**LAW AGAINST JUSTICE AND SOLIDARITY: REREADING DERRIDA AND AGAMBEN AT THE MARGINS OF THE ONE AND THE MANY**

*By*

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## *Introduction: Derrida, Agamben and Key Others Confronting the Gaps between Law, Justice and Solidarity*

Law and justice are in crucial ways against nature as well as against solidarity. As David Hume famously proclaimed, justice is an "artificial virtue"[1] in contrast to the social bonds of family and community which are affectively grounded in solidarity and manifestations of mutual sympathy.[2] Law is also artificial much in the same way as justice. Indeed, the law that governs legal relationships sharply differs from other laws, such as the laws of physics or the laws of nature. Whereas the latter are internal and inextricably linked to their subject matter, legal norms are for the most part external in relation to those they govern, and in an important sense even against those subjected to their force.[3] Law is also against justice, in part because laws are and can be unjust, and in part, as Derrida has convincingly argued, because law sustains and highlights the impossibility of justice. [4] Indeed, building on Aristotle's insight that justice must be paired with equity and correspondingly generally applicable laws supplemented with equitable exceptions, Derrida demonstrates that justice cannot properly mediate between self and other unless it were to achieve the impossible task of fully encompassing at once the rule and its exception.[5] Furthermore, to this disjunction between law and justice should be added one between the latter two and social solidarity. On the one hand, when self and other are entwined in deep bonds of solidarity in a common communal project in which they are equally invested, questions of justice among them are unlikely to rise to the surface. On the other hand, to the extent that law is conceived as a self-standing normative order propelled by its own inner logic, as it does in Kelsen's positivist vision,[6] it tends to remain too abstract to command heartfelt internalization or commitment sufficient to transcend estrangement and dominant focus on fear of sanctions. Significantly, Kelsen puzzled over why those subjected to law would commit to a purely formal self-enclosed normative

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[1] *See* David Hume, *A Treatise of Human Nature, Bk III, Pt II* (1740).

[2] *Id., Bk III, Pt 1.*

[3] Law's artificiality is most obvious from the standpoint of legal posivism. But even under natural law approaches, be they grounded on divine origin or reason, law often stands out against human will and human nature as exemplified by the juxtaposition within the Old Testament of Cain's murder of his brother Abel and the Ten Commandments' prohibition against murder.

[4] *See* Jacques Derrida, *Force of Law: The 'Mystical Foundation of Authority'* in In Drucilla Cornell, Michel Rosenfeld & David Carlson (eds.), *Deconstruction and the Possibility of Justice*. Routledge (1992)

[5] *See* Michel Rosenfeld*, Derrida, Law, Violence and the Paradox of Justice***,** 13 *Cardozo Law Review* 1267 (1991).

[6] *See* Hans Kelsen, *The Pure Theory of Law* 1 (2d ed., M. Knight, trans. 1967).




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order. And this led him to turn to Freud's theories regarding group psychology in a search for some amalgam between an unconscious drive towards group identity and solidarity and a logical realization that an orderly and unified polity requires adherence to a constitutional hierarchy.[7] Only such a link could properly account for why those subjected to laws would internalize and validate them as their own.

Whereas Kelsen searched for some conjunction between law and solidarity, Schmitt and Agamben cast the dynamic between law and solidarity in terms of a disjunction. This becomes manifest in the case of the exception which for Schmitt arises in cases of emergencies. It is the sovereign who is exclusively empowered to declare the emergency and who triggers the exception that legitimates shedding the shackles of the law and of the constitution in order to leap into the realm of pure politics. Having declared the exception for as long as only he or she deems it to be warranted, the sovereign exclusively formulates and implements the political agenda projected to best advance the cause of those who count as the regime's friends against the latter's foes.[8] Consistent with Schmitt's vision, law bleeds into politics under the pressures of emergencies and that highlights the disjunction between the two. At the same time, once the genie of politics spills out of the container that harbors the law, its spread looms as all encompassing, thus apparently stamping all laws with politics. Moreover, whereas Schmitt ties the exception to emergencies, Agamben much more radically links the exception to every law as for him there is an unbridgeable gap between every piece of legislation and its application.[9] For Agamben law cannot predetermine its implementation as the administration of law inevitably leaves a great deal to discretion. In Agamben's view, there is accordingly an unbridgeable disjunction between law and administration. For Schmitt, on the other hand, disjunction emerges as much more fluid given that, at times, law seems to stand in contrast to politics and that, at other times, it appears to spill over into, or to become suffused by, politics.

The disjunctions and spill overs that circumscribe Schmitt's and Agamben's respective legal theories require supplementation for purposes of presenting law as susceptible of coherence and of legitimacy. Consistent with this, Schmitt turns to political theology and Agamben to an apportionment between allegory, image, spectacle and symbol, on the one hand, and *oikonomia,* on the other.[10] Significantly, political theology as it emerges in the works of Schmitt and the realm of the symbolic that Agamben couples with *oikonomia* are thoroughly grounded in religion. For Schmitt, politics are deeply rooted in religion, with kings enjoying divinely bestowed powers and historical destiny propelled by miracles. Contemporary secularization does replace theistic religion, but politics retains its traditional *modus operandum* with the divinely backed king replaced by the charismatic leader and miracles giving way to magic.[11] Much in a similar vein, Agamben locates the origin of contemporary politics in Christian theology's account of the mystery bound up in the relationship between the immutable unity of God

[7] *See* Hans Kelsen, *The Conception of the State and Social Psychology With Special Reference to Freud's Group Theory,* 5 International Journal of Psycho-Analysis 1-38 (1924).
[8] *See* Carl Schmitt, *Political Theology* (George Swab, trans., 2006).
[9] *See* Giorgio Agamben, *State of Exception* 24-31 (Kevin Attell, trans., 2005).
[10] Compare Schmitt's *Political Theology, supra to* Giorgio Agamben, *The Kingdom and the Glory: For a Theological Genealogy of Economy and Government* (Lorenzo Chiesa and Matteo Mandarini, trans., 2011).
[11] *Id.*




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and the plurality of the Holy Trinity resulting in the unfolding in historical time of divine providence and grace as it pertains to human beings.[12] Originating in the theology in question and still in full force at present is what Agamben posits as an immutable political-constitutional-legal matrix that separates the sovereign from those who govern and the legislator's law from the actual conduct of the affairs of the polity through an *oikonomia.*[13] Strikingly, although historically moored in Christian theology, the matrix unveiled by Agamben is apparently so hardwired as to become impervious to the abandonment of Christianity or the repudiation of all religion.[14]

Derrida's conception of an unbridgeable gap between law and justice in the necessary but always frustrated pursuit of solidarity among self and other is mirrored in Agamben's account of an insurmountable gulf between law and administration. For Derrida, law must call for justice and solidarity can only be genuinely achieved through justice, which renders the deconstructive quest for an ethical reconciliation of the singular, the universal and the plural akin to the tragic fate that befell on Sisyphus as incarnated in Camus' celebrated account.[15] For Agamben, in contrast, the nexus between law, justice and solidarity may be as elusive and problematic as it is in the case of Derrida, but it becomes masked by the ceremonial spectacle of the Christian unity of God in its mysterious harmony with the Holy Trinity, on the one hand—thus suggesting an imaginary reconciliation of the singular, the universal and the plural—and obfuscated by the workings of administration that escapes from (the sight of) law and justice, on the other hand. Is the passage from Derrida to Agamben one from painful truth and despair to artifice, spectacle and the dulled comforts of ordered administration besides or beneath law and justice? In terms of the challenges posed by law, justice, solidarity, and the relationship between the singular, the universal and the plural in contemporary polities, does the vision laid out by Agamben represent progress over that elaborated by Derrida? Or else, does Agamben's reconstruction ultimately lead to a regression in relation to Derrida's deconstruction? Finally, do Derrida's and Agamben's respective contributions point the way to further, potentially more fruitful, ways of reconciling the singular, the universal and the plural within a common horizon that could afford greater linkage between law, justice and solidarity?

To better explore these questions, Derrida's and Agamben's contributions to legal theory will be critically examined in Part I below in relation to the most relevant principal currents of legal theory against which they are set. Part II will investigate in greater depth the insights and shortcomings of Derrida's and Agamben's contributions to our grasp of the relationship between law, the singular, the universal and the plural; and also explore whether Agamben can be said in some meaningful sense to be Derrida's successor within the realm of critical approaches in legal theory. Finally, Part III will focus on whether Derrida's and Agamben's contributions can be accounted for and adapted in order to aim for a better integrated account of the relationship between law, justice and solidarity in its confrontation with the dynamic tension between the singular, the universal and the plural. Moreover, the latter inquiry will

[12] *See* Giorgio Agamben, *The Kingdom and the Glory, supra,* at 109-143.
[13] *Id.*
[14] *Id.,* at 286-287.
[15] *See* Albert Camus, *The Myth of Sisyphus* (Justin O'Brien, trans. 1955).

be undertaken within the ambit of a pluralist, as opposed to a monistic or a relativistic, normative approach.

## *Part I: Situating Derrida and Agamben within the Landscape of Contemporary Legal Theory*

### *A) The Difficulties In Placing Derrida and Agamben Within the Streams of Modern Jurisprudence*

Derrida's writings on law and justice are situated within his own deconstructive enterprise and they highlight his increasing turn toward ethics.[16] Derrida, however, does not directly engage with contemporary legal theorists. Much the same is true for Agamben though he studied law and engaged with Schmitt.[17] Although both Derrida and Agamben have had influence on legal theorists on both sides of the Atlantic and beyond, their impact on legal theory as a whole has been rather modest. One reason for this is that the writings of both of these authors are rather dense and complex rendering them of difficult access for most legal theorists. Consistent with this, the present undertaking will not attempt to actually locate Derrida's and Agamben's respective contributions within the history of contemporary jurisprudence. Instead, I propose to engage in a counterfactual reconstruction seeking to situate the two of them where they might best fit within the unfolding of twentieth and early twenty first century jurisprudence within both the Anglo-American and the Continental European traditions. In other words, the focus in this Part will be on the questions within contemporary jurisprudence to which Derrida and Agamben can be read as providing answers, on the further salient questions that their contributions can be interpreted as raising, and on the conflicts, contradictions and tensions that these contributions may illuminate, solve, advance, exacerbate or redirect. Because of the present concern with overall trends, the references to the relevant jurisprudence will be selective and they will be dealt with for the most part with broad strokes.

In addition to placing Derrida's and Agamben's contributions relevant to jurisprudence within the already mentioned broad framework carved out by Kelsen and Schmitt, they can also be fruitfully associated with specific notorious turning points within the trajectory of jurisprudence during the last several decades. In Derrida's case, as I have argued elsewhere,[18] deconstruction can be persuasively envisioned as becoming embraced by law within complex contemporary legal systems and particularly within the American one rooted in the common law and engaged in a broad ranging, often ethically

[16] *See* Michel Rosenfeld, *Derrida's Ethical Turn and America: Looking Back from the Crossroads of Global Terrorism and the Enlightenment*, 27 Cardozo L. Rev. 815-845 (2005).
[17] *See* Giorgio Agamben, *State of Exception* 1 (Kevin Attell, trans. 2005).
[18] *See* Michel Rosenfeld, *Just interpretations: Law Between Ethics and Politics* 29-32 (1998).

charged, interpretation of a written constitution.[19] Specifically, Derrida and deconstruction irrupted into the American jurisprudential scene in the late 1980's when Derrida's presented his *Force of Law*[20] at the Cardozo School of Law in New York City, and when a panel on deconstruction and the law was held at a Critical Legal Studies (CLS) annual meeting in Washington, DC.[21] From a theoretical standpoint, moreover, Derrida's deconstructive methodology and ethical quest centered on justice assumed a notable place in American jurisprudential discourse at a time when CLS was running out of steam and as its former adherents and sympathizers were in quest of sequels or alternatives. Derrida and deconstruction thus joined Critical Feminist Theory[22] and Critical Race Theory[23] as heirs to CLS poised to leap beyond its limitations.[24]

Situating Agamben in terms of the various currents of contemporary jurisprudence, on the other hand, is at once easier and more difficult. It is easier in that, as already mentioned, Agamben directly responds to Schmitt regarding the state of exception. Agamben thus in effect rethinks Schmitt's conception of law as subsumed within political theology and recasts it by sundering law's potential for efficacy from its claim to legitimacy. Law's efficacy derives from its functioning as *oikonomia,* meaning, in the context of Ancient Greece, the practical successful management of the household; or, transposed to the confines of the modern polity, meaning administration guaranteeing the orderly steering of the bureaucratic state. Law's legitimacy, in contrast, originates in the religious mystery surrounding the Christian Holy Trinity, and as alluded above, links to *oikonomia* through the projection of divine grace and divine providence toward the realm of human affairs. In the contemporary era, as the divine is substituted, or even in some circles eradicated, by secularism, the Christian Trinity retains its legitimating force, for Agamben, but this time as an image of mystery, splendor, sumptuous spectacle, and symbol of the transcendent amalgam of the unity and universality of God and the plurality and individuality of the (now abstracted) Christian Trinity. Going beyond his historical link to Schmittian jurisprudence, Agamben promotes a theory that, in an important sense, purports to be equally valid for any period following the advent and the implantation of Christianity. At the same time, Agamben tackles challenges to his theories that are seemingly posed by competing contemporary accounts of law's

[19] This linking of Derrida's deconstructive approach to texts and to ethical issues arising of the encounter between self and other to the common law approach is in no way contradicted by Pierre Legrand's claim in his contribution to this volume that Derrida's conception of law was thoroughly and exclusively steeped in French law. Even if that were conceded, Derrida' s approach to the interpretation of texts, his insights into the dichotomy between law and justice, and his ontological and ethical concern with doing justice to the other in all his or her singularity all mesh very well with the intertextual proclivities and interweaving of legal and ethical strands typical within common law adjudication.

