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Auschwitz as Nomos of Modern Legal Thought

Tawia B Ansah, New England School of Law

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Auschwitz as *Nomos* of Late Modern Juridical Thought

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**Introduction**

Ananya Vajpeyi notes that, “Thought in Europe has yet to recover from the episode, now more than six decades old, of Nazism. The Holocaust continues to be *the* theme that preoccupies European intellectuals even into this new century.”¹ She goes on to discuss the urgent need for a new law in India, an Act to condemn genocide that, given the repeated instances of this crime on the sub-continent within the last few decades (i.e., Gujarat 2000 and other mass atrocities), it is her hope will enable India to “recover” from these atrocities. Vajpeyi hopes, in effect, that political repair can be effectuated by juridical interruption; that is, that by nominating each violent event a legal “genocide,” the sense of a continuous, normative violence-as-usual will be broken. Her call in 2005 echoes a similar one in 1945 after WWII when the international community called for the creation and later ratification of a Genocide Convention.² The Convention is one of the founding documents of modern international criminal law, as well as a source of the post-WWII laws protecting human rights at the international level.

Vajpeyi’s comment, though, has as much to do with the legal crime of genocide and the reparative aspect of nomination, the Holocaust looming large in the background, as it does with the status of the death camps within philosophical discourse on the left within the West. Recently, for instance, one intellectual, Giorgio Agamben, has made Auschwitz the centerpiece of his theory on the relationship between sovereign power and

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the juridical subject. This centrality of the events in Nazi Germany is most clearly evident in his so-called “homo sacer project,” a series of at least three, possibly more (apparently forthcoming) books on the modern sovereign. Of the many aspects of his theory that have been subject to critique, perhaps the most sustained is this centrality of the camps.

If Vajpeyi’s general proposition is right, that the camp remains central to thought, then perhaps the issue is not so much the fact of centrality but rather the modality and purpose of deployment, i.e., how the camps function as central to thought, and why, i.e., to what political, juridical or other end the camps are deployed as central. Gillian Rose, for instance, argues against the postmodern representation of Auschwitz as “the measure of demonic anti-reason.”

Alain Badiou also, whilst he “accept[s], without reservation, the singularity of the extermination,” notes that this does not deny its character as anything other than a “political sequence,” and not “Evil” in some absolute sense.

In this essay, I focus on how and why Auschwitz is central, indeed, paradigmatic, to Agamben’s philosophical thought. I ask how this centrality has been received by his readers, those of us in law and other disciplines for whom his theories have value. That

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3 The “homo sacer project” is comprised of three books: *Homo Sacer: Sovereign Power and Bare Life* (Stanford, 201); *Remnants* (op. cit.), and *State of Exception*, trans. Kevin Attell (Chicago, 2005). One author, Thomas Carl Wall, has described the project as follows: “The theses in Giorgio Agamben in his still expanding *Homo Sacer* project are, in part: (1) the original political ‘element’ is sacred life; (2) this sacred life, at one time exceptional and excluded from public life, is now virtually coextensive with the political as a whole; (3) as such, as virtually coextensive with the entirety of the political, this sacred life is also virtually banalized (as in the banal expression ‘politics as usual’); and thus (4) it is the goal of sovereign power, in accord with the logic of the ban, to isolate and to actualize sacred life as banal in conformity to its classical definition as that life which can be killed but not sacrificed. Insofar as it is worthless, utterly banal, this life – nothing but bare life, or life purely insofar as it is political – falls outside any but legal language. There is nothing much to say about this bare life. (I am able-to-be-killed. So what?).” Thomas Carl Wall, “Au Hasard,” in *Politics, Metaphysics, and Death: Essays on Giorgio Agamben’s Homo Sacer*, ed. Andrew Norris (Duke, 2005), at 31 (emphasis in original).


is, if we wish to use Agamben to assist us in understanding the contemporary state of
global law, sovereignty and governance – for instance, how to see Guantanamo Bay, the
“war on terror,” and other recent politico-juridical events through the lens of his
analytical categories: “state of exception,” “bare life,” and the modern sovereign – do we
also need to acquiesce in the central status of Auschwitz to those categories? How then
does this shape our approach to global law and political governance? Thus, I examine a
sampling of the critical engagement with his work, particularly those concerned to show
either that Auschwitz no longer remains central or that, whilst central in the sense of
“important” and productive, should not occupy a paradigmatic status within thought.

I hope the analysis and comparison will suggest something about the nature of
late modern thought as it pertains to the massive event of the Nazi death camps. For
Agamben, as his critics note, the edifice of his theory would collapse without Auschwitz
as paradigmatic to it; this is enough for some to discredit the theory of sovereignty and
the exception as jejune at best, dangerous at worst. I do not propose to defend
Agamben’s deployment of Auschwitz as central, but to show how it works, and the ends
he hopes to achieve thereby. Likewise, I examine the critical discourses opposed to the
centrality of the camps, and ask how they work to displace this centrality, and the ends in
view of this displacement.

How successful is either modality? Is there a sense, in each case, that some part
of the objection is incorporated such that even as, on the one hand, Auschwitz is
paradigm and/or the nomos of thought (in Carl Schmitt’s spatial sense of the term,\footnote{See, e.g., Carl Schmitt, \textit{The Nomos of the Earth in the International Law of Jus Publicum Europaeum}, trans. G.L. Ulmen (Telos, 2006), orig. \textit{Der Nomos der Erde im Volkerrecht des Jus Publicum Europaeum} (Berlin: 1950) at 70: ‘Nomos comes from nemein – a [Greek] word that means both ‘to divide’ and ‘to pasture.’ Thus, nomos is the immediate form in which the political and social order of a people becomes
the temporality of the paradigm) of late modernity, it is also quite marginal, as a political element, to late modern thought? Is the reverse also true, on the other hand, of Agamben’s critics? What can we learn from this dialogue around this epochal event about thought itself in late modernity? Much will depend upon what the event is, or rather, how it is perceived: as a massive trauma, with psychoanalytical implications; as a “holocaust,” with sacral-redemptive intimations; as incommensurable, ultimate or radical evil, with an aura of silence and awe about it; as a technique of war, no more nor less “evil” than any other, notwithstanding the enormity of its dimensions.

In the result, I argue that the contrasting views cohere in a dichotomy: for Agamben’s readers critical of the death camp as juridical paradigm, Auschwitz is an instance of mass human rights atrocity in a nominative, pragmatic, and exceptional case. It is paradigmatic of the failure or absence of the political, anomos rather than nomos. As such, it can be invoked, much as does Vajpeyi, to engender a discourse of “repair” to a traumatized socio-political psyche or state of affairs, and to restore a sense of the normalcy of nonviolence. For Agamben, Auschwitz is ontological, paradigmatic of the political element, and normative: its delineation as “exceptional” is fused with the rule. Through the paradigm, he wants to make visible the figure of the Muselmann as a central ethical and political problem for thought. 7 Whereas the former perspective sees the

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7 Neil Levi and Michael Rothberg, “Auschwitz and the Remains of Theory: Toward an Ethics of the Borderland,” *symploke* 11.1-2 (2003), 23-38 at 24: examining “the ambitiousness of [Agamben’s] project, which seeks to place Auschwitz at the center of modern thought and politics,” and attending to “the way Agamben uses the writings of Primo Levi in order to establish the figure of the Muselmann as the absent ground of a new ethical dispensation” (italics in original).
camp as an aberration, the latter sees it not so much “essential” as constitutive, i.e., as
indeed the “nomos of the earth,” in Schmitt’s famous phrase.⁸

Ostensibly, the former view seems historical and the latter transhistorical and
exemplary. And yet, by repudiating the idea of Auschwitz as exemplary of a certain kind
of annihilatory violence, by rejecting its juridical element, the former view also seeks to
obviate the extent to which historically this violence has also been normative. Thus, each
view provides a window into the nature of late modern juridical thought and, with it, the
possibility for political intervention. The question will then be what the consequences are
for each view: on the one hand, the pragmatic view sees law as an end in the reparative
modality: legislation will save us from more violence, or mediate between violence and
the self. The other sees law as merely a means to an end, the basis for a shift in
perspective more radical, and onto-theological, than legislative: law is itself both the
mediatory violence and the basis for its own self-overcoming.

Each view, in a kind of binarity, depends upon the other. As such, analyzing the
opposition is suggestive of the gestures within each of them as well. For Agamben, to
effect the transhistoricity of the camp, the historical camp must be sedimented and
immanentized: one singular event can be traced back to the beginnings of the
philosophical and theological tradition: to Athens or to Eden, depending upon the point of
view. For the critical or pragmatic approach, the transhistoricity of Auschwitz must be
repudiated; it functions within historicized theory as an exclusion. The latter conforms to
a spatial metaphor, the former to a temporal one.

⁸This is the title of Schmitt’s book. See also, Schmitt, Nomos, at 71: the nomos is linked to “a historical
process – to a constitutive act of spatial ordering.”
I examine three bases for exclusion, all having to do with the danger, to thought, of situating the camps as paradigmatic: exclusion due to the fear of recurrence (immanentization “kills the victims all over again”), due to the fear of maintaining an irrational element within juridical, logical thought (the *anomos*, or the political chaos, of the camp), or due to the fear of hegemony and colonization of the camp within thought (the erasure of any and all historico-philosophical alternatives to the conception of the sovereign as exemplified by the camp). My analysis is not designed as a critique of these views, or indeed of these fears, which are quite real. On the contrary, I wish to show how and why, through the juxtaposition of the paradigmatic and the pragmatic perspectives, juridical thought obtains a certain shape (spatially speaking) and projection (temporally speaking) under the pressure of the camp as nomos. My aim, then, is to have a clearer sense of how we think the nomos within late modern thought, and as such how, in consequence, we may conceptualize what is normative to political and juridical judgment.

**Part 1: Politics and exclusion**

There are several ways in which modern thought, in its relationship to Auschwitz, attempts exclusion, or at least displacement from a central or paradigmatic status. Any historical event, especially one of such massive impact, must go through various levels and stages of attention and estrangement. In this essay, I am concerned with the question of how thought, or the particular discourse, either centralizes or displaces the camp in its
unfolding of its nomos, or political element, i.e. as a specific discursive practice (law, political science, metaphysics, etc.).

As noted, I will look at the two frameworks for situating the camp: ontology-paradigm on the one hand, and nomination-pragmatism on the other. Within the latter, I focus on three discursive modes of exclusion, each related to ways of conceptualizing thought and mediation. The three modes of exclusion are political, juridical, and philosophical-historical. The proponent of the first is Andrew Norris, who is editor of a volume of critique \(^9\) that engages with Agamben’s *homo sacer* project. I choose two other essays within that same volume to represent the other modalities of exclusion: Peter Fitzpatrick for law, and Andreas Kalyvas for philosophy-history.

First of all, in what sense is Auschwitz exemplary as the nomos? Instead of synopsizing Agamben’s *homo sacer* project, I explore its outlines through the various authors’ critical engagements with it. I will then analyze Agamben’s theory in relation to these critiques as a juxtaposition rather than as a defense. In this way, I hope to show how the various perspectives and strains are interrelated and, as such, offer a perspective on conceptions of the nomos within late modernity.

