical state scepticism: ‘If ‘there is always a violence at the heart of every form of political and legal authority’ [...]\textsuperscript{31} upon what grounds can we distinguish between, or develop a critique of, the security-seeking practices of particular states and why should we bother?’\textsuperscript{32}

Secondly, Agamben’s reference to zones of indetermination, the twilight zones in which the legal situation is undefined and uncertain, provides sensitive insights into potential and actual anomalies in political and legal systems of modern societies; examples like Guantanamo Bay or Abu Ghraib

\textsuperscript{29} Agamben 2005, p. 86-87.
\textsuperscript{30} Agamben 2005, p. 59-60.
are readily at hand. At the same time, it is also hard to deny that zones of indetermination contradict the normative standards of a constitutional state. Moreover, there is reason to believe that actors in the public arena would perceive such twilight zones as unjust, that the legal system would condemn them as illegal, and that the political system would come under ‘stress’ – as David Easton would say –, if it does not, at least, to some extent react to this kind of pressure. It is hard to deny that ‘this radical variant of state scepticism tends [...] to underplay the openness of political systems and the theoretical and political prospects that this affords.’ With any ethical, legal, and political criteria to distinguish between different political systems – criteria which Agamben’s argumentation lacks –, all of them look the same, and for all of them the state of exception works as a paradigm of modern governance. But is that true? And what can we gain from such a view that, in the end, can no longer distinguish between Auschwitz and Guantanamo Bay?

Thirdly, to understand the state of exception as a technique of modern governments also raises questions about political intention and rationality. Agamben’s answer to these questions refers to the concept of sovereignty. But who is actually sovereign? In his study on sovereignty, Agamben defines the sovereign by his power to ban *homo sacer*, the life that can be killed with impunity. The sovereign and *homo sacer* are connected in a peculiar complex way. But what kind of political rationality underlies these structures, and, if this structure does not have any rationality, why does it function so well that the state of exception becomes the paradigm of modern governance? Finally, what is governance supposed to mean in this context?

The last question gives an indication of some of the problems that result from Agamben’s argument. He basically lacks an adequate concept of politics. It seems to be mainly for this reason that the concept of exception, and that of the state of exception as well, take the place of the criteria of illegality and injustice. Misure and abuse of power are no longer the subject of ethics, legal theory, and political philosophy, but a mere sign of the times in which the exception rules. From this perspective, it does not make any difference if the people live within a constitutional state or under a dictatorship; regardless of the political system, they tend to become *hominis sacri*, victims in the state of exception.

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33 Loader & Walker 2007, p. 91.
34 Loader & Walker 2007, p. 92: ‘[O]ne is left with a politics of critique, and a failure of political imagination, that leaves radically underspecified the feasible or desirable alternatives to current institutional configurations and practices, or else merely gestures towards the possibility of transcendent forms of non-state communal ordering.’
To sum up, Schmitt and Agamben reveal to what an extent the state of exception argument is determined by their conception of sovereignty, and therefore, by the underlying concept of politics, however insufficient it may be. Whereas Schmitt draws the borderline of political systems along the friend-enemy distinction, Agamben would argue that this distinction is not outside, but inside the political system, expressed by the relation between the sovereign and *homo sacer*. Either way, the friend-enemy distinction has evoked a lot of discussion in the current debate on terrorism; it therefore deserves a closer look.

2 The Free Society and Its Enemies

Liberal democracies, devoted in their normative principles and institutionalized decision-making processes to the Kantian ideal of eternal peace, have serious problems accepting the empirical fact that people have shown, over and over again in history, to be prepared to fight them in mortal combat. Whether it likes it or not, the free society has its enemies – and it has to eradicate them with all means necessary in order to secure its own survival. In fighting these enemies – labeled as ‘terrorists’, ‘extremists’, ‘religious fanatics’, ‘maniacs’, etc. – liberal democracies resort, ever less reluctantly, to measures at odds with their professed principles of freedom. Also in Western Europe, freedom of speech, freedom of religion, basic rights of suspects, and so on, are being restricted at a staggering pace.35 Usually, this kind of aggressive polarization is thought to be the exclusive province of totalitarianism. As Van Gunsteren writes, ‘[t]otalitarian regimes know only the logics of for or against, friend or enemy.’36 Since the friend-enemy distinction is commonly attributed to the former Nazi ideologue Carl Schmitt – as some people never tire of pointing out –, it has become as suspect as its author.37 However, to discredit the opposition by associating it with totalitarianism or Nazism is not the same as to dismantle it theoretically, let alone to ban it from political reality. The enemy has made an undeniable, powerful entrance into liberal democracy and threatens its way of life (as Tony Blair said) no less than its life, from the outside and from the inside.