[20] See Jacques Derrida, "Force of Law: The Mystical Foundation of Authority" in Drucilla Cornell, Michel Rosenfeld and David Carlson, eds., *Deconstruction and the Possibility of Justice* 3-67 (1992).

[21] I was one of the panelists at this panel on Derrida, deconstruction and law, which was one of the best attended ones at the 1988 annual CLS meeting.

[22] *See, e.g.,* Carrie Menkel-Meadow*, Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School",* 38 Journal of Legal Education 61 (1988).

[23] *See, e.g.,* Kimberlé Crenshaw*, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law,* 101 Harvard L. Rev. 1331 (1988).

[24] Consistent with what was already mentioned, it bears emphasizing again that in terms of *actual* influence in the American jurisprudence community, Derrida and deconstruction enjoyed a scant presence in comparison with critical feminist and critical race theory.

legitimacy. Thus, for example, Agamben argues that Habermas's discourse theory of law grounding legitimation on communicationally generated consensus does not do away with the need to combine divine origin and *oikonomia.* Indeed, as Agamben sees it, Habermasian consensus points to the glory and acclamation of the people that embody the contemporary iteration of divine intervention.[25] In other words, what appears as rationally produced consensus among communicationally engaged self-governing politically engaged free and equal human beings ultimately depends on an instantiation of glory, both divine and human, of the Father and of the Son, and of acclamation of the people as substance and as communication.[26] Habermas may give primary or exclusive emphasis to communication as the basis for legitimation, but Agamben sees the communication in question as but one plausible means to account for the glory and acclamation transmitted by the people as substance.

Ascribing a particular place to Agamben's jurisprudence within the history of contemporary jurisprudence, on the other hand, is made especially difficult by virtue of two principal factors. First, Agamben's jurisprudence purported validity throughout the reign of Christendom and through all its socio-cultural byproducts defies attempts to anchor it in one contemporary school or current rather than in any other. And second, given the density of Agamben's thought and of his dearth of direct engagement with many of his contemporaries, there does not seem to be any obvious place for him to occupy in the succession of jurisprudential trends and debates. With this in mind, as announced above, I will proceed with a counterfactual reconstruction: if we had to find a place for Agamben within the unfolding history of contemporary jurisprudence, where would that place be? To which problems, questions and responses marking contemporary jurisprudence might Agamben's theory make the most notable possible contribution? My overall answer is that is that the most fruitful hypothesis, which I will attempt to buttress below, is that Agamben is best regarded as providing a reconstruction that replaces or supplements Derrida's deconstruction. Moreover, to better appreciate the import of my hypothesis, it is first necessary to place both Derrida's and Agamben's respective jurisprudences within the broader jurisprudential undertakings of their contemporaries.

Derrida's irruption on the American jurisprudential scene took place, as already mentioned, at a time when the main thrust of the CLS movement was waning. Derrida's appeal, in that context, was propelled by the combination of two principal elements: his deconstructive approach to texts and the comprehensive intertextuality it relied upon; and the ontological and ethical implications stemming from his confrontation with the necessary but impossible task of reconciling law and justice. CLS's scope and range was wide and diverse and its adherents drew from a multiplicity of theoretical sources.[27] What drew together the otherwise diverse and highly heterogeneous body of work produced by the CLS movement was a discrete critique of various fields of law purporting to instill order and doctrinal coherence through the uncovering of contradictions, inconsistencies and the perennial indeterminacy of law. In CLS's view, this indeterminacy allowed judges and others in charge of interpreting the law to operate under a façade of objectivity and respect for rights and standards of justice while in fact ultimately engaging in politics and producing outcomes that invariably served the purposes of the

[25] *See* Giorgio Agamben, *The Kingdom and the Glory, supra,* at 258-259..
[26] *Id., at* 259*.*
[27] *See, e.g.,* Duncan Kennedy, *Form and Substance in Private Law Adjudication,* 89 Harvard L. Rev. 1685 (1976).

powerful. What Derrida's deconstructive approach to texts was poised to contribute to CLS's "trashing"[28] of legal texts was a systematic approach rooted in intertexuality going all the way down which posited that all interpretations are always subject to revision and that they all inevitably comport ambiguities, aporias, and a seemingly endless stream of actual or potential connotations.

The CLS movement had virtually exhausted itself in the US by the end of the 1980's because after having completed dazzling unmaskings of the pretenses of discrete fields of private law, such as contracts and torts, and of public law, such as constitutional and criminal law, its proponents stood upon the ruins of the bodies of law they had debunked without seeming to be able to suggest any constructive alternatives. At that point, some critical voices suggested that CLS had gone too far. Thus, for example, critical race scholars argued that in spite of law's indeterminacy and susceptibility to being politicized, African-Americans were palpably better off thanks to application of the US civil rights laws than they would have been in the latter's absence.[29] Significantly, whereas some critical theorists may have somewhat pulled back from CLS's most radical conclusions, Derrida can be understood as starting where they left off in search of a new path to a more constructive enterprise. This he managed by supplementing deconstruction as a methodological instrument with deconstruction in its ontological and ethical dimensions. Legal texts may be deconstructed endlessly, but law always stands between self and other, each of whom emerges as ontologically indissoluble and as ethically charged to keep pursuing the impossible by using law to do justice--understood as requiring giving the other his or her due consistent with the latter's radical and irreducible singularity.[30]

Deconstruction's ethical command to use the law to seek justice entrusts law with a constructive mission that CLS proponents did not provide for, but has not thus far revealed in what that constructive mission might actually consists in, or in what it might result. Consideration of these two crucial issues will be addressed in Part II below. Before turning to that task, however, it is necessary to engage in some further inquiry into Derrida's and Agamben's jurisprudential precursors and to attempt some further elucidation of the place of our two protagonists' contributions in the broader theoretical landscape of contemporary jurisprudence.

### *B) The Precursors of Derrida's and Agamben's Legal Theory*

From a bird's eye perspective, the Kelsen versus Schmitt confrontation that framed twentieth century continental European jurisprudence finds an echo in the Anglo-American setting. Indeed, on the one hand, the positivism of H.L.A. Hart shares much with the positivist vision of Kelsen. In both cases, law emerges as a sui generis self-sustained normative order that becomes distinct and particularized through a procedural pedigreed process. For Kelsen, it is the constitution or *Grundnorm* that sets the bounds of the self-contained legal order by specifying how valid laws can be enacted, and what counts

[28] *See* Mark G. Kelman, *CRITICAL LEGAL STUDIES SYMPOSIUM: Trashing*, 36 Stan. L. Rev. 293 (1984).
[29] *See* Kimberlé Crenshaw, *supra note 23.*
[30] *See* Michel Rosenfeld, *Just Interpretations, supra*, at 18-32, for a more extended discussion of these points.

as a valid law; [31] for Hart, it is the rule of recognition that performs an equivalent function.[32] On the other hand, one can detect definite affinities between Schmitt's jurisprudence and what may be reconstructed as CLS's overriding jurisprudence.[33] As already noted, for Schmitt law becomes ultimately subsumed under political theology, with charisma replacing religion in the age of secularism. CLS, for its part, replicates in its own way the Schmittian move from law to politics, but leaves recourse to religion or charisma aside.

Neither law viewed as a self-standing normative order nor law as politics bereft of God or charisma loom as normatively attractive or persuasive from the standpoint of those subjected to such law and to its sanctions. In other words, law hardly emerges as appealing, substantively legitimate or just if it is reducible to either consistent, orderly enactment or to mere politics. As already mentioned, Kelsen was intrigued as to why people would be inclined to obey the law and looked to Freud to inquire whether something deep in the human psyche could account for commitment to lawfulness.[34] Positivism itself does not yield any clue as to why people should find the law legitimate or just and why they should obey it but for fear of sanctions. Furthermore, if law is reducible to politics, thus enabling the powerful to impose their will over the powerless, then it appears to be little more than a tool of oppression.

Those who espouse a positivistic account of law may seek to find legitimacy in democracy to the extent that they operate within a legal system that institutionalizes democratic lawmaking. In that setting, law is the product of the constitutionally empowered legislator, and it appears legitimate because it embodies the will of the citizenry's majority. As often pointed out, however, claims to legitimacy based on the will of the majority can be problematic, particularly in multinational, multicultural or religiously diverse polities in which majorities may be prone to oppressing, or trampling on the rights of, minorities.

The impasse between positivism's positing law as *mere* law and law as *mere* politics after erosion of the friend versus foe divide and the fading of charisma need not necessarily result in a dead end. This follows from a consideration of alternative contemporary jurisprudential theories that offer different perspectives on law and on its sources of legitimacy. For present purposes, it suffices to focus on a particular cluster of such theories as the latter added to those flowing directly from Kelsen and Schmitt considered thus far provide a fair representation of the jurisprudential landscape into which Derrida's and Agamben's contributions may be most usefully integrated. The most significant theories in question include: those that that envisage the legitimation of law in terms of contract or consensus; those that embrace a moral justification of law, thus for all practical purposes siding with natural law in its perennial confrontation with positivism; the law and economics theory that justifies laws in terms of their propensity to contribute to wealth maximization; and, the theory of law as a self propelling

[31] *See* Hans Kelsen, *The Conception of the State and Social Psychology, supra.*

[32] *See* H.L.A. Hart, *The Concept of Law* 92-93 (1961).

[33] Because individual members of the CLS movement professed allegiance, in whole or in part, to a wide variety of theoretical movements ranging from Marxism, to existentialism, post-structuralism and pragmatism, among others, the reconstruction undertaken here focuses on similarities that span across most CLS contributions while disregarding differences and nuances among the various contributors to the movement.

[34] *See supra,* note--.

autopoietic system that is normatively closed and that as such bears some noteworthy affinity to positivism.

*i) Rawls and Social Contract Based Legitimation*

Social contract based legitimation of law is grounded on the premise that all individuals subjected to law are free and equal and that all obligations to obey the law are ultimately self-imposed, either directly or indirectly. Drawing on Kant and Rousseau and adapting classical social contract theory for contemporary use, Rawls offers a hypothetical social contract procedure as the means to construe principles of justice that provide criteria of legitimation for law.[35] Rawls's hypothetical social contractors operate behind a "veil of ignorance"[36] and reach agreement on two principles of justice—the equal liberty principle and the difference principle.[37] Moreover, based on this, the hypothetical social contractors further agree on "the basic structure"[38] and the "constitutional essentials"[39] of a just society. Whereas Rawls' contractarian approach does not guarantee the justice of every single law, it does provide for unanimous consent for the lawmaking process as well for enshrining fundamental rights, thus overcoming the legitimating shortcomings of positivism linked to democratic lawmaking. Indeed, if the basic structure and constitutional essentials of a given polity are unanimously agreed to and if these provide for a combination of democratic laws and anti-majoritarian fundamental rights guarantees, then the resulting legal regime must be deemed to be just overall, notwithstanding that an occasional law standing alone would manifestly fail to garner unanimous consent.