According to Andrew Norris, a political scientist, the case for Auschwitz as paradigm of modern politico-juridical discourse fails. Indeed, not only does Auschwitz as “‘the fundamental biopolitical paradigm of the West’” \(^10\) fail within legal and political discourse, but its central instauration precludes thereby an ethical alternative to the violence of the camps itself.

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\(^9\) *Politics, Metaphysics, and Death: Essays on Giorgio Agamben’s Homo Sacer*, ed. Andrew Norris (Duke, 2005); hereinafter “Politics.”

\(^10\) Norris, Politics, at 262-63 (quoting Agamben, citation omitted).
Norris points to Alain Badiou’s “polemic” against “the general use of the Shoah as the unique and privileged example of radical evil.” As Norris explains, in his critique of the “unfortunate result in Agamben’s case” of the centrality of Auschwitz, “On Badiou’s account, the assertion of the exemplary status of the Shoah asserts both that it is the standard by which evil is to be judged in our time and that, as the paradigm, it is beyond such comparison with other, less radical forms of evil. ‘As a result, the extermination and the Nazis are both declared unthinkable, unsayable…yet they are constantly evoked…The measure must itself be unmeasurable, yet it must constantly be measured.’”

Norris’s critique of Agamben’s homo sacer project centers on the camp as nomos. The paradigm fails, in Norris’s view, to vindicate Agamben’s claims in developing a theory that would “return[] thought to its practical calling.” A recurrent theme of Norris’s critique is a fear of the recurrence of the very violence that Agamben’s theory purports to contest through the idea of the camp as paradigmatic. According to Norris, once the violence is so conceptualized (as nomos, thus normative), its practico-political recurrence is inevitable.

Norris notes that “Agamben’s project hinges upon the paradigmatic status of the camps.” Quoting Agamben, Norris notes that, “More specifically, the Nazi death camps are not a political aberration, least of all a unique event, but instead the place where politics as the sovereign decision on life most clearly reveals itself: ‘today it is not

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12 Norris, Politics, at 264 (quoting Agamben, Homo Sacer, at 5).
13 Norris, 263.
the city but rather the camp that is the fundamental biopolitical paradigm of the West.” 14
As such, “Without the claim for the paradigmatic nature of the camps, Agamben’s own arguments are marginalized, and politics and law become again a matter of communities, interest, conveniences, and so on. This makes it imperative for those who find Agamben’s work suggestive or compelling to ask what makes the camps and their victims the best examples of *homo sacer*, and whether the claim that they are raises problems for Agamben’s analysis.” 15

Essentially, the camp as paradigm is a problem for Agamben on several counts: first, on historical terms: Norris asks “why the camps of Stalin’s Soviet Union aren’t the paradigm of the political.” 16 Second, the choice of the German camp is informed by the decisionism that Agamben derives from “the erstwhile Nazi Carl Schmitt,” 17 a choice presumably tainted by both Nazism and decisionism. A third and related problem for Agamben is his methodology in deploying the camp as paradigm: it is spatial rather than “functional,” with intimations (related to decisionism) of colonial expansion and authoritarian imposition. The critical gravamen: Agamben’s schema installs a dilatory camp at the center of thought, which entails “deciding upon the camp victims one more time, thereby repeating the gesture of the SS in precisely the way he says we must avoid.” 18

Norris encapsulates the problems with Auschwitz as nomos on the basis of the decisionism of the exception and the paradigmaticism of the example, the fusion of which creates a theory that cannot open itself up to “an immanent critique,” to wit: “But on

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14 Norris, 262-263. Elsewhere, Norris notes “.
15 Norris, Politics, at 271.
16 Norris, Politics, at 271.
17 Norris, Politics, at 272.
18 Norris, Politics, at 278.
[Agamben’s] own account, there is an isomorphism between the exception and the example or paradigm. Given his acceptance of Schmitt’s analysis of the former as the product of the sovereign decision, this renders Agamben’s evaluation of the camp as ‘the fundamental biopolitical paradigm of the West’ a sovereign decision beyond the regulation of rule or reason. As this casts his readers as either subject or enemy, it is hard to imagine how the politics it might produce will serve as a real alternative to that which it contests.”

The problem with Auschwitz as paradigm is that it represents, within Agamben’s theory, a dangerous and bloody “nomos of the earth,” an imperialist basis for juridical thought itself. Such a nomos sits outside of law, is unregulated, and subject to no rational critique. It makes of Agamben himself, proffering an example that by definition (i.e. as paradigm or para-deigma) transcends history, a “sovereign who decides upon the exception” as extrinsic to judgment. Thus, whereas “the central example of the Muselmann of the Nazi death camps” lends Agamben’s work “a great deal of pathos, and allows him to argue that the history of metaphysics is not an arcane subject…but [is] in fact the most pressing and important ethical and political topic of our time,” and that centralizing Auschwitz to thought will “‘return thought to [its] practical calling],’” its fusion with Schmittian decisionism means that the paradigm falls outside of its historical situatedness and time; it is itself the category and instantiation of metaphysics in its fusion with history.

19 Norris, Politics, at 264.
20 Norris, Politics, at 270.
Such a normative logic, or illogic, fails to provide a rational politics in the alternative to that of the camp itself. Schmitt’s theory of sovereignty maintains that “any legal system rests upon a decision that cannot itself take the form of law.” As such, not only does the example/exception isomorphism fail in formal logic, and not only does it represent a “sovereign” decision that “becomes instantly independent of argumentative substantiation and receives an autonomous value,” it is also, as such, not a “universal” (i.e. as compared with example as “concrete universal that displays itself as such to the highest form of reason, and not merely the sovereign decision”).

Decisionism, in short, pulls the example into the juridico-political terrain where it is “made by fiat” merely; the form of this isomorphism could not apply to other instances of bare life.

In the result, then, the principal failure of the schema is in its evincing a recurrence of the crimes it contests. Norris concludes: “Moreover, what the above analysis suggests is not the need for a more poetic or poietic mode of thinking, but one that can escape the decisionistic implications of Agamben’s understanding of the logic of the political and still make judgments concerning what politics is and should be…”

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21 Norris, 272. See also Norris, at 275: “The clear implication of Agamben’s own explanation of what makes something exemplary or paradigmatic is that in claiming a paradigmatic status for the camps he is and can only be making an unregulated decision that cannot be justified to his readers in a nonauthoritarian manner” (emphasis in original).
22 Norris, Politics, at 267.
23 Norris, Politics, at 271.
24 Norris, 276. See also, at 277: “The paradigm or example mirrors the structure of the exception: as the one is an inclusive exclusion, so is the other an exclusive inclusion” (emphasis in original).
25 Norris, 277: “For Agamben to escape this unwelcome paradox [whereby his theory is a “repetition of what it sets out to condemn,” id.] he would have to relax the identification he asserts between philosophy and politics. He would, in other words, have to justify a mode of evaluation that escaped the limitations he attributes to logic.”
26 Norris, Politics, at 277, quoting Schmitt.
27 Norris, Politics, at 276.
28 Norris, 283 n.57.
29 Norris cites to Karen Quinlan and the Texas death row inmates as examples of Versuchspersonen, see 270-71.
Unfortunately, Agamben’s acceptance of Schmitt’s decisionism makes it impossible for his analysis to claim any general validity. Perhaps worse, it puts him in the position of deciding upon the camp victims one more time, thereby repeating the gesture of the SS in precisely the way he says we must avoid.”

Central to the fear expressed by Norris in relation to the centrality of Auschwitz, fused with Schmittian decisionism, is recurrence and dilation. First, as noted, Agamben’s spatial metaphor intimates a decisionistic imposition, i.e. shades of imperialism, whereupon the example, Auschwitz, occupies and colonizes political thought. Second, fusion here subtends the formal blurring or confusion between a “logic of politics” as applied to a “logic of philosophy” such as to universalize and immanentize the example through the authoritarian decision.

Animating, and juxtaposed against, these fears and the fusion that engenders them is a problem of critical discursive containment. Take, for instance, Norris’s analysis, in a footnote, of the “lacunae” in Agamben (in the relation “between the logic of the political and the actual [or ontic] history of politics”): Norris begins by quoting Agamben to the extent that “‘the link between bare life and politics…secretly governs the modern ideologies seemingly most distant from one another’ (Homo Sacer, 4)” He then asks: “Why then do they ‘seem’ to be so different from one another? And why is this link clearer in some sites – the camps – than in others, such as contemporary Britain? If contemporary Britain is essentially the same thing as a camp, why is it not a camp? More

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30 Norris, Politics, at 278.
31 Norris, 277: there is a fear here of (con)fusión, both discursive – it leads to a theory that lacks “any general validity” – and logical (the two modes, politics and philosophy, have diametrically opposed aims, whereby politics is “potentially deceptive rhetoric,” and philosophy is “impartial rational argumentation.”
32 Norris, 283 n.57.
33 Norris, 283 n.57.
fundamentally, why is the polis not itself a camp? Norris then goes on to explain that there is a difference between the polis and the camp, the former the site of an implicit relationship between political life and bare life, or rule and exception, the latter the site of an undoing of that relationship. The rhetorical slippage, from “seeming” to “essence,” is small but critical, and points to what more deeply underwrites the critique: the lack of clear distinctions, “decisive” criteria, sets of arguments, and so on, that would rupture the problematic fusion (of rule and exception, political life and bare life) and diffusion-excess of the camp within political discourse.

Furthermore, a sense of two Agambens, a good and a bad, so to speak, becomes evident upon reading Norris. He attempts to keep them distinct. Thus, one finds the “good” Agamen of The Coming Community – here he is more like the logical Hegel, the “practical” Heidegger, and the non- or anti-authoritarianism of a Kantian “sensus communis aestheticus” – and then the “bad” Agamen, essentially of the homo sacer project – here he is more like the “erstwhile Nazi Carl Schmitt.” The latter Agamen is guilty of imperialism and authoritarianism precisely because his example (Auschwitz) is a product of a sovereign decision outside of the terrain of judgment (concerning “what politics is and should be” at 278) and outside of law: “the determination that the camp is

34 Norris, 283 (emphasis in original).
35 Norris, 276: whereby the “example is a concrete universal that displays itself as such to the highest form of reason, and not merely the sovereign decision.”
36 Norris, 277: whereby “it is the return to the question of practice outside of philosophical reflection that makes Agamen’s work appear a revitalization of the Heideggerian tradition. Unfortunately, Agamen’s acceptance of Schmitt’s decisionism makes it impossible for his analyses to claim any general validity.”
37 Norris, 275: “In Kant’s judgments of taste, there is a ‘wooing’ of the assent of others who share your common sense of the matter. In Agamen, there is a decision that is imposed upon others.” Also, at 276: after quoting from The Coming Community, Norris notes that “[t]he exception and the decision both go unmentioned in this text, and the suggestion is left open that something like Kant’s sensus communis allows us to recognize that ‘shows itself’ as being exemplary” (emphases in original).
38 Norris, 272: on Agamen’s theory of a confusion between law and exception, exemplified by the camp, rather than that the camp was less about law and more about a “fascist imitation of law”: “Such suspicions [that Agamen got the Schutzhaft, or state of exception, entirely wrong] are only heightened by Agamen’s reliance on the erstwhile Nazi Carl Schmitt’s account of the sovereign decision.”
representative of the rule is one that is *made* and not in any substantive sense
recognized…In each case the decision is primary, and the rule derived from it.”