In their dialogue with Giovanna Borradori, both Jürgen Habermas and Jacques Derrida point to the difficulty of identifying who is the enemy. According to Habermas, ‘one never really knows who one’s enemy is’.

Since al-Qaeda, terrorism has adopted a new form: organizing itself into networks, it has dispersed all over the world. As a result, the opponent can no longer be identified, nor the danger he represents. However intangible, the enemy does not evade characterization in psychological terms: in Habermas’ view, he is a fundamentalist who, disgusted with Western consumerist culture and deprived of its luxuries, falls back on premodern, religious beliefs. Not surprisingly, Habermas locates the origin of the problem, and the key to its solution, in communication: ‘The spiral of violence begins as a spiral of distorted communication that leads through the spiral of uncontrolled reciprocal mistrust, to the breakdown of communication.’

In order to break this negative spiral, living conditions have to be improved and people have to be relieved from oppression and fear. Trust is to be developed in communicative everyday practices, in which people learn to take up the role of the other, alternately speaker and hearer. ‘The critical power to put a stop to violence, without reproducing it in circles of new violence, can only dwell in the telos of mutual understanding and in our orientation toward this goal.’

In Habermas’ view, a new cosmopolitan order has to be established on the basis of universal rights. Ideally, continent-wide organizations such as the EU, NAFTA and ASEAN, will turn into ‘empowered actors’ that are capable of making transnational agreements. Habermas rejects the Schmittian ‘ontologization of the friend-foe relation’ that debunks this new global order as a hidden power-play between national political actors, each with their own specific interests. In a hermeneutic vein, Habermas argues that ‘every objection against the selective application of universalistic standards must presuppose these same standards.’ He raises the same argument against Derrida’s deconstruction of the concept of tolerance. Derrida considers tolerance to be a paternalistic concept: for him, it is a form a charity, based on unequal relations. As an alternative, he puts forward a ‘pure and unconditional hospitality’ that ‘opens or is in advance open to someone who is neither expected nor invited [...]’. Habermas ripostes by postulating that, within a democratic community, tolerance is not a hierarchical and monologous

40 Borradori 2003, p. 38; Habermas 2004, p. 28.
affair, but the outcome of a dialogue based on reason between equal citizens; ‘no room is left for an authority allowed to one-sidedly determine the boundaries of what is to be tolerated’. Subsequently, he repeats his claim that ‘any deconstructive unmasking of the ideologically concealing use of universalistic discourses already presupposes the critical viewpoints advanced by these same discourses.’

In both cases, Habermas’ line of reasoning does not seem to be very convincing. It might be true that, hermeneutically speaking, any criticism of universalistic standards, either of a realist/sociological kind (Schmitt) or of a deconstructive/philosophical kind (Derrida), has to start from presuppositions already contained in these standards. That does not mean, however, that both kinds of criticism cannot be valid and are not capable of relativizing, or at least modifying, the universalistic applicability of these standards. One does not have to reject out of hand the idea of universal rights to recognize that they are inherently vulnerable of being abused for private and national interests, which often happens in political practice. One can easily overstate this claim by reducing universal rights to interests (which, contrary to Habermas’ suggestion, Schmitt never would have done), but the sheer recognition of their possible, and actual, abuse lowers in advance all too high expectations regarding the blessings of a global world order. To be sure, international institutions and international law are indispensable and important tools in the fight against terrorism, as Derrida also agrees, but to suppose that a global world order is able to banish enemies from the face of the earth once and for all is a dangerously naïve mistake. Even in a fully globalized world, boundaries will have to be drawn, otherwise no order would exist in a political or legal sense, but only chaos. A world without boundaries, that is, a world without any officially recognized boundaries, resembles the Hobbesian state of nature in which every man is a terrorist to his fellow-man.

To assume that there can be a peaceful and rational dialogue among citizens about where to draw the line is to deny the inevitable inequality in political status that exists among people and the role authority plays in political decision-making. Communication can never be the solution to the problem, since it is an intrinsic part of the problem. With persons who are placed out-
side and who lack basic citizenship, no communication takes place whatsoever. Refugees barely ever get the chance of participating in the political process that decides their fate. In liberal democracies, proposals are made to strip the political rights of supposed terrorists.\textsuperscript{46} Whatever the amount of arguments exchanged, it is political authority that takes the preliminary decision with whom it wants to converse as well as the final decision on how and when to stop the conversation. Because order can only exist as a result of the drawing and guarding of boundaries, a political decision is required on who may count as a friend and is thus included in this order, and who is placed outside this order and who is, for that reason, not a friend but a stranger who can, ultimately, turn into an enemy if he constitutes an existential threat to the order at hand (e.g., by carrying out terrorist attacks). Therefore, tolerance is, as Derrida rightly argues, always limited, conditional, and one-sided. Boundaries may be stretched – and one function of Derrida’s concept of hospitality is precisely to do so – but they can never be given up completely. As a result, the friend-enemy distinction does not need to be founded in theological speculations about the on-going battle between good and evil (as seems to be the case in Schmitt)\textsuperscript{47}, but can be inferred directly from the political necessity to create order.

