

# THE EMPTY TOMB: POST-CRITICAL LEGAL HERMENEUTICS

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There is nothing more refreshing than a successful failure. A momentary flaring of flamboyance. A near miss. Fifteen weeks as media monarchs; a good part—a small part—of a decade as a political threat to the order of the academy, if not the stability of the system. The affective bonds and the institutional disruption of youthful and latterly not-so-young dissidents and socialist sympathizers within the law schools definitely had their excitements, their impetus and novelties, and then they grew old, got rejected, disappeared into the shadows, backrooms, and faculty lounges. The various histories assign different figures to the failure of critical legal studies (CLS) in the U.S. of A.: it was killed by the lack of a positive program; it went underground and still subsists as interstitial trench warfare; it slept with the enemy, got distracted by the status incentives and glittering prizes of the law professoriat; it was undermined by its own poor scholarship, by the pretention of philosophy; it fragmented into forty different movements; it was undone by a predilection for abstraction and consequent waning of its visceral commitments. I could think of plenty of other post-mortem descriptive vivisections, but that list will do. Add to it as you wish. This Article will focus on the last interpretation, the decline of critique in law due to its tendency to academicism, a propensity to adiaphorism or indifference to doctrine, which is an essentially hermeneutic diagnosis of an affective inability.<sup>1</sup>

One of the founding brothers of the U.S. critical legal movement, Peter Gabel, left conventional law teaching early on to become an activist and administrator. On reflection, a quarter of a century later, youth in the rear view mirror, Gabel sees the decline of radical politics in law, and specifically the all too sudden stasis of the critical legal movement, as a consequence of psychological and spiritual weaknesses. It is true that the movement ran into a wall—the tenure wars, the threat of institutional exile, in a word law professors—but that was only the symptom, the obvious reason for deceleration. Walls, after all, can and have come down. The root cause was an interior weakness to the collectivity, an affective incapacity, and so, in the end, a failure of desire—

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<sup>1</sup> See Peter Gabel, *Critical Legal Studies as a Spiritual Practice*, 36 PEPP. L. REV. 515 (2009). I should note here that the relevant referent of post-critical is local and contemporary, namely post-critical legal studies, the movement having been the source of a brief revival of the legal hermeneutic tradition in the United States that goes back at least to FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS, OR PRINCIPLES OF INTERPRETATION AND CONSTRUCTION IN LAW AND POLITICS, WITH REMARKS ON PRECEDENTS AND AUTHORITIES* (Boston, Charles C. Little & James Brown 1839), but which was mainly a reflection of the so-called linguistic turn in social theory.

optimism of the intellect but pessimism of the will. In Gabel's view, it was not only that the established order resisted or rejected the critics, but equally that the bonds between the dissidents, the sense of collective urgency and mutual affirmation, fell away. The existential goal of the movement was to build a community, to connect, to bond, to share affections and affirm ideas, to love, but these embodied and interpersonal attributes of collective encounter, "the whirl of the spiral dance" and of "eye contact" too soon became sedimented in "reciprocal withdrawnness" and "mutual solitude."<sup>2</sup> The system gets to you, memory shapes community and experience dampens relationships, all too often placing habitus and impetus alike in the past, in the origin, in that childhood, institutional, existential or both, in which we were all sovereigns of our restricted worlds. Now, in the desert of the real, the corporate wasteland as reflected in the mirror of law school grade curves, classroom hazing, and doctrinal vacuities, separation and alienation have, in Gabel's view, left the heart beating weakly. A seemingly bleak picture. The hermeneutics of habitus, the ethos of the movement as a political community, gives way to the theory of critique, a movement towards abstraction that reflects the normative impetus of law, as well as a demographic that does not include successful reproduction of the movement in the next generations. Thus, the repetitive sense of fading away, the detachment from the viscera, a necessary though not necessarily desirable aging and separation, from movement to perambulation, reflective, if nothing else, of the success and institutionalization of the participants. They became named chairs, spouses, parents, professors of general jurisprudence, poets, film-makers, Associate Dean.

Gabel, however, is affirmatively optimistic: "But it's not too late!" Community survives, there is time and place for play, connection still. The way out or, better, the way forward for CLS is "to return to its original instincts as a righteous social transformation movement and this time recognize that there is a spiritual basis for our understanding of the social individual that is rooted . . . in the enlivening mutual recognition, or Love, that was always at the heart of the movement out of which CLS was born."<sup>3</sup> The failure of critical legal studies, the hiatus or temporary derailing thus offers a dynamic lesson and sounds a rallying cry. Post-critical legal hermeneutics should return to the early writings and recover the breath of enthusiasm, the light of shared excitement, the ideals of justice and love that the nascent movement of critique had conjured and that subsequently, with mainly benign collective senescence, got mislaid. It is this argument as to the lost object of critique, the forgotten core, and its accompanying interpretative theory that is a new project born of old texts. It touches a chord, a song not yet sung, that is also emergent in the margins of European legal studies and gains surprising support in the work of the Italian jurist and philosopher Giorgio Agamben.<sup>4</sup>

<sup>2</sup> Gabel, *supra* note 1, at 522.

<sup>3</sup> *Id.* at 529.

<sup>4</sup> I will focus primarily on three texts: *GIORGIO AGAMBEN, WHAT IS AN APPARATUS?* (David Kishik & Stefan Pedatella trans., Stanford Univ. Press 2009) (2006); *GIORGIO AGAMBEN, LE RÈGNE ET LA GLOIRE: POUR UNE GÉNÉALOGIE THÉOLOGIQUE DE L'ÉCONOMIE ET DU GOUVERNEMENT* (2008) [hereinafter *AGAMBEN, LE RÈGNE*]; and *THANOS ZARTALOUDIS, AGAMBEN: POWER, LAW AND THE USES OF CRITICISM* (2010).

The argument that I will pursue is an intricate and, dare I say it, old world variation on Gabel's observations. In terms of the history of ideas, the spirituality of law and of critique is a return of political theology. On one side of that history and doctrine is the theory of law as a holy heritage, a transcendental hierarchy ordained by the divinity, ensconced in the Church and the ecclesiastical polity. Law is here the public and visible representation of the will of an absent source (*deus absconditus*), be it divinity or sovereignty, in whose name the law speaks in the mouths of its unhappy, waiting subjects—vicarious institutional beings all. The categories of political life are borrowings or, in Agamben's terminology, signatures of their generally secreted and forgotten theological sources. In this account, the legal is public and visible, vicarious but expressed and known through its theatrical or properly liturgical rites, the public monuments and other grand statements of the increasingly spectacular and ever more visiocentric public sphere.

But what if the ostensive and obvious realm of great men, of heroines and heroic lives, of massive tomes and their black letter laws was only a part of the story—and a misleading part at that? Put differently, the theater of public events, of great trials and tabular laws, the codes and columns, books, libraries, and promulgations could well be a misdirection, a partial truth, texts that conceal much more than they reveal, documents and instruments that distract and preoccupy as much as they enliven or embrace the reality of governance and the viscera of practice. Agamben's thesis is precisely that: the domain of ostensive sovereignty, triumphal events, and visible declamation of laws is to be understood literally, that is as a properly transcendent and, in the main, anti-nomically connected to the forgotten theology, as Agamben relays it, of "oeconomic" disposition, which in the Latin is also sometimes termed the flowers of law—*flores legum*.<sup>5</sup> The triumphal and acclamatory occasions of promulgation are necessary but distinct from the practices of administration and the quotidian reality of governance, which in an old adage declares "I observe but I do not obey". His treatise thus devolves around the baroque maxim *rex regnat sed non gubernat*, meaning that the king rules but does not govern.

The sovereign, who, at least since Hobbes, embodies an unsurpassable power, is the inheritor of a publicly proclaimed theater of justice and law that directly embodies the political theology of divine rule.<sup>6</sup> The secular figurehead, the delegate of divinity, thus plays an iconic role, makes grand statements, declares, promulgates, heralds, warns, prohibits, and announces, but

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<sup>5</sup> It is interesting to note here that *oikonomia* and *flores legum* were used interchangeably, both meaning collection and ordering of laws and specifically of signs, the titles being used for early law dictionaries that followed Book 50 of the *Digest, de verborum significatione*. See SOARES DE RIBEIRA, *OIKONOMIA, SEU DISPOSITIO REGULARUM UTRISQUE IURIS IN LOCOS COMMUNES* (Cologne 1570); THOMAS DE THOMASETTIS, *FLORES LEGUM CUM SUIS EXCEPTIONIBUS, & DECLARATIONIBUS: EX VARIIS LEGIBUS, GLOFFIS, & DOCTORIBUS COLLECTIS* (Cologne 1657).

