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HOMO SACER: MUSLIMS AS OUTLAWS IN AMERICAN POLITICAL THOUGHT

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ABSTRACT

HOMO SACER: MUSLIMS AS OUTLAWS IN AMERICAN POLITICAL THOUGHT

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As the United States of America has embraced and defended its right to operate with impunity on a global battlefield, Muslims in particular have found themselves in an increasingly Western-controlled and anti-Muslim world in terms not only spatial but also discursive, with Western intervention not only military but also ideological. Much has been written about the roots of anti-Muslim thought in the civilizational conflict between the Christian and Muslim worlds, or Euro-American racism and xenophobia, but the developments of the American War on Terror deserve a political analysis that measures the systemic impact on the safety of Muslims in the American order, with an eye for opportunities to strengthen their position. Giorgio Agamben's philosophical work on outlawry and bare life in the Roman figure of *homo sacer* provide a field for this analysis, of which this thesis focuses on the Muslim American citizen as the *Muselmann* – the limit figure of humanity - in the global camp. How historical is Agamben's theory, and how contemporary? I argue that Agamben's theory is even more historical than he himself proves, and that Muslims in America, even the citizens among them, are the latest – but also, the most fundamental – example of bare life at the center of America's civil war.

KEYWORDS: Muslims, America, citizenship, outlawry, Islamophobia, Agamben

ÖZ

HOMO SACER: AMERİKAN SİYASET DÜŞÜNCESİNDE KANUN KAÇAĞI OLARAK MÜSLÜMANLAR

McGOLDRICK, CYRUS
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Amerika Birleşik Devletleri, küresel bir savaş ortaminda dokunulmazlıkla faaliyet gösterirken, özellikle Müslümanlar, kendilerini yalnızca mekansal değil, aynı zamanda söylemsel olarak da, hem askeri hem ideolojik alanda Bati kontrolu altında, giderek daha fazla Müslüman karşıtı olan bir dünyada buldular. Hıristiyan ve Müslüman dünyaları arasındaki uygarlık çatışmasında, Müslüman karşıtı düsüncenin kökleri, Amerikan ırkçılığı ve yabancı düşmanlığı hakkında çok şey yazılmıştır, ancak Amerika'nın Terörle Mücadele politikasındaki gelişmelerin Amerika kontrolu altında yasayan Müslümanların güvenliği uzerindeki etkisinin, Müslümanların pozisyonunu güçlendirmek gayesi ile, sistematik olarak analiz edilmesi gerekmektedir. Giorgio Agamben'in Roma Hukuku'nda karşımıza çıkan Homo Sacer, yani çıplak hayat yaşayan kanun kaçağı "kutsal insan" figürü üzerindeki felsefi çalışmaları, Müslüman Amerikalı vatandaşı kuresel dunyadaki Muselmann, insanligin siniri, olarak gören bu analiz için bir temel oluşturmaktadir. Agamben'in teorisi ne kadar tarihsel, ne kadar günceldir? Ben bu analizde, Agamben'in teorisinin kendisinin kanıtladığıdan daha da tarihsel olduğunu ve Amerika'daki Müslümanların, hatta vatandaş olanlarin bile, Amerika'nın iç savaşının merkezinde çıplak hayatin en yeni – ayni zamanda da en önemli – örneği olduğunu tartışıyorum.

ANAHTAR KELİMELERİ: Müslümanlar, Amerika, vatandaşlık, kanun kaçağı, İslamofobi, Agamben

TEŞEKKÜR

For my family, who are my teachers…

For my teachers, who are my family…

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Introduction: The Strangers

The Messenger of Allah (peace be upon him) said:
Islam began as something strange and will revert to being something strange, so glad tidings to the strangers.[1]

Background: Muslims in an American World

Over the last century and more, many Muslims have settled by choice or as refugees in the United States, joining a population of African-descended Americans that had mostly been stolen to the western hemisphere as slaves, freed after centuries of captivity and conflict, and then moved to embrace Islam either in Sunni or heterodox formulations in great numbers. These increasingly diverse Muslim communities had equally diverse political orientations towards the American government.

The Americans, having apparently defeated the USSR in their "Cold War," have turned to the lands occupied primarily by the Muslims – some for economic reasons, some ideological.[2] America's War on Terror (the name for the open-ended military campaign against Muslims that oppose American control of their lands and resources) has primarily caused the death and displacement of millions of Muslims overseas, but it is also a domestic war, targeting American Muslims (at least one in three of whom are of Black African descent[3]) with surveillance, infiltration, entrapment, political prosecution, assassination, and discrimination in schools, businesses, and streets. Black Americans of all faiths live in what Michelle Alexander calls America's "racial caste system": mass

[1] "The Book of Faith," *English Translation of Sahih Muslim*, trans. by Nasiruddin Al-Khattab, Volume 1, (Riyadh: Darussalam, 2007), 237.
[2] Michael Hunt, *Ideology and US Foreign Policy*, (New Haven: Yale University Press, 2009).
[3] Michael Lipka. "Muslims and Islam: Key findings in the U.S. and around the world," *Pew Research Center*, 22 July 2016, www.pewresearch.org/fact-tank/2016/07/22/muslims-and-islam-key-findings-in-the-u-s-and-around-the-world/.