The fusion leads to a rulership of death rather than life. That is, if the example is of the decision on the exception, and the “‘exception and example are correlative
concepts that are ultimately indistinguishable,’”\(^{40}\) then given that the example is “unto
death,” so also is the decision. But this “isomorphism” is especially keen given that Norris
seems to subscribe to a Platonic theory of recognition, and so is worried by a theory that
cannot resort to anything beyond itself. The deep problem of decisionism, shackled as it is within Agamben’s theory to the camp, is that in each case the decision,
in Schmitt’s words, “becomes instantly independent of argumentative substantiation and
receives an autonomous value.”\(^{41}\) (275).

But what if this most troubling aspect of the example-exception nexus is also the whole point of a departure from the Platonic or rationalist schema within which it is not only a failure in its own terms, but dangerously so? What if the “good” Agamben, the one with (arguably) a post-juridical *political* vision of an ideal community which “focuses upon the possibilities opened up by nonidentical, liminal being, rather than upon the idea that the camps are where the best examples of such being is found”?\(^{42}\) Is the same Agamben as in the latter (camp as polis/political)? Put another way, what if the *Muselmann* is the index, in reverse, of both abject and ideal, the one outlined within the homo sacer project (bare life), the other within the “coming community” (liminal, “whatever” being)?

\(^{39}\) Norris, 275.
\(^{40}\) Norris, 275, cited to Homo Sacer, 22, 21.
\(^{41}\) Norris, Politics, 275.
\(^{42}\) Norris, Politics, 276.
When we see the gesture in each as a kind of ecstasy, we see that the logical, pragmatic or doctrinal failure is a necessary prerequisite to the “validity” of the example-exception fusion. Norris, in attempting to sever the good from the bad Agamben, cites to a passage from *The Coming Community* that he suggests is closer to a Hegelian rationality than to the decisionism imported into Agamben’s conceptualization of the camp as paradigm of bare life: there, the example is universal precisely because it is “neither particular [*particolare*] nor universal [*universale*] but a singular object that shows its singularity [*singolarita*]. Hence the pregnancy of the Greek term, for example: *para-deigma*, that which is shown alongside...hence the proper place of the example is always beside itself, the space in which its undeniable and unforgettable life unfolds. This life is pure linguistic life.”

The point is that Auschwitz too, conceptualized as paradigm, is thereby rendered as a “singular object” outside of, and always alongside, its own historico-material context. The attempt, then, to separate the good and the bad Agamben, like the drive to distinguish between the abandonment of law (bare life) and the releasement to law (liminal, nonidentical being), is of a piece with the desire of law to purify itself of, or to “exuviate,” the inner, shameful, paradigmatic and contaminating violence (of Nazism, decisionism, imperialism, exclusion, etc.) as a nomos. In a sense, the exuviation of a central-normative violence is itself a purifying gesture that echoes the originary exclusion of bare life in order to subject it to the violence of sovereign biopower. The gesture, as recurrence, itself is a kind of ecstasy, encompassed within the refusal of law in relation to Auschwitz, the outside or refusal that reveals the truth of law as law purified of

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Auschwitz, or law purified of the violent ecstasy-privation of bare life. The law, like the sovereign, longs to express and encompass “the example [as] a concrete universal that displays itself as such to the highest form of *reason*, and not merely the sovereign decision,”45 thereby escaping the taint of tyranny. But the point, of course, is that the “good” and “bad” Agamben reflect two sides of juridical thought.

As a rigorously logical, juridical and political matter, Auschwitz as paradigm fails to live up to its epistemological potential as a conduit to an alternative politics, a politics that escapes the fascistic, fatalistic, and authoritarian teleology (or ban) of the sovereign. Nevertheless, what is evident in both the “good” (Hegelian, concrete universal) example and the example fused with the exception within Agamben’s theory is that both are involved in recurrence, both subtend visions of purification (pure “high” reason for the concrete universal, pure silence-abjection for the *Muselmann*), and both *qua* example are always “para-deigma.”

What is perhaps also interesting about Agamben’s example is that the purification is implicit in both the practice that is the paradigm – genocide as a will to, and program of, identity purification – and in the extent to which, precisely as decision, it is excluded from the realm of decision, i.e. the law. Thus, similar to Norris’s own programmatic exclusion of Auschwitz as an example that would lend the political theory within which it is central any “general validity,”46 so also it is the very centralization of Auschwitz that suggests itself as a strategy or procedure of truth, a setting-beside-itself and outside of the ideal terrain of the projected disconcealment of the political element.

45 Norris, Politics, 276 (my emphasis).
46 Norris, Politics, at 278.
Contrary to Norris, then, Agamben’s *homo sacer* project “cannot be separated” from the ideal or affirmative projections in his other work (including *The Coming Community* and *The Open: Man and Animal*). Central to both is the paradigmatic figure of the *Muselmann*. Auschwitz, then, represents not the fulfillment of the (Hegelian) logic of the example, but its distortion to evince something beyond it, beyond even its rationalistic universality. But it is in this sense that Norris is right: the problem of recurrence (of the camps, specifically, but also the politics within modernity of the camp-as-*nomos*) cannot simply be avoided by “a more poetic or poietic mode of thinking” even if the latter were able to effectuate the sought-after escape from decisionism of the *homo sacer* (or onto-political) project within Agamben, since the ecstasy of the example is already implicit in both the quest for a “return [of] thought to its practical calling” and, with it, the problem of recurrence.

**Part 2: Law and exclusion**

Peter Fitzpatrick notes in the conclusion to his own critique of the camp as paradigm, “we cannot live in a terminate bareness, ‘without any mediation’ (171). We can live only mediately.” In his critique of Agamben’s *homo sacer* project, Fitzpatrick

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47 Norris, Politics, at 278: whereas “true, nonmetaphysical philosophy will be a variant of Heideggerian *Gelassenheit*” which can be “found in *The Coming Community*, this is not an accurate characterization of *Homo Sacer*,” i.e., Norris, as do most readers of Agamben, sees a distinctly different approach in the *homo sacer* project as opposed to the more “optimistic” philosophy found in other works.

48 See blog by Adam Thurscwhell, noting the same distinction between the “affirmative political vision” and the *homo sacer* project, described as the “necessary-but-not-sufficient critical prolegomenon” to it. Thurschwell cautions that “there ultimately cannot be any pure separation between the two sides.” See Adam Thurschwell, “Before the Law,” at the website: [http://beforeshelaw.typepad.com/before_the_law/agamben/index.html](http://beforeshelaw.typepad.com/before_the_law/agamben/index.html), post at 1/23/2006 (last visited 3/9/2007).

also maintains that Agamben “does not make the case” for Auschwitz as paradigm of modernity, or the case for the camp as the modern polis. To the extent that legal discourse, not least in the “ambivalence” of the sacred at the source of law’s authority, as well as the movement within law between norm and exception, internality and externality, is dynamic, pendular (between, toward, and productive of the “duality” of life and death) and evolutionary, the instauration of the camp as nomos stills law’s movement, disambiguates its source, and calcifies it as fixedly “unto death.” As such, Agamben’s project fails as an alternative projection of the political (human, lived action).

According to Fitzpatrick, Agamben’s case for the camp as paradigm of the law is simply “not made out.” With that failure, all the other sub-examples of the camp-as-nomos, other Versuchspersonen (particularly the refugee), also make no sense. At the center of his critique of the centrality of the camp are two themes: one is that the argument fails as legal theory, and fails as a description of how the law was (and was not) operative within the camp itself (at 67); that is, Agamben’s schema fails at the juridico-historical level. The second theme is that the camp as paradigm fails at a metaphysical level: it simply projects an impossibility. There is no such thing as life without law; even bare life is “mediated” in some fashion. By indexing the Muselmann as representative of the law’ deactivation and as the central trope of abjection and promise, Agamben simply fails to show how law actually works, or how the traditional relationship between rule and exception is never a univocal obliteration of one by the other which, Fitzpatrick maintains, must needs be the case with the encompassing example of the camps as “law empty of pre-existent content, [law] in its ‘pure form’” (67).
These themes within Fitzpatrick’s critique center upon two tropes: sacrality and salvation. For the first, Fitzpatrick maintains a pendular ambivalence of the sacred in the movement of law between the norm and the exception. I find in the tension between movement and stasis the will to a certain form which is both the expression of a certain pleasure within the discursive movement and a rejection of that pleasure. That rejection coheres with a refusal of “pure form.” Second is the trope of salvation within law, i.e., that the law as “mediation” describes the life of the subject and, without mediation, the subject would not exist. The posit of juridical salvation can be seen as normative rather than descriptive when one considers the alternative: the posit and the projection of an immediate existence as either a nonsense or an impossibility. This im-mediation is the impossibility of pure form.

I suggest a linkage, in Fitzpatrick’s critique of Agamben’s theory of law, between the refusal of both pure juridical form and of Auschwitz as paradigm. Form stripped of content, and paradigm freed from context: both inhere within the event as a kind of free, open “exposure.”50 The relation of form and example, then, inheres within the conception of the camp as a kind of icon or image (imago), represented as both “form” and as “paradigm.” Fitzpatrick’s juridical refusal, then, says something about the rejection of the transcription of historical event into transhistorical exemplar or universal (Platonic) form and, with it, the idea that such ideation has any valency within law as such. In a sense, the rejection of event as icon suggests the “truth” of event only as logos,

50 For Heidegger’s meaning of event, see Michael Inwood, A Heidegger Dictionary (Blackwood, 1999), at 54-55. One meaning proffered for “event, happening, occurrence, is given, in part, as follows: “2. Begebenheit, ‘event,’ comes from geben, ‘to issue, put [coins, etc.] in circulation’ and sich geben, ‘to betake oneself; expose oneself [to danger]; to come to pass.” Part of the enterprise of centralizing Auschwitz as event is an exposure to it, as well as the evental site (following Badiou) of (one’s) being as an exposure. See Badiou, Being and Event, trans. Oliver Feltham (Continuum, 2005) (orig. Editions du Seuil, 1988), at 507: defined as “totally ab-normal (+). It is also said of such a multiple that it is on the edge of the void (+), or foundational.”
i.e., truth inherent in bodies as language, i.e. bodies mediate(d), always and already, by language rather than silence. Thus, the capture of im-mediation (spiritualism, revelation, ecstasy, etc.) as capable of truth content, i.e., bodies and language fused or constructed through a conception of law as im-mediation (an impossible task as a practical or pragmatic matter) compromises the necessity of law as mediation and, as such, salvific. Ultimately, law as the necessary “mediation” saves the body from the im-mediation of unfettered sovereign power. In a sense, then, Fitzpatrick’s critique of Agamben’s schema, which is underpinned by the camp as paradigm (Muselman as the repository of this silence/revelation/ecstasy), is similar to Norris’s: both are animated by a fear of the colonizing effects, to thought – whether per political or juridical discourse – of that centralized aporia.

Fitzpatrick finds a conundrum, i.e., “of something being constituted by what it itself produces.” But as he looks at the meaning of the sacred in relation to the law, Fitzpatrick seems to find just such a self-constitution implicit in the political movement internal to law between norm and exception, center and externality. The difference between what he seems to concede as constitutive of law’s production and what Agamben finds constitutive, by extrapolation, is the difference between the law’s will to life and its will to death.