<sup>6</sup> See ROBERTO ESPOSITO, *CATÉGORIES DE L'IMPOLITIQUE* (2005) (offers a brief but useful overview); ERNST H. KANTOROWICZ, *THE KING'S TWO BODIES: A STUDY IN MEDIEVAL POLITICAL THEOLOGY* (1957) (provides a trajectory of this argument distinguishing the mystical and natural bodies of the Sovereign); CARL SCHMITT, *POLITICAL THEOLOGY* (George Schwab trans., Mass. Inst. of Tech. 1985) (1922) (important for Agamben because of its political inflections).

only in a spectacular and distanced way. The world of appearances, of public stages and media events, is there to be viewed, watched, and screened. It rules but does not govern. The text of law, in this argument, is the text of rule. As for governance and the administration of everyday intimacy, the life of relationship and intimate encounter, the spiral dance of social relations and institutional roles to which Gabel addresses himself<sup>7</sup>, or alternatively—and less benignly—the quiet desperation of withdrawal, that is largely another territory, a distinct text, a different endeavor of a much more specific and affective kind. This realm of actual governance, the formation of subjects, the organization of visible spaces and faces, and the normative lens of quotidian interaction, I want now to suggest, is the proper object of post-critical legal hermeneutics and can, initially at least, form the referent of the current designators of post-critical legal studies which now and variously, with optimism or cynicism gets named and renamed diversely as critique 2, governmentality, righteousness, mediation, law as spiritual practice and, indeed, sublunar legal scholarship as a whole.<sup>8</sup>

#### AFFECTIVE MAINTENANCE

I will start with a very basic question and a rather obscure but nonetheless illustrative text. Following up on the question that Peter Gabel poses in his attempt to reorient and revitalize critical legal scholarship: how is a community held together? What makes the group or Church, the flock or fold, the collective sense of custom and use, the inheritance that “we” enter, when “we” go before the law, which is to say into Kafka’s castle, the institution with its tacit code and silent norms, with its unwritten laws and its established ways? This is not only a question of heavy signs, monumental inscriptions, trophies and statues, columns, trials, and other public dramas that exemplify but do not embody so much as exclude and occlude the interior dimension of governance. The domain of public expression and visibly inscribed law, of fear, glory, and triumph has its complement, its obverse in the creation and capture of the juridical subject as a legal being, as an oeconomic mode, an administrative site, and reverent space, let us say, of attachment to law.<sup>9</sup> The early modern lawyers occasionally talked in this sense of common law as a “nursing father,” and meant by this that the sovereign, Leviathan, was equally also a parent, a father confessor, and concerned very practically with the *cura animarum* (care of souls) which, historically of course, had been more exclusively the province of

<sup>7</sup> Gabel, *supra* note 1, at 522.

<sup>8</sup> Sublunar, let me explain, simply in the sense, European perhaps, that any scholar claims to be critical, but in the United States legal academy critique has sometimes a reputation of wildness that requires the *sotto voce*.

<sup>9</sup> 2 EDMUND GIBSON, *CODIX JURIS ECCLESIASTICI ANGLICANI: OR, THE STATUTES, CONSTITUTIONS, CANONS, RUBRICKS AND ARTICLES OF THE CHURCH OF ENGLAND, METHODICALLY DIGESTED UNDER THEIR PROPER HEADS. WITH A COMMENTARY, HISTORICAL AND JURIDICAL* ch. X (London, Baskett 1713) (offers detailed collations of the law of persons); JOHN GODOLPHIN, *REPERTORIUM CANONICUM: OR, AN ABRIDGMENT OF THE ECCLESIASTICAL LAWS OF THIS REALM, CONSISTENT WITH THE TEMPORAL* (London, R. & E. Arkins 1687). I discuss much of this literature in Peter Goodrich, *The Theater of Emblems: The Optical Apparatus and the Investiture of Persons*, 6 L., *CULTURE & HUMAN*. (forthcoming 2011).

the clergy prior to the annexation of their authority and the seizure of their goods by the state.<sup>10</sup>

The question then is that of how to attend to the interior attachment to law, and my initial answer is that this requires recognition of the spaces of affection and attachment, the love that St. Paul was fond of saying was the completion of the law. The example I will use briefly is an intriguing early modern Catholic text by the floridly named Archbishop of Albia in Spain, Hyacinthe Serroni. The text, *Entretiens affectifs de l'ame avec Dieu*, is directed to new members or, more exactly, new converts (*rejettons*) to the faith and is exemplary both in sketching the method of induction and in depicting the community.<sup>11</sup> The literal translation of the title is *Affective Conversations of the Soul with God*, but the hermeneutic sense is probably closer to *Affective Maintenance of the Soul with God*. In either version, whether conversing or internally repairing and maintaining, the Archbishop is aware of the need to institute intimate rites that will capture and hold the neophytes in their newfound space: "You have finally become living members of Jesus-Christ . . . you have come back into the Church in this Holy City where the Lord appears in all his glory (*grandeur*) . . ."<sup>12</sup>

The space of faith, conceived of as a city, elsewhere termed a house, a castle, an arsenal, a tower, and a mansion, is evidently one of affect in which miracles, happiness, admiration, praise, and joy mingle: each new convert is "our crown." One aspect of this particularly acute moment of conversion and entry is obviously the recognition of the glory and greatness, the majesty and splendor of the divinity ever present in the very structure of the Church. There is a public, iconic, and heavy symbolic presence and ritualistic utterance of the divinity and law, an apparatus of appearance that has to be praised and venerated. The other side to this, however, is that this majesty or sheer brilliance is not a wholly practical technique for engaging and maintaining the necessary communication, affects, and interior commitments that the Church as collective body requires. The convert enters into the living body of Christ, becomes a child of God, and precisely as a child, as a pure emotion, requires affective tutelage, guidance, and affirmation in the means of membership. The catholic community is the holy sanctuary writ large. One could usefully look to the rules of monastic orders to see extreme versions of the rule that Serroni advocates through his annotations and interpretations of the psalms. Indeed, taking an example that is historically close, within *The Rules of St. Benoist* (the saint's

<sup>10</sup> The common lawyers did not hesitate to borrow from the Romans and define law as "knowledge of all divine and humane things." See, for an important early example, SIR JOHN DODERIDGE, *THE ENGLISH LAWYER: DESCRIBING A METHOD FOR THE MANAGING OF THE LAWE OF THIS LAND* 29 (The Lawbook Exchange, Ltd. 2005) (1631). This borrowed definition, placed upon the sovereign and all his delegates and viceroys, judges and administrators the role of nurture and care of the soul. This spectral jurisdiction, shared with the Church, is made explicit, for example, in ROGER COKE, *JUSTICE VINDICATED FROM THE FALSE FUCUS PUT UPON IT*, BY THOMAS WHITE GENT., MR. THOMAS HOBBS, AND HUGO GROTIUS 21, 98 (London, Tho. Newcomb 1660), where he addresses common law as a nursing parent.

<sup>11</sup> HYACINTHE SERRONI, *ENTRETIENS AFFECTIFS DE L'AME AVEC DIEU, SUR LES PSEAUMES DE LA PENITENCE* (Paris, Antoine Dezallier 1686).

<sup>12</sup> *Id.* at sig. a.ii.v.

declarations for daily life within the order addressed to his “children”) a similar focus is evident. The psalms are the keys to the kingdom, the hymns will bring sanctuary and connection, one needs only to approach with fear and “psalmodize wisely: I will praise you in the presence of the angels.”<sup>13</sup>

To this end, reverting again to Serroni as our exemplar, the Archbishop offers his text, a commentary of great detail upon the *Psalms of David*, as a guide to penitence and to the rules of behavior that stem from it. Referring then to his source, the book of sacred songs, he observes that the Spanish monarch, “your father in the faith,” has recently, in his generosity and wisdom, allowed a translation of the *Psalms of David* into the vernacular:

Now you can boast that you have received from the hand of the greatest of Monarchs the living expressions of the heart of the holy King David, and so the Kings have become your nurses (*nourissiers*) and you have been suckled by doubly Royal breasts.<sup>14</sup>

There is little need to engage in any Freudian digression on the image of the nursing father, the King who offers his breast to nourish the newly converted. Note only the obvious, namely, that there is a strongly erotic tone, a passion, an intense sense of enjoyment of this royal breastfeeding. It is almost a disappointment, at least to modern eyes, that what should be fluid, milky secretions from the nipple is in fact but a reference to a text. Hyacinthe Serroni is in some respects prepared for such a reaction and praises the psalms, the songs of laudation, in words borrowed from Saint Augustine: “everything that is of use in the Scriptures is collected in the single *Book of Psalms*. It predicts future events, it reports the histories of centuries past; it gives Rules for the conduct of life; it is the great treasure chest of all good doctrine; it cures (*guerit*) all of the wounds of Souls old and new in a swift, easy and admirable fashion . . . .”<sup>15</sup> The psalms provide a pleasurable and beneficial means of maintaining the soul in relation to God, and variously allow the living member of Christ’s body to meditate, pray, converse, and communicate with the divinity via the acclamatory techniques and hymnological apparatuses of the psalms.