Rawls' contractarian approach has been widely criticized, however, in important part on the grounds that his veil of ignorance does not make for neutrality among actual interests bracketed away and thus not subject to consideration by the hypothetical contractors.[40] Thus, for example, the veil of ignorance favors the risk averse and privileges individualism over communitarianism.[41] To the extent that it is biased and that its biases are hidden from the hypothetical contractors, any unanimous consent by the latter would ultimately fail the contractarian ethos, either as not amounting to a genuine consent or as not adequately respecting all involved as being truly free and equal.[42] Furthermore, from a Derridean perspective, even if the veil of ignorance were thoroughly neutral, the mere fact that it hides many of their most important interests and aspirations from the contractors precludes that the resulting principles of justice treat each of those coming under their sweep in all his or her singularity.

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[35] *See,* john Rawls, *A Theory of Justice* 12 (1971).
[36] *Id.,* at 136-142.
[37] *Id.,* at 60-65.
[38] *Id.,* at 7.
[39] *See* John Rawls, *Political Liberalism* 139-140 (1993).
[40] *See,* Michel Rosenfeld, *Law, Justice, Democracy and the Clash of Cultures: A Pluralist Account* 32-34 (2011).
[41] *Id*.
[42] In part in response to his critics, Rawls reframed his contractarian approach by narrowing the relevant domain for unanimous consent from that of comprehensive justice to that of political justice. *See* his *Political Liberalism* (1993). However, this narrowing of the relevant domain of justice did not solve the problem of neutrality or eliminate the privileging of certain interests or conceptions of the good over others. *See* Michel Rosenfeld, *Law, Justice, supra,* at 62-67.

### *ii) Habermas and Consensus Based Legitimation*

By moving from consent to consensus, by reinforcing the nexus between Kant and Rousseau, and by doing away with any veil of ignorance in the dialogical process that is supposed to yield just laws, Habermas points to a path towards overcoming the shortcomings found in Rawls' theory. Like Rawls' hypothetical contractors, Habermas' participants in an ideal speech situation that is best suited to lead to a consensus are free and equal individuals who relate to one another as strangers seeking to live together in a common just and fair legal regime.[43] Unlike Rawls, however, Habermas allows for each participant in the idealized discourse procedure --whereby all participants benefit from an equal opportunity to present their arguments and all agree to be persuaded exclusively on the basis of the inherent persuasive force of the arguments before them—to bring all his or her "non-metaphysical" interests to the table.[44]

Habermas asserts that there have been three post-metaphysical paradigms of law that have purported to harmonize legal and factual equality. These are: the liberal-bourgeois paradigm which provides for equal formal rights, but promotes factual inequality; the social-welfare paradigm which is meant to remedy the factual inequality of the preceding paradigm, but in so doing reduces welfare recipients into passive clients dependent on state welfare bureaucrats; and, finally the proceduralist paradigm, which is supposed to overcome the shortcomings of its two predecessors.[45] Indeed, under the proceduralist paradigm everyone subjected to a law is in essence both its author and someone who has willingly embraced it as being just. Moreover, consensus, as Habermas understands it, means agreement *on the same grounds* among all those involved (as opposed to compromise in relation to which those who agree could each do so on different grounds).[46]

Stressing the inadequacies of mere formal legal equality and of bureaucratically administered welfare, Habermas reframes Kantian universalism and the predominance of the right and the just over the good. Habermas does so by making the process whereby the categorical imperative and just legal

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[43] *See* Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* 415-416 (W. Rehg, trans., 1996).

[44] As Habermas seeks to establish a "post-metaphysical" legal regime that reconciles legal and factual equality, he leaves no room within his discursive process for the introduction of religious dogma or religious ideology. *See,* Michel Rosenfeld, *Just Interpretations, supra*, at 136.

[45] *See* Jurgen Habermas, *Between Facts and Norms, supra*, at 418-419.

[46] *Id., at* 459-460. Habermas specifies that consensus is always required in morals, but that compromise might sometimes suffice in law. *Id.,* at 460. Consensus requires that that which is being agreed to be *universalizable*, and that is imperative in the realm of morals that extends to all human beings at all times. *Id.,* at 109. Legal regimes, on the other hand, mostly apply to single polities. Accordingly, morality must generate consensus among proponents of all ideologies whereas law must only do so among proponents of those ideologies present within the relevant polity. Thus, for example, morality must seek consensus equally compatible with all the world's religions whereas a country that does not count with a single Buddhist or Muslim need not adopt legal norms that would garner the consensus of adherents to the the latter religions. For present purposes, the distinction between consensus and compromise can be ignored to the extent that from a Habermasian perspective all legal systems must be consistent with morality and that, for practical purposes, they must garner the agreement for the same reasons of all those within the bounds of a particular legal domain.

regimes are established thoroughly dialogical rather than ultimately monological as Kant does.[47] In other words, whereas for Kant the categorical imperative can be deduced by each individual who uses reason, for Habermas what ought to count as universal in morals or normatively valid for all within the polity in the case of law can only be arrived at as the collective product of a dialogically fair process. To this, moreover, Habermas links Rousseau's concept of the citizen as being at once (part of) the ruler and (part of the) ruled, thus only obeying laws that are self imposed.[48]

Habermas's dialogical consensus coupled with his insistence on vigorous and thoroughly engaged self-government seems to share much in common with Derrida's account of the relation between law and justice. There is, however, one glaring difference between the two: Habermas posits his discourse theory of law and morals as sketching a firm path to justice whereas Derrida insists on the latter's impossibility. Viewing the matter more closely, leaving aside Habermas's contestable commitment to the priority of the right over the good, there are three important criticisms that can be leveled at his dialogical proceduralism.[49] First, Habermas excludes metaphysical perspectives, including religious ones, and thus the dialogical process cannot be universal *ex ante*. Second, whether or not the dialogical process would yield a consensus in any particular instance seems purely contingent, unless one assumes that the parties to the dialogue would be bound by reason to reach such consensus (in which case reason and not any intersubjective process would determine what is just and the legitimacy of law). And third, as made manifest by certain feminist critiques,[50] Habermas's procedural paradigm arguably fails to provide a level playing field for all the non-metaphysical perspectives it invites into the dialogical forum.

Consistent with the three above criticisms of Habermas's proceduralism, both he and Derrida concentrate on the need to reconcile the universal (which for Habermas is embodied in Kantian universalizeability) and the individual as free and equal. In the end, Habermas offers a manifestly contestable reconciliation whereas Derrida concludes that such reconciliation is bound to fail, but must nonetheless be steadfastly pursued.

There are also aspects of Habermas's theory that seem relevant from the standpoint of Agamben's contribution. These include Habermas's second legal paradigm, the social-welfare one, and the dynamic relationship that he conceives as emerging from the confrontation between system and lifeworld. Habermas's social-welfare legal paradigm relies on bureaucratic administration to insure the distribution of goods and services required to secure the basic welfare of the citizenry. The administration in question certainly seems to share much in common with Agamben's notion of *oikonomia* . What is particularly noteworthy in this connection is Habermas's above mentioned criticism of the social-welfare legal paradigm as reducing the citizenry into passive clientism, thus depriving welfare recipients of autonomy and dignity. Bureaucratic administration seems indispensable in any modern polity, however,

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[47] *See* Jurgen Habermas, *Moral Consciousness and Communicative Action* 195, 203-204 (C. Lenhardt and S.W. Nicholsen, trans., 1990).

[48] *See* Jean Jacques Rousseau, *The Social Contract* 16-17 (C. Frankel, ed. 1947).

[49] For an extended discussion of these three criticisms, *see* Michel Rosenfeld, *Just Interpretations, supra*, at 136-148.

[50] *See id.,* at 138-144.

and it must therefore stay in place even after full transition to the proceduralist paradigm. One way one can imagine the legitimation of bureaucratic administration under the proceduralist paradigm is through the subjection of the administrative state to constitutional safeguards and constraints.

To better grasp how bureaucratic administration may be reconciled with self-government it is necessary to take a closer look at Habermas's understanding of the dynamic between system and lifeworld. In modern complex societies, according to Habermas, bureaucratic administration and the economy operate as self-regulated systems steered respectively by administrative power and monetarization. Standing against these systems is the lifeworld, which provides an entirely different kind of integration. The lifeworld endows a collectivity with meaning by providing "a social integration based on mutual understanding, intersubjectively shared norms, and collective values".[51] The lifeworld, moreover, can integrate the operative systems within a normatively integrated meaning endowing framework, but as systems expand they can threaten to "colonize" the lifeworld.[52] To combat "colonization", the lifeworld must be adapted and geared to constraining the undue expansion of systems so as to preserve meaning and normative coherence.[53] Thus, for example, as global capitalism exacerbates income inequality, the state must deploy welfare policies designed to reduce income inequality. Consistent with this, through use of the proceduralist paradigm in law, the contemporary polity must reign in and subsume under the norms inherent in its appropriately adapted lifeworld the seemingly ever expanding system of bureaucratically led administrative coordination. What follows from this in relation to Agamben is that whereas he conceives *oikonomia* as standing on its own, for Habermas the economy and the administrative system cannot aspire to meaning or to normative validity unless they can be subsumed under the ethos of the polity and made to conform to the dictates of the dialogical process that yields the proceduralist paradigm of law.

*iii) Dworkin's Substantive Liberal Egalitarian Conception of Law's Integrity*

Standing against positivism, CLS, and all process based theories, including Rawls's, Dworkin articulates a theory of law's coherence, integrity and legitimacy that is substantive in nature and that posits that law is only ultimately meaningful to the extent that it is grounded in a particular political philosophy and corresponding morality.[54] Through his criticism of Hart's positivism, Dworkin evokes the core traditional natural law conviction that legitimate law is inextricably tied to morality.[55] But whereas natural law relies on divine prescription or reason as the source of morally grounded legitimate law, Dworkin embraces a political philosophy firmly grounded in the Enlightenment. More specifically, Dworkin promotes a particular conception of an Enlightenment based political philosophy, namely a liberal egalitarian one built on the proposition that all persons are entitled to equal concern and

[51] Jurgen Habermas, *The Postnational Constellation: Political Essays* 82 ( Max Pensky, ed. & trans., 2001).
[52] *See* Jurgen Habermas, "Further Reflections on the Public Sphere" in Craig Calhoun, ed., *Habermas and the Public Sphere* (1992).
[53] For a more extensive account of the dynamic between system and lifeworld in the context of globalization, *see* Michel Rosenfeld, *Law, Justice, Democracy and the Clash of Cultures, supra*, at 276-278.
[54] *See* Ronald Dworkin, *The Forum of Principle,* 56 N.Y.U. L. Rev. 469, 478 (1981).
[55] *See* Ronald Dworkin, *Taking Rights Seriously* 40-45 (1978).

respect.[56] This difference between traditional natural law theory and Dworkin's theory is crucial in that the former is by its own terms universal in nature and scope—we are all the children of God and/or we all possess reason—whereas Dworkin's theory is inevitably contestable as it is admittedly tied to Enlightenment values and as it stands against many competing existing liberal conceptions, such as the libertarian one, for example.

Dworkin attacks the mere law approach of positivism and the reduction of law to politics of CLS through his use of the distinction between principle and policy. As he specifies, "arguments of principle are arguments intended to establish an individual right; arguments of policy are arguments intended to establish a collective goal".[57] Dworkinian principles are supposed to constrain legal rules and to guide collective aims embodied in policies pursued through laws. One important question that Dworkin's distinction between principle and policy leaves unanswered is why his liberal egalitarian political philosophy and moral outlook should be preferable to any of the other existing competing conceptions of the good. Dworkin does not provide any full or satisfactory answer to this question, but he tellingly asserts that the US Constitution happens to enshrine fundamental liberal rights as legally binding constitutional rights.[58]

Dworkin and Derrida share in common their rejection of CLS' purely negative conclusions and an unshakable conviction that law must be inextricably linked to justice. Beyond that, however, they pretty much emerge as sharp opposites. This is perhaps best exemplified by their diametrically opposed views regarding the interpretation of texts. As against Derrida's inexhaustible intertextuality, Dworkin has famously defended throughout his entire career that there is a single right answer for every hard and highly contested legal case.[59] Put in its best light, Dworkin's highly contested conclusion implies an alignment between his political philosophy, his morality, his distinction between principle and policy, and the heuristic intervention of an imagined supra-human all knowing judge whom he names Hercules.[60] In short, from a Derridean perspective, Dworkin's quest is indispensable, but his positing the contestable as universal and his repression of all singularity by means of the imposition of a fictitious demigod's legal interpretive diktat a reminder of the road not to take.