incarceration, poor living conditions, workplace and other forms of discrimination, and persistent racism and criminalization continue, along with almost daily reports of unarmed Black men being killed by police. [4] Black Muslims live at the intersection of the War on Terror and this racial caste system. Sohail Daulatzai writes, in analyzing the government's prosecution of Imam Jamil al-Amin (previously known as H. Rap Brown of the Black Panther Party),

> The collapse of the categories of the 'Black criminal' and 'Muslim terrorist' reveals the ways in which the post-9/11 security state has blended and blurred the domestic and foreign realms of American power, and it allows us to trace the intimacies between the emergence of imperial imprisonment in the Muslim Third World of Iraq, Afghanistan, and Guantanamo Bay and the explosion of the domestic U.S. prison apparatus in the post-Civil Rights era.[5]

Hisham Aidi writes:

> "The aspirations of the very poor and disenfranchised in America will continue to overlap with the struggles and hopes of the impoverished masses of the Muslim Third World, who will in turn continue to look towards African-Americans for inspiration and help."[6]

For the leaders and communities whose experience with the American state has been one of oppression, the response has been either confrontation or avoidance: if the law did not protect the subjects, or if it was used against the subjects, then they would find little use for the law. On the other hand, a recent study of the political views of Muslims showed broad investment and even pride in American citizenship (despite negative views towards US President Donald Trump's posture and policies towards Muslims).[7]

The resulting Islamic discourse around political solutions for problems with the United States has produced myriad conflicting opinions, ranging from full immersion and assimilation into the American project to full separation, exodus and military resistance. Disagreements about the goals of Islamic political engagement often revolve around the

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[4] Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, (New York: The New Press, 2010), 2.

[5] Sohail Daulatzai, *Black Star, Crescent Moon: The Muslim International and Black Freedom Beyond America*, (Minneapolis: University of Minnesota Press, 2012), 172.

[6] Hisham Aidi, "Jihadis in the Hood: Race, Urban Islam and the War on Terror." *Middle East Research and Information Project.* Volume 32, Fall 2002: http://www.merip.org/mer/mer224/jihadis-hood#[9].

[7] "US Muslims Concerned About Their Place in Society, but Continue to Believe in the American Dream," PEW Research Center, 26 July 2017.

relevance and application of concepts from the classical Islamic tradition and the compatibility of new ones, like allegiance and citizenship, democracy and *khilafah*, and *hijrah* and division of the world into geographical categories of *dar al-Islam*, *dar al-harb*, and middle grounds. Setting aside those committed exclusively to Muslim autonomy and *khilafah*, the Muslims debating the proper goals and strategies for dealing with the American experience must first understand the external terrain, including the nature of the political-social relationship between the American government and its Muslim citizens and residents. Can the American legal system truly protect Muslims, or are Muslims categorically outside the protection of the law?

Outlawry: An Exploration

From this line of thought came my interest in outlawry, a concept with a fascinating double meaning: from Old Norse into Old English, an outlaw is "a person who has broken the law, especially one who remains at large or is a fugitive," and also "a person deprived of the benefit and protection of the law;" to outlaw is to "ban or make illegal," or to "deprive (someone) of the benefit and protection of the law."[8] Outlaws are created by a decision, either as punishment for a crime or as a result of their refusal to submit to that authority: once placed outside the protection of the law, they can be killed with impunity.

What follows is an exploration of outlawry as it applies to Muslim citizens under American law. Chapter 1 is a synthesis of Agamben's theory on sovereignty, the state of exception, and the figure of *homo sacer* as an ideal type of outlawry against which to compare historical and contemporary dynamics. Chapter 2 is a survey of the historical evidence of relevant Western legal traditions (some of which were mentioned by Agamben himself) - including Athenian, Roman, Scandinavian, English, and German law - using outlawry according to the theoretical ideal type. Chapter 3 is an argument that the War on Terror broadly and US policy toward its Muslim citizens specifically amount to *sacratio* and a normalized state of exception, stripping Muslims down to bare

[8] "Outlaw." *Oxford Dictionary*, https://en.oxforddictionaries.com/definition/outlaw.

life in a way that normalizes and advances - but still stands beyond - the parallel treatment of all within reach of American sovereignty.

Method: Practical Comparative Law

Comparative law in the Western academy has generally been a means for understanding foreign law and culture, but scholars are now calling for its employment toward "grander pursuits," like self-reflection through comparison, and taking on questions of national and international policy, examining "core principles of the constitutional order, like freedom of speech, freedom of religion, equality, or structural matters like separation of powers."[9] If the legal security of Muslim citizens of America is relevant to our debates about our political goals and strategies, then the law itself – both on paper and in practice – must be analyzed. But the relationship of law with its nation's culture places upon the social scientist the burden to understand not only the law but also the culture, "the substructural forces that influence law" like "religion, history, geography, morals, custom, philosophy or ideology."[10] The work at hand will require an analysis of both the law (with an eye to its more honest historical manifestations) and those forces below the surface.

Outlawry no longer admits its identity in "words on the page," but comparative law is a growing field, and its scholars now encourage using a "pluralist toolbox" that includes, for example, the "functional method" (focusing on the "actual societal problem" and the "actual result of the legal approach to that problem"), the "analytical method" (analyzing concepts in different legal systems, using "ideal types" in order to "rank those legal concepts, rules, institutions, on a scale according to the degree of fitting with the core characteristics of the 'ideal type'"), and the "historical method" (determining the

[9] Edward J. Eberle, "The Method and Role of Comparative Law," (*Washington University Global Studies Law Review*, Volume 8, Issue 3, 2009, http://openscholarship.wustl.edu/law_globalstudies/vol8/iss3/2), 453-4.
[10] Ibid., 452-3.

relationship of different legal systems to a "deeply rooted tradition," as opposed to "accidental historical events").[11]

[11] Mark van Hoecke, "Methodology of Comparative Legal Research," (*Law and Method*, December 2015).