If the purpose of the vernacular publication of the psalms, along with the Archbishop’s commentary, is strictly a practical one, a convocational exercise, then it is the technical details that are most interesting. There is, as noted, a dual structure to the commentator’s introduction. King David is sovereign and untouchable, the resplendent juggernaut of near Eastern mythology, latterly Leviathan in the common law tradition, a very public image of an intangible power.<sup>16</sup> This is *maiestas*, the living representation of an absent God, the delegate or vicar of Christ on Earth whose path is paved with glory and praises, whose body is mystical and whose dignity never dies. Kantorowicz famously traced the legal architecture of this concept of sovereignty but it is one that is most obviously for show and belief, not for conversation. This sovereign rules but does not govern. There has to be another side, an alternate face and an

<sup>13</sup> SAINT BENEDICT, LA REGLE DU B. PERE S. BENOIST 99 (1701).

<sup>14</sup> SERRONI, *supra* note 11, at sig. a.iii.v.

<sup>15</sup> *Id.* at a.iii.r.

<sup>16</sup> On this figure and its origins, according to the maxim *ex oriente lux*, see PIYEL HALDAR, LAW, ORIENTALISM AND POSTCOLONIALISM: THE JURISDICTION OF THE LOTUS EATERS 101-26 (2007).

interior mode to David's gargantuan presence, and this is precisely the administration of the soul that is so intimately presented and ritualistically acted out in the progression of the psalms.

The sovereign who breastfeeds is still King, legislator, maker, and promulgator of laws. In the terminology of Hyacinthe Serroni's commentary, however, where it is a question not of public veneration but of private life, of being in its everyday, multiple, and interior affects, and the moods of the household subjects, then the norms are administrative and practical. It is knowledge, sure enough, that is conveyed, but in the form of guides, instructions, moralizing maxims, and emblematic images that will direct the desires and focus the aspirations of the believer. It is in the end the practice of belief that has to be inscribed, embodied, and acted out quite explicitly "so as to maintain you in the good and to repress the most violent passions."<sup>17</sup> And of course there is more to this administration and care of the soul, but at the moment it is the dual structure that I will excerpt because this is what the common lawyers most strikingly adopt. John Selden indeed inscribes an entire history of common law with the title *Jani Anglorum* and his title page carries a woodcut of the two faced Janus, along with a maxim that is intriguingly doctrinal in its implications. The motto reads *haec facies populum spectat, at illa larem* and translates most properly as "this face looks to the multitude and the other to the tutelary deities of the household."<sup>18</sup> While this may seem a curious representation of a specifically English law, and of course has its roots in Roman law and most immediately in Alciatus' *Emblemata*, there is a distinctively Anglican interpretation.<sup>19</sup>

The motto of Alciatus' Janus is *prudentes*, meaning foreseeing but also intelligent, prudent, and versed. In Renaissance Latin, *prudens* also has the shorthand meaning of learned in law and thus what we now mean generically by lawyer. The image accompanying the motto is of two faces floating over a group of houses. This is a law that is expressly depicted as also entering the home and taking hold of the tutelary life, the patterns and prayers of the domestic inner sanctum, be it conceived as the *gynaecium* or *amicitia*, the amatory or amicable. This sense of governance, of a floating spirit, a face whose aspect is turned spectrally to the most intimate and invisible dimensions of human life, is picked up upon by the English emblematisers, the priest Geoffrey Whitney and the lawyer George Wither.<sup>20</sup> Both reproduce the admitted hieroglyph of omniscience, and Wither, in particular, refers in his description of Janus to a

<sup>17</sup> SERRONI, *supra* note 11, at sig. a.iiii.r.

<sup>18</sup> JOHN SELDEN, *JANI ANGLORUM FACIES ALTERA MEMORIA NEMPE A PRIMULA HENRICI II* tit. p. (London, 1681).

<sup>19</sup> ANDREAS ALCIATUS, *EMBLEMATUM LIBER* (1531) was reprinted and translated numerous times. It became the standard reference although THOMAS COMBE, *THEATER OF FINE DEVICES, CONTAINING AN HUNDRED MORALL EMBLEMES* (London, Richard Field 1614) uses the first French vernacular emblem book, the lawyer GUILLAUME LA PERRIÈRE, *LE THEATRE DES BONS ENIGMES* (Paris, Janot 1540), as his source, and is inventive in his interpretive vernacular verses.

<sup>20</sup> GEFREY WHITNEY, *A CHOICE OF EMBLEMES, AND OTHER DEVISES* 108 (Leyden, Christopher Plantyn 1636); GEORGE WITHER, *A COLLECTION OF EMBLEMES, ANCIENT AND MODERNE* 138 (London, Augustine Mathewes 1634).

God “[t]o whom, all hidden things are truly knowne.”<sup>21</sup> The most extraordinary emblem of Janus, however, comes from Henry Peacham’s lesser-known *Basilikon Doron* of 1610, where the figure of Janus is utilized to castigate pride.<sup>22</sup> The image is of a wide brimmed black hat placed over a crown, floating over a landscape with a tree in the foreground. The tree is the figure of amity and loyalty and the hat-encrusted crown floats a distance from it, connoting infidelity and connivance. In the background, visible but not very close, is the city from which one can but suppose the unfaithful and arrogant emblem of deceit has been exiled. Beyond that, and the point of significance here, is that the hat cannot hide the crown, mere vestment will not mask the pride or arrogation of the “pharisees” (puritans) who seek to feign piety through venerable vestments and yet who are, in the reality of their practice, far from righteousness in Peacham’s eyes. The clothes are seen through, the skin cannot mask, the face will not hide the ever present and all seeing hovering law.<sup>23</sup> If nothing escapes the law, then the urgency and the instructiveness of Serroni’s everyday lessons in affective maintenance of the soul’s relationship to God become ever more evident.

Wide-brimmed hats cannot hide the subject from the eye of the law. The pride that propels the fashion of mask and vestimentary deflection is also visible to the spectral ruler. If Janus can always see through merely mortal designs, or as the early modern lawyers put it, the divine can always “outsee” and proclaim *video et rideo* (“I look and I laugh”), then the public shows and spectacles of the *ius triumphi*, declarations and promulgations, columns and theatre of sovereignty, vehement visibilities, and monumental appearances of legality, are of a secondary significance. For these shows to be possible, for there to be an audience, first there must be an interior order, a mapping of legal emotions that will capture the subject and attach her to law. In the Latin tradition, which the common lawyers were very happy to adapt to their own causes, *patria potestas*, the domestic hierarchy and internal order, precedes *regia potestas* or the sovereign and plural version of the *oikonomia*, meaning the administrative order and rhetorical, which is to say persuasive and active disposition that derives ultimately from the household as the first order and hierarchy of management.<sup>24</sup> The law as nursing parent and the sovereign as suckling breast are both images of an interior transmission, of an invisible—yet more effective—non-law that takes hold in the ghostly realm of the spirit. The domain of mundane administrative efficacy, of the actual apparatus of implementation, meaning “disposition” and instantiation—governance in Agamben’s argot—belongs paradoxically to the less obviously visible practice of affective

<sup>21</sup> WHITNEY, *supra* note 20; WITHER, *supra* note 20.

<sup>22</sup> GEORGE PEACHAM, *BASILIKON DORON* 96 (Daly ed., 1998) (1604). The epigram reads: *Iane Pharisaiici tibi mitto hae symbola fastus* (“I send you, Janus, this symbol of your Pharisee-like arrogance”).

<sup>23</sup> See generally MICHAEL STOLLEIS, *THE EYE OF THE LAW: TWO ESSAYS ON LEGAL HISTORY* (2009) (on the figure and metaphoric meaning of the eye of the law in a historical perspective).

<sup>24</sup> Zartaloudis, *supra* note 4, at 56-65 (provides an invaluable philological account of *oikonomia* as the conjunction of *oikos* and *nomos*, household and norm).

maintenance and governance of the soul. It is this thesis that Agamben has recently and extensively examined.