Dworkin's positing the contestable as a manifestation of something that takes the place of the universal within the American polity can be plausibly interpreted as bearing a significant affinity to Agamben's appeal to glory and acclamation as complementing the administrative characteristics of *oikonomia*. As noted, Dworkin draws on one ideology among the many deriving from the Enlightenment and then ties it to the US Constitution which is widely acclaimed and at the very center of American glory. Arguably, moreover, Dworkin's Hercules magically insures the right ordering and alignment of law

[56] *See id.,* at 180-183.
[57] *Id,* at 90. This articulation seems to imply a natural rights theory in the tradition of Locke rather than a natural law one. Strictly speaking, Dworkin bears affinity to these two traditions without fall squarely within either. An individual right may be an inalienable one in the Lockean mold or one deriving from a moral principle, such as the inherent dignity of all human beings.
[58] *See id.,* at 184-205.
[59] For a discussion and critique of Dworkin's "one right answer" thesis, *see* Michel Rosenfeld, *Dworkin and the One Law Principle: A Pluralist Critique*, 59 Revue Internationale de Philosophie 363-92 (2005).
[60] *See* Ronald Dworkin, *Law's Empire* 239, 264-6 (1986).

and justice through the guarantee of infallible interpretation. Is this comparable to Agamben's reliance on the Holy Trinity for purposes of endowing *oikonomia* with providence and grace? Are Dworkin and Agamben equally resorting to artifice to cover up respectively the contradictions and limitations of the Enlightenment and the mirage of a self-standing administration?

The last two jurisprudential theories that bear significant relevance to the present analysis are the law and economics theory and the autopoietic theory of law. Both of these theories most obviously relate to Agamben's concept of *oikonomia,* though they may also be regarded as having broader connotations that may also be useful in relation to Derrida.

### *iv) Law and Economics Versus* Oikonomia

In contrast to positivism which purports, above all, to tackle law as it is, law and economics is a normative theory. In its most encompassing version, law and economics proclaims that the purpose of law is wealth maximization, and that wealth maximization provides the best means to equal freedom allowing each individual to pursue his or her ideals and self-interest.[61] Moreover, based on the assumption that human beings are self-interested and instrumentally rational, Posner, the leading figure in the law and economics movement, posits that economic science can provide an objective evaluation and interpretation of laws in its dual capacity as a positive science capable of explaining the behavior of rationally self-interested individuals and as a prescriptive science oriented toward wealth maximization.[62] Consistent with this, if an open ended law can be interpreted in many different ways, law and economics requires that the interpretation best suited to promote wealth maximization be adopted. In short, consistent with Posner's theory, law should serve the economy by channeling human nature to wealth maximization which will leave all in the best possible position to achieve self-realization and self-fulfillment.

Economy for Posner seems quite close to what *oikonomia* represents for Agamben. To be sure, "economy" is not synonymous with "*oikonomia",* but the parallels are quite striking. In its early historical understanding, *oikonomia* meant the prudent ordering or management of the household; in the modern prescriptive sense invoked by Posner, the economy is the prudent stirring, management, preservation and increase of a polity's resources with a view to maximizing wealth in order for the society involved to achieve the best possible order and harmony. In the modern context, *oikonomia,* in Agamben's view, connotes administration rather than economy. But, consistent with Habermas's distinction above, both the contemporary economy and bureaucratic administration function as self-enclosed and self-sufficient systems that remain distinct from the particular lifeworlds with which they share a common social space.

If the systemic aspects of economics and administration are brought to the fore, then Posnerian law ideally would tend to dissolve into economics whereas law in Agamben's account would become reduced to administration. More precisely, even if law's only purpose were to serve the economy, it would not entirely disappear as wealth maximizing would require a functioning law of contracts and of

[61] *See* Richard Posner, *The Problems of Jurisprudence* 382 (1990).
[62] *Id.,* 353-367.

property. Law's validity and legitimacy, however, would be entirely dependent on its advancing wealth maximization. Accordingly, within a law and economics ideal, reducing law to economics would be coherent and self-justified as fitting within the overall objective of achieving wealth maximization, which itself looms as justified as the supposedly best available means to insure individual self-realization and self-fulfillment. In contrast to this, the passage from law to administration in Agamben's conception seems doubly contingent. First, it is not apparent whether the *specificity* of the law involved has any impact on the resulting administrative bureaucratic particulars; and second, it seems that no particular administration is inherently more legitimate or just than any other to the extent that the glory and acclamation that provide it with a source of legitimation is external to, independent of, the specific administrative regime in play.

It is obvious that the desirability of linking the legitimacy of law to wealth maximization is highly contestable as is Posner's libertarian political philosophy. But more importantly, for immediate purposes, law's legitimacy cannot be systematically conceived or assessed exclusively in terms of economics. To his credit, Posner himself has recognized this, and emphasized the limits of the economic theory of law in a discussion on whether or not a constitutional right to abortion is warranted. Indeed, it is not only impossible to determine whether such a right would be wealth maximizing, but it would be altogether meaningless to ascribe a "cost" to the aborted fetus.[63] What follows from this is that the economy may be a self-contained system, but law cannot be comprehensively and systematically understood or legitimated in terms of economics. That, in turn, results in a comparative advantage for Agamben's theory as bureaucratic administration may be systemically self contained and a society with an *oikonomia* would clearly seem better off than one without (assuming, for the sake of argument, that the latter would be plausible).

### *v) Luhmann's Legal Autopoiesis and* Oikonomia

In as much as Agamben's *oikonomia* is systematic and self-contained it seems useful to explore how it stacks up against Luhmann's theory of law as an autopoietic system.[64] Luhmann's theory shares with legal positivism the conviction that the validity of legal norms is not dependent on extra-legal norms. Contrary to positivism, however, Luhmann's theory avoids reliance on subjective and contingent factors in favor of systemic self-referential structural elements that are self-contained in their functioning. Specifically, Luhmann's autopoietic theory regards law as a normatively closed subsystem of the social system that creates and reproduces elements through communications.[65] In other words, legal autopoiesis is supposed to result in a legal system that remains operationally severed both from extralegal norms and from arbitrary subjectivity by relying on self-referential circularity as the foundation of law. Placed in its broader context, as society becomes more complex, it requires greater

[63] *See* Richard Posner, *Overcoming Law* 22 (1995).
[64] *See* Niklas Luhmann, *Essays on Self-Reference* (1990) and *Operational Closure and structural coupling: The Differentiation of the Legal System,* 13 Cardozo L.Rev. 1419 (1992).
[65] *See* Niklas Luhmann, *Essays on Self-Reference, supra,* at 3.

social differentiation and the legal autopoietic system which Luhmann characterizes as environmentally and cognitively open but normatively closed serves to stabilize expectations.[66]

Luhmann's autopoietic theory tackles law at such a high level of abstraction that it is difficult to get a workable handle on it.[67] The systematicity of law can be perhaps better grasped by reference to the analogy drawn by Luhmann between autopoietic economics and autopoeitic law.[68] The key to the autopoietic economy is the process of monetarization. In broad terms, the economic system is open to needs, products, services, etc., but closed in that it converts all economic transactions into the system of monetary exchanges. In the context of a market economy, everything that comes within the purview of the market must be quantified by being ascribed a monetary value.

What is important to retain from Luhmann's theory, for our purposes, is that a complex contemporary society cannot do without an economy that systematically spreads monetarization or without a legal system that systematically provides for stabilization of expectations—in the sense that one can enter into a contract requiring future performance by another party and inevitably face *factual* uncertainty concerning that performance, but not *legal* uncertainty as the law provides either for performance or for a remedy in case of a failure of performance. It seems warranted to consider Agamben's concept of administration embodied in *oikonomia* as systematically analogous to Luhmann's legal or economic autopoeitic system. Moreover, if that analogy were to hold, then arguably Agamben's recourse to the Holy Trinity, glory and acclamation would be superfluous or purely contingent and external to law. Thus, for example, trial by ordeal makes no sense without belief in Divine intervention in human affairs, but Luhmannian systematic monetarization or stabilization of expectations, and presumably Agamben's administration, loom as completely independent not only from any divine presence, but also from any conception of the good that may yield a Habermassian lifeworld.

Another consequence that follows from Luhmann's autopoeitic theory of law is that there is no valid connection between law and justice, or more precisely, between justice according to law – that is, justice as reducible to the consistent application of the law—and justice above law—that is, justice pursuant to pertinent moral theories, political philosophies, or conceptions of the good. If Luhmann is right, then Derrida's quest to seek justice through law is not only impossible, but also ultimately meaningless. Indeed, if law is a normatively closed system, it is meaningless and completely unproductive to try to assess it in terms of the norms pertaining to other normatively closed systems, such as morals.[69]

Luhmann's autopoietic theory of law is highly contested[70] as law's normative closure seems questionable, at least in relation to certain areas of law. Thus, the focus on stabilization of expectations may be paramount in certain areas of private law, such as contract, but not in others, such as criminal

[66] *See* Niklas Luhmann, *The Unity of the Legal System* in *Autopoietic Law: A New Approach to Law and society* 27 (Gunther Teubner, ed., 1987).
[67] *See* Michel Rosenfeld, *Just Interpretations, supra*, at 93.
[68] Niklas Luhmann, *Essays on Self-Reference, supra,* at 230-231.
[69] At a public discussion that I attended at Cardozo in the fall of 1992, Derrida and Luhmann profoundly disagreed on this point, with little common ground between them on the subject of the relation between law and morals.
[70] *See* Michel Rosenfeld, *Just Interpretations, supra*, at 109-112.

law or constitutional law where the immorality of discrimination on the basis of sex would trump maintaining stable expectations relating to long established sexist laws. Moreover, law's separate systematicity as conceived by Luhmann may not hold as compared to the systematicity of a monetarized economy or a rational bureaucratic administration. In the end, Luhmann as well as the other theorists discussed in this Part provide insights that shed light on the contributions of Derrida and Agamben, either through significant affinities or oppositions, as intellectual precursors or conceptual foes, and as sources of inspiration or as foils. Keeping that in mind, it is now time to examine in greater detail the respective contributions of Derrida and Agamben.

## *Part II. From Derrida's Deconstruction to Agamben's Reconstruction*

### *A) Derrida's Deconstruction: Methodological and Ethical*

Derrida's theory of law as deconstruction features two key components already briefly discussed: the methodology of deconstruction applied to legal texts; and, deconstruction in its ontological and ethical dimensions centered on the irreducible singularity that permeates the relationship between self and other and that between law and justice. In order to understand how these components may factor into a cogent theory of law—and, in Derrida's case, given his emphasis on the ethical dimension of deconstruction, into a broader normative theory that embraces both law and morality-- it is necessary from the outset to place the latter within the dynamic between the universal, the singular and the plural. All moral and legal theories that postulate that all human beings are in some important sense essentially equal, including Derrida's theory in its ontological dimension, must contain some relevant conception of the universal and of the individual. It is the individual who is the subject of equality and the equality that binds all individuals together must project a universal dimension. Moreover, inasmuch as particular legal regimes are meant to rule within the nation-state (or within supra-national polities that encompass less than all of humanity) and that laws within a polity are the product of democratic majorities, legal theories must account for the plural. The plural, in turn, can consist of the people as distinct from other peoples, the majority and various minorities, as well as various communities that divide along the lines of ethnicity, language, culture, religion and ideology.

As Derrida emphasizes, law is inextricably linked to violence.[71] Law is most notoriously and objectionably violent when it is applied unjustly against someone. Consistent with this, inasmuch as Derrida believes that justice through law is impossible, all implementation of law must result for him in the perpetration of unjust violence against all those who find themselves constrained by the workings of law. If this were the end of the matter, the import of Derrida's insight would add little to that of CLS, and would amount to the conclusion that the powerful under law (whether the government or the powerful

[71] *See* Jacques Derrida, "Force of Law: The Mystical Foundation of Authority", *supra,* at 5-6.

interests behind the latter) do violence to the powerless under law. Derrida, however, does not merely link violence to law while simply excluding justice from the entire domain of legal relations. As we have seen, for Derrida every use of law carries an obligation to aim for justice and although justice will inevitably remain unfulfilled, the unfailing duty to pursue it remains unchanged so long as law mediates intersubjective dealings among human beings. Does this mean that Derrida posits law's irremediable failure as a tragic and inescapable aspect of the human condition?