Chapter 1: Homo Sacer as Theory of Outlawry

Giorgio Agamben's nine books of the *Homo Sacer* series analyze the roots, process, and implications of outlawry as an institution of Western political power in general and criminal law in specific. In this chapter, I will summarize the major features relating to outlawry of these writings and synthesize an "ideal type" of the institution of outlawry against which we can read historical and contemporary dynamics related to the specific subject of Muslim citizens of America.

The *Homo Sacer* Series: A Synthesis

Giorgio Agamben (born in 1942) is a leading philosopher and political theorist, studying language, aesthetics, politics, philosophy, and religion. He was educated at the University of Rome, studied under Martin Heidegger as a post-doctoral scholar, and has been teaching since 1975.[12] He engages often with the work of Walter Benjamin, as well as Aristotle, Heidegger, Foucault, Hegel, Schmitt, and Freud, but also religious and literary figures.[13] His scholarship is broad and diverse, but he has developed a body of work around his focus on law and sovereignty, beginning with his book *Homo Sacer: Sovereign Power and Bare Life* and culminating in a series of nine volumes published over twenty years, arranged and then rearranged into a (non-chronological) order by Agamben himself:

1. *Homo Sacer: Sovereign Power and Bare Life* (published 1995, translated 1998)
2.1. *State of Exception* (2003, 2005)
2.2. *Stasis: Civil War as a Political Paradigm* (2015, 2015)
2.3. *The Sacrament of Language: An Archeology of the Oath* (2008, 2011)
2.4. *The Kingdom and the Glory: For a Theological Genealogy of Economy and*

[12] "Giorgio Agamben," The European Graduate School / EGS, http://egs.edu/faculty/giorgio-agamben.
[13] Ibid.

*Government (*2007, 2011)

2.5. *Opus Dei: An Archeology of Duty* (2012, 2013)

3. *Remnants of Auschwitz: The Witness and the Archive* (1998, 1999)

4.1. *The Highest Poverty: Monastic Rules and Form-of-Life* (2011, 2013)

4.2. *The Use of Bodies* (2014, 2016)[14]

Agamben has said that his original interest for this project was "the relation between law life": "In our culture, the notion of life is never defined, but it is ceaselessly divided up: there is life as it is characterised politically (*bios*), the natural life common to all animals (*zoë*), vegetative life, social life, etc. Perhaps we could reach a form of life that resists such divisions?"[15]

The first volume, *Homo Sacer: Sovereign Power and Bare Life*, begins with an analysis of this difference in Greek language and philosophy for concepts of life: "*zoë*, which expressed the simple fact of living common to all living beings (animals, men, or gods), and *bios*, which indicated the form or way of living proper to an individual or a group."[16] Citing Aristotle, Agamben explains that despite consciousness of the natural beauty of simple living (for which "*zoë*" was used, as well), the natural life was excluded from political life and relegated to the home as "merely reproductive life."[17] Agamben reminds the reader of Foucault's concept of "biopolitics," also rooted in the Greek opposition of the two forms of life, which for Foucault was the transition to modernity: when state power begins to work to control simple living bodies, to keep them alive but also domesticate them.[18] Foucault's work on politics was mainly along two tracks, the technologies of the state and the technologies of the self, but these "perspectival lines"

[14] Adam Kotsko, "The order of the Homo Sacer series," (26 August 2015, https://itself.blog/2015/08/26/the-order-of-the-homo-sacer-series/), and "A chronological order of Agamben's publications, and reflections thereon," (1 August 2016, https://itself.blog/2016/08/01/19863/), *An und für sich*.

[15] Jordan Skinner, "Thought is the courage of hopelessness: an interview with philosopher Giorgio Agamben," *Verso*, (17 June 2014, https://www.versobooks.com/blogs/1612-thought-is-the-courage-of-hopelessness-an-interview-with-philosopher-giorgio-agamben).

[16] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. by Daniel Heller-Roazen, (Stanford: Stanford University Press, 1998), 1.

[17] Ibid., 2.

[18] Ibid., 3.

converge to a point without reaching them.[19] Agamben notes, also, that Foucault did not focus his analysis on concentration camps or totalitarian states, whereas Hannah Arendt, working twenty years previously, never included biopolitical analysis in her study of concentration camps and totalitarianism.[20] These missed connections set up Agamben's work, in this first volume specifically and the greater project generally.