*OBJET PETIT L (THE LOST OBJECT OF LAW)*

Walter Benjamin perhaps captured the point first in a fragment in which he remarked enigmatically that “nothing historical can relate itself on its own account to anything Messianic.”<sup>25</sup> The historical is in this view the downfall of the Kingdom of God, just as the messianic is the demise of history. It is therefore necessary, in Benjamin’s rather elliptical view, to separate history and theology, the profane and the messianic, happiness and religion, so that temporality has its day. Benjamin uses the metaphor of two arrows shot in opposite directions and yet, even if opposed, the two forces are not unconnected, but rather increase each other “so the order of the profane assists, through being profane, the coming of the Messianic Kingdom,” and the profane is indeed in this conception “a decisive category of its quietest approach.”<sup>26</sup> For Agamben the relevant distinction is precisely that between secularization and profanation: “Secularization is a form of repression. It leaves intact the forces it deals with by simply moving them from one place to another.”<sup>27</sup> The repressed returns, presses against the barrier of consciousness, as we know, and it is here, in glimpses, flashes, symptoms, and pain, that a new category that intervenes between the opposed forces is sought. For Benjamin it is paradoxically “a worldly restitution that leads to the eternity of downfall,”<sup>28</sup> and Agamben further specifies a restoration to human use: “For to profane means not simply to abolish and erase separations but to learn to put them to a new use, to play with them.”<sup>29</sup>

The protocols of the critical theorists are happiness and play, erasure and use value. In any event, the issue that Benjamin allusively touches upon by way of referring to the dynamic of historical happiness as the downfall of the eternal is one that has haunted political theology. Rather than tracking the distinct and opposed trajectories of the historical and the Messianic, the political theologians have rather theorized a direct transmission from the transcendental to the immanent, from the ecclesiastical to the secular. The jurisdiction of the Church, meaning in essence the theory and figures of divine hierarchy and sovereign rule, in a word unhappiness, is viewed as a simple transfer into the new secular and reputedly modern order. The complementary dualism of Church and State, the parallelism of spiritual and terrestrial, is regarded as a split internal to the secular order which thus takes on, in the language variously of Filmer and of Hobbes, the sacral character of absolute power. This is *reductio ad unum*, a singular state embodied in its iconic figures of the Holy See of which it

<sup>25</sup> See WALTER BENJAMIN, *Theologico-Political Fragment*, in *ONE-WAY STREET* 155 (1997); Thanos Zartaloudis, *Soulblind, or On Profanation*, in *THE WORK OF GIORGIO AGAMBEN: LAW, LITERATURE, LIFE* 132-48 (Justin Clemens et al. eds., 2008) (picks up on this theme in the argot of happiness).

<sup>26</sup> BENJAMIN, *supra* note 25.

<sup>27</sup> GIORGIO AGAMBEN, *PROFANATIONS* 77 (2007) (hereinafter “AGAMBEN, PROFANATIONS”).

<sup>28</sup> BENJAMIN, *supra* note 25.

<sup>29</sup> AGAMBEN, *PROFANATIONS*, *supra* note 27, at 87.

is, in theory, the delegate and vicarious *exemplum*. It is against this simplification and reduction that Agamben pitches the Trinitarian theology of *oikonomia*, discussed below, and towards which Hyacinthe Serroni's treatise on affective maintenance is directed.

I neither intend nor am I able to provide a full reconstruction of Agamben's philological and doctrinal analyses. The figure of the history that he conveys, however, could well be that of Janus, the emblem of common law who represents a divided polity and dualistic methodology by means of a two headed (*Jane bifrons*) divinity. Various representations in emblematic texts, the key feature of Janus is of course the unity of the double aspect. It is one and the same figure who looks forward and back, outside and inside, above and below. This is key to the programmatic interpretation of Agamben that we find in Zartaloudis because, where political theology has argued that there are two orders, divine and human, that are serially linked, one giving way to the other, one subordinate to the other, Agamben offers a more subtle interpretation. The order may be two-faced, lissome and supple, but it remains one, undivided and complex in the model of the triune, father and son in variably antagonistic and harmonious relation, and between them the Holy Spirit, the invisible order of angels, the visible realm of the clouds. This thesis is both political and doctrinal, and it is to the theological and philological roots of the argument that I will briefly turn.

Agamben's argument, pursued in extraordinary detail, is that there is a missing dimension to the modern reception of the early Christian tradition of political theology. The sovereign who rules, on the model of the divine legislator and his delegate, is only one moment of a more complex model of rule and governance, classically *arche* and *dynamis*, order and movement, which has not one but two faces. The *duplicem vim* (dual order and power of the divinity) resides in a distinction that theology has variably elaborated between God and Christ, spirit and incarnation, contemplation and action, substance and relation, being and economy. So distinct indeed are the two sides of divinity that theologians would often speak of two distinct Gods, as for example the second century Platonist philosopher Numenius who distinguishes a first divinity, the king, a stranger to the world, a transcendent and totally inoperative God, from a second God who, by way of contrast, is active and occupied with the government of the world.<sup>30</sup> In the later Latin tradition the distinction is between *deus otiosus, rex inutilis*, (a superfluous god, a useless king) and a secondary order embodied in *deus actuosus*, a divinity concerned with the practical guidance and governance of being.

The concept of a dual order, of a nominal ruler and a secondary figure who implements the actual governance of beings, threatens to present a polytheistic conception of order against which Christianity had defined and distinguished itself. Agamben's thesis is that the concept of the Trinity was the doctrinal response to this threat of plural Gods. Christ comes as part of the Father, as a god who is internal to God, both part of and separate from the creator and encompasser of all being. In the conception of Boethius, there is a divine providence and then a second order of destiny that is concerned with the

<sup>30</sup> AGAMBEN, *LA RÈGNE*, *supra* note 4, at 127 (citing Numenius).

disposition or *oikonomia* of terrestrial things. The former order is transcendent, the latter is imminent, and this conception corresponds broadly to the Thomist distinction between general and special providence, the former directed to first causes and to the order of God, the latter to that of the other (*ad invicem*), the secondary and contingent realm of governance.<sup>31</sup> Be the theology as it may, and there is now a very secure guide to this doctrinal trajectory, the important point for hermeneutic analysis is that Christian humanity is born and exists under a double sentence, a *duplicem sententiam* according to the author of the *Tractus de amore*, which does not imply division so much as it does dialogue and disposition.<sup>32</sup>

This model of governance, represented not by the mythology of Leviathan but rather by the Janus of common law, is elaborated in the forgotten texts of the lesser order or secondary act, which is that of economic administration, the management of the household, and the disposition of beings according to the practical dictates of everyday conduct. In Christian terminology, the being who comes before law already has the law internally inscribed and is thus ready and malleable for the *lex ceremoniarum*, the rites and observances of the public realm. The *oikonomic* sphere, as Mondzain has brilliantly elaborated, is one of relation and instantiation according to the order of images, the icons of *oikonomia* that direct the senses and organize the organs of the subject to desire and address themselves towards the divinity.<sup>33</sup> It is here, in recuperating and expatiating upon the concept of *oikonomia*, that Agamben makes his most novel contribution.

Elaborating the Thomist, neo-scholastic theory of earthly rule, Agamben traces the forgotten order of *oikonomia*—in Latin *dispositio*—as the art of governance and practical implementation of power in the domestic realm.<sup>34</sup> This relates to the *ius imaginum* to the causes of connection and hierarchy of places within the order of images that would later be mislaid, or dismissed as an archaism of social pageantry, a forgotten aspect of the over-invested spectacles of early common law. For Agamben, however, the key to *oikonomia* resides in understanding that the jointure of the two faces of Janus accurately portrays the dual aspect of a single hierarchy and order of law. The principle of *oikonomia* is one of substitution, of the son for the father of superior for inferior within what is paradoxically, or at least in the abstraction of doctrine, an egalitarian order. The principle of circulation of power is that of vicarious displacements of office and role in which “[t]he ontology of acts of government is a vicarious ontology in the sense that, in the interior of the economic paradigm, all power has a vicarious character, and performs the offices of another. This means that there is no ‘substance’ but only an ‘economy’ of power.”<sup>35</sup> Each carries within the image of a higher power in whose name they act. This *potestas vicaria* (vicarious power) is replicated throughout the entire order of social being but has its most acute site of application, its vanishing point one could say, in the

<sup>31</sup> *Id.* at 177

<sup>32</sup> The esoteric reference here is to 3 ANDREAS CAPELLANUS, TRACTATUS DE AMORE 322 (P. G. Walsh ed. & trans., 1982) (1190).

<sup>33</sup> See generally MARIE-JOSE MONDZAIN, IMAGE, ICÔNE, ECONOMIE (1996).

<sup>34</sup> AGAMBEN, LA RÈGNE, *supra* note 4, at 210.

<sup>35</sup> *Id.* at 219.

tutelar realm, in the gynaeceum and in what transpires to be the far from innocent domain of the familial playpen.

The Royal *oikonomia* reflects the divine *oikos* and management, just as the household of the lowliest subject reflects the hierarchy and principles of the royal domesticity. The logic of substitution is an apparatus of transmission that both structures the interior according to an exterior norm, the household and the polity, but also and less obviously inscribes the affect of worship, of reverence for hierarchy and a sense of the sacred into the seemingly secular social order of being. Take hierarchy first. The principle of imitation of empire (*imitatio imperii*) that Pierre Legendre has lengthily excavated is one that inscribes the subject into the symbolic order in accordance with the image of the divinity – *haec imago* as the Latin vulgate puts it.<sup>36</sup> That said, what makes this descending order of subjects, each in the image of its progenitor, possible is a system of substitutions that theologians depicted early on as the earthly reflection of a heavenly hierarchy, human order as the mirror of the angelic. Régis Debray in his *Exact Science of Angels* makes the point that the order of the earthly city must reflect that of the celestial city, and the latter is organized and governed according the complex hierarchy of angels. The positions and posts of the earthly city reflect the echelons of the angelic: “It was only when the absolute took refuge in the abstract, in monotheism, that the figure of the intercessor became ineluctable. God’s absence-presence had to be bridged by an imagistic interface between invisible divinity and our downcast eyes of flesh and blood.”<sup>37</sup>

The theory of angels, in Agamben’s succinct description, is a theory of government, plain and simple. Debray accedes to a similar point in also acknowledging that “Pious figuration had the jump on bookish conceptualization (the image gets to things before the idea can). And it indeed proved necessary for men of dogmas and theses to catch up to those who worked in images.”<sup>38</sup> This, of course, may simply seem to be a vivid way of depicting the task of hermeneutics as that of studying the figures of transmission, the little images and petty icons (*icunculæ*) of the reformed and vernacular text of the scriptures.<sup>39</sup> There is more, however, at play than the mere inscription of hierarchy, the echelons on the escutcheon, the order of precedence within the law of honor at the state dinner, the opening of a parliament, the inauguration of a president, the investiture of a bishop, or the appointment of a dean. These

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<sup>36</sup> The most recent elaboration is to be found in PIERRE LEGENDRE, L’AUTRE BIBLE DE L’OCCIDENT: LE MONUMENT ROMANO-CANONIQUE. ÉTUDE SUR L’ARCHITECTURE DOGMATIQUE DES SOCIÉTÉS 100 (2009).

<sup>37</sup> RÉGIS DEBRAY, TRANSMITTING CULTURE 35 (Eric Rauth trans., Columbia Univ. Press 2000) (1997) (hereinafter “DEBRAY, TRANSMITTING CULTURE”). An expanded version of this argument can also be found in RÉGIS DEBRAY, CROIRE, VOIR, FAIRE: TRAVERSES (1999) where he argues, in the context of the maxim that “no-one rules immediately,” that the angel is the principle of symbolic efficacy as such. There has to be a mode of transmission from abstract to concrete and angelology is the form it has taken.

<sup>38</sup> DEBRAY, TRANSMITTING CULTURE, *supra* note 37, at 37.

<sup>39</sup> THOMAS PHILIPOT, A BRIEF HISTORICAL DISCOURSE OF THE ORIGINAL AND GROWTH OF HERALDRY, DEMONSTRATING UPON WHAT RATIONAL FOUNDATIONS, THAT NOBLE AND HEROICK SCIENCE IS ESTABLISHED 7 (London, E. Tyler & R. Holt 1672). I have commented on that text in Peter Goodrich, *A Note on Icunculæ*, 13 PÖLEMOS 3 (2009).

vestiges of military ranking, translated from the army of angels, may ensconce hierarchy in the social but they do not directly address the affective inscription of honor, the norm of reverence and obedience that was to be shown towards parents and that subtends the acclamatory and hymnological apparatus of the interior realm, the dialogue of the soul with non-being.

Debray mentions images, and Legendre has discussed the role of dance in generating subjective passion and love of authority, but Agamben places these in their proper doctrinal context.<sup>40</sup> The affective dimension of hierarchy is not simply lodged initially at the level of the family but is inscribed through the entire liturgy of psalm and song, prayer and penitence. The subject must be brought to sing. Not only should the chord within the individual be struck and tuned, but the proper object of such rites should be the hierarchy of authority that leads to the divine. The subject is to admire and sing the praises of the collective figureheads, the father, the captain, the headmaster, the line manager, the judge, the crown, the sovereign, and thence the power that they represent: “Glory is the space where theology endeavors to think the impossible conciliation between the immanent Trinity and the economic Trinity, between *theologia* and *oikonomia*, between being and practice, between God in itself and God for us.”<sup>41</sup> It is in and through hymn and song, psalm and prayer, through the entire paraphernalia of liturgical rites, laudation, and acclamation, that the soul of the subject is attached to and comes to accept the hierarchy to which they belong. Could it be otherwise?

Politics, in its Western juridical form, is an intrinsically theological endeavor within which the variable modes of acclamation, and now the everyday media spectacles of politics, law, state action, and sovereign pronouncement, provide the affective bond, the interior dialogue that authorizes power and, in Agamben’s version, binds rule to governance, politics to economy. More than that, the liturgical modes of acclamation, now incorporated into the diverse forms of political and legal popularity that are used to justify everything from war to legislative decisions, are juridical forms. Kantorowicz was the first to note that the mystery that is embodied in ministry is a jurisprudential invention.<sup>42</sup> The acclamation is a modality of justice—*dignum et iustum est* (it is proper and just) according to the old formula—and part of the ritual signification of power within the Church but equally, if in less florid modes, in the state and judiciary.<sup>43</sup> Vestments, robes, portraits, bars and benches, ceremonial openings, solemn oaths, flags, insignia, and sacred, or at least carefully guarded, sites of publication and promulgation all serve to bolster legal authority by means of optical indications of authority. The eyes, hands, and mouth are opened to inhale and express the aura of legality. Reverence circulates according to inherited patterns.

Returning to Serroni and the guide that he offers to affective bonding, the dialogue of the soul with God, one can note two structural features to the manual. The first is the trajectory from penitence to salvation. The subject begins

<sup>40</sup> See, e.g., PIERRE LEGENDRE, *LA PASSION D’ÊTRE UN AUTRE: ÉTUDE POUR LA DANSE* (1978).

<sup>41</sup> AGAMBEN, *LA RÈGNE*, *supra* note 4, at 314.

<sup>42</sup> Ernst Kantorowicz, *Mysteries of State*, in *SELECTED STUDIES* (1965).

<sup>43</sup> AGAMBEN, *LA RÈGNE*, *supra* note 4, at 261.

by acknowledging his or her failure. Penitence, as the sixth Psalm of David vividly elaborates, begins with confession, a self-abasement, and acknowledgment of weakness, infirmity, and sin. The plea for forgiveness is directed to the divinity and Serroni offers the appropriate arguments: “there are two reasons that I put forward for the forgiveness of my sins; one is your mercy, the other my weakness.”<sup>44</sup> Obviously enough, it is not sufficient for the penitent subject to mend their ways. Mere reform does not erase the always pre-existent debt, the fact of prior sin and iniquity which the Lord alone can “obliterate from the soul.”<sup>45</sup> The trajectory of penitence is toward forgiveness by the external force and the tag at the end of each confessional statement is that the plea be answered, the subject forgiven, saved, and cured of their transgressions. The model of this salvation is juridical in the sense that the plea for salvation is a prelude to that terrible day, the last day of judgment when each must account for their lives. It is this plea to the one who will be the judge on that day which fills the air with the cries of the penitent—help me, cure me, wash me, save me, overlook me, dispose of me as you will. The sixth Psalm, as glossed by Serroni, in fact offers a visual metaphor: “Turn your eyes towards this miserable sinner, and have pity upon me: Turn, like a gracious (*affable*) Prince, a benign and merciful [sovereign], towards this rebellious subject who cries out now for mercy and swears an eternal fidelity to you . . . Turn towards me as an indulgent judge . . . Turn towards me like a loving father towards a rebellious child.”<sup>46</sup> Here, then, is the judge fully described as loving parent, nursing father, patient, gracious, benign and merciful. Here is the source of judgment expressed in the invisible face of the sovereign or his delegates, locked in the gaze of the infinite and ineffable. Later, in the fiftieth Psalm: “Turn your face away (*averte faciem tuam*) from my sins and obliterate my iniquities.”<sup>47</sup> I will look toward you while you look away from my wrongdoing. I cannot see and you are, in any event, invisible and must be taken on the strength of trust, which is to say on the strength of the text.

If no one escapes the institution, if being a subject or a person in law means membership of an institutional structure and symbolic order, the Christian pedagogy of subjective conduct provides a remarkable insight into the path and direction of this penitent being. The mouth is opened, as Christians say, to plead, to cry out, to implore, and also to praise and acclaim. These two subjective positions, these stances of affective attachment, are miraculously implanted in advance of the symbolic birth of the subject. We are in this sense choral beings, born to sing blame and praise, give penitence and laudation to an invisible higher being who is our judge and our salvation. Our model for this laudation is, as Agamben stresses, angelic. It is the choir of angels, the invisible chorus of the celestial city that we mimic and hope eventually to join. The second feature, then, of Serroni’s text is precisely affective. The Lord, the sovereign, the judge is a being who is extraordinarily weighed down by affective qualifications. He is adorable, gracious, glorious, indulgent, admirable, magnificent, and merciful. These attributes, or so the penitent pleads, will eventu-

<sup>44</sup> SERRONI, *supra* note 11, at 2.

<sup>45</sup> *Id.* at 3.

<sup>46</sup> *Id.* at 7.

<sup>47</sup> *Id.* at 70.

ally erase his anger, fury, and terribleness. This antinomy, however, belongs to the surface and to the extreme, to crimes and iniquities, as opposed to the more mundane and repeated affectivities of a lesser order. Put differently, the pleadings place the subject in a collective choral space, a zone of praises, along with their songs, defining the subject as a member of the brotherhood, community, flock, and choir.

Serroni is most particular on what belonging to the Church means: “[Y]ou cannot sing a pleasing Canticle to the Lord from a foreign land, or you would unceasingly dishonor his name.”<sup>48</sup> To join the living body of Jesus-Christ is more than anything else a hymnal act, an entry into a “happy Sion” and “Holy City” where the grandeur and magnificence of the Lord can be experienced through the singing of praises: “Happy are those who inhabit the house of the Lord, they praise him throughout the century of centuries.”<sup>49</sup> The psalms are translated precisely in this manner to allow subjects to sacrifice perpetual praises to the Lord. In this way, in every moment, the subject can maintain an affective dialogue, an interior song—prayer or plea—directed towards the divinity. As far as the psalmist is concerned, we are silent until the praise of the Lord opens our lips—*Domine labia mea aperies*.<sup>50</sup> Once opened, the mouth lauds the Lord in unison with all the others, King and populace together, who exist in the glory and sing the praises of the divine, of the clouds that look down on the earth, of the sky, of the mysteries.

Curious though it may seem to engage in a hymnological and acclamatory analysis of the subtexts of law, including the codes and administrative practices of governance, this is precisely the currently unquestioned, not yet profaned, affective dimension of an otherwise exterior rule. If one attends closely to the language of the gloss on the Psalms, what is at stake is, in the end, a question of economic disposition, the administration of the interior subject through the maintenance of an affective dialogue with the divine. Serroni is admirably direct: “there is no need to search for external examples, when I have the domestic (*domestique*) example of my own soul and my own experiences” of divine grace.<sup>51</sup> The household of the soul must come to mirror the house of the Lord. The interior path, “the sacrifice of praises” to the divinity is the royal road to justice—*sacrificium iustitiae*.<sup>52</sup> The acclamatory trajectory, which passes through and joins with law, is one that is directed towards a collective justice, a rhythm and song that carries the singular into the community, the collective symbolic order of praises and veneration, admiration, and spectacle. The lawful subject exists in unison of worship, mouth open, hands outstretched, eyes raised to the firmament in loving aspiration.

#### THE EMPTY TOMB

The interior quality of justice, its *oikonomic*—domestic—location and practice, lends an immediacy and experiential presence to justice and law as

<sup>48</sup> *Id.* at fol. Aiiiv.

<sup>49</sup> *Id.* at fol. Aiiir.

<sup>50</sup> *Id.* at 77.

<sup>51</sup> *Id.* at 82-83.

<sup>52</sup> *Id.*

acclamatory enterprises, as bodily practices that subtend governance. Justice and law seem far removed from, better and much more immediate and visceral than the abstractions and academicisms that are normally associated with critical hermeneutics and the spider's web of texts that are associated with them. Archbishop Serroni's remarkable manual makes vivid and visceral sense of Agamben's argument that glory, laudations, acclamations, and hymns of the intimate public realm, including service, penitence, self-reflection, contemplation, and prayer, are intrinsic elements and necessary supports of the juridical order and sovereign law. Praise invests, imbues, and permeates power. It is the primary modality of its practice. Approval ratings, approbation, denigration (lessening of praise), clapometers, cheers, canned laughter, citation counts, YouTube hits, website visit counts, and celebrity in all its forms flood the public sphere and keep the soul directed towards and in dialogue with the song of the collective, the medium of the affective law, the disposition and distribution of the subjects of governance, and the singing and signing bodies of the interior public sphere.

Political theology has tended to distance the modern polity from the religious sources that it deems were inherited by or reproduced in a secular form within the contemporary public domain. Sovereignty, the presence of *maiestas* and *dignitas* (office/dignity) in modernity, is viewed as something of a philological relic, an archaism of charismatic leadership in what were—at least for a while—deemed rational times. For Agamben, however, the political is and remains indelibly religious precisely because of the loss of the doctrine of economy and the consequent failure to explicate and address the affective practices of governance, including actual and interior administration. The public sphere, the domain of rule and law, depends upon the science of government and affective administrative techniques that the Trinitarian doctrine of economy produces. Even in the modern state “the decisive element remains that towards which the providential machinery was from the very beginning directed: the *oikonomia*, the knowledge of the governance of men and things.”<sup>53</sup> As Serroni teaches, this is in large measure a science of praises, an art of adulation that mirrors the celestial order, the hierarchy of angels, and the ineffable chorus of Holy specters, and, by doing so, elicits love of power in the form of the second or human order of acclamation.

What then of post-critical legal hermeneutics? How is a revival of progressive vision, of a radical or rebellious *anima legis* or juridical spirit to be accomplished? The answer, according to Agamben, lies in profanation.<sup>54</sup> What was sacred must be profaned, which is to say that it must be returned to human use, to playful purpose, to a species of innocence or reinvention. The argument, taken up in detail by Zartaloudis, is that we remain within political theology and must find a path beyond it.<sup>55</sup> The logic of such movement beyond norm and law, meaning hierarchy and subjection, as Agamben

<sup>53</sup> AGAMBEN, *LA RÈGNE*, *supra* note 4, at 221.

<sup>54</sup> AGAMBEN, *PROFANATIONS*, *supra* note 27, at 73.

<sup>55</sup> THANOS ZARTALOUDIS, *THE IDEA OF JUSTICE* (manuscript on file with the author). On the concept of the “Beyond” and its uses in critical legal theory, see Ralph Sandland, *Feminist Theory and Law: Beyond the Possibilities of the Present?*, in *FEMINIST PERSPECTIVES ON LAW AND THEORY* 89 (Janice Richardson & Ralph Sandland eds., 2000).

powerfully notes, lies in the subsisting choral core of political theology: “secularization is a form of repression.”<sup>56</sup> Only the movement “beyond,” meaning into the classical jurist’s “free use,” a transformed modality and its desacralized practices, into heterotopic spaces, makes any seizing of the time or taking back of the critical project possible.<sup>57</sup> This program, however, remains and perhaps must remain an abstract invocation if it is to avoid becoming legislative, legal, or an imposition. It has to remain unfinished, to borrow an earlier formulation. That status will not be challenged here, but rather an attempt will be made to address the more substantive implications of the acclamatory apparatus that Agamben has so rigorously outlined.

The initial and perhaps crucial point that Agamben makes is that of the theological antinomy of the two orders, transcendent and immanent, glorious and glorifying, sovereign and subjected. The division distinguishes a realm of providential inactivity, great books, monumental texts, and the sovereign as some version of Leviathan against a second order of actuality, meaning administration, disposition, and execution within the world. This second order, despite its primary role in actuality, tends to be overlooked. Certainly the Trinitarian theology of *oikonomia*—of the administration of things “domestique” or interior—has lacked its expositors and practitioners. Even the Marxists viewed practice—the changing of the world—as being an exterior endeavor, a replacement of the *regnum providentiae* rather than an attention to the administration of persons and images in their secular and internal realm. The *ordo ad Deum* still trumped the *ordo ad invicem* other realm, and so the divine order transcends the practices of men. So an initial and intriguing insight emerges from the theological seriousness of Agamben’s study: the apparatus of government, the texts to which attention should be turned, are not necessarily those that claim to be law. Serroni’s treatise, the emanations of planet Hollywood, the chorus of celebrity culture, and the internal hierarchy of the academy will provide a dangerous and potentially liberating supplement to the dark order of black letter law or the dirges of its doctrinal elaborations.

The opposition between rule and governance can be drawn out in a number of liberatory ways. What has been argued, most simply, is that it is not so much legal rule as promulgated in public legislative orders or judicial decrees, but governance, not sovereignty but administration—what we now call regulation—that needs to be addressed. The Trinitarian position is one that called attention to Christ as the image of God, as the implementation of the divine on Earth, both part of the father and born as the son *ego est in patre et pater in me est . . . qui videt me videt patrem meum*. Christ represents that divine economy, the administration of providence executed on Earth. It is, at least for the Christian West, Christ that matters and fills in the law while also pointing to its fulfillment in myth or afterlife. It is the apparatus of manifestation and disposition that matters, not the general rule. This reference is to the moment and occasion of actual administration, of instant attention, but there is a further aspect to this governance that is perhaps both more and less obvious. The apparatus, as the example of Christ’s presence on Earth makes amply evident,

<sup>56</sup> AGAMBEN, PROFANATIONS, *supra* note 27, at 77.

<sup>57</sup> AGAMBEN, WHAT IS AN APPARATUS?, *supra* note 4, at 18.

is a mode of appearance, a way of making hierarchy visible and affectively present. It is not the rule that binds but rather the manifestation that authorizes, the spectacle that legitimates, and thus the image that solemnizes and ordains the substantive and visible practice that will first take hold in the imagination. Christ is the image of the father and so it is logically necessary to consider the regime of the visual or the order of appearance as the first archive of hierarchical being, the originary scission, cut or wound that marks the space, the hidden order, that governance must fill, that *oikonomia* will dispose. Nothing, as the medieval lawyers liked to put it, is more beautiful than order—*nihil pulchrius ordine*—and that reference is also to the array of images, the hierarchy of insignia, the *ius imaginum*—the viscera and vividness of the visible world.

The optical apparatus of governance is little-studied and less understood. There are few hints in the extant jurisprudential texts except occasional asides that refer to what are invariably treated as incidental features of the juridical regimen of social being: the art of law; nomenclatures of legal purity; rules of recognition of official conduct; internal hierarchy of the legal academy; interior points of view; and diverse modes of promulgation and dissemination that usually fall along some species of textual lines. References to colors, insignia, symbols, portraiture, tropes, trophies, vestments, rites, dance, psalm, and song are much less common, indeed positively continental. This is despite the fact that the real artisans of law's ritual and repetitive presence are the common lawyers, or at least that was historically so. Returning to the lines of sight that constitute the most immediate presence of the governmental apparatus does indeed take us outside of law as conventionally and majestically conceived. It is not that there is no visible order of sovereign presence, it is in fact manifold and spectacular. It is rather that there is reason to take up these signs and their ordering and division in novel forms.

According to one etymology that Agamben favors—others are “insipid and incorrect” (just to give you a taste)—religion stems from *re-legere*, meaning to read multiple times, to dwell upon and take slowly.<sup>58</sup> For post-critical legal hermeneutics this injunction to read again, reflect upon, and address the “law that is no longer applied but only studied” is simply a start.<sup>59</sup> It is, and I will be very tentative about this, a rather academic approach, even if it is a very necessary one. The necessity derives from the insistence upon re-reading, a critically reflexive overturning of the methods of juristic complacency and doctrinal common sense. On the other hand, the long trajectory through the doctrine of the Trinity and the appearance of the divine in the human, father in the son, and, to be rudely direct about it, meaning in the image has a more dynamic implication. It is what is visible, what is made to appear and gets to be seen—acclaimed and sung as community—the practices of governance and the manifestations of hierarchy, that should claim attention.

The order of the visible is not amenable to the usual modes of textual hermeneutics. This is because, in some respects, it is not a purely textual enterprise, but rather, as the concept of apparatus implies, an inscription of writing in a more diverse and stronger sense, a point of intersection between word and

<sup>58</sup> AGAMBEN, PROFANATIONS, *supra* note 27, at 74.

<sup>59</sup> *Id.* at 76.

image, between text and world, rhetorical and performative and so requires a different method of viewing, sensuous apprehension, and reverie of thought, as opposed to merely reading. The question posed by the apparatus of visual dissemination is that of the interlinear and apprehensive moments of encounter that songs, indicators, monitors, screens, and other installations, including texts, produce. The ambient text, the *ambulatio* in interpretive theory, is a reference to the *corpus*, the body, the image, the face in the world and of the world. The crucial moment here is that of impact, the Trinitarian impossible unity in which the order of ideas impacts what Serroni aptly depicted as the extant and living body of the world. It is a visual and tactile enterprise, an engagement and infusion of the viscera into the actual. It is a reflection of what is imperfectly seen and heard, arrayed, and orchestrated before and as the living being. At the level of hermeneutics, it is art history that can probably teach lawyers the most about how to view and interpret the apparatuses that have affect and effect in the choral practices of daily life by performing and repeating the rites that inscribe law.

The legal tradition inherited a lengthy history of *ars docta* (esoteric artistic knowledge and visual representations). These took the form of elaborate codes of visual knowledge that began with the military and civil science of administration, under the rubric of *de notitia utraque dignitatum* – translating literally as *Signs of Office*—but also meaning signs of honor and celebrity, virtue and nobility.<sup>60</sup> For every office (*dignitas*) there was a name and an image along with a description of what it was that the celebrity or noble who fulfilled that office was assigned to do. Accompanying that art was the discipline of heraldry or blazon that had the task of representing the genealogical virtues, the identity and honor of the family. This was for military and civic purposes and would involve, as the lawyer Bartolus most famously expounded, the precise use of color, elements, and mottos to mark the social place of the bearer.<sup>61</sup> Often termed *symbola heroica*, the visual representation of the arms of the ruling class, the noble and administrative family, was the progenitor of the strictly juristic invention of the emblem book.<sup>62</sup> Inordinately popular as a legal and didactic genre for two centuries, the emblem books provided visual representations of moral and legal maxims with Latin mottos (the sign of law) and accompanying, and generally vernacular, explanations in verse.

#### CONCLUSIONS

The commonwealth always was and certainly continues to be flooded with images. These images have their own history, law, and art. The question that this paper has traced, via the work of the unlikely duo of Serroni and Agamben, is what impact this imagistic trajectory should properly have upon post-critical

<sup>60</sup> See, e.g., GUIDO PANCIROLI, *NOTITIA UTRAQUE, DIGNITATUM, CUM ORIENTIS, TUM OCCIDENTIS, ULTRA ARCADII HONORIQUE TEMPORA* (London, Porta 1608).

<sup>61</sup> See A GRAMMAR OF SIGNS (Oskar Cavallar et al. eds., 1995) (a modern edition of Bartolus's *Tractatus de insigniis*).

<sup>62</sup> See generally VALERIE HAYAERT, *MENS EMBLEMATICA ET HUMANISME JURIDIQUE* (2008) (the essential work); Peter Goodrich, *The Visual Line: On the Prehistory of Law and Film*, 14 PARALLAX 55 (2008).

legal hermeneutics. A series of conclusions can be drawn from the history and can be used to proffer a project and revitalization of a movement at rest. The first and most striking point is that images involve a different logic to that of linear textuality and its analogical modes of reasoning. The image, to borrow from the art historian Didi-Huberman, dissimulates.<sup>63</sup> By this he refers to the fact that the image does not represent, but rather figures a reference that belongs within a visual and symbolic order. The daubs of red in Fra Angelico's scene *noli me tangere*, to use Huberman's example, are not merely color and are not flowers but rather, within the symbolic order that he paints for, are the stigmata of Christ. What is seen, in other words, is not what is there but rather the image directs the gaze according to complex rules of association within a symbolic order. The image is hieroglyphic and enigmatic. We see as in a glass darkly. The visual is a hint, and lures the understanding toward the mystery, the impossibility that invisibly underpins incarnation. The lawyers make the same point: "the symbol," Abraham Fraunce opines, "is a representation by which something is concealed."<sup>64</sup> It is, by the time that Fraunce is writing, deemed a vestige or impression of other and higher causes, a relic belonging to the order of the invisible. In other words, and here we can borrow from Freud, the order of images obeys a logic of its own. We think in images but they both impact us and direct us in lateral and unconscious ways.

The image operates and is to be interpreted according to its patterns of condensation and displacement.<sup>65</sup> Condensation refers to the compression of meaning in the image, the storing of energy and also of diverse chains of association that represent primary processes. Freud uses the example of an italicized letter in a text.<sup>66</sup> Condensation is the work of the dream in Freud, and in legal hermeneutic terms is translated into the task of the administration of actuality, the work of law, in the theory of *oikonomia*. Displacement, by contrast, refers to the transit of ideas, the shifting of energy from a repressed origin to a dream image that is not directly connected to the base idea.<sup>67</sup> Displacement is the transit or passage between ideas, the slippage of meaning between latent and manifest dream thoughts, in Freud's determination. The simple daubs of red in Fra Angelico's painting can form an appropriate enough example. If we follow the basic tenets of classical hermeneutics, we can address the meaning of red in terms of the four levels of interpretation: literal, allegorical, ethical, and spiritual. Each level represents a chain of associations, a pattern and transit of meaning from the manifest to the signified, visible to invisible. Start then with the lexical level. The literal meaning of red is from the color of blood and refers most immediately to blood, and then to fire and sunset. The associations that run from blood, fire, and sunset—such as passion, rage, and warning—can

<sup>63</sup> GEORGES DIDI-HUBERMAN, *FRA ANGELICO: DISSEMBLANCE AND FIGURATION 3* (Jane Marie Todd trans., Univ. of Chicago Press 1995).

<sup>64</sup> ABRAHAM FRAUNCE, *SYMBOLICÆ PHILOSOPHIÆ LIBER QUARTUS ET ULTIMUS 2* (photo. reprint 1981) (1585).

<sup>65</sup> This Freudian theme is discussed famously in CHRISTIAN METZ, *THE IMAGINARY SIGNIFIER: PSYCHOANALYSIS AND THE CINEMA* (Celia Britton & Annwyl Williams trans., Indiana Univ. Press 1982) (1977); it gains a fascinating gloss in LAURENCE MOINEREAU, *LE GÉNÉRIQUE DE FILM: DE LA LETTRE À LA FIGURE* (2009).

<sup>66</sup> MOINEREAU, *supra* note 65, at 127.

<sup>67</sup> *Id.* at 143.

be added to each of these figurative connotations. The second tier of allegorical meanings are too numerous to render, but are conventionally divided into bright and dark red, and correlatively masculine and feminine significations. Bright red is the life principle, the mark of stimulation, warriors, and the enthusiasms of war, as well as being a druidic sign of priestly combative skill. Dark red, by contrast, is the sign of earth, womb, and menstruation.

The ethical meaning of red is inscribed in the legal works of armory that codify the colors of the heraldic representation of virtue and fame. In armory, red is termed sanguine and is “a princely colour”; according to Gerard Legh, “[t]his colour, is of great estimatio[n], and very stately, and is th[e] apparel of knights of the bathe, as also of the sergeants of the lawe at their [solemn] feastes.”<sup>68</sup> There is then the code of combinations of the color red with other colors, planets, metals, and precious stones to form any particular blazon. Enough, however, of the *symbola heroica*, interesting though they are; the final meaning is *anagogic* or spiritual. Here, as was mentioned earlier, red is, in theological terms, a mark of the wounding of Christ and brings with it the chain of associations that treats the stigmata as proof of crucifixion. It is evidence of the twice-impossible status of Christ as a non-man put to death, and as a divinity who rose again from the dead. It is the empty tomb that forms the backdrop of the painting and paradoxically reveals, in its emptiness and openness, the latency and power of the *ordo ad invicem*, the other scene of actual administration.

The four different levels of meaning are taken from textual hermeneutics, but it has to be remembered that in Christian theology there is, in practical terms, a very visual if paradoxical origin to both text and word. They are signs not simply because the word was in the beginning, before creation, but also and in less elevated terms because the word was an image, visual mark, and impress of an invisible cause. The empty tomb makes the point in the motto *noli me tangere*, don't touch me because I am both human and divine but also because I, the son, am simply an image, a reference to the father. The sign, be it word or color, is there to signal to something beyond and outside the tomb, yet equally represented by and through it. The dissemblance that was earlier remarked is that the empty tomb is far from empty, it is heavy with meaning, it is the exemplary figure of an absent cause, the sign of an invisible truth. That the image figures the truth, that it is *veritas falsa* (both real and dissembling), is a common figure in legal treatises and has to be placed alongside another maxim: it is the symbol that has effect, sends the message across, and gets the work done.<sup>69</sup> In a similar vein, the emblemist Bornitius offers: *verbo et signis efficax Deus*—God [law] is efficacious through words and images—as the accompanying visual emblem makes evident in the form of a heart with eyes and ears inscribed on it floating over a somnolent city.<sup>70</sup> The heart breaks out of the clouds, the shadows, and stares directly at the viewer in a somewhat

<sup>68</sup> GERARD LEGH, *THE ACCEDENS OF ARMORY* fo. 21 (London, Richard Tottill 1562).

<sup>69</sup> The Latin, borrowed here from PIERRE LEGENDRE, *DIEU AU MIROIR: ÉTUDE SUR L'INSTITUTION DES IMAGES* 201 (1994), is from Peter Lombard, the Latin being *sacramentum, id est quod figurat*.

<sup>70</sup> J. BORNITIUS, *EMBLEMATUM ETHICO-POLITICORUM* (1662), reprinted in PIERRE LEGENDRE, *L'EMPIRE DE LA VÉRITÉ* fig. 3 (1983).

threatening manner. The spectral heart is a defense of the city, the visceral sign of the law, which the terrestrial walls, towers, and spires equally protect. There is no need to prolong the analysis, in that the notion of the image of the heart is well known to common lawyers who have since “time immemorial” adhered to the maxim that it is the heart that does justice—*corde creditur ad iustitiam* in the Latin vulgate. That then is the territory of the hymnological hermeneutics, prayer, and interior abnegation and aspiration that Serroni spelled out as the means of affectively capturing the heart for the law of God. Serroni is remarkably precise. The prepenultimate gloss, third from the end, offers a certain poetic license in translating and interpreting Psalm 140: for the glory of your name, Lord, give me a second life in your equity.<sup>71</sup> In interpreting this plea, Serroni emphasizes that grace is not law, indeed that life is not law but is rather beyond it and in fulfillment of it. Thus it is not by right “or law of justice that I can have [a life of grace], having achieved only your disgrace, but by a law of beneficence which you have legislated for yourself, by a law founded solely on your mercy.”<sup>72</sup>

Serroni offers the paradoxical notion of a law of charity, and uses the image of a divinely self-imposed equity. There are numerous avenues of interpretation to follow here and they range from the paradox noted of a gratuitous obligation, a voluntary necessity, to a beyond of law that is itself a non-normative, normative order, a law without law. It is important to note that this is not a law of law, a regulating ideal or higher order of justice in some Hegelian mode. It is literally a without, a heterotopia, a pure image. For the purposes of post-critical legal hermeneutics, it is the space within which this non-law invisibly produces the manifestations that guide the administration (*oikonomia*) of bodies and relations. This before the law of grace, Gabel’s “whirling dance” of social and ethical connection exists, if it exists, in this space outside of law, in the viscera of friendship, trust, and hope. Call it love or laughter, after the Rabbi has stipulated the paradox that “the God that we do not believe in does not exist.”<sup>73</sup>

Last words, final image. If the object of glory in Agamben’s account is the empty throne, the self-governing world, then the subject that acclaims and lauds that *splendor vacui* is constituted according to an apprehension or, let us say, visual hermeneutics of images. The *ius imaginum*, the law of images was a doctrine and notation of celebrity, a listing if you will of the *dramatis personae* of the public or, here, the intimate public sphere. What then holds a person to a polity? What affectively maintains the juridical or post-critical legal soul? For common lawyers the answer is, at least historically, an unwritten law. That of course has a seemingly unremarkable meaning, namely a law that is based upon practice and use, patterns of conduct, and the Psalms. But this unwritten law, *dies sine linea*, is also apprehensible as an outside of law, a realm of images, of condensations and displacements that gain their effect through their aesthetic and affective properties. What is it to find and declare an unwritten law? At one level it is to resurrect a precedent, to cite to a text, to

<sup>71</sup> SERRONI, *supra* note 11, at 129. The Latin reads somewhat differently: *Propter nomen tuum Domine vivificabis me, in aequitate tua.*

<sup>72</sup> *Id.* at 30.

<sup>73</sup> Gabel, *supra* note 1, at 522.

a record, to a memory, but, as all lawyers know, it is also an interlinear and supra-textual moment of invention, an entry into practice, and a poetic moment of creation of judgment. There is no law here, only image, and the work of legal invention that takes place outside of law. The unwritten law, the empty tomb, is witness to a plethora of critical possibilities. It is here that the force of law encounters the contours of affect, here that the text becomes an image, the letter a figure, the body an enigma, and poetry law.