Although all elements of tragedy cannot be removed from Derrida's perspective on the relationship between law and justice, it does make a difference whether one considers that all laws are equally unjust as opposed to some laws being manifestly more unjust than others. As we shall see, Derrida's theory comes closer to that latter position, but before considering this any further it is necessary to take a closer look at the dynamic between law, violence and justice and to spell out in somewhat greater detail Derrida's conception of the nexus between the universal, the singular and the plural.

Polities that function pursuant to the rule of law grant the state a monopoly over the legitimate use of violence. Laws, moreover, are violent in that they constrain those subjected to them. Laws typically allow for taxing, fining and imprisoning those under their sway and thus do violence against the latter. Laws can also enable and lend support to those subjected to them, and that is the case for those who rely on laws to safeguard their property or secure their rights under contracts they have decided to enter into. But even when they are enabling, laws are at the same time constraining as the failure to abide by the property rights of others or to fulfill contractually assumed obligations subject those responsible to legally established remedies or sanctions. Accordingly, all laws entail doing some violence to those within their sway, but not all the violence involved seems equally unjust. Thus, for example, a law commanding racial apartheid is certainly much more unjust than a law ordering thieves to restitute the stolen property in their possession to those they have stolen it from. One may argue that the apartheid law is unjust and hence perpetrates unjustified violence whereas the property restitution law is just and therefore it commands justified violence. Conceivably, the above restitution law may in fact be unjust in whole or part—stealing a loaf of bread to feed one's starving child from an exploiting bakery chain that does not reinvest in the local community may be arguably morally justified and the law that prohibits it therefore arguably unjust—but it would still be reasonable to insist that the apartheid law is more unjust and hence more unjustifiably violent than the restitution law.

Derrida's account of the relationship between the universal and the individual draws on two clashing philosophical traditions that frame his understanding of the relationship between law and justice. The first of these is that of Kant[72] whereas the second is that of Nietzsche and Heidegger.[73] In a nutshell, Derrida's conception of justice as necessary but impossible combines Kantian universalism with the categorical imperative understood as requiring treating others exclusively as ends in themselves. Living in accordance with the categorical imperative as thus construed is impossible as a matter of *practical reason* because life is inconceivable without treating at least some others at certain times as means. This is perhaps most obvious in a capitalist society where the success of the market depends on treatment of

[72] *See* Jacques Derrida, *Voyous* 167-194 (2003).
[73] *See* Jacques Derrida, *Margins of Philosophy* 109-136 (1982).

others as means to the achievement of one's economic designs, but is also the case in all other settings in which inevitably others must figure as means to one's survival and well being. For Derrida, however, this Kantian reading of the categorical imperative as requiring the impossible must be supplemented by the Nietzschean/Heideggerian insight that the living and constantly evolving experience that confronts us in all its complex diversity and vitality can never be neatly captured much less grasped by reason. Consistent with that, one can never treat the other adequately as an end in him or herself because we cannot account for the other in all his or her singularity. In other words, in this Derridean perspective, treating the other ethically and with the the full justice that he or she is due requires the impossible to achieve command to never treat the person in question as a means as well as the impossible to attain knowledge of the unique singularity of the other in all its diversity so as to grant to the latter full justice consistent with his or her full dignity as an autonomous being.

This double impossibility to do justice does not exempt the duty to strive for it according to Derrida's account. The Kantian impossibility revealed through practical reason should be understood as a stern reminder that whereas we are always bound to fail fully satisfying the categorical imperative, we should persistently strive to approximate it as much as possible and condemning those who patently refuse to do so. Thus, for example, an employer cannot avoid treating his or her employees as means in the furtherance of the relevant enterprise's objectives, but this can be done by awarding decent wages to one's employees and treating them with respect as opposed to exploiting them and needlessly trampling on their dignity. The Nitzschean/Heideggerian impossibility, on the other hand, does not foreclose constantly striving to better account for the other's singularity and thus aiming at improved though ultimately incomplete and insufficient justice. Accordingly, it seems clearly preferable to take into account the values, interests, convictions and objectives of others as much as possible rather than ignoring them or remaining largely insensitive to them.

That Derrida understands the double impossibility in question as imposing an inexorable ethical obligation to strive for the impossible both in terms of the universal and the singular is not only evidenced by his conception of the relation between law and justice, but also by his analysis of the dynamic between self-regarding and other-regarding friendship[74] and of that between conditional and unconditional forgiveness.[75] Perhaps the most salient example of Derrida's comprehensive ethical approach, for present purposes, is his insistence on the dichotomy between majoritarian democracy and the "democracy to come" (la démocratie a venir).[76] Rationally pursuing the will of the majority is certainly preferable to non-democratic forms of government, but it is insufficient as it does not allow for full respect for the irreducible singularity of each person and with leaving sufficient room for such singularity to flourish.[77] In other words, democracy is ultimately impossible for Derrida because self-rule through majority based decisions cannot ever culminate in "the democracy to come" which requires self-rule for every person according to what his or her irreducible singularity requires.

[74] *See* Jacques Derrida, *Politiques de l'amitié* (1994).
[75] *See* Jacques Derrida, *On Cosmopolitanism and Forgiveness* (M. Dooley and M. Hughes, trans., 2001).
[76] *See* Jacques Derrida, « Deconstructing terrorism » in *Philosophy in a Time of Terror: Dialogues with Jurgen Habermas and Jacques Derrida* 120 (Giovanna Borradori, ed. 2003).
[77] *See id.,* at 130.

Derrida is not alone in seeking to negotiate the gap between the universal and the singular. So do Kant, Rawls and Habermas, among others. But whereas the latter three philosophers privilege identity over differences among individuals, which allow them to advance an ethics of identity, Derrida's uncompromising commitment to irreducible singularity in all its diversity and complexity compel him to embrace an ethics of difference. [78] Indeed, Rawls seeks to bridge the space between the universal and the singular by defining justice for the "basic structure" of society and by specifying "constitutional essentials" whereas Habermas does the same by fostering consensus among all individuals who share moral capacity on what is "universalizable". For Derrida, in contrast, no configuration of common identity can ever suffice as it necessarily leaves out differences that must be properly factored in order to give singularity its ethical due.

As noted above, consistent with Derrida's ethics of difference, some laws emerge as clearly less unjust than others and majority democracy is closer to the democracy to come than an authoritarian dictatorship would be. But what about the large number of instances where there is no clear demarcation between various laws that aim for justice or democratic policies that seek to address individual needs? For example, neither equal treatment nor affirmative action can fully achieve race-based or gender-based justice. Should a Derridean therefore be indifferent among laws or policies that defy clarity in relation to the seemingly inexhaustible number of differences associated with individual singularity?

Derrida is anything but indifferent, and his unrelenting commitment to the pursuit of justice and democracy strongly suggests that the best that one can do is to pursue intractable and uncertain decisions affecting justice with authenticity and good faith. In other words, one should choose among alternatives that are not obviously better or worse than one another by doing as best as one can with the intention of advancing justice. This approach bears some significant resemblance to Sartre's existential philosophy relying on authenticity as the means to avert "bad faith" and conformity with injustice and oppression.[79] Derrida acknowledged having been influenced by Sartre.[80] What approximates Derrida's commitment to singularity to Sartre's existential leap is the need to act solely on intuition and good faith as no guidance from pre-existing established norms can be counted upon in an ever changing endlessly diverse normative setting. What separates Derrida from Sartre, on the other hand, is Derrida's Kantian universalism discussed above.

Because of his special concern for singularity and consequent commitment to an ethics of difference Derrida nurtures an unbridgeable gap between his Kantian conception of the universal and what approximates an existential thrust toward the singular. In Derrida's case, however, reliance on authenticity and good faith is insufficient. This is not only the case where no guidance is available to decide among what loom as plausible alternative options to approximate justice. It is also, more importantly, the case where individuals are engaged in seemingly irresolvable conflicts against one another. In such situations, accommodating the singularity of one of the antagonists seems bound

[78] For a more extended discussion of the contrast between ethics of identity and ethics of difference, *see* Michel Rosenfeld, *Law, Justice, Democracy and the Clash of Cultures, supra*, at 290, 295-297.
[79] *See* Jean Paul Sartre, *Being and Nothingness* 86, n. 10 (Hazel E. Barnes, trans., 1966).
[80] *See* Jacques Derrida, "Il courrait mort : salut, salut », 587 *Les Temps Modernes* 7 (1996).

automatically to detract from the singularity of others. This latter problem is perhaps best illustrated by Derrida's reaction to global terrorism as exemplified by the attacks on September 11, 2001.[81] In a nutshell, Derrida condemns the 9/11 terrorist attackers as perpetrating what amounts to an act of pure violence without meaning or future and thus remaining outside of the ambit of intertextual exchange which is indispensable in the ethical quest to further vindicate the singularity of the other.[82] Particularly, in view of the fact that Derrida acknowledges that traditional terrorism at the level of the nation state--such as ETA in Spain or the IRA in the UK--is meaningful (even if subject to condemnation),[83] his conclusion regarding global terrorism is altogether unconvincing. Indeed, global terrorists certainly have a message, an ideology and objectives. Moreover, viewed retrospectively the 9/11 attackers certainly had a "future" as evinced by the various changes involving increased security, decreased liberty, ever more onerous restrictions affecting air travel as well as many other costly measures that have been adopted in numerous countries hit or threatened by terrorist violence.

Derrida strongly condemns global terrorism, but his condemnation appears squarely inconsistent with his ethics of difference and its requirement to honor singularity all the way down. In sum, Derrida's ethics is superior to its existentialist counterpart due to his Kantian universalism. However, because he allows for an unbridgeable gap between the universal and the singular, Derrida's ethical commitment to honor all singularity opens him up to the same criticisms that afflict the existential leap. The gesture may be authentic, but it may be as likely to somewhat advance justice as to somehow set it back. Finally, Derrida's ethics of difference and its fixation on singularity does not leave much room for the plural. And that leaves his deconstructive ethics at a loss when it comes to filling the gap between the universal and the individual.

### *B) Agamben's Reconstruction: The Twin Pillars of Glory and Administration*

Casting Agamben as providing a reconstruction that complements and/or transcends Derrida's deconstruction of law might well seem oddly paradoxical. Indeed, as discussed above, Agamben's theory rests in a crucial sense on an immovable disjunction, namely that between law and administration. Is it not, accordingly, better to characterize Agamben's gap between law and administration as a displacement of Derrida's gap between law and justice with both of these gaps bearing a strong analogy from a deconstructive standpoint?

Upon closer examination, Agamben's disjunction takes on an entirely different meaning if viewed in terms of what is for him the crucial juxtaposition between the realm of theology and that of the orderly conduct of human affairs. What emerges as central for Agamben is the role of Christian theology as determinant in shaping the deep structure of legal/administrative systems, including contemporary ones notwithstanding the latter's self-understanding as being purely secular.[84] Before tackling the particulars

[81] For an extended discussion and criticism of Derrida's position, *see* Michel Rosenfeld, *Law, Justice, Democracy and the Clash of Cultures, supra,* at 255-266.
[82] *See* Jacques Derrida, « Deconstructing terrorism », *supra*, at 147.
[83] *See id.,* at 103 (nation-state terrorists claim to be responding to state perpetrated terrorism and have national liberation objectives).
[84] *See* Giorgio Agamben, *The Kingdom and the Glory, supra*, at 284-285.

of Agamben's theological paradigm and evaluating how it may advance the quest for legitimacy of contemporary legal regimes, it is necessary briefly to highlight the important differences that separate Agamben's theological conception of law from Schmitt's. Besides their differences concerning the state of the exception discussed above, Agamben objects to Schmitt's political theology as failing to account for Christian theology's division between God's sovereign power and the government of the economy as delineating two separate paradigms that frame a "bi-polar" system.[85] As Agamben sees it, by refusing to separate the sovereign from government, Schmitt eliminates all non-political elements in governance and law, thus privileging peoplehood, race, culture, and religion and confining legitimacy to the friend versus foe spectrum.[86]

Among the most notable consequences that follow from Schmitt's brand of political theology is the rejection of pluralism as well as well as that of liberal democracy's separation of powers. Accordingly, Schmitt can be viewed as above all standing for a transition from the divinely anointed Christian monarch to the modern charismatic leader that exerts authoritarian power as the "Führer" or "Duce" of a given people with a unique common destiny.[87] The broad friend/foe political framework embraced by Schmitt (at least in its secularized iteration) excludes not only pluralism, but also universalism. Consistent with this, the source of Schmittian legitimacy is the collective singular and, for our purposes, the legitimacy involved looms as circular in that the law of a people emerges as legitimate to the extent that it is that people's law.