Fitzpatrick notes that there is an aspect of law that can be considered sacred, inasmuch as the law “determinantly combines what is determinately here with responsiveness to what is ever beyond, even if that determination is only and ever ‘for the

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51 Fitzpatrick, at 49.
52 Fitzpatrick, 57, comparing Agamben to Foucault: whereas the latter finds that the sovereign power is both unto death and unto life, else if only the former it would, like the Nazi state, be “‘an absolutely suicidal State,’” id., Agamben “is more wedded to the immobility of his dedicatory quotation from Paul: ‘And the commandment, which is ordained to life, I found to be unto death’ (ix, II)” (cite to n.27)).
time being,’” at 53. That is, the law is, in its sacrality (or like the sacred), ambivalent with respect to its externality, the non-law: “In agreement with an earlier Agamben, then, my argument will pivot on this ambivalence of the sacred and link this ambivalence to the insistence of the sacred in law, the sacred as determinately restricting or separating off yet going ever beyond restriction – affirming itself yet being always other to itself.”

Fitzpatrick puts this forward as a description of law’s movement; that is, in relation to its exception-externality, law breathes into and affirms (constitutes) itself as its “as not,” as that which it previously was not. It is, even as it is also “other to itself.” This description of movement implies vitality. As such, it is itself the ambivalence of the sacrality of law-as-life. Fitzpatrick’s critique of Agamben, however, is that the latter stills and freezes this vibrant, lived movement within the figure of the *homo sacer*: “It is in the light of this focal formula, this ‘sole’ exclusion [bare life included ‘solely in the form of its exclusion’] that the ambivalence of the sacred is stilled and its ‘ancient meaning’ made determinate and effective in modernity. Thence the sacred, as the monadic demarcation of the life imported by homo sacer, ‘constitutes the first paradigm of the political realm of the West,’ of the now-modern West (9).” The camp then replicates this stillness/stasis of the homo sacer’s survival from antiquity to extend into and colonize the modern polis (54).

Fitzpatrick’s argument is that historically, however, Agamben fails to make the case: he misinterprets Roman law and misapplies the 1679 writ of habeas corpus upon which he bases his transhistorical extraction of the homo sacer from antiquity to modernity. The main point, though, is that by (dis)stilling the ambivalent movement of

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53 Fitzpatrick, at 53.
54 Fitzpatrick, 55: “This is close to fanciful.”
the sacred as the law’s relationship with its exteriority into a death-icon (homo sacer, Muselmann, camp), Agamben thereby stills the capacity of the juridical “commandment” toward both life and death (58): the icon-paradigm subtends only the latter.

But even as it “stills” the ancient figure of sacrality, the camp conceptualized as paradigm, or icon-imago, seems also to move, dilate, colonize: encamped within law, Auschwitz begins and persists the poiesis and universality of death. It is no less sacred, in this sense, than the will to life. Whence the link between the law as sacred and the sacrality of the icon: the latter is the “stilled” imago of the former, and its endless replication and performance. The central stasis of the icon, in short, (re)iterates the link between sacrality as external to and inherent within law, sacrality as the movement between law and non-law, and sacrality pursuant to (or engendered by) iconic stasis. As such, the description of sacrality would be incomplete, or at least primarily normative, if it excluded the will to the iconism of the camp, i.e., the iconism of the political element within thought that must include the enormity of the camp as political fact. Fitzpatrick’s exclusion of Auschwitz as paradigm seems, then, to exclude what could be the political element within an erotic will (eros) toward death and stillness (thanatos) at the center of the law’s vitality. It is an exclusion that attempts to purify law of this political element.

Fitzpatrick also notes that the sacred is the source of Schmitt’s conception of sovereignty, one borrowed and reworked by Agamben within the homo sacer project. According to Schmitt, “the sovereign [is] a ‘secularized theological concept’ or, borrowing Schmitt’s terms, as one of the ‘mundane factors that have taken the place of God.’” The decision, however, is “an independent determining moment” (n.28). For Fitzpatrick, this constitutive independence suggests a problematic self-sufficiency to the
concept of sovereignty (the “conundrum” earlier referred to). Instead, Fitzpatrick proposes that the legal decision should be read as the law’s “‘madness’ in which the existent law and fact (and other things) are enmeshed until the decision is made as a law that will incorporate some erstwhile facts (and other things) and decidedly reject others, whence that new law will become further enmeshed with facts (and other things), and so on ever iteratively.”

An alternative reading of the sovereign-decision nexus, however, might not see the binarity of the decision itself, but instead its paradox. This too sees the decision as a kind of madness, an im mediacy, ultimately an ecstasy: quoting Søren Kierkegaard on the love-hate paradox of Abraham’s sacrifice (“‘Only in the instant when his act is an absolute contradiction to his feelings, only then does he sacrifice Isaac…’”), Derrida notes: “I have emphasized the word instant: ‘the instant of decision is madness,’ Kierkegaard says elsewhere. The paradox cannot be grasped in time and through mediation, that is to say in language and through reason. Like the gift and ‘the gift of death,’ it remains irreducible to presence or to presentation, it demands a temporality of the instant without ever constituting a present. If it can be said, it belongs to an atemporal temporality, to a duration that cannot be grasped: something one can neither stabilize, establish, grasp [prendre], apprehend, [nor] comprehend.”56 This giving-death, the instant of the legal decision, constitutes in a juridical sense the sovereign as such as an “ecstasy-belonging.”57

55 Fitzpatrick, 67.
57 Agamben, State of Exception, p. 35. He continues: “Being-outside, and yet belonging: this is the topological structure of the state of exception, and only because the sovereign, who decides on the exception, is, in truth, logically defined in his being by the exception, can he too be defined by the oxymoron ecstasy-belonging” (emphases in original).
Combining these strains, then, we see the decisional moment as an “exception” (the camp) that constitutes the sovereign as a kind of ecstasy-belonging, an un-mediated “gift” or ground with implications of (colonial) dilation and expansion within juridical thought. The point is that this imperial madness – as the truth of law beyond law’s reason – is both disclosed by the mythopoiesis of an obliteration of the modern polis by the camp, and obscured thereby. Fitzpatrick is right that “for law, inclusion is irreducible,” and thus law cannot be purely “unto death,” cannot end in a “vacuity of pure form.” And yet, the mythopoietic camp-as-nomos suggests precisely this tendency or will as the ecstatic, joyful discovery of life (inclusion) through, within, and beyond the sacrifice (exclusion, gift) of that flesh-mediation, the ultimate madness of the *Muselmann*-saint.

But this rather abstract point does not translate, is not graspable, through a pragmatist vision of law’s evolving, fecund and sentient experience. The law’s quest for ultimacy and for purity may seem in the instant too detached from the lived oscillation of law’s decisional mediation between norm and exception, life and death, an oscillation that cannot resolve within and be stilled by the icon-eidolon of the camp. But I think the point of the ecstatic, underwriting quest of thought toward the juridical stasis of the camp not only traces the sacral trajectory of a political joy in death (polis as death camp), but also the promise of return/parousia. For, as Fitzpatrick points out, albeit prescriptively, “the mediated life is the only life we can sentiently be with.” The question, however, concerns the perdurably recensive return of the icon-eidolon as representative (or representation) of that very mediation and its im-mediated promise of redemption within law’s space.
Why the fear of a recensive return of the icon? If the icon represents the camp, then return represents violence. As Johannes Fabian has noted in another context, the “iconism of symbolic approaches” within anthropological discourse is a trope of imperialism.\(^{58}\) It is as if Agamben offered a critique of imperialism despite the legal “vacuity of pure form” inherent to the homo sacer project. This point, indeed, relates to the link between Agamben and Benjamin, examined below. But here, on the contrary, it is the iconic purity that suggests a perdurable symbolic order and approach (i.e. paradigm as “a ‘hybrid of law and fact in which the two terms have become indistinguishable’ (9)” at 61) that suggests what Fabian terms “hieratic continuity” and spatial expansion. That is, the state of exception as both stable/juristic (“juridical procedures”) and as “expansionary indistinction” is a form of the imperial discursive modality.

Malcolm Bull, for one, seems also to share the view that Agamben’s theory, centered as it is on the camp as nomos, is flawed. He critiques both the state of exception itself as having any real explanatory power,\(^{59}\) and Agamben’s dependence upon it as historically and theoretically distorting.\(^{60}\) Nevertheless, Bull makes an interesting point

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\(^{58}\) See, e.g., Johannes Fabian, *Time and the Other: How Anthropology Makes Its Object* (Columbia U.P., 1983), at 132 and 135: “The image of Bali derives from visual-spatial reduction which is at the same time too concrete and too abstract: too concrete, inasmuch as it depicts the Balinese clothed in a confusing plethora of symbols; too abstract when it wrongly projects a hieratic continuity onto their troubled history...In sum, anthropological discourse on Bali has been given to excesses of visualism which have the cumulative effect of temporal distancing: Bali is paradisiacal, hieratic, emblematic – everything but coeval with the Western observer.”

\(^{59}\) See Malcolm Bull, “States don’t really mind their citizens dying (provided they don’t all do it at once): they just don’t like anyone else to kill them,” in book review of Agamben’s State of Exception, available at [www.generation-online.org/p/fpagamben2.htm](http://www.generation-online.org/p/fpagamben2.htm), last visited 3/8/2007. Originally published in *The London Review of Books*, vol. 26, no.24 (16 December 2004), available at [http://www.lrb.co.uk/v26/n24/contents.html](http://www.lrb.co.uk/v26/n24/contents.html), at 2: “Although they may shuffle back and forth between norms and exceptions, sometimes reverting to an earlier norm, sometimes dragging the norm along to catch up with the exception, states always try to maintain a monopoly of violence. The exception itself makes little difference, for even under the law your vulnerability is truly terrifying.”

\(^{60}\) Bull, 3: “This [i.e. Agamben’s elision of Sorel on the link between violence and law] distorts Agamben’s argument at both a historical and a theoretical level. Missing from his account of the state of exception is any real acknowledgment that, in its modern form, a primary function of the emergency has been to deal with strikes.”
about Agamben’s locus of the camp as modern polis: “Against the discredited emphasis on the divine presence in history, progressive revelation, and human perfectibility, Karl Barth’s commentary on Paul’s Epistle to the Romans emphasized the otherness and absolute sovereignty of God, the fallen nature of humanity, and the importance of decisions precipitated by an encounter with divine revelation. For Agamben, the state of exception offers similar possibilities, for in it we finally experience the true awfulness of sovereignty and our abjection before it.”