Whereas Habermas points to the practical impossibility of identifying the enemy – against what persons, groups, or organizations exactly is the war on terror declared and how are they to be found and fought? –, Derrida deployed his deconstructive strategy in order to call into question, on a more fundamental philosophical level, the concepts of war and terror(ism), including the opposition between friend and enemy they seem to presuppose. In his dialogue with Borradori, which is by far the most interesting of the two, Derrida analysed the ‘event’ of 9/11 in terms of an autoimmunitory process or a suicide. Firstly, the aggression to which the US was exposed appeared to come from the inside: the attacks were carried out by people who lived in the US and were trained and supported by the US. According to Derrida, ‘these hijackers incorporate, so to speak, two suicides in one: their own but

\textsuperscript{46} In the Mohammed B. case, the Dutch public prosecutor required that the suspect should be deprived of his political rights, so he could not abuse them. The judge refused this on the only ground that it was highly unlikely that Mohammed B. would ever make use of his political rights, given his aversion to liberal democracy. This implies, a contrario, that if it is plausible that a terrorist will become politically active, he can be deprived of his political rights. If he wants them, he will not get them, and if he does not want them, he will get them – unmistakably, there is a certain logic to this reasoning.

also of those who welcomed, armed, and trained them.\textsuperscript{48} Secondly, 9/11 made it clear that there can be no longer a ‘balance of terror’ in which states neutralize each other’s nuclear power like in the ‘good old’ days of the Cold War, because the nuclear threat now comes from anonymous forces that strike in an unforeseeable and incalculable way. Thereby, the existence of the world – as a shared physical space no less than as a ‘symbolic’ space, that is, the world as it is organized today politically and otherwise, the ‘world order’ in short – is put at risk. This causes, in Derrida’s opinion, a traumatism for which there is no redemption: the fear will always be there that the worst is yet to come. Finally, the so-called ‘war on terror’ will reproduce the causes of the ‘evil’ it claims to fight. Like a body suffering from an autoimmune disorder, every attack will provoke a counter-attack, over and over again.

Subsequently, Derrida argued that ‘war’ and ‘terror’ are rather vague concepts that can be misused easily. How can there be a war if there is no clearly identifiable enemy? What is terror, and how can it be distinguished from fear, anxiety, and panic? Does terrorism include state terrorism, and may non-state terrorism be justified as a reaction against it? How to differentiate between terrorist attacks and freedom fights, between terrorism and war, and, ultimately, between war and peace? Since there are no clear answers to these questions, the concepts, slippery as they are, can be appropriated opportunistically. The most powerful and destructive appropriation is, in Derrida’s view, the self-evident way in which ‘terrorism’ is used in post-9/11 political discourse. The more the concept is used, the more it helps the terrorist cause by enhancing its status and visibility and giving it a sense of purpose and direction. Here again, the logic of autoimmunity becomes apparent.\textsuperscript{49} Summarizing, ‘[b]y declaring war against terrorism, the Western coalition engenders a war against itself.’\textsuperscript{50}

Derrida’s concept of autoimmunity is meant to function, among other things, as a third term between the friend-foe divide. It destabilizes this classical opposition in at least three closely related ways. To begin with, it shows that there never can be a clear and absolute distinction between the two poles: the enemy lives inside the group of friends and is inseparable from us, like a parasite and its host; conversely, friends conspire, usually unwittingly, with the enemy in a treacherous pact. That explains why people who have lived and worked together for a long time with later suicide bombers were so shocked when they found out the true nature of their supposed friends.