Christianity is a universal religion in its scope and self-understanding. Schmittian Christian political theology may thus be considered to comport a universal dimension that disappears upon its secularization. Agamben's theological theory steeped in Christianity also projects a universal dimension, and one of the important questions that this raises is whether unlike in the case of Schmitt, in that of Agamben secularization does not have to precipitate a fall from universalism. At least, upon first impression, it is quite plausible that in Agamben's case secularism need not displace universalism. Indeed, whereas for Schmitt the source of legitimacy of the divinely anointed monarch is the universal God and in that of the modern polity, a particular nation, ethnic group, or other community of friends; for Agamben the relation between the Christian Deity and the *oikonomia* is structural and systemic as is its counterpart in the secularized polity.

The key to Agamben's conception of legitimation is the dynamic between theological conjunction of the relationship between God and humans and the disjunction between the sphere of the transcendent and that of the immanent wherein government and *oikonomia* unfold. Within the Christian vision that Agamben lays out, legitimation, the universal, the singular and the plural all neatly align into a coherent whole. Moreover, the guarantor of this legitimate order is God (even if he remains absent within the

[85] *Id.,* at 66-67.
[86] *Id.,* at 74-77.
[87] In spite of Schmitt's actual political trajectory within the confines of Hitler's Nazi regime, his political theology theory of law based on the friend/foe divide need not be confined to a fascist or otherwise authoritarian regime. Indeed, as long as the "we /they" logic is operative the nature of friend and foe and the mode of association among friends appear to remain fairly open. Since the present focus is on Agamben and his appraisal of Schmitt, the broader contours of Schmitt's theory will not be further addressed.

realm of the *oikonomia*) and true religion. Accordingly, the key question that secularization raises in terms of legitimacy, on the assumption that the structural and systemic interplay between law and administration remains the same, is whether the relationship between the universal, the singular and the plural can be meaningfully harmonized with each among these receiving its due. In other words, can the kind of legitimacy regarding law and administration guaranteed by Christianity endure the latter's demotion from *the* true religion to one contested conception of the good among many?

In order to be in a position to consider this last question properly, it is imperative to mark a sharp distinction between structural ordering, systemic functioning, acquiescence and acclamation on the one hand, and legitimation and persuasive normative justification, on the other. As we shall see, even if we were fully to agree with Agamben's account of the workings of the relationship between law and administration from medieval Christianity to the present, the kind of legitimation that has been available in the context of Christian hegemony is no longer available in our contemporary religiously and ideologically diverse political environment. Because of this, either Agamben's factual account is equally compelling whether one can count on a God absent from administration or no God at all, in which case, Agamben's legal theory comes close to Luhmann's autopoietic one from the standpoint of legitimation: functionally and systemically, modern society requires the operation of a complex legal regime which cannot be further legitimated in terms of justice or of broader normative commitments. Or else, in view of the lapse of its Christian source of legitimation, Agamben's theory must be paired with a contemporary persuasive equivalent or, in the absence of the latter, be cast as standing for the proposition that the necessary nexus between law and administration present in every contemporary polity is beyond legitimation. In the latter eventuality, Agamben's gap between law and administration would bear after all an uncanny resemblance to Derrida's gulf between law and justice.

Agamben's legal theory derives from his assertion that Christianity separates God from His government of the world.[88] For the world to be well governed, it is necessary that God remain disempowered,[89] thus separating the transcendent order of the Kingdom of God from the immanent order of the government of human bodies (including the body politic) and souls.[90] Although God the Father and God the Son are one (together with the Holy Spirit) ontologically, it is the passion of Jesus that manages the *oikonomia* in pursuit of salvation through providence.[91] It is through history, that Jesus as his Father's vicar acts and governs in the latter's name[92] to bring about divine grace upon the governed humans.[93] Providence, however, must confront the "nature of things" which are contingent and inhere within the immanent economy, thus making what appears marginal the very core of what is subjected to the act of governing.[94] In short, even divine inspired governance must be carried out by (from a practical standpoint) an agent who must administer the contingent in his deployment of

[88] *See* Giorgio Agamben, *The Kingdom and the Glory, supra*, at 54.
[89] *Id.,* at 106.
[90] *Id.,* at 46, 82.
[91] *Id.,* at 47.
[92] *Id.,* at 138.
[93] *Id.,* at 137.
[94] *Id.,* at 118-119.

providence in the pursuit of salvation, and all that for the glory of God, the Father.[95] As Agamben puts it, the economy of salvation that Jesus institutes on earth is undertaken for the glorification of the Father, and is hence an economy of glory.[96]

In the above account, God is omnipresent but remains completely inactive in the administration of human bodies and souls. Agamben specifies that the machine of government functions as a theodicy wherein the sovereign presence is symbolized by a supervising eye, the government, by a hand that leads and corrects, and the judgment (or judicial power) by the word that judges and condemns.[97] Notably, this theodicy is structured and functions like the modern state built upon the rule of law.[98] The secular legislator thus becomes the vehicle of the transcendent whereas the executive power becomes the administrator that gives life to the law by adapting it for purposes of creating order amidst the unmanaged particularities and contingencies that happen to inhere within the polity. Moreover, Agamben insists that even glory has not disappeared from the modern rule of law state. Glory in that state may no longer be proclaimed in relation to God, but it is nonetheless directed to the people as sovereign. This secular form of glory is an acclamation expressed through public opinion and it is to be understood as the manifestation of the people's consensus in relation to the *oikonomia* that brings them order and that furthers their destiny.[99] Modernity may push the transcendent divine pole of the bi-polar theological government and administration model completely out of the picture, but Agamben insists, it does not thereby eliminate the theological model itself.[100] On the contrary, in some important sense, atheism completes the theological model in question by taking it to its logical conclusion. In Agamben's words, "God has made the world just as if it were without God and governs it as though it governed itself."[101]

Before examining Agamben's account in terms of legitimation, two additional points are in order. First, Agamben observes that the theological idea of a natural order of things is also present in modern economic theory as dramatically illustrated by Adam Smith's postulation that the economic market's functioning is guaranteed by the workings of an "invisible hand". [102] And second, Agamben suggests that glory is best understood in terms of the void given that the key conjunction between the king's majesty and his necessary idleness for purposes of governance is the image of an empty throne.[103] This suggests that both the expression of glory and the targeted object of one's glorification are completely open-ended as presumably anything may suffice to overcome a pure void.

One plausible way to account for Agamben's theory involves interpreting his Christian model as figuring as an exemplary allegory of the structure and function of all legal systems and their inevitable devolution into administration. In that case, from the standpoint of legitimation, Agamben would be

[95] *Id.,* at 202.
[96] *Id.*
[97] *Id.,* at 130.
[98] *Id.,* at 142-143.
[99] *Id.,* at 170.
[100] *Id.,* at 284-285.
[101] *Id.,* at 286.
[102] *Id.,* at 282-284.
[103] *Id.,* at 242-245.

highly reminiscent of Luhmann. All societies require an administered *oikonomia* and as long as order is preserved and the citizenry maintains its acclamation by glorifying some contingent being or entity, it is pointless to search for any further source of justice or legitimacy. On the other hand, one can read Agamben's account of the Christian paradigm within its own context wherein it is inextricably linked to the acceptance of Christianity as the true religion. The main virtue of this latter reading is that it yields a rich and illustrative counterfactual that allows for a deeper and more thorough critical understanding of the problem of legitimation in secular contemporary rule of law polities.

From within Christianity, legitimation of the Christian *oikonomia* with Jesus as the vicar of God the Father is self-referential and self-explanatory. The creation is after all God's design and he is the source of all truth and justice throughout the world. Moreover, the bi-polarity of the Christian *oikonomia* may owe to certain peculiarities of the Christian narrative (as presented by Agamben), such as the concern with reconciling providence, grace and human free will, but does not detract from its truth and justice. What is more interesting from the present standpoint, however, is how the Christian *oikonomia* exemplifies how the universal, the singular and the plural can be harmonized. Ontologically, the Holy Trinity is unified and embodies the universal. On the other hand, as embodied, Jesus becomes an individual with a history and he stands as a bridge between the individual and the universal, of which he forms part ontologically, on the one hand, and he also partakes in the plural in a variety of ways, on the other hand. Indeed, Jesus in his historical dimension is a Jew who lives in the land of Judea. Also, as a vicar of God the Father charged with the governance of human bodies and souls, Jesus confronts plurality framed by the contingent immanent factors that make up the "nature of things" that must be managed in each realm and for each generation.

Jesus as one with God and the Holy Spirit, as a Jew, and as an individual who was crucified incarnates at once the universal, the plural and the singular. But what happens to the universal, the singular and the plural and to the quest for their harmonization and legitimation once Jesus and Christianity have been rendered inoperative within the bounds of the secular rule of law state and of its godless *oikonomia*?

What remains in the secular context, consistent with Agamben's account, is the separation between sovereignty and governance and the need for acclamation in recognition and affirmation of glory. Without the reassuring presence of a universally shared religion, however, it seems that acclamation and glory become most problematic. This, as Agamben underscores, is attested by the glorification of Mussolini and fascism in Italy during the 1930's and by the rift between the Duce and Pope Pius XI as praise and acclamation shifted from the Christian faithful to fascist militants.[104] Moreover, what about the *oikonomia* without Christian providence, grace or salvation? As already emphasized, neither the economy as a system nor bureaucratic administration can guarantee *good* governance. Likewise, the sole realization of order over the "nature of things" within a polity by no means suffices to insure justice or legitimacy.

[104] *Id.,* at 192-193.

What Agamben's model calls for once Christianity or any other equally sweeping conception of the good fails to garner widespread consensus within a polity is: first, a basis for acclamation that may be subject to legitimation consistent with the coexistence of a plurality of conceptions of the good; and second, means to differentiate between good and bad administrative governance in light of the unbridgeable gap between law and administration. In the end, Agamben's invocation of acclamation and administration can be interpreted as providing a path toward reconstruction when set against Derrida's deconstructive engagement with the insurmountable gap between law and justice. Moreover, as Agamben's model fails to offer a satisfactory solution to the contemporary challenges posed by the quest for justice, Agamben's reconstruction is best posited as a complement to, rather than as a replacement of, Derrida's deconstruction. Tellingly, both Derrida's and Agamben's respective theories suffer from the same crucial lack. In Derrida's case, as noted above, there is no cogent criterion for distinguishing more relatively unjust laws from relatively less just one. This bears a striking resemblance to Agamben's lack of criteria to distinguish normatively acceptable acclamations and glorifications from pernicious ones and relatively better administrative governance from relatively worse ones.

## *Part III. Placing Derrida's and Agamben's Insights under a Pluralist Lens: Can Law, Justice and Solidarity Become More Closely Aligned?*

Derrida's deconstructive model with its insurmountable gap between law and justice makes room for the interplay between the universal, which it casts in Kantian terms, and the individual, who emerges in existentialist garb, but, as already noted, it apparently leaves no room for the plural. Agamben's reconstructive model, on the other hand, once detached (ontologically as opposed to structurally or systematically) from its Christian matrix, makes room for the plural and the individual, but not the universal. Indeed, those who acclaim and who glorify always constitute a collective unit that is distinguishable from others, whereas the inevitable presence of the contingent and of the particular in any unit to be administered by an *oikonomia* presupposes an interaction between distinct individualities. At the same time, as God the Father is replaced as the one to be glorified by a king, president, dictator or other personifier of the sovereign, the polity involved loses all perceptible links to the universal.

From Derrida's deconstruction stand out necessity coupled with impossibility and the lack of room for plurality. From Agamben's reconstruction, on the other hand, what comes to the fore is the seemingly purely contingent emotional collective acclamation coupled with a necessary systemic administration impervious to normative justification, a combination resulting in no link to the universal. The challenge at hand, therefore, is to inquire whether departing from the insights of Derrida's deconstruction and Agamben's reconstruction as they relate to law, justice and administration, there may be any plausible path toward integration and reconciliation of the universal, the singular and the plural.