Beyond this edifying vision of the camp, however, Bull cautions that if one looks to Agamben’s state of exception for a prescription, one will be disappointed: rather like the “theological modernism [that] was perceived to be discredited by the ease with which it lent itself to German militarization in the First World War,” and the “identity politics and multiculturalism [that] appear to be the ideological buttress for the new imperialism (‘We must invade Afghanistan in order to establish rights for women’),” Agamben’s schema, for all that it forces us to confront our own abjection, will either fail or, more likely, become irrelevant: “Theories and theologies of crisis tend to have a limited currency, in that one society’s emergency is often another’s normality, and, by definition, normality is always the more common of the two.”61 Furthermore, living under law (life mediated by law) is vulnerable enough without the added explanation that vulnerability is produced by biopower.62

61 Bull, 2. “The ‘new normal’ is already losing much of its novelty, even as 11 September 2001 fades into history,” id.
62 Bull, 2. “The exception itself makes little difference, for even under the law your vulnerability is truly terrifying. You are born into a world where the state can, with the acquiescence of your friends and neighbours, deprive you of your property, liberty, limbs, even your life. It is this sense that Agamben vividly conveys through the concept of the ‘biopolitical body.’ But although he acknowledges that ‘the production of a biopolitical body is the original activity of sovereign power,’ he repeatedly claims that this development is somehow the result of the state of exception.”
Bull himself notes in a footnote that there is something to Agamben’s fascination with the state of exception that “resonates with Benjamin’s concern with standstills.” This is suggestive, since it may mean that the purpose, no less than the modality, of the camp as paradigm may indeed not fit within a pragmatist juridical discourse except, as Bull notes, as a means of achieving a sense of our abjection and, as such, the possibility for juridical redemption (law as mediation between the abject and the normalcy of the self). In the result, Bull seems to suggest what Fitzpatrick implies: that the camp must be rejected in order to permit the law’s redemption-mediation between the subject and the event. As I will argue below, however, this sense of redemption requires a fixed look at the thing, whereas Agamben’s theory of camp as nomos may be interpreted, in the light of its relationship to Benjamin’s theory of messianism, seems instead to invite a reflection upon the object not through an edifying and fearful apprehension, but rather through, so to speak, a “dislocated” gaze.

In the result, Fitzpatrick’s theory that the camp paradigm fails within the logos, although ostensibly pragmatic-descriptive, is actually as normative as the perspective it contests. Like Norris’s posit of a “good” and “bad” Agamben, Fitzpatrick disaggregates a “late” and an “early” Agamben, the former proposing the flawed and “fanciful” homo sacer project with its telos in “entities marking a limit of, and being beyond, the

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63 Bull, 3, endnote: “It isn’t surprising that Agamben, as the editor of Einaudi’s edition of the works of Walter Benjamin, is struck by the etymological link between iustitium and solstitium, which resonates with Benjamin’s concern with standstills. He also identifies the state of exception with the ‘supplement’ in deconstruction, and with Alain Badiou’s definition of the event as ‘an element of a situation such that its membership in the situation is undecidable from the perspective of the situation.’”

64 See Robert Kudielka, “Platonic Dilettantism,” at www.richardwoodfield.org.uk/archive/dasbuild/platonic.htm (last visited 10/20/07) for an analysis of Platonic idealism and the arts. On what happens to the gaze (its “dislocating”) as it looks at a Cubist painting, discounting the Platonic presumption of a static perception either of the eidōs/idea above or the phantasma below, Kudielka notes: “The disembodied structure of minutely shifting and inflected planes in a Cubist painting establishes a self-generating visual movement in which perception and memory collaborate without ever converging in a definitive image,” at 7 of 7.
human.”\textsuperscript{65} In agreement with an “earlier Agamben,” Fitzpatrick proposes law as mediation; i.e., as a necessary constraint to life viewed as unconstrained and in excess. This is a life that requires law to save it, with the camp functioning not as normative constraint but as limit and caution. Fitzpatrick’s repudiation of the camp paradigm is both a rejection of an ostensibly transhistorical conception of mediation between the subject and its excess/abjection. The life as “mediate” is also a sacred life because the law’s ambivalent and insistent sacrality is “the sacred as determinately restricting or separating off yet going ever beyond restriction – affirming itself yet being always other to itself.” \textsuperscript{[53]}

As I suggested in relation to Norris’s critique, however, it is at least arguable whether there is any real cleavage between an “early” and a “later” Agamben, even as this severance appears necessary to Fitzpatrick’s argument. The later Agamben, in other words, may not have repudiated the exemplarity of the camp to the theory of law that he proposed at an earlier (i.e. homo sacer project) time. On the contrary, in an essay that predates his homo sacer project, Agamben defines the sacrality of law as its revelatory and restorative moment; it is the complex idea of messianism that allows him to juxtapose the suspension of law (the state of exception) with the messianic “suspension of the suspension,” \textsuperscript{[Open, 92]} a “Shabbat” \textsuperscript{[id]} that seems allegorically to restore an Edenic repair to the evils of exceptionality. As I will argue below, the Shabbat or break is integral to his (later) conception of law as developed in the homo sacer project.

Thus, what appears in Fitzpatrick to be descriptive rejection of an eschatology is a prescriptive assertion of the utility, autonomy and power of law independent of the

\textsuperscript{65} Fitzpatrick, 66: “from what omniscient position can Agamben discern such things – discern these entities marking a limit of, and being beyond, the human.”
fearful tendency toward fascism intimated by ideation, iconism, and formalism inherent to the transhistorical exemplar. The fact that the exemplar evokes this fear is itself interesting and resonant within late modern thought, and suggests the indirect way in which Auschwitz, precisely as the site of a fascistic triumph, continues to inform, shape, and constrain juridical thought. Fitzpatrick has had to disambiguate his theory of sacrality, has had to mount a dichotomized temporal persona (two Agambens) against which to defend his repudiation of the iconic camp, and has had to still the thanatophilic power of law “unto death” in order to assert its salvific, mediatory essence, one that must, as Norris puts it, “exuviate” the camp.66

In the end, just as Norris abhorred the centrality of Auschwitz as the risk of recurrence (“repeating the gesture of the SS,” and so on), Fitzpatrick refuses the paradigm because it leaves the self indeterminate and im-mediated, a prey to unfettered and immediate power. Refusal itself mediates the self’s relationship to mediation-law; refusal saves her from the vulnerability of anomos, indistinction.

Fitzpatrick recognizes that the relationship between law and the camp, historically and discursively, is complex, not least because at one register it is precisely within the camp that the law seeks to work itself pure. This element of the law within the camp maintains its paradoxical purchase on the juridical imaginary, especially when the sites of exceptionality proliferate. Fitzpatrick concedes that the pendular movement within the law between exception and norm is a kind of “madness.” This too contests the univocality of the camp as only the production of death. But if refusal is a kind of forgetting, then Fitzpatrick’s rejection of a conjunction between the camp and the law operates to create an opposition, likewise, between law within the camp and law “in

66 Norris, Politics, 276.
itself” as separate from the camp: the former finds itself within the limits of time and space, i.e. eschatological law; the latter exceeds limits, ends, and eschatology; it “has its being in the very life of men” [68].

The point is that the severance is not necessarily antagonistic, since the former (law in the time of the now, i.e. eschatological time) instrumentalizes the latter, according to a perspective that locates the camp at the center of the polis (life of men). Disaggregating these forms within which law takes place such as to obviate-obliterate the effect or shadow meaning of the camp (as representative of law “unto death”) by the “excess” of law-as-life is itself a normative project and not simply a description of how law operates. It prescribes the urgent task of cauterizing the influence within law of a political paradigm of death. But the prescription comes at a price: the death-instinct or the violence of law is displaced onto the camp, and excluded. Exclusion of the camp-paradigm saves the law, but only conditionally, from itself.

Part 3: Juridical sovereign versus bio-sovereign

Thus far, the attempt or desire to exclude the camp from an exemplary place within thought has suggested a fear of the political recurrence of violence, and a fear of compromise, i.e. of the mediatory logic, rationality and redemption of law. Andreas Kalyvas, a political scientist, offers a different kind of critique for refusing the view of the camp as nomos. With this critique, an aspect of the others under consideration comes more clearly into view, an aspect that in fact complements Agamben’s own undertaking in situating the camp as paradigm: each is engaged in a kind of restoration. Norris, for
instance, restores politics to a more truthful, or Hegelian, purpose by rejecting the
decisionism of Schmitt and its deterministic-recursive taint within Agamben’s political
theology. Fitzpatrick wishes to restore a sense of law as the \textit{logos} freed of the fascistic
juridical elements of the camp. Kalyvas recovers a model of the sovereign from the
Platonic dialogues that does not depend upon the tyranny of Agamben’s transhistorical
biosovereign; the latter, as we have seen, depends for its legitimacy upon the production
of bare life, and the paradigm for this production is the camp.

Agamben’s project is also restorative. But before analyzing it in the next part, I
wish here to address the specific critique advanced by Kalyvas and ask: as a rejection of
the biosovereign as well as a restoration of an alternative model, what does Kalyvas’s
analysis of Agamben’s theory, particularly the camp paradigm, suggest to us about the
nature of thought in late modernity and its relationship to Auschwitz? With Kalyvas, we
see Auschwitz as a traumatic rupture, an aberration at the limits of thought rather than its
paradigm. That it remains central to thought only means that thought cannot seem to
remove this canker or escape this excrescence. But thought wishes to return to the
Platonic ideals, to its own true self, to repair itself after the wound of Auschwitz.
Kalyvas, then, offers not only a critique of Agamben’s paradigm, but of thought as such
as it has strayed from its original ideals with the very instantiation of the camp, and as
western thought remains lost in its continued fixation on the camp. The theme, for
Kalyvas, is that where thought goes toward the camps, thought has failed as a political,
philosophical, and imaginative project.

Western thought fails to realize the political to the extent that it remains fixated on
the camp, its trauma. This fixation, in short, constitutes the failure of the political to exist
at all. Kalyvas’s analysis of Agamben’s homo sacer project critiques this failure as a central trope of that project. Thus, inasmuch as the *polis* had from the beginning harbored the “biopolitical fracture,” the split between *bios* and *zoē* that itself engendered the rupture between the *oikos* and the *polis* and, with it, the foundations of the philosophical search for the (ideal) politics, the idea of the political never really existed as such. This is an untenable conclusion to draw from the entire western tradition, but the only one to be drawn from the telos of the political within the camp. As such, the link between sovereign power, bare life (*zoē*), and the camp, although ostensibly a critique of the tradition, is in a sense its obliteration; as Kalyvas notes, the “biopolitical fracture represents the unsettling legacy that ancient political philosophy bequeathed to the moderns and that haunts the history of modern politics. Thus political modernity might be defined as the continuous struggle to heal, repair, or even transcend this fundamental fissure.”

Kalyvas argues that by situating the essence of sovereign power within the camp, the homo sacer project casts the political as such as merely a potentiality beyond the camp (the political realized, in essence, within a “sovereign-less” society). Thus, the politics to-come is a transcendence of the politics of the now, i.e. *polis* as camp. Here we see the linkage, or the continuity, between the violence of the sovereign over bare life and the affirmation of a to-come beyond sovereign power (recall here Norris’s severance of the “bad” Agamben of the homo sacer project from the “good” Agamben of the “Coming Community”). The critique of sovereign power as functionally a “healing” or transcendence of the originary error that has, from the beginning, defined the political

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67 Kalyvas, Politics, at 110.
68 Kalyvas, Politics, at 110.
(inasmuch as its apotheosis is the camp) not only casts the state of exception as a being-beside of philosophical reflection in relation to the “wound,” so to speak, of the political (politics as the ecstasy-agon of death), but also connotes the state of exception as apotheosis of and, paradoxically, escape from, an ancient, atemporal struggle to realize the ideal polis.