He disagrees with Foucault about biopolitics being a defining feature of modernity, instead arguing that the transition is in the processes by which the exception becomes the rule and by which the excluded (or at least marginal) bare life "begins to coincide with the political realm" to the point of "irreducible indistinction."[21] Biopolitics itself is ancient: "In Western politics, bare life has the peculiar privilege of being that whose exclusion founds the city of men."[22] And, in an exegetical turn, Agamben analogizes the simultaneously empowering but limiting transition from voice to language with the human inclusion/exclusion from natural life into the political life, forgoing a natural, simple good for a structured attempt at building a new kind of good life:

> The fundamental categorial pair of Western politics is not that of friend/ enemy but that of bare life/political existence, *zoë*/*bios*, exclusion/inclusion. There is politics because man is the living being who, in language, separates and opposes himself to his own bare life and, at the same time, maintains himself in relation to that bare life in an inclusive exclusion.[23]

The first book comes to three conclusions about the relationship between life and politics:

1. The original political relation is the ban (the state of exception as zone of indistinction between outside and inside, exclusion and inclusion).
2. The fundamental activity of sovereign power is the production of bare life as originary political element and as threshold of articulation between nature and culture, zoë and bios.
3. Today it is not the city but rather the camp that is the fundamental biopolitical paradigm of the West.[24]

[19] Ibid., 6.
[20] Ibid., 4.
[21] Ibid., 9.
[22] Ibid., 7.
[23] Ibid., 8.
[24] Ibid., 181.

A key feature of the investigation is a historical figure that Agamben agues is the example of bare life itself, and "the key by which not only the sacred texts of sovereignty but also the very codes of political power will unveil their mysteries": *homo sacer*, the outlaw, "who may be killed and yet not sacrificed."[25] He is included only inasmuch as he is excluded. The ambiguity of the sacredness of the outlaw (the prohibition on sacrificing him and impunity for the one who kills him) was so confusing to even later Romans, not to mention the scholars since, that Agamben argues it only makes sense in the context of the sovereign exception (building on his chapter about sovereignty and the sovereign exception in Chapter 1 of this volume):

> Here the structural analogy between the sovereign exception and sacratio shows its full sense. At the two extreme limits of the order, the sovereign and homo sacer present two symmetrical figures that have the same structure and are correlative: the sovereign is the one with respect to whom all men are potentially *homines sacri*, and *homo sacer* is the one with respect to whom all men act as sovereigns. [26]

The association of sacredness with the state, then, is not just about secularizing religious notions of power, but about the fundamental power of the sovereign to consecrate.[27] And the crimes that merited *sacratio* - such as cancellation of borders, acts of violence of a son against his parents, or a representative cheating his client - were so grievous because of their violation of the social order: "Not the act of tracing boundaries, but their cancellation or negation is the constitutive act of the city (and this is what the myth of the foundation of Rome, after all, teaches with perfect clarity)."[28]

Agamben then investigates the relationship and even sameness of the sovereign and *homo sacer*. He raises the fact that "scholars have approximated the figure of *homo sacer* to that of the *devotus* who consecrates his own life to the gods of the underworld in order to save the city from a grave danger,"[29] a theme that provides an interesting

[25] Ibid., 8.
[26] Ibid., 72-4, 83-4.
[27] Ibid., 85.
[28] Ibid.
[29] Ibid., 96.

connection to the figure of the outlaw folk-hero (which I will revisit in the conclusion but leave for later research).

Agamben then cites the legal scholar Rudolphe Jhering:

> The entire character of homo sacer shows that it was not born on the soil of a constituted juridical order, but goes all the way back to the period of pre-social life. It is a fragment of the primitive life of Indo-European peoples .... In the bandit and the outlaw (*wargus*, *vargr*, the wolf and, in the religious sense, the sacred wolf, *vargr y veum*), Germanic and Scandinavian antiquity give us a brother of *homo sacer* beyond the shadow of any doubt. ... That which is considered to be an impossibility for Roman antiquity - the killing of the proscribed outside a judge and law - was an incontestable reality in Germanic antiquity.[30]

Jhering's analysis more practically makes the point that outlawry was not only a Roman concept but also more ancient and more lasting in the Western political tradition (a claim that I will take further in Chapter 2). Theoretically, it also reinforces Agamben's analyses of the *homo sacer* as being stripped of its humanity, returned to the animal life, "neither man nor beast," and also of the centrality of the Hobbesian state of nature to the necessity of the law, sovereign, and punishment. [31] From this, Agamben makes the argument that the ban is the "original juridico-political relation" rather than Rousseau's social contract, and the failure to realize this has "condemned democracy to impotence" in the face of power, and "rendered modern democracy constitutionally incapable of truly thinking a politics freed from the form of the State."[32]

The Nazis' attempted extermination of the Jews was predicated on reducing the Jews to animals, to bare life, but it is "only the most disquieting" of the "enigmas […] that our century has posed to historical reason," rooted in the ancient foundations of sovereign power, but still alive in the modern state: "Sacredness is a line of flight still present in contemporary politics, a line that is as such moving into zones increasingly vast and dark, to the point of ultimately coinciding with the biological life itself of citizens. If

[30] Jhering, *L'esprit du droit romain*, 282, quoted in *Homo Sacer*, 104.
[31] *Homo Sacer*, 105-6.
[32] Ibid., 109.

today there is no longer any one clear figure of the sacred man, it is perhaps because we are all virtually *homines sacri*."[33]

To introduce his thesis on the camp-as-paradigm mentioned above, he quotes Hannah Arendt: "The supreme goal of all totalitarian states […] is not only the freely admitted, long-ranging ambition to global rule, but also the never admitted and immediately realized attempt at total domination. The concentration camps are the laboratories in the experiment of total domination, for human nature being what it is, this goal can be achieved only under the extreme circumstances of human made hell."[34] But Agamben takes it further, re-centering the "contiguity" between democracy and fascism in the roots of all Western politics:

> It is almost as if, starting from a certain point, every decisive political event were double-sided: the spaces, the liberties, and the rights won by individuals in their conflicts with central powers always simultaneously prepared a tacit but increasing inscription of individuals' lives within the state order, thus offering a new and more dreadful foundation for the very sovereign power from which they wanted to liberate themselves.