### *A) Contested Versus Uncontested Universals*

Before exploring how to proceed in light of Derrida's and Agamben's respective theories, it is necessary to draw attention to an important distinction regarding the concept of the universal. It is not the same thing to claim universal validity for a normative proposition or to assert that the latter should extend to humanity as a whole at all times and places than to be able to demonstrate that a normative proposition is universally valid. Kant, Rawls and Habermas, for example, propose norms that are meant as universal and as universally applicable, but which, as discussed above, are vigorously contested. Similarly, Catholicism is a religion that is universal in its scope and, as Pope Benedict XVI emphasizes, it promotes universal truth as Catholic faith is understood as fully coinciding with human reason. However, one need only refer to the issue of the legality and moral permissibility of abortion, both of which happen to be consistent with secular and certain religious worldviews, to underscore that the Pope's claim to universality is contestable.[105] Moreover, whether any moral or legal norm is truly demonstrably universal is certainly a matter of dispute that need not be pursued here. Suffice it, for present purposes, to postulate that certain norms, and in particular the inherent moral equality of all human beings, will be (counterfactually) treated as if universally valid in the context of the present inquiry (although obviously not accepted as such in Ancient Greece, under feudalism, or in the age of American slavery). The justification for this counterfactual ascription of universal validity is twofold: first, the norms involved are uncontested by those theorists who are heirs of the Enlightenment and committed to the essentials of contemporary democratic constitutional rule; and, second, the ascription in question accentuates the distinction between conceptions of the universal that are best regarded, within their proper context, as uncontested, and those, like Rawls's two principles of justice or Habermas's communicative ethics, that are cast as universal, but remain widely contested. In short, this distinction can be encapsulated in the contrast between an "uncontested universal" and a "contested universal".

All the theories discussed above that appeal to, or make room for, a universal, including Derrida's and Agamben's so long as it remains squarely attached to Christian theology, are connected to a contested universal. Proponents of these different contested universals as well as proponents of conceptions of the good that do not appeal to the universal—e.g., a tribal religion or ethnic based nationalism—are bound to disagree on what constitutes legitimate law, true justice, or valid morality. Accordingly, both on the level of theory and on that of factual embrace of religion, morality, political agenda or ideology, there is no consensus in contemporary polities that adhere to constitutional democracy. Furthermore, this lack of consensus opens the way to two plausible alternatives: a struggle among competing contested normative outlooks with no reasonable basis for a consensus on legitimate law or justice; or, a quest for accommodation of the relevant competing conceptions of the good within a more broadly encompassing normative framework that would make room for some workable harmonization of the universal, the singular and the plural.

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[105] *See* Marta Cartabia and Andrea Simoncini, eds., *Pope Benedict XVI's Legal Thought* 3-9 (2015) (referring to the Pope's view that Catholic faith and reason coincide in affirming universally valid morality and law); and Christopher McCrudden, "Benedict's Legacy: Human Rights, Human Dignity, and the Possibility of Dialogue" *in id.,* at 164-165 (pointing to "major tensions between the Catholic Church and several secular human rights positions, including those on abortion").

### *B) Comprehensive Pluralism as the Contested Universal of Choice*

Based on the belief that the pursuit of this latter alternative is clearly preferable, pluralism in its normative dimension emerges as the optimal choice as compared to liberalism or other available monistic or relativistic approaches.[106] Taking the inherent moral equality of all human beings as an uncontested universal,[107] the commitment to normative pluralism results in the endorsement of a contested universal as will be further explained below. Normative pluralism, however, puts forth a contested universal that is distinguishable from most of its counterparts. Indeed, ordinarily the embrace of a contested universal must be done to the exclusion of all competing contested universals. Pluralism, in contrast, is dependent for its own coherence and viability on significant accommodation of other contested universals. Thus, for example, liberalism or Catholicism seems best served by elimination respectively of illiberalism or of secularism and all non-Catholic religions. On the other hand, if all non-pluralist conceptions of the good were eliminated, pluralism would become completely superfluous. Accordingly, pluralism looms as more encompassing of competing conceptions of the good than its non-pluralist counterparts, and, as will be argued below, that enables pluralism to enhance the insights of Derrida's deconstruction and Agamben's reconstruction while, at the same time, mitigating the effects of their respective shortcomings.

As I have made the case for pluralism—namely, for a particular version of it that I have named "comprehensive pluralism"—extensively elsewhere,[108] I shall limit the present discussion to the minimum necessary to address the pertinent issues concerning Derrida and Agamben. With this in mind, it appears at first sight quite plausible that pluralism might provide ways to introduce a plural dimension in connection with Derrida's deconstruction. But, by the same token, it would seem that pluralism would be a poor candidate for purposes of finding a suitable universal dimension that might be added to Agamben's reconstruction. Upon further inquiry, however, it turns out that comprehensive pluralism, when properly understood, sets out a dynamic that links together a universal and a singular dimension to its more conspicuous anchoring in a far reaching plural dimension.

In the broadest terms, comprehensive pluralism embraces as universally valid the proposition that all persons are inherently morally equal. Moreover, comprehensive pluralism interprets the equality in question as including a *prima facie* entitlement for each person individually or in conjunction with others to embrace and pursue a conception of the good of his or her choice for purposes of achieving self-realization and self-fulfillment. Consistent with this, comprehensive pluralism conceives the moral equality of persons as encompassing an *ex ante* presumption of moral equality among all conceptions of the good embraced by one or more persons within the relevant polity. Whereas moral equality itself is

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[106] For a comparison of the key differences among pluralism, monism and relativism, *see* Michel Rosenfeld, *Just Interpretations, supra*, at 206.

[107] This postulation does not imply, as noted above, that the proposition in question is uncontestable. Instead, the assumption is that this proposition is uncontested among those who address the legitimacy of law in the context of contemporary constitutional democracies.

[108] *See* Michel Rosenfeld, *Just Interpretations, supra,* at 213-224; and Michel Rosenfeld, *Law, Justice, Democracy and the Clash of Cultures, supra,* at 297-308.

presumed to be an uncontested universal, the presumptive equality among conceptions of the good is acknowledged to amount to a contested universal. Furthermore, in what also figures as a contested universal, comprehensive pluralism postulates that peaceful accommodation of as many competing conceptions of the good as best as possible is categorically normatively preferable to any plausible monistic or relativistic alternative. In other words, moral equality as understood by comprehensive pluralism would be frustrated if one contested conception of the good were allowed to officially prevail over all others, or if a systematic adoption of relativism would leave ideologically diverse polities in a permanent war of all against all among proponents of competing conceptions of the good.

In its operating dynamic which unfolds as an ongoing dialectic with no ultimate resolution,[109] comprehensive pluralism is thoroughly pluralistic in its aims, but it also combines a partially monistic dimension and a partially relativistic one. It is partially monistic in its confrontation with other conceptions of the good in the competition to ascend to a (contested) universal status. Thus, for example, pluralism may, on the one hand, compete with liberalism and Catholicism to establish a pluralist as opposed to a liberal or a Catholic normative order while, on the other hand, aiming to be inclusive of liberalism and Catholicism in its pursuit of accommodation of as many conceptions of the good as best as possible. Conversely, in order to accommodate other conceptions of the good within its normative purview, it must "relativize" the latter to some degree. Thus, for instance, Catholicism cannot be incorporated consistent with its self-perception as universal given its believed complete overlap between Catholic faith and human reason. The very fact that other conceptions of the good that reject Catholicism must also be included within the pluralist polity implies that neither the Catholic nor the non-Catholic perspectives in question can be given the ultimate say in the normative realm. Consistent with this, a Catholic absolute proscription on divorce on religious, moral and legal grounds could not be extended to an entire polity also comprised of Jews, Muslims, Protestants and many others espousing various secular ideologies, all of which allow for divorce. Within the ambit of a pluralist normative order, peaceful coexistence between Catholics and non-Catholics would be accommodated as best as possible. That would mean that Catholics could act against divorce within their own religious community—e.g., by not recognizing secular divorces religiously and by refusing to perform a religious marriage if a would be spouse is a divorcee—but could not act beyond the bounds of their own religious community to prevent the state from granting secular divorces or to limit other religions from granting religious divorces within their own communities of faith.

Whereas the preceding example seems relatively straightforward, other clashes between competing conceptions of the good may present much more daunting challenges to the pluralist, particularly when inclusion of one such conception can only be achieved at the expense of exclusion of some other such conception. These difficulties can be left aside here, however, as it is the dynamic mode of functioning of comprehensive pluralism that provides the key to understanding how a pluralist gloss may usefully

[109] Each particular situation requires first an equalization of all competing conceptions of the good struggling against one another followed by the most inclusivist possible accommodation of as many of them as possible. The resulting configuration will result inevitably in the generation of further conflicts, however, thus requiring a new round of pluralist equalization and accommodation. This dialectic, moreover, is not envisioned as culminating in any final resolution. For a more extensive discussion of the contrast between this pluralist dialectic and Hegel's, *see* Michel Rosenfeld, *Law, Justice , Democracy and the Clash of Cultures, supra*, at 42-51 .

recast any plausible nexus between Derrida's deconstruction and Agamben's reconstruction. In brief, the ongoing dialectic launched by comprehensive pluralism brings together in a constantly evolving trajectory a universal, an individual and a plural dimension. Comprehensive pluralism's (contested) universal dimension is encapsulated in its fixed set of norms that it must deploy to pursue and advance its aim of peaceful coexistence among the greatest possible number of conceptions of the good. Its individual dimension, on the other hand, is defined by its incorporation of the (uncontested) proposition that all humans are inherently morally equal together with endorsement of the proposition that each individual is equally morally worthy as the actual or potential possessor of, or adherent to, a particular conception of the good. Finally, comprehensive pluralism's plural dimension is principally twofold: first, it seeks to optimize conditions for the flourishing of the plural; and, second it depends for its very viability on the survival of the plural.

To complete this highly schematic account of the dynamics of comprehensive pluralism, it is worth briefly to concentrate on its mechanics and potential as employed in the context of actual polities. At any time in an actual polity, certain conceptions of the good happen to be privileged while others are disadvantaged, discriminated against, or suppressed. From a pluralist standpoint, this requires a twofold operation: first, the field must be leveled and all privileges revoked in a process of equalization among all competing conceptions of the good; and, second, the institutional order must be refitted to accommodate the now equalized conceptions of the good as much and as best as possible under the aegis of those norms that pluralism casts as universal—including, tolerance, maximum liberty within communities and the highest possible mutual respect and deference among different communities. Moreover, this twofold operation can be used not only for institution setting purposes, but also for counterfactual critique and justificatory purposes. Indeed, an actual situation displaying grave inequalities among competing conceptions of equality can be productively critiqued from the vantage point of what the pluralist ideal would require. On the other hand, an actual situation that, while acknowledgedly imperfect, may seem the closer to the pluralist ideal than any realistic alternative could be thus justified in terms of its susceptibility to further perfectibility toward a somewhat closer approximation to the pluralist ideal.

### *C) Derrida's Deconstruction in Pluralist Perspective*

It is the application of this pluralist dynamic process combining counterfactual critique and justificatory potential toward further perfectibility that can accentuate links between Derrida's deconstruction and Agamben's reconstruction. This process can also address lacunae as well as potential advantages that arise in connection with tracing the trajectory of the narrative that takes us from Derrida to Agamben. Starting with Derrida's deconstruction, the focus on the pluralist dialectic leads to two distinct mutually reinforcing insights. As already briefly indicated above, pluralism can supply the missing plural dimension to better handle deconstruction's conception of the nexus between law and justice. In addition, deconstruction's emphasis on the unbridgeable gap between law and justice reinforces both the sustained need for the continued operation of the pluralist dynamic process and the reminder that the pluralistic dialectic never ascends toward any ultimate resolution. As against Derrida's Kantian universalism, pluralism offers a universalism of its own grounded on the norms that are essential to the constitution and preservation of a pluralist legal and moral order. Although there are

differences between these two conceptions of the universal, they are both similar in the crucial respect that is relevant for present purposes, namely adhesion to the proposition that all persons are inherently morally equal. Moreover, there is also a key confluence between deconstruction and pluralism relating to the individual and his or her irreducible singularity. Pluralism focuses on conceptions of the good and allows for each individual to devise or choose to adhere to his or her own. To be sure, most conceptions of the good are collectively created and managed and, to a large extent, individuals are born into, or educated consistent with, particular conceptions to which they are most likely to adhere in whole or part. Nevertheless, and particularly in a pluralist-in-fact setting that is ideologically and religiously diverse, multicultural, and thus open to many competing conceptions of the good, an individual can choose to partake in more than one conception of the good—e.g., one can be a nationalist Catholic feminist environmentalist—and to singularize his or her commitments and goals to the point of occupying a unique position that can never be fully accounted for by any prevailing law or society wide political or moral order.