\textsuperscript{48} Borradori 2003, p. 95.
\textsuperscript{49} See also Derrida 2005, p. 63-70 ff.
\textsuperscript{50} Borradori 2003, p. 151.
Subsequently, we have created, and continue to feed, the enemy against whom we are engaged in a mortal combat. We have nourished him, we have trained him, we have supplied him with the weapons with which he is determined to destroy us. (The parable of Frankenstein makes its entry here.) In this sense, we fight ourselves by fighting the enemy. Moreover, and more disturbingly, the enemy exists only as a consequence of the war that we have launched against him and only as long as we are prepared to continue this war. As Hardt and Negri point out, the designation of an enemy, fictitious or real, is a necessary condition for raising a war: ‘[W]hen war constitutes the basis of politics, the enemy becomes the constitutive function of legitimacy. [...] The presence of the enemy demonstrates the need for security.’

Ultimately, by fighting the enemy and, by implication, ourselves, we may end up in destroying ourselves and everything we stand for (including our guiding rules and principles).

Another implication of the logic of autoimmunity is that the enemy, precisely because he is inseparable from us and is created by us, may be fully indistinguishable from us and, therefore, very difficult, if not down-right impossible, to identify. Who is the enemy? In an earlier discussion with Schmitt’s conception of the political, Derrida argued that ‘the purity of pólemos or the enemy, whereby Schmitt would define the political, remains unattainable.’ According to Schmitt, the political presupposes the possibility of distinguishing between friend and enemy, and therefore, of killing. Again, who is to be killed? Who is my enemy? One answer Schmitt gives is that ‘[m]y brother is found to be my enemy.’ In another cryptic formulation, ‘[t]he enemy is our own question as figure’ (‘[d]er Feind ist unsre eigne Frage als Gestalt’). Derrida questioned Schmitt’s characterization in the following way:

The enemy would then be the figure of our own question, or rather, if you prefer this formulation, our own question in the figure of the enemy. The enemy in question, and through the brother, the brother enemy, it originally resembles, indiscernibly resembles, the friend, the original friend (Freund) qua brother of alliance, sworn brother, according to the ‘oath of fraternity’ (Schwurbrüderschaft). The question is armed. It is an army, a friend enemy army.

51 Hardt & Negri 2004, p. 31-32.
53 Both quotations are taken from Derrida 1997, p. 149-150.
54 Derrida 1997, p. 150.
My brother, who, in the figure of my own question, questions me, is enemy and friend, two in one. Hardt and Negri point out that, since the war on terror has no clear target, everybody can become an enemy or, for that matter, a friend. ‘To the extent that the enemy is abstract and unlimited, the alliance of friends too is expansive and potentially universal.’ More radically, Derrida suggested in the quotation above that, in a war on terror, enemies and friends are not only abstract and boundless categories; they might also become blurred to the point of indistinction. ‘The figure of the absolute enemy, in this reversing passage, seems to resemble that of the absolute friend: the deadliest tragedy of fratricide.’ What we are fighting is a hybrid creature, partly friend, partly enemy, a ‘friend enemy army’, indeed. A clear symptom of this blurring is that the parties involved can easily switch positions: erstwhile friends turn into enemies (once, Bin Laden was supported by the US in his fight against the Taliban, as well as Saddam Hussein’s regime of terror), and vice versa (former terrorist Khaddafi is now commonly seen as an ally in the anti-terrorist cause).

These two dialogues by Habermas and Derrida, taken together, can be read as a justified warning against too quick and global declarations of war and enmity. In the current war on terror, it is far from clear who is the enemy, let alone, how to find and fight him. Belligerent rhetoric, omnipresent in today’s political discourse, may encourage and strengthen the terrorist cause instead of weakening it. At the same time, the Western World cannot afford to stand by, doing nothing when attacked. To pretend that terrorism is not the enemy but fear, as Benjamin Barber does, is to close one’s eyes to the reality that there are people on the loose, inside and outside our world, however hard to identify and trace down, who aim to destroy it. Surely, the West must defend itself, but the crucial question is precisely with what means. A widely shared assumption is that the war – if it is indeed a war – should be fought as much as possible in accordance with the rules and principles underlying our legal and political order. While fighting the enemy, one should not forget to invest in friendship as well. As Derrida indicates,

57 Benjamin R. Barber, Fear’s Empire. War, Terrorism, and Democracy, New York: W.W. Norton & Company 2003, p. 32.
58 Strictly speaking, the fight against terrorism is not a war because, among other things, there is no clearly identifiable enemy; one cannot lead a war against a “network”, as Habermas states (Borradori 2003, p. 35). It can be argued, however, that the meaning of the concept of war has changed over time, with declarations like ‘the war on drugs’ and ‘the war on poverty’. In the new, broader sense of the word, the fight against terrorism may be considered a war (cf. Hardt & Negri 2004, p. 14).
friendship consists in the suspension of the possibility of killing that establishes community.59