Habeas corpus, arguably a right of an arrested person to be presented before a judge for judgment, is also a reduction of the person to his body (*corpus*), an example of the double-sidedness of "victories."[35] Arendt's thesis - that the refugee illustrates the inability of nation-states to protect or even acknowledge human rights (as opposed to civil rights) – is also true, but Agamben goes further by focusing in on even the practical rights of citizens:

> Yet it is time to stop regarding declarations of rights as proclamations of eternal, metajuridical values binding the legislator (in fact, without much success) to respect eternal ethical principles, and to begin to consider them according to their real historical function in the modern nation-state. Declarations of rights represent the originary figure of the inscription of natural life in the juridico-political order of the nation-state. The same bare life that in the *ancien regime* was politically neutral and belonged to God as creaturely life and in the classical world was (at least apparently) clearly distinguished as *zoë* from political life (*bios*) now fully enters into the structure of the state and even becomes the earthly foundation of the state's legitimacy and sovereignty.[36]

[33] Ibid., 4, 111, 114-5.
[34] Arendt, *Essays*, 240, quoted in *Homo Sacer,* 120.
[35] Ibid., 123-5.
[36] Ibid., 127.

The roots of citizenship in a nation in "birth," both linguistically and also politically (in terms of birth into a nation or birth to citizen parents) is the rooting of sovereignty not in divine sanction or even personal consent but the fact of life itself, natural birth.[37] The "blood and soil" that for the Nazis defined German-ness has "innocuous" Roman origins.[38] And if the citizen is part of the sovereign, then non-citizens are not, and have a different (smaller) set of rights, if any at all.[39] Refugees, then, are useful in that they show the falsity of even belief in human rights that are not proscribed by a state.[40] A parallel process common in 20th century Europe was denaturalization, by which internal enemies were stripped of their citizenship: France, Belgium, Italy, Austria, then Germany all had such policies (culminating in Germany's denationalization of Jews before sending them to the camps).[41]

What seem to have been the first concentration camps, instituted by the Spanish in Cuba and the English in South Africa, were also products of martial law and the state of exception, "a state of emergency linked to a colonial war is extended to an entire civil population."[42] The Nazi case is similar, rooted in an old Prussian law that was used first to incarcerate Communist militants and Eastern European refugees after the first world war, citing the doctrine of *Schutzhaft* ("protective custody") to "take into custody" individuals before any crime, "to avoid danger to the security of the state."[43] German governments had used it so frequently that the Nazis were hardly doing something unfamiliar, except the particularity of the Nazi case in that there was no "state of exception" actually mentioned in the decree, which Nazi jurists worked around by asserting a "state of willed exception" – in the words of Agamben: "the state of exception thus ceases to be referred to as an external and provisional state of factual danger and comes to be confused with juridical rule itself." [44] Because the camps are

[37] Ibid., 128.
[38] Ibid., 129.
[39] Ibid., 130.
[40] Ibid., 131.
[41] Ibid., 132.
[42] Ibid., 166-7.
[43] Ibid., 167.
[44] Ibid., 168.

themselves the "permanent spatial arrangement" of the state of exception, in them, "everything is possible."[45] The Dachau concentration camp for political prisoners was "placed outside the rules of penal and prison law," and "the camp's absolute independence from every judicial control and every reference to the normal juridical order was constantly reaffirmed."[46] As the Jews had been denationalized and then sent into this space of exclusion, the categories of citizen and *homo sacer* are the most confused, and biopolitics takes its greatest form.

Race is an important part of any analysis of the Nazi project, especially as it deals with the exclusion and denationalization of an entire race of a nation's citizens, and Agamben situates that too within the sovereign exception:

> A concept such as the National Socialist notion of race (or, in the words of Schmitt, of "equality of stock") functions as a general clause (analogous to "state of danger" or to "good morals") that does not refer to any situation of external fact but instead realizes an immediate coincidence of fact and law. The judge, the civil servant, or whoever else has to reckon with such a notion no longer orients himself according to a rule or a situation of fact. Binding himself solely to his own community of race with the German people and the Fuhrer, such a person moves in a zone in which the distinction between life and politics, between questions of fact and questions of law, has literally no more meaning.[47]

The biopolitical body of the German Jew is both a Jewish "life unworthy of being lived" and a German "full life": "The separation of the Jewish body is the immediate production of the specifically German body, just as its production is the application of the rule."[48] Even the concept of "people" contains within it the "biopolitical fracture" (both the people who are fully people and sovereign, and the people who are the oppressed masses), and in this light the German purification of its "people" from Jews, Gypsies, and the handicapped was an attempt to remove from itself those who would not assimilate.[49]

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[45] Ibid., 169-70.
[46] Ibid., 169.
[47] Ibid., 172.
[48] Ibid., 173-4.
[49] Ibid., 176-80.