Kalyvas posits instead a different view of sovereign power: not one that is a “failed” attempt to heal an ancient and irremediable error (of first philosophy), but one that does not inhere in negation: “Plato’s instituting weaver provides elements for reconceptualizing sovereignty as requiring relative but not absolute new beginning.”^69 It is a sovereign as a melding of different elements, one that changes and grows (or fades) with time and history. The interesting point is that this, unlike the bio-sovereign, is insistently juridical: “among the things mixed together in the process of weaving Plato mentions the laws. The web of politics is also a legal web. The political weaver who ignores the legal threads might fail to create strong and cohesive social bonds. In this sense, the weaver is always already within the realm of the juridical, however unshaped and unformed this might be during the moment of the originary weaving.”^70

To effect a distinction between the sovereign weaver and the bio-sovereign, which finds its “proper place in the concentration camp,”^71 Kalyvas has characterized the former as constituent or embedded, the latter as “an absolute rupture,” an “ex nihilo creation, which emanates from utter nothingness,”^72 something which, he claims, alarms Agamben himself, but seems nonetheless to maintain the constituent sovereign as an insoluble

^69 Kalyvas, Politics, at 127.
^70 Kalyvas, Politics, at 127.
^71 Kalyvas, Politics, at 109.
^72 Kalyvas, Politics, at 126.
paradox which, as Kalyvas notes, “entails the ineradicable externality of the sovereign subject to the legal order.” The subject of the sovereign weaver, on the other hand, is firmly located within the law.

Thus, we have the law as exception, law as pure decision ex nihilo, on the one hand, and on the other the law as contingent, the cohesive societal bond. The latter conception is possible in part, at least, through setting up this juridical dichotomy and through the rigorous rejection of the camp as the destiny of law; the weaver gains legitimacy through negation of this failed project of bio-sovereignty.

The bio-sovereign is pure decision, with all the problems that attend this conception. “The sovereign decision…is an absolute beginning, and the beginning (understood as αρχη) is nothing else than a sovereign decision.” The camp, as destiny of the decision, represents “a hidden teleological kernel that Agamben inserts into Western thought as he tries to trace the unbroken evolution of sovereign biopolitics from its modest and convoluted origins in the ancient city to its full materialization in the modern camp, where it meets its scandalous destiny.” Thus, the polis merely “prefigures” the camp, the latter having “radicalized and fulfilled” the former’s “potential.” “Naked life,’ Agamben asserts in his description of modern politics, ‘which was the hidden foundation of sovereignty, has meanwhile become the dominant form of life everywhere.” “What was blurred [in the polis] is now fused.”

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73 Kalyvas, 111: “By contrast, Agamben, by leaving out this aspect of sovereignty from his own definition, focuses on how the modern is deduced from the ancient and the present from the past. He proposes a theory of history that does not seem to bring forth anything new.” [111; Schmitt cite to n.22]
74 Kalyvas, 112.
75 Kalyvas, Politics, at 111 n.31.
76 Kalyvas, Politics, at 111 n.31.
Kalyvas finds absent from this “highly abstract historical and conceptual reconstruction” any account of “the reasons, forces, interests, struggles, movements, strategies, and actors that were and still are involved in the unfolding of bio-sovereign politics,” leading to “an almost totalistic, agentless history” which, although “concerned with politics and its eclipse,” ends up being “quite unpolitical.”

Telescoping the camp, Agamben’s is “[t]he history of Western politics [as] a history of repeated failures.”

Kalyvas makes an interesting point, though, that takes one to the messianic element of Agamben’s homo sacer project (if one sees a continuity between the utopic and the apocalyptic Agamben); it has to do with the way the construction of the bio-sovereign is dependent upon a specific conception of time: “The camp, by fusing the exception and the rule into a permanent state of emergency, halts time. In the camp there is no room for unpredictable exceptions, precisely because they have become the norm. Time is nonexistent as a lived experience. If the camp is a limit zone beyond time, the sovereignty that inhabits its space is also situated outside time. It is frozen, congealed time.”

Thus, the body as such within the sphere of the exception or of bio-sovereignty is suspended, permitting the recensive gaze from Auschwitz to the archē of first philosophy as one continuous wound.

Agamben posits one restoration-resolution to this “dark, limit zone of sovereignty and its institutional manifestation, the camp,” and Kalyvas another. But both are a

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77 Kalyvas, 112.
78 Kalyvas, 112: “Agamben gives no explanation for the sovereign’s repeated victories and unstoppable march toward the camp, leaving the impression that the disastrous triumph of sovereign power might have been guided by the iron hand of historical necessity all the way to the camps.”
79 Kalyvas, 113: “Finally, this distressing absence of the experience of time might be the result of its suspension in the concentration camp. What is the exception turned into a rule if not the negation of its temporal singularity as an event? After all, the exception that remains a fleeting occurrence, an indeterminate accident, is a reminder of historical discontinuity and temporal heterogeneity.”
80 Kalyvas, Politics, at 113.
return to the “true” sovereign; both are a return to law. Although Kalyvas dismisses Agamben’s resolution as an “elusive notion of a coming politics” that “ultimately dissolves into an eschatological, utopian vision of social life, which will fulfill the historical telos, and thus will move beyond historical time,” a vision that “demands an enormous leap of faith away from the realm of necessity and worldly reality,” I hope to show that in fact Agamben’s resolution, like Kalyvas’s, is also a return to law and the “realm of necessity and worldly reality.”

In part, the denial of these aspects to Agamben’s vision is through the exclusion of the camp. Having done that, Kalyvas can proceed to separate his vision of a sovereign rooted in history, with “strongly egalitarian and democratic implications.”

As noted, then, what separates the two conceptions of sovereignty is the law, which mediates between different conceptions of the political. In a sense, Kalyvas is engaged in a kind of idealization of law, inasmuch as it is absent from his interpretation of Agamben’s conception of the camp, thereby permitting the exclusion of this negation of law viz. the camp from his conception of a juridical sovereign. This weaver sovereign too, as Kalyvas notes, is committed to “a sort of purification” [124] and “creates ‘the finest and best of all fabrics.’” Kalyvas notes that, “Weaving corresponds to the founding, constituent activity ‘that makes the web of the state,’” 126 cited to Plato, 310e.

The allusion to the web, of course, recalls the pervasive imagery of webs, nets, and tapestries within Aeschylus’s plays, *The Oresteia* (see, e.g., 909, 918-19, 921-22, 924, 927, 944, 946-49, 958-60, and 1125-28: story of Clytemnestra’s entrapment and murder of Agamemnon. She relates the incident later, to the Chorus, at 1379-84: “The thing is

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81 Kalyvas, Politics, at 116-117.
82 Kalyvas, Politics, at 118.
83 Kalyvas, Politics, at 126.
done. Thus have I wrought, and I will not deny it now. That he might not escape nor beat aside his death/ as fishermen cast their huge circling nets, I spread/ deadly abundance of rich robes, and caught him fast. I struck him twice…”). The point is that the return of the sovereign weaver as law-giver, mediating between morality and politics, collective memory and personal ambition, is a risk: the weaver could also be a tyrant, as (s)he is in Aeschylus.

In the result, though, Kalyvas wants to escape the trauma of the camp and return thought to linear time. In order to achieve this, the camp must become absolute trauma, the bio-sovereign entirely non-juridical, and the palliative – the sovereign weaver (or any of the multiple and rich alternatives to the bio-sovereign) – becomes the repository of a redemptive law. In a sense, Kalyvas offers the poietic mode of thought that Norris had declined. The pragmatist modality reflects something urgent about the nature of late modern thought: a strain that is impatient with revelation that inheres within an image of depredation and the excess of death and destruction; something too much of this when Auschwitz becomes the ontology of thought. Indeed, such a perspective would seem as Emil Fackenheim famously put it, to “hand [Hitler] yet other, posthumous victories.”

And yet, there is another strain within late modern Western thought; it is a strain that is critical of the capacity of law, or politics, or theology, to act as the mediatory and redemptive discourse that thought wishes to invest in them. It is a strain that contests the

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84 See, e.g., Peter Manseau, “Revising Night: Elie Wiesel and the Hazards of Holocaust Theology,” in Crosscurrents, Fall 2006, at 387 (originally published on www.KillingTheBuddha.com): “While he considers different responses to this Event in each of his books, throughout his work Wiesel treats the Holocaust first of all as a theological occurrence…It is an Event of such magnitude it transcends history,” Manseau at 388. Whereupon, one could argue that same form-essence dichotomy within Zizek’s analysis might apply as much to Holocaust theology as to Christianity: “The gap here is irreducible: either one drops the religious form, or one maintains the form, but loses the essence. That is the ultimate heroic gesture that awaits Christianity: in order to save its treasure, it has to sacrifice itself – like Christ, who had to die so that Christianity could emerge,” Zizek, 171.
idealism of redemptive discursive modalities, such as those that discharge the juridicality of the camp in favor of a narrative of Manichean oppositions (Kalyvas, of course, accuses Agamben of quite this element, although in a different context). It is a strain that requires the paradoxical maintenance, within thought, of an event or phenomenon – the camp, in this case – as both central and marginal. This is Agamben’s posit, as I read him in both his homo sacer project and in his earlier work.

Part 4: Paradigms and adjustments

Kalyvas’s critique shows a common thread in both the previous critiques and within Agamben’s theory as such: the restorative aspect. The nomos that underwrites Kalyvas’s sovereign weaver is juridical, whereas the nomos of the bio-sovereign is all violence. These then present two ways of thinking the nomos, i.e. the definitive political element, within late modernity. If, then, Agamben’s nomos is both restorative and yet terminates within the camp, what juridical consequences follow?

If Auschwitz is the nomos of modernity, then, the critics intimate, we have much to fear for the nature of late modern thought: the recurrence of the violence as paradigmatic and pervasive (whereupon Guantanamo Bay is both inevitable and the “exception” that proves the “rule” of law); the end of law as rational and mediatory; the elimination of all other modes of sovereignty but the bio-sovereign. We can say, then, that the pragmatic rejection of the camp as paradigm is itself a nomos of repair and protection. The modality of pragmatist thought, at least in its rejection of the camp as ontology (or onto-theology), is about warding off the destitution of law as such, and
recuperating a sense of its salvific element. Law is badly bruised, ravaged and ignored quite enough within late modernity without adding to the problem by suggesting that it is, as such, living out its destiny as the site of death and abjection.

Given all of this, how explain the power of the idea that the camp is the nomos of modernity, that the law is somehow fused with its exception, that Guantanamo Bay is not an aberration but merely a recent outcrop of what is always and already latent: the camp as the “hidden matrix” of juridical thought? The strength with which the idea is refused – e.g., Norris’s caution that such centrality is tantamount to “killing the victims all over again,” and Fitzpatrick’s that a theory based on such centrality is “fanciful” – attests to the power of the idea. It is the yearning for a restoration of something prior to the damage done to thought by the event of the camp itself. And both Agamben and the critics are engaged in this restorative project, which takes the form of a search for the new.

What does it mean to say that Agamben’s vision is restorative? It means that the centrality of the camp somehow assists in a project that restores truth (justice) to law, indeed, more exactly, restores law to its own true self, rather than a project that impregnates law merely with death (law “unto death”). But this centrality is also, and deeply, a marginality, hence a restoration that is also a quest for the new. It is this tension within restoration-as-newness that characterizes late modern juridical thought and discourse.

My argument is that this tension is evident within the critiques of Agamben’s homo sacer project as much as it is part of that project. To clarify this, I look at an essay from the “old” Agamben, i.e. an essay based on a lecture given in 1992 and presumably
preceding his homo sacer project (although both were published in 1998). There, Agamben uses a story by Franz Kafka as an allegory of the messianism announced, as it were, in Walter Benjamin’s Eighth Thesis in “Theses on the Philosophy of History.” What I hope to show in looking at this early essay is first, the nature of this restoration-nowness tension, and second, how in this version of the interplay, the camp is essential. Third, or relatedly, I want to show how the essentiality of the camp to the “messianic task” (i.e. as described within the allegorical tale by Kafka) also explains, as it were, the camp’s centrality to the homo sacer project.

Before the homo sacer project, Agamben had already theorized the trajectory, or the “scandalous destiny,” as Kalyvas calls it, of thought from Aristotle to Auschwitz. In the above-noted essay entitled, “The Messiah and the Sovereign: The Problem of Law in Walter Benjamin,” Agamben relates the state of exception to this destiny. Juxtaposed against this destiny is the doctrine of messianism. Agamben, in this essay, wishes to explain how messianism is very like a state of exception but with one crucial difference: essentially, it is the difference between law as the will to life, and law as “unto” death.

Agamben quotes Benjamin’s Eighth Thesis, at the beginning of his essay, as follows: “‘The tradition of the oppressed teaches us that the “state of exception” in which we live is the rule. We must arrive at a concept of history that corresponds to this fact. Then we will have the production of a real state of exception before us as a task.’”

Agamben then follows this up with “another fragment” of Benjamin’s in which the

85 Kalyvas, 112.
87 Agamben, Potentialities, at 160 (emphasis in original).
relationship is clarified between messianism, exception, and judgment: as Benjamin puts it, following what he also calls a “fragment” from Kafka: “‘Every instant is the instant of judgment on certain moments that precede it.’” And Agamben’s gloss on the fragments, put together, is to suggest that, “Messianic time has the form of a state of exception (Ausnahmezustand) and summary judgment (Standrecht), that is, judgment pronounced in the state of exception.” The link then is made between these states – exception and messianism – and law.

But what is law? Agamben notes that Benjamin “both cites and falsifies,” i.e. engages in a “conscious alteration” of, a line from Carl Schmitt: “Instead of ‘the rule as such lives off the exception alone,’ he writes: ‘the “state of exception” in which we live is the rule.’” For Agamben, this alteration enables Benjamin to “establish a parallelism between the arrival of the Messiah and the limit concept of State power. In the days of the Messiah, which are also ‘the “state of exception” in which we live,’ the hidden foundation of the law comes to light, and the law itself enters into a state of perpetual suspension.”

Already we see intimations of the camp as the hidden foundation (the “hidden matrix,” as Kalyvas calls it), or at least the perception of this historical event as a state of exception that enables a view of law as itself within a perpetual state of suspension. Auschwitz, here, is not a sociological fact (per the pragmatists) but an operation, a lens, functioning for Agamben much as the panopticon functioned for Foucault, through which to discover the hidden structure of historical time. This view,

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88 Agamben, Potentialities, at 162.
89 Agamben, Potentialities, at 162.
or centrality of the camp, ostensibly completes Benjamin’s distortion of Schmitt’s simple
dichotomy by rendering a judgment on that dichotomous relationship between rule and
exception. It is as if the view from Schmitt is that of the rulers, and from Benjamin that
of the oppressed: the latter must see the same phenomena only through a distorted and
distorting lens in order to achieve and lay claim to a “concept of history” that corresponds
to the lived reality of rule as, rather than merely from, the exception.

Fundamental to this procedure, this linking and maintenance of disparate
fragments – recall that even the perspective of the oppressed is a “tradition” – is the
requirement of alteration, these small adjustments that characterize the restorative task at
hand. Commenting on the arrival of the Messiah in relation to Halakhah (the entirety of
Jewish law), Agamben notes that “His task – which Benjamin once expressed in the
image of a small displacement that seems to leave everything intact – is more complex
[than simply abolishing the old law], since the original structure of the law to be restored
is more complex.”\textsuperscript{91} What is complex is the idea that the old is both restored and become
new, or the restoration is of law “in its originary structure,”\textsuperscript{92} whereupon restoration is
also “fulfillment,” analogous to “the Christian conception of the pleroma of the law.”
That is, what is complex about the originary structure of law is that it is nothing but a
series or a process of small adjustments that are, by themselves, nothing but fragments,
implying a simultaneous process or event of destruction. Taken together and denying as
such the individuation of the fragments, their restoration becomes a kind of fulfillment of

\textsuperscript{91} Agamben, Potentialities, at 164.
\textsuperscript{92} Agamben, Potentialities, at 167.
the law. Agamben quotes by way of example Jesus’ pronouncement in Matthew 5:14-18:
“I am come not to destroy [katalysai], but to fulfill [plēryai].”

Messianism itself is an adjustment; as Agamben notes, historical time and messianic time “cannot be reduced to a dual logic (this world/the other world)” nor to perfect homology with each other. Rather, the attempt in placing them together is “to bring to light the hidden structure of historical time itself.” This is the same task that messianism undertakes with respect to law as well. And this is what makes Kafka’s novel, for Agamben, particularly ripe for elucidating the task.

The novel, no more than a page long, is well familiar, as Agamben notes: “I take for granted that the reader remembers the story of the doorkeeper standing before the door of the law and the man from the country who asks if he can enter it, waiting without success only to hear the doorkeeper tell him, at the end of his life, that the door was meant for him alone.” Agamben then lays out his thesis: this parable is an allegory of the state of law in the messianic age, that is, in the age of its being in force without significance. The open door through which it is impossible to enter is a cipher of this condition of the law.”

Agamben begins his interpretation of the story by adjusting previous interpretations; in a sense, he performs what he later describes as the “messianic task,” and earlier noted as the gesture – displacement, adjustment as fulfillment – that will effect the coming into view of the “originary structure” (of historical time, of law, etc.). He notes that the interpretations of Gershom Scholem and Jacques Derrida are incomplete and require a small adjustment-fulfillment. For instance, Agamben quotes the

93 Agamben, Potentialities, at 167.
94 Agamben, Potentialities, at 168.
95 Agamben, Potentialities, at 172.
following from Scholem: “Being in force without significance (Geltung ohne Bedeutung): for Scholem, this is the correct definition of the state of law in Kafka’s novel.” Law thus “maintains itself ‘in the zero point of its own content,’’ i.e., its apparent Nothingness is actually an “extreme reduction” of its content.”96 Similarly, whereas Benjamin agrees with the implicit nihilism in Scholem’s schema, he writes that “Kafka ‘succeeds in finding redemption in the overturning of the Nothing.’”97 Derrida finds even redemption impossible, and notes, in relation to Kafka’s story that “‘The law…keeps itself [se garder] without keeping itself, kept [gardée] by a door-keeper who keeps nothing, the door remaining open and open onto nothing.’”98 Agamben quotes others, such as Massimo Cacciari, to the effect that “‘The man from the country cannot enter, because entering into the already open is ontologically impossible’” All this, Agamben suggests, leads to an idea of law as simply an impossible task: “In the final analysis, all the interpreters of the parable read it as the apologue of the man from the country’s irremediable failure or defeat before the impossible task imposed upon him by the law.”99

All this would corroborate a theory of rule and exception whereby the latter is in fact exceptional, that it is an absence of law, a “nothing” or an extreme constraint upon the rule. Such a rule would not be “in force” whilst suspended; as Agamben notes, “The man from the country [according to the above interpretations] is consigned to the potentiality of law because law asks nothing of him, imposes on him nothing other than its ban.”100 Such may indeed be the case historically or sociologically, including within the concentration camps and, more recently, within Guantanamo Bay: there is law,

96 Agamben, Potentialities, at 169 (emphasis in original).
97 Agamben, Potentialities, at 171.
98 Agamben, Potentialities, at 173.
99 Agamben, Potentialities, at 173.
100 Agamben, Potentialities, at 172.
but it is “suspended” to the extent that the sovereign – who is, after all, a juridical
creature (leaving aside for the moment the arguments, such as Kalyvas’s, of the non-
juridicality of the bio-sovereign) – has unfettered (or virtually unfettered) access to the
body of the subject.

But what of the fact that within the camp, within Guantanamo, within any state of
emergency, there is if anything an excess of law? The Nazis, for instance, may have
produced the camps as an outcrop of the suspension of Article 48 of the Weimar
Constitution, but subsequent to that they were in fact juridically prolific. The Muselmann
is the product of both a suspension and an excess. Thus, how to understand the open
door as the space of law when, intuitively, it looks like the law’s absence, Nothingness,
or impossibility? How to understand law as in force when suspended? Here Agamben
effectuates a nexus between messianism, the camp, the state of exception, and
Benjamin’s “tradition of the oppressed” in his interpretation of Kafka’s story.

What exactly is the messianic task? Agamben looks at the last line, and offers a
different interpretation of the story, noting that “The interpreters seem to forget, in fact,
precisely the words with which the story ends: ‘No one else could enter here, since this
door was destined for you alone. Now I will go and close it [ich gehe jetzt und schliesse
ihn]’.”\footnote{Agamben, Potentialities, at 173-174.} First, Agamben notes that the openness of the door is “the invisible power and
specific ‘force’ of the law.” Second, “it is possible to imagine that the entire behavior of
the man from the country is nothing other than a complicated and patient strategy to have
the door closed in order to interrupt the law’s being in force.” Thus, something happens
at the end of the story that does not reveal itself as an event as such. It is the
disconcealment of this “something” that, as if with the man’s complicity, “the apparent
aporias of the story of the man from the country instead express the complexity of the messianic task that is allegorized in it.” Agamben then links this story to another fragment of Kafka’s, in which he states: “‘The Messiah will only come when he is no longer necessary, he will only come after his arrival, he will come not on the last day, but on the very last day.’” Agamben then links this “double structure” to that implied in Benjamin’s paradigm (i.e. restoring the “tradition of the oppressed”), “of ‘a real state of exception’ as opposed to the state of exception in which we live.” He notes further: “This paradigm is the only way in which one can conceive something like an \textit{eskhaton} – that is, something that belongs to historical time and its law and, at the same time, puts an end to it.”\textsuperscript{102}

What is brought to an end, then, is the state of exception as a singularity, as, indeed, an exception \textit{tout court}. Instead, a doubling effect takes place, and the same figure that creates the exception is the doppelganger, so to speak, of the figure that brings it to an end: sovereign as messiah, and messiah as both legislator and redeemer.\textsuperscript{103} The messiah is a “bi-unitary figure” and “constitutes the true sense of the division of the single Messiah (like the single Law) into two distinct figures, one of which is consumed in the consummation of history and the other of which happens, so to speak, only the day after his arrival.”\textsuperscript{104} Thus, the man from the country colludes in the “complexity of the messianic task” by standing, recursively, before the law and permitting himself to be judged by the doorkeeper. This judgment is itself the interruption of the state of exception within which the law is in force (the paradigm of the tradition of oppression).

\textsuperscript{102} Agamben, Potentialities, at 174.
\textsuperscript{103} Agamben, Potentialities, at 173.
\textsuperscript{104} Agamben, Potentialities, at 174.
The interruption, in turn, brings about the real state of exception: the door, which was open only for him, is shut.

Agamben uses the story as an allegory of the coincidence, without identity, of historical and messianic time: “Only in this way can the event of the Messiah,” here understood as the moment of revelation when the door is shut, when the force of law as a state of exception is interrupted, “coincide with historical time yet at the same time not be identified with it, effecting in the eskhaton that ‘small adjustment’ in which, according to the rabbi’s saying told by Benjamin, the messianic kingdom consists.” This conclusory statement suggests the messianic task in microcosm: it is layered with narrative upon narrative, each one pronouncing a “judgment” upon the other, each judgment a “small adjustment” in the way the previous story or narrative comes into view. Even as the eskhaton “puts an end” to historical time, the “messianic event” is endlessly repeated as the man continues to stand in the open.105

Similarly, the paradigm of the concentration camp is the “instant of judgment” upon the juridico-philosophical tradition; like the messianic kingdom, it is the law’s “limit concept.”106 That is, it is its judgment and, as such, its “entire order” or “hidden structure.” But in order to see this ( messianic) role of the camp, one has had to dislocate one’s gaze from fact to example; that is, one has had to make a “conscious alteration,” to “cite and falsify,” historical fact in order for paradigmatic truth to come into view. And that “truth” is the suspension of the suspension: for the camp, that means suspending the “tradition” of its unique, exceptional status. It is a technique of law and an “instant of judgment” upon the law. In a sense, the camp paradigm continues where Benjamin’s

105 Agamben, Potentialities, at 174.
106 Agamben, Potentialities, at 163.
“tradition of the oppressed” as paradigmatic of law left off. Indeed, it effectuates the adjustment-fulfillment that attempts to bring into being a “real” state of exception, a real interruption of the force of law through its own suspension.

The messianic task, and the role of adjustment-fulfillment, is extended to the role played by the human subject within each drama, for instance that of the man from the country: his collusion suggests more agency than the role of the Muselmann in the camp, or the subaltern within Benjamin’s historical paradigm. And yet, neither of the latter is entirely passive either. In other words, each is subject to the same dislocation, remaining the same even as they are adjusted by the task, thereby coinciding with themselves as sovereign legislators-redeemers.

On the one hand, then, it would seem as if a justification for installing the camp as paradigmatic nomos is either merely a spiritual-personal theologumenon (the man’s stand before the law, like Benjamin’s before history, is a self-empowering “instant of judgment”), or edifying (the paradigm of a tradition of the oppressed enables a corrective to the historical narrative that violence is an occasional, exceptional event). On the other hand, since the messianic kingdom is not identical with historical time, the “small adjustment” is essentially nihilistic, since it means that nothing changes: the man continues to come before the law, is never permitted past the door, and as he dies he dimly perceives it being shut.

The point, though, is that whilst nothing changes, everything does: not potentially, Agamben insists, but radically. And it is precisely for that reason that the idea of the

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107 Agamben, 174 (after quoting Kafka’s notebook fragment): “The particular double structure implicit in this messianic theologumenon corresponds to the paradigm that Benjamin probably has in mind when he speaks, in the Eighth Thesis, of ‘a real state of exception’ as opposed to the state of exception in which we live.”
camp as nomos – as the definitive political element of the now – is so resisted, on the one hand, and so pervasively central to thought, on the other. For Agamben, however, working at the level of exemplar rather than “sociological inquiry,” the link between Benjamin’s “tradition of the oppressed,” the Muselmann of the camp, and the obscure Roman law figure of the homo sacer, seems unexceptionable. At that level of paradigm, the centrality of Auschwitz suggests, if nothing else, the struggle within thought to achieve a glimpse of its “hidden structure,” whether as obsessed with “an urge to catastrophize,” as Slavoj Zizek suggests,\footnote{Slavoj Zizek, \textit{The Ticklish Subject: the absent centre of political ontology} (Verso, 2000), at 153: Zizek remonstrates against “a favorite twentieth-century intellectual exercise: the urge to ‘catastrophize’ the situation: whatever the actual situation, it \textit{had} to be denounced as ‘catastrophic.’” Included in the group of philosophers who do this is Agamben, who “defines the twentieth-century concentration camps as the ‘truth’ of the entire Western political project.”} or as a means of describing the immanent violence of institutional structures and discourses, whether historical, juridical, or philosophical.

\section*{Conclusion}

To answer Norris’s query: does the camp as nomos deny any “general relevance” to Agamben’s theory of the political element within modern thought? Neil Levi and Michael Rothberg\footnote{Neil Levi and Michael Rothberg, \textit{“Auschwitz and the Remains of Theory: Toward an Ethics of the Borderland,”} \textit{symploke} 11.1-2 (2003) 23-38.} think not, although whatever relevance it has, for thinking through the camp as nomos in order to achieve a post-Holocaust ethics, must be critiqued as self-limiting. In a sense, Levi and Rothberg see the centrality of the camp as an “ambitious project,” with the Muselmann as the figurative source of a new ethics – as exemplified in Agamben’s \textit{Remnants of Auschwitz} and in \textit{Homo Sacer: Bare Life and Sovereign Power}. And just as Agamben uses Benjamin to develop a “new” politics, or dislocation, through
the camp as nomos in temporal-messianic terms, he uses Primo Levi to conceptualize a new ethics in spatial terms through the radical visibility of the Muselmann. This visibility too is a dislocation; as Levi and Rothberg note, Agamben “points out that others have avoided the ‘sight’ of the Muselmann and have thereby offered restricted accounts of post-Holocaust ethics, for which the Muselmann is the ‘limit,’ and he implicitly asserts that in daring to make the Muselmann visible, his own work will transcend those limits and expand the scope of ethics.”

Centralizing the Muselmann and making him visible, thereby eradicating his limit status, is to suspend the ethical suspension invited by the sight/site of the Muselmann, and to invite a new ethics engaged in “expanding the boundaries” of the human. But this project, Levi and Rothberg note, is at cost: first, the Muselmann is de-historicized, as is the camp itself, whereupon the camp as nomos “seems to be suggesting that Auschwitz is potentially everywhere, a suggestion that ends up eliding the specific challenges posed both by the Muselmann [in terms of testimony] and the camp system [as, within the material conditions of the camp, producing the figure of the Muselmann].” Second, this dehistoricizing of the Muselmann means that Agamben’s post-Holocaust ethics ends up “transforming him into a fetish, the sole site of the truth of the camps.” Levi and Rothberg therefore critique Agamben’s theory of the camp as nomos as a transcendental project by returning to Primo Levi, the source for Agamben’s reflections on the Muselmann, and propose a more heterogeneous and multifaceted

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110 Levi and Rothberg, at 27.
111 Levi and Rothberg, at 27.
114 Levi and Rothberg, at 31.
means of apprehending the camp than is permitted, in Agamben, “by such gestures as making the Muselmann the measure of all ethics.”\textsuperscript{115}

Levi and Rothberg find in Levi a different way to conceptualize a post-Holocaust ethics, one grounded in the idea of “different types of limits” to thought within and through the camp itself: “In the camp, ‘useless violence’ (another Levi concept) and counterrational genocide coexisted with an economy of vilecne that still functioned according to the profit motive and the imperatives of war.” As such, “the challenge lies in constructing an ethics predicated on a recognition of the compenetration of extreme, counterrational violence with a world that remained (and indeed in some ways remains) largely the same as before the Nazi ‘final solution.’” The point of Levi’s critique of Agamben, then, is to re-map the space of the camp within modern thought, and dislocating the space of the ethical as inhering within the singular, abstractified figure of the abject. The general relevance of thinking the camp heterogeneously, then, is that “The compenetration of the everyday and the extreme that Levi describes as the open universe or borderland of Auschwitz has implications not only for post-Holocaust ethics, but also for thought in the age of theory trouble,” i.e., theory “in trouble” in terms of relevance, and theory troubled by the ethical limit presented by the camp.\textsuperscript{116}

The spatial metaphor that required a critique, by Levi and Rothberg, of Agamben’s dislocation of the gaze from the absence of the abject figure to its radical visibility, i.e., Levi and Rothberg’s use of Primo Levi to reallocate the gaze from the figure to the multiple and complex sources of violence within the camp, renders Levi’s theory relevant, and seems to imply that Agamben’s allocation fails. And yet, the spatial

\textsuperscript{115} Levi and Rothberg, at 32.
\textsuperscript{116} Levi and Rothberg, at 34.
metaphor also seems to articulate a normative continuity that is a problem for thought, the problem suggested by positing the camp as nomos. Levi and Rothberg apply Levi’s multivalent and compenetrative gaze through a metaphor of border “between extreme violence and everyday life,” borders that “are now exponentially more porous. Whether the issue is famine, war, terrorism, epidemic, ethnic cleansing, or the echo of traumatic histories past, Levi’s figure of the open universe conjoining and communicating between violence and commerce speaks to the needs of the present, although its implications will have to be worked out concretely for these very different forms of violence.”\textsuperscript{117}

But one can analogize Levi’s ethical “open universe” with Kafka’s juridical “open door,” and compare the spatialized “porous border” (the camp as “borderland”) with the messianic task of dislocating, even falsifying, the gaze at historical truth. One thereby sees how the rejection of the Muselmann as the figure of a post-Holocaust ethics and the failure of the camp-\textit{paradigm} as a historical category nevertheless (re)iterates the camp-\textit{nomos} as historical critique: as Levi and Rothberg note, “At least…the novelty of industrial genocide – along with other expressions of extreme, modern violence – ought to provoke a self-critical moment in modes of thought that remain, despite the developments of the last decades, dominantly European-inspired and Europe-centered.”\textsuperscript{118}

This brings us back to Vajpeyi and the query as to why, and through what modalities, the camp remains central to thought. What was the European “nomos of the earth” for Schmitt remains so today, except that since Schmitt, the camp has come into existence as a spatial product – a compenetration of “violence and commerce” – of that

\textsuperscript{117} Levi and Rothberg, at 35.
\textsuperscript{118} Levi and Rothberg, at 35.
same spatial (i.e. land appropriation, in international law) nomos of the “*jus publicum europaeum*.”\(^{119}\) It is of course possible to oversimplify, but the point seems to be that to think the camp in relation to modern law as a “topography” is also to forget the camp within the *jus publicum europaeum* as constative violence.

The temporal palimpsest of the “messianic task,” then, involves the critical urgency of a radical shift from constative to performative violence, the “real” exception, with all the risks implied in that gesture, as Gayatri Spivak has noted: “‘The properly performative act must produce (proclaim) what in the form of a constative act it merely claims, declares, gives the assurance of describing…It cannot make itself be forgotten [*se faire oublier*], as in the case of states founded on a genocide or a quasi-exterrmination’”\(^{120}\) Guantanamo Bay gestures towards the city of Auschwitz: it cites and falsifies it, just as Auschwitz itself gestures toward the city of Oświęcim:\(^{121}\) it cites and falsifies the polis. The gesture of the camp is the political element (the nomos) *as* the juridical task, not the end, of Auschwitz as paradigm. It is a task of not-forgetting.

\(^{119}\) Schmitt, Nomos, at 82 (extending the old world order/nomos to a conception of the new: “The many conquests, surrenders, occupations, annexations, cessions, and successions in world history either fit into an existing spatial order of international law, or exceed its framework and have a tendency, if they are not just passing acts of brute force, to constitute a new spatial order of international law.”


\(^{121}\) See, e.g., Emily Harris, “Poland Appeals to Label Auschwitz as ‘German,’” at [http://www.npr.org/templates/story/story.php?storyId=11291650](http://www.npr.org/templates/story/story.php?storyId=11291650) (Authorities in Poland want to change the name of the Auschwitz concentration camp to officially include the word "German" in the title).