3 De(con)struction of Terrorism

Three basic positions can be discerned in the foregoing discussion about the state of exception and the friend-enemy distinction. To begin with, the deliberative position, championed by Habermas, who tries to parry the terrorist challenge by promoting cross-cultural dialogue and education of the unenlightened. In his view, terrorists are people who have not yet seen the light of reason, but might be convinced to do so. But if not, are ‘we’, the heirs of the Age of Reason, allowed to kill them? Here, the deliberative position remains silent. Secondly, the decisionist position, defended by Schmitt, who pointed to the limits of a rational approach building on communication. In his view, liberalism fell prey to the romantic dream of an ‘endless debate’.60 In the end, the Rechtsstaat is constituted and, in the case of existential crises, maintained by non-liberal means. The decision to suspend or to install or reinstall the rule of law can never be founded on law, but is a ‘pure’ decision to be taken by the sovereign. Agamben radicalizes Schmitt’s decisionism by questioning the old separation between the state of exception and normalcy: in his opinion, nowadays power triumphs over law not only in extraordinary but also in ordinary times. In this line of thinking, fighting terrorism by using means that contravene the rule of law (such as torturing suspects) can be justified, not so much on moral or legal grounds, but on existential grounds only: in the fight for life, you have to do what you have to do; or as Schmitt put it with reference to Napoleon’s order: ‘Partisans can only be fought by partisan means.’61

Derrida’s project of deconstruction takes an unstable middle position between Habermas’ naïve deliberationism and Schmitt’s all too realistic decisionism. On the one hand, Derrida is keenly aware of the limits of rationality: in his view, there are no universal applicable principles to which everyone gifted with reason could be convinced to comply. Politics requires the drawing of boundaries, which cannot always be fully justified legally or

59 Derrida 1997, p. 122-123. Since this passage is mostly written in the subjunctive, it is very hard to pin down what Derrida actually wanted to say here. However, we claim our interpretation to be true to his general line of thinking.


morally. On the other hand, Derrida justifiably warns against the danger of too easy declarations of the ‘war on terror’. It is not at all clear what or whom we are fighting in the name of anti-terrorism. In this way, deconstruction can be seen as a kind of hyper-liberalism taking realist claims seriously and, at the same time, playing them out against themselves by endlessly questioning the realist basis of the allegedly realist claims. Following the logic of auto-immunity, we are fighting enemies of our own design. This approach points to self-restraint in the means to be chosen in sustaining a particular legal order. Moreover, it points to the importance of understanding the origins of terrorism – an understanding that not only identifies the obvious factors of poverty and lack of recognition, but involves a critical and confronting self-inquiry into Western colonial and post-colonial politics. The call for self-inquiry echoes Socrates’s well-known dictum of gnóthi sautón. And, yes, since the old days of the Greek polis, the question remains the same: Are philosophical reflections capable of calling into question political actions by posing irritating questions? ‘We’, the enlightened ones, are already irritated by terrorism. ‘They’, our enemies, the terrorists, seem to be irritated not so much by their failure (which only encourages them), but above all by their success. As the example of Hamas in Palestine shows, terrorists tend to fall silent as soon as they have reached their goals. The challenge is to take useful insights from both Habermas’s deliberationalism and Schmitt’s decisionism in answering the question: What comes after terrorism? This highly irritating question may be the philosophical beginning of a de(con)struction of terrorism.

63 In a recent article, we have made a tentative start in answering this complex question by focusing on the self-destructive character of terrorism, cf. Oliver Lembcke & Bart van Klink, ‘Eskalation als modus operandi. Zur Rationalität des modernen Terrors aus politiktheoretischer Sicht’, in: Martin H.W. Möllers & Robert Chr. van Ooyen (eds.), Politischer Extremismus. Bd. 2: Terrorismus und wehrhafte Demokratie, Frankfurt a.M.: Verlag für Polizeiwissenschaft 2007, p. 29-44. As for instance Loader & Walker 2007 (Chap. 8) argue, there always has to be a balance between security and other principles connected to the rule of law. From a normative point of view, it follows that terrorism should not be fought by all means available which, to a greater or lesser extent, defy the principles of the legal order concerned. Moreover, a detached stance is required that involves, among other things, less media exposure than terrorists claim for their own activities. Yet, even if terrorism may appear as an existential threat to the existing legal order, terrorists still have a vested interest in keeping this ‘hostile’ order alive, as the enemy, in order to justify their war against ‘the war against terror’. In one way or another, this spiral of violence has to be broken in order to prevent what Schmitt called the ‘ultimate final war of humanity’ (Schmitt 1996, p. 37).