By the definitions given, Agamben asserts that the camp is every "space in which bare life and the juridical rule enter into a threshold of indistinction," whether or not crimes are actually committed there, because "whether or not atrocities are committed depends not on law but on the civility and ethical sense of the police who temporarily act as sovereign.[50] The "birth of the camp in our time appears as an event that decisively signals the political space of modernity itself," when the nation-state enters into such a crisis that it can no longer "function without being transformed into a lethal machine."[51] Whereas the "old trinity" was the state, the nation, and the land, the camp has broken it by becoming the "fourth, inseparable element."[52] Agamben closes by drawing an analogy between the Nazi project and the way that the global "democratico-capitalist project of eliminating the poor classes through development not only reproduces within itself the people that is excluded but also transforms the entire population of the Third World into bare life," and he asserts that anyone who would end the global "civil war" needs to take this fracture into account.[53]

In the final "threshold" of the text, Agamben introduces the figure of "the Muslim," *der Muselmann*, who was really one (or many) of the Jewish inhabitants of the concentration camp "from whom humiliation, horror, and fear had so taken away all consciousness and all personality as to make him absolutely apathetic (hence the ironical name given to him)."[54] Agamben does not explain what is ironical about the name, but he offers him as a symbol, one who has been stripped of everything both animal and reasonable, but who by being incapable of distinguishing between "pangs of cold and the ferocity of the SS" has made the guard "powerless before him," and who therefore may be in some "silent form of resistance."[55]

[50] Ibid., 174.
[51] Ibid., 174-5.
[52] Ibid., 175-6.
[53] Ibid., 180.
[54] Ibid., 185.
[55] Ibid.

Agamben's *State of Exception* is a further exploration of the titular concept in the "no-man's land between public law and political fact."[56] He argues that the state of exception is primarily related to civil war and insurrection, and so amidst a global civil war, the state of exception is the "dominant paradigm of government in contemporary politics."[57]

He gives a brief history of the state of exception in Roman and contemporary European (including American) governments. His analysis of the Roman institution of *iustitium*, a state of exception, raises the question about whether or not a citizen could be punished for transgressing the law while defending the state, finally arguing that in such a time of a state of exception, there is no law to uphold or transgress, and so one who wrongfully kills a citizen still has impunity as long as the state of exception continues.[58]

His narrative of the American case begins with power struggles between President and Congress about the constitutional passage protecting *habeas corpus* "unless when in Cases of Rebellion or Invasion the public Safety may require it," and the power to declare war resting with Congress and military command with the President.[59] The first real examples of this dynamic were in the actual American Civil War, with Lincoln acting as "absolute dictator" for a number of weeks, and then continuing to suspend *habeas corpus* after his powers were ratified by Congress.[60] Woodrow Wilson also had wartime exception powers delegated to him by Congress during World War I.[61] Franklin Delano Roosevelt claimed emergency powers beginning in the Great Depression and expanded them during World War II, culminating in the detention of 70,000 American citizens of Japanese descent and 40,000 Japanese citizens living in America.[62] George W. Bush's positioning of himself as "commander-in-chief" is in this context of post-9/11 emergency, real or imagined.[63] Agamben cites Bush's order for "indefinite detention"

[56] Giorgio Agamben, *State of Exception*, trans. by Kevin Attell, (Chicago: University of Chicago Press, 2005), 1.
[57] Ibid., 2.
[58] Ibid., 48-50.
[59] Ibid., 19-20.
[60] Ibid., 20-1.
[61] Ibid., 21.
[62] Ibid., 22.
[63] Ibid.

and trial by "military commissions" for noncitizens suspected of "terrorist activities" – he confirms Judith Butler's assertion that Guantanamo, in removing even "prisoner of war" status from detainees is bare life at "maximum indeterminacy."[64]

Stasis: Civil War as a Political Paradigm, the third volume of the series, is a short investigation into a point raised in the first two volumes, based on the lack of a theory of civil war even in a time where international wars were either decreasing or absent of the formalities of declarations of war, in place of civil wars or "uncivil wars" (aiming at the "maximization of disorder").[65] Agamben argues that civil war is, in the Western political logic, both necessary and also necessary to be excluded, and, after articulating the tension between the family and the city as a balance in phases that repoliticizes all bonds, asserts that terrorism is the "global civil war" of our time, a natural response to "life as such" becoming "the stakes of politics."[66] The second half of the book, although not the immediate subject of this thesis, is a study of the eschatological dimension of Hobbes's *Leviathan* through Schmitt and Benjamin.

The Sacrament of Language: An Archaeology of the Oath is an exploration of the importance of the oath of allegiance, beginning with Paolo Prodi's assertion that the oath is the "basis of the political pact in the history of the West."[67] *The Kingdom and the Glory: For a Theological Genealogy of Economy and Government* is an analysis of the relationship between government and glory, the mystification of power and the emptiness at its center.[68] *Opus Dei: An Archaeology of Duty* is an exploration of the effectiveness of liturgy and its relationship to politics and the contemporary crisis.[69]

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[64] Ibid., 3-4.
[65] Giorgio Agamben, *Stasis: Civil War as a Political Paradigm*, trans. by Nicholas Heron (Stanford: Stanford University Press, 2015), 1-3.
[66] Ibid., 4, 24.
[67] Prodi, *The Sacrament of Power: The Political Oath in the Constitutional History of the West*, 11, quoted in Giorgio Agamben, *The Sacrament of Language: An Archaeology of the Oath*, trans. by Adam Kotsko, (Stanford: Stanford University Press, 2011), 1-2.
[68] Giorgio Agamben, *The Kingdom and the Glory: For a Theological Genealogy of Economy and Government*, trans. by Lorenzo Chiesa and Matteo Mandarini, (Stanford: Stanford University Press, 2011).
[69] Giorgio Agamben, *Opus Dei: An Archaeology of Duty*, trans. by Adam Kotsko, (Stanford: Stanford University Press, 2013).

Agamben called his *Remnants of Auschwitz: The Witness and the Archive* a "perpetual commentary on testimony."[70] One point relevant to this thesis is the link of witnessing to martyrdom in the Greek language (although Agamben does not mention that the same relation exists in Arabic).[71] He also spends a chapter returning to the figure of the *Muselmann* mentioned in *Homo Sacer*. Several sources originate the label with the prostration assumed by a malnourished person at the point of death or other physical traits of the most beaten figures in the camp.[72] Agamben settles on the perceived fatalism of Muslims in European thought as being the source of the title for those already resigned to their death.[73]

The *Muselmann* is the quintessential bare life. Another source mentions the unanimity of disdain for the "Muslims" there: prisoners were too worried about themselves to care about them, prisoners that collaborated were angry and worried about them, and the SS officers saw them as "garbage," such that "every group thought only about eliminating them, each in its own way."[74] The *Muselmann* was also a particularly object of fear for other prisoners because of the risk that they would become him – Agamben suggests that the camps could be represented as "concentric circles" that constantly wash up against the central non-place in which the Muslims live.[75]

The Highest Poverty: Monastic Rules and Form-of-Life is Agamben's continuation of the investigation into an ideal form of life beyond the relation of law and appropriation, in which he focuses on Christian monasticism and its disciplines.[76] *The Use of Bodies*, the final volume in the series, is an attempt to theorize an ideal form-of-life that allows the resolution of the biopolitical rupture.[77]

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[70] Giorgio Agamben, *Remnants of Auschwitz: The Witness and the Archive*, trans. by Daniel Heller-Roazen, (New York: Zone Books, 1999), 13.
[71] Ibid., 26-8.
[72] Ibid., 43, 45.
[73] Ibid., 45.
[74] Ibid.
[75] Ibid., 51-2.
[76] Giorgio Agamben, *The Highest Poverty: Monastic Rules and Form-of-Life*, trans. by Adam Kotsko, (Stanford: Stanford University, 2013).
[77] Giorgio Agamben, *The Use of Bodies*, trans. by Adam Kotsko, (Stanford: Stanford University, 2016).

The Ideal Type

In order to judge the congruency of historical and contemporary legal dynamics to the theoretical map drawn by Agamben, we must draw out the key features of the theory. In brief:

- A state of civil war or insurrection is used to justify a state of exception suspending normal rights, and the state of exception becomes normalized.
- The outlawry is a ban, an exclusion by which someone is included in the order only through their exclusion. The individual or population to be outlawed is dehumanized (often in animal terms) and stripped of citizenship before having their civil rights violated.
- The sovereign can deputize citizens to act as vigilantes, or any man can act as a sovereign over the outlaw by killing him with impunity or choosing to spare him. The sovereign and his deputies keep their impunity as long as the state of exception continues.
- The state can detain people who have not committed a crime, and so camps are the physical manifestation of the institution of outlawry. Some camps are about maintaining or expanding the imperial-colonial relationship, others about cleansing the national people of internal enemies or the unassimilable, and others simply about housing refugees without letting them into the state fully.
- Because of the seeming permanence of the global civil war and the full normalization of the state of exception, everyone is in some way in a camp, but there are also different levels of dehumanization in the camp, with the gravest represented by the *Muselmann*.

These five points provide us with an ideal type against which we can measure legal realities in the times and places relevant to this discussion.

Chapter 2: Outlawry in Western Legal History

In this chapter, I will survey the available evidence for Agamben's claim (via Jhering) that outlawry – the ban – is not only a specific Roman phenomenon but something central to the European legal traditions going back to its ancient roots and continuing until today. I prove that many of the features in the ideal theoretical type of outlawry synthesized in the last chapter are present in the historical legal sources of the Greeks, Romans, Germans, Norse, English, and Euro-Americans.

On Legal Genealogies

First, though, it may be worth reinforcing Jhering's assumption of the relevance of the laws of different times and places to each other. The links are five:

1. Ancient Greek law is one of the sources for Roman law.[78]
2. Laws of the Germanic peoples – including those in Scandinavia and the Anglo-Saxons – are of a "legal family" that pre-dates the Roman conquest.[79]
3. The Roman conquest of the Franks is a turning point in Germanic law, such that the Frankish law is more Roman than ancient German.[80]
4. The Norman (German) conquest of Britain brings the impact of Frankish (German-Roman) law to the Anglo-Saxons, such that English law is now more Roman than ancient German.[81]
5. English common law was "*the* major influence" on American law in the nation's early history.[82]

[78] Esin Örücü, "Family Trees for Legal Systems: Towards a Contemporary Approach" in Mark van Hoecke, ed., *Epistemology and Methodology of Comparative Law*, (Oxford: Hart Publishing, 2004), 365.
[79] "Anglo-Saxon Law" and "Germanic Law," *Encyclopædia Britannica*, 2002.
[80] Ibid.
[81] Ibid.
[82] Morris L. Cohen, "The Common Law in the American Legal System: The Challenge of Conceptual Research," (*Law Library Journal*, Volume 81, Issue 13, 1989), 20.

This legal genealogy is the basis for the coherence underpinning Agamben's argument about the relevance of Greek philosophy and Roman law to power in modernity. Measuring the examples from different places on this legal family tree against the theoretical ideal model, though, is what would prove the relevance.

Outlawry: Ideal and Real

I will now mine the first five legal traditions for outlawry of the type theorized by Agamben, using his own examples and more, aligning them with the five major features listed at the end of Chapter 1.

The Exclusion
The outlawry is a ban, an exclusion by which someone is included in the order only through their exclusion. The individual or population to be outlawed is dehumanized (often in animal terms) and stripped of citizenship before having their civil rights violated.

Outlawry in ancient Athens was *atimia*, the "deprivation of all rights" including life: "the *atimos* (person suffering *atimia*) could be killed without legal redress; the killer was not liable to prosecution or penalty."[83]

In Rome, the first term for the outlaw was *hostis*, which at the time of the Twelve Tables (c. 450 BC) meant "stranger" but legally referred to anyone with whom Rome was at war.[84] This war-time definition was expanded to include treasonous citizens as well, and the punishment was that they could be killed on Roman territory by any citizen with full impunity."[85] This status followed the outlaw even if he were able to successfully flee Roman territory, so he remained a wanted man, and sanctions could be taken against his

[83] Adele C. Scafuro, "Atimia" in Roger S. Bagnall et al., ed., *Encyclopedia of Ancient History*, (Blackwell Publishing Ltd., 2013), 923.
[84] Adolf Berger, *Encyclopedic Dictionary of Roman Law*, (Philadelphia: The American Philosophical Society, 1953), 489.
[85] Ibid.

children (including ineligibility to hold political office).[86] For most citizens in early Roman history, though, outlawry was through Agamben's prime example of *sacratio*, the sentence of *sacer esto*, resulting in "exclusion from the community, from divine and human protection."[87] When someone went fugitive in order to escape judgment, exile was then enforced on the fugitive by seizure of property and decree of outlawry: *interdicere aqua et igni*, interdiction of water and fire.[88] The interdiction of water and fire is especially interesting for both practical and symbolic reasons.[89] Water and fire were the utilities of the time, "symbolic material needs of life," and so the outcast was forbidden access to them within the jurisdiction.[90] Alternatively, fire and water may have been symbols of purity, and so the exile was separated from them so as to not "defile" them for the rest.[91] As exile became a punishment in its own right, it targeted "disruptive persons" with banishment, especially foreigners (with examples of Greek philosophers, Jews, and Chaldeans being banished), but also Roman political rivals that were stripped of Roman citizenship and their property before being either banned or confined.[92]

Outlawry as an English word is derived from the Scandinavian (specifically west Norwegian) word *utlaga*, meaning "outside the law," entering English usage at the end of the first millennium A.D. before which it was one of the oldest and most common punishments. [93] When someone was outlawed for life, he "lost his legal status and persona, and was doomed to live a life as if a wild animal in the forest. His goods and

[86] Gordon Kelly, *A History of Exile in the Roman Republic*, (Cambridge: Cambridge University Press, 2006), 3.
[87] Berger, *Encyclopedic Dictionary of Roman Law*, 687.
[88] Ibid., 463.
[89] Kelly notes: "The full formula seems to have been *tecti et aquae et ignis interdictio* […], although 'shelter' is generally omitted in the sources." Ibid. 26.
[90] Ibid.
[91] Ibid.
[92] Kelly, *A History of Exile in the Roman Republic*, 3, 65; Berger, *Encyclopedic Dictionary of Roman Law*, 463, 673; and Andrew M. Riggsby, *Roman Law and the Legal World of the Roman*, (Cambridge: Cambridge University Press, 2010), 202.
[93] Elisabeth van Houts, "The Vocabulary of Exile and Outlawry in the North Sea Area around the First Millennium," in *Exile in the Middle Ages: Selected Proceedings from the International Medieval Congress, University of Leeds, 8–11 July 2002*, ed. by Laura Napran and Elisabeth van Houts, (Turnhout: Brepols Publishers, 2004), 13; and Anne Irene Riisøy, "Outlawry: From Western Norway to England" in New Approaches to Early Law in Scandinavia, ed. by Stefan Brink and Lisa Collinson, (Turnhout: Brepols, 2014), 102.

lands were forfeited, and he was not allowed any contact with others. Punishment of support for a full outlaw in turn consisted of full outlawry."[94] Full outlawry was specifically dehumanizing, exemplified by the Old Norse word *vargr* – wolf – given to them.[95] The *varg* was also denied burial in Christian graveyards by 11th century Norwegian Christian laws.[96] The distrust associated with these "irredeemable" outlaws was understood to pass on to their children.[97]

Johann of Schwarzenberg's 1507 *Bamberg Procedure for the Prosecution of Capital Crimes (Bamberger Halsgerichtsordnung)* reads: "As you have been lawfully judged and banished for murder, so I remove your body and good from the state of peace and rule them strifed and proclaim you free of any redemption and rights and I proclaim you as free as the birds in the air and the beasts in the forest and the fish in the water, and you shall not have peace nor company on any road or by any ruling of the emperor or king."[98] "Free as the birds" was, by the 16th century AD,

> … freedom from civil society and the church, and not least freedom from civil