The combination of the pluralist universal and of the fact that singularization in relation to conceptions of the good is necessarily mediated through partaking in collectively articulated normative orientations that are plural in nature allows for partially filling the gap between law and justice that Derrida leaves wide open. Indeed, whereas for Derrida the only available means to handle the gap in question is through an existential leap, the pluralist can rely on principled choices. One of these choices is between more pro-pluralist and more anti-pluralist laws; another, is based on consideration of the plural collective commitments of individuals that furnish a partial common currency in the realm of normative dealings among a multiplicity of ultimately irreducible singular human beings. A clear illustration of this important difference between Derrida and pluralism is provided by the case posed by global terrorism. As discussed above, Derrida characterized the 9/11 terrorists as purveyors of violence without meaning or future, but as already pointed out those attacks did not in fact lack meaning or a future.[110] From a pluralist standpoint, however, the global *jihadist* conception of the good that motivated the 9//11 attacks is not hard to asses as it ranks by far as the most anti-pluralist one among all those that enjoyed a significant position in the Western democracies targeted by Al Qaeda. And as a consequence, even if the 9/11 terrorists had had a set of valid grievances, their own ideology and the shockingly violent ways in which they sought to vindicate it unmistakably emerged as far more unjust than any of the real or imagined injustices against which they rallied. In the end, even if pluralism provides the means to achieve principled decisions for selecting less unjust laws over more unjust ones, Derrida's insight that the gap between law and justice is ultimately unbridgeable remains exemplary for the pluralist. Indeed, not only does the choice of the least unjust legal alternative achieve only relative justice, leaving many injustices untouched; but also, given the dialectical nature of pluralism, it is almost certain to give rise to new injustices that will pose novel legal challenges.

### *D) Agamben's Reconstruction in Pluralist Perspective*

Turning to Agamben's bi-polar order, pluralism can, at least in part, remedy its above identified two principal shortcomings in a post-Christian setting: the lack of a universal dimension and the absence of a

[110] *See supra,* at--.

criterion of good governance. Separating the sovereign to be acclaimed and glorified from the government has a major virtue. Even in the paradigmatic case of God the Father and his vicar Jesus, human contingency among the governed (or in religious parlance, sinning among the humans under administration) remains inevitable. Accordingly, perfection, justice and legitimacy can find optimal expression in the personification of the sovereign who remains neatly uncompromised by the vicissitudes of governing. Ironically, however, in a thoroughly secular setting, where the universal guarantee provided by God the Father is categorically withdrawn, the virtue in question can easily turn into a major vice. To put it bluntly, a framework that allows for replacing God the Father with Hitler, Mussolini or Stalin seems to call for downright rejection. Nevertheless, with pluralism in mind, one can avoid the above pitfall by construing Agamben's theory as requiring glorification and acclamation of someone worthy of such commitment because of possessing a universal dimension opening a path to legitimacy and to perfectibility. To the extent that pluralism embodies a (contested) universal, any sovereign who adheres to pluralism's core norms would thus foreclose subjection to authoritarian tyrants. But as core norms standing alone are not likely to suffice for purposes of garnering the requisite degree of acclamation and glorification needed to keep a polity sufficiently glued together to function smoothly, something additional would be required. And recourse to pluralism may prove helpful again.

In contemporary democracies, the sovereign is "the people", or more particularly, the people of a given nation-state or of a transnational political unit, such as the European Union. In the US, it is the "We the People" that has given itself the US Constitution who counts as the sovereign. The US people, moreover, has evolved throughout several waves of immigration, the abolition of slavery, the grant of the vote and full constitutional equality to women, and many other important changes.[111] Given all these major shifts in the nature and composition of this "We the People", it is best conceived as a collective subject under constant construction that is deployed through the "imagined community" known as the American nation.[112] The US people and all other contemporary peoples can be imagined in many different ways and thus remains at bottom relatively amorphous and malleable much like Agamben's empty throne that figures for him as the symbol of glory. [113] Any plausible image of a people must take into account history, culture, tradition and in most cases religion and other ideological commitments. These ingredients, however, can be combined in many different ways. The American people, for example, has been marked by slavery and its abolition, and greater emphasis may be placed on images that enhance lingering racial divisions or on contrasting images that accentuate elements of racial healing. More generally, an imagined sovereign people or the person and/or institutions that symbolize it may be depicted in ways that are more or less congruent with pluralism and its (contested) universal norms. As Agamben emphasizes, in modern democracies acclamation is expressed through

[111] *See* Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture and Community* 34-35 (2010).
[112] *See* Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (1990) (characterizing the modern nation which, unlike families or tribes, is made up of strangers as an "imagined community').
[113] *See* Giorgio Agamben, *The Kingdom and the Glory,* at 245.

public opinion,[114] and formation and transformation of the latter certainly seems amenable to pluralist influence.

Turning to the question of good governance, one can agree with Agamben that there is an insurmountable gap between law and administration and yet insist that pluralism may be helpful in guiding the functioning of the bureaucracy. All *oikonomia* involves an element of contingency and hence of unpredictability as far as the bureaucratic administrator is concerned. Beyond that, however, there are both internal and external mechanisms that can constrain or guide the administrative system. Internally, some maintain that the administrative state veers to professional expertise, making it thus, by and large, apolitical.[115] In as much as administrative governing is a matter of expertise, efficiency emerges as the proper criterion of good governance and should remain uncontroversial and consistent with pluralism. Others, on the other hand, consider administration thoroughly political and "expertise", in fact, oriented towards certain (usually powerful) particular interests to the detriment of others. Consistent with this latter position, pluralism can serve as a criterion that sets more inclusive administrative policies as more likely to foster good governance than less inclusive ones. Finally, the fact that the administrative system may not be externally governed does not mean that it may not be externally constrained. As the above discussion of Habermas's distinction between "system" and "lifeworld" suggest, normative constraints can be invoked to limit undue expansions of seemingly runaway administrative bureaucracies.[116] Also, as is quite common in modern democracies, constitutional norms, such as due process clauses, are widely used to constrain administrative rule, and nothing prevents these norms from conforming to pluralist essentials.

As in the case of Derrida, the contemplated interplay between Agamben's theory and pluralism can be considered to be potentially mutually enriching. As far as the non-governing sovereign ruler is concerned, Agamben reminds the pluralist that the community of communities within the polity that makes room for a plurality of perspectives must be susceptible of being imagined in a way that garners sufficient genuinely felt acclamation in spite of entrenched inter-communal differences. Also, Agamben's reference to the empty throne metaphor should prompt the pluralist not to lose sight that the sovereign people's projected image remains constantly subject to adjustment in conformity with the unfolding of the dialectic of pluralism. Finally, the Agamben's focus on the gap between law and administration and the contingency that it underscores reinforces the pluralist's realization that his or her task is endless as each instance of pluralist governance will inevitably generate new problems that will require further administrative shifts and adaptations.

### ***Conclusion***

As understood through the preceding analysis, Derrida's deconstruction followed by Agamben's bi-polar reconstruction, particularly as recast in terms of the normative vision grounded in comprehensive

[114] *Id.,*at 255.
[115] *See* Michel Rosenfeld, *Constitutional Versus Administrative Ordering in an Era of Globalization and Privatization: Reflections on Sources of Legitimation in the Post- Westphalian Polity*, 32 Cardozo L. Rev. 2339, 2348-2351(2011). The following discussion draws on the analysis developed in this article.
[116] *See supra,* at--.

pluralism, carve out a cogent and potentially very fruitful account of the questions of law's legitimacy and of its relationship to justice. Derrida's methodological deconstructive intertextual approach to law underscores that there is no definitive interpretation of any legal text both because the latter is open to a multiplicity of often contradictory meanings and because it inevitably remains open to further connotations projected into the future and to reconfigurations of significant portions of its past due, among others, to reinterpretations of history. All textual interpretations are intersubjective, and pluralism, mindful of Derrida's deconstruction, urges that pursuit of the most inclusive ones be prioritized. Derrida's ethical deconstruction, on the other hand, commands relentless pursuit of ever elusive justice. The pluralist dialectic, in turn, allows for a non-linear conjunction between a temporary victory of the (relatively) more just over the less just and concurrent acceptance of the impossibility of ever overcoming injustice. Because of his lack of emphasis on the plural, Derrida's methodological and ethical universe appears lonely and tragic. Agamben's reconstruction, in contrast, reintroduces the plural in all its glory and sumptuous imagery. We must be governed and that entails harsh bureaucratic systemic administrative rigors coupled with the messy travails caused by inevitable irruptions of human contingency. To live through the drudgery, inconveniences, inequities and frustrations of administration, the polity's citizenry must find a distraction in a sumptuous spectacle worthy of common bonding prompting acclamation and glorification. As we have seen, in the post-Christian universe, Agamben's reconstruction easily seems arbitrary, but that can be mitigated through recourse to pluralism's universal norms and to the pluralist criterion for distinguishing between more and less inclusive governance.

From the standpoint of the relationship between law, justice and solidarity, the conjunction of Derrida's deconstruction, Agamben's reconstruction and pluralism present a rather complex and seemingly fractured picture. Law emerges as legitimate in part as it is "our" law inasmuch as we interpret it for Derrida, we derive it from our acclaimed sovereign for Agamben, and we make it as inclusive of all of us as possible for the pluralist. On the other hand, law remains at least somewhat repressive and alienating for Derrida because it always falls short of justice, for Agamben because it does not afford protection from the arbitrariness of administration, and for the pluralist because it is never sufficiently inclusive while always provoking new instances of exclusion. Turning to justice, it can never be achieved for Derrida; it fades in the case of Agamben—either because in the Christian world what depends on God and on Jesus his vicar must be considered inherently just or because in the post-Christian world there seems to be no reliable measure of justice to gauge the byproducts of acclamation and administration; and it is partial, temporary, and open ended in the case of pluralism where what predominates is an interminable confrontation between the more just and the less just without ever reaching full justice. Finally, in none of the three cases under consideration is the place of solidarity unequivocal. In the case of Derrida, what seems to predominate is the coexistence of elements of solidarity and alienation in as much as law is a gesture toward justice in relation to the other and a concurrent manifestation of injustice in its failure to account fully for the singularity of each person that happens to be under its sway. For Agamben, in contrast, the connection between law and solidarity seems purely contingent, if it exists at all. Indeed, in Agamben's account, solidarity looms as strongly present among those who acclaim and glorify and may link indirectly to law regarded as the product of the sovereign. On the other hand, there seems no inherent connection between genuine solidarity and

bureaucratic administration. In pluralism, solidarity is related to law and justice, but again not in a straightforward or unchanging way. Above all, pluralist solidarity looms as divided between the sphere of inter-communal interaction and that of intra-communal dealings. The community of communities that encompasses the polity as a whole cannot function harmoniously without some degree of society wide solidarity. Yet the latter solidarity is at once both sustained and countered by the more intense solidarity that binds distinct groups within the polity intra-communally. Without inter-communal solidarity, intra-communal life may not be peacefully sustained, but allegiance to the community of communities may well require sacrifices resulting in limitations regarding intra-communal life.

In the last analysis, combining the insights of Derrida, Agamben and pluralism does not lead to a clear, neat, unique persuasive resolution of the thorny issues that the relation between law, justice and solidarity pose to contemporary legal theory. Nevertheless, the combination in question yields valuable insights and confirms that the pursuit and better understanding of how law, justice and solidarity may stack against one another are worthy endeavors deserving of ongoing attention. If there is one lesson that emerges from the preceding discussion, it is that what may be most important is to focus on the process whereby the actual quest for harmony between law, justice and solidarity unfolds over time. Indeed, it seems rather unlikely that we will succeed any time soon in predicting or imagining a set of realizable conditions that would secure a stable harmony among these three terms that have posed serious dilemmas through modern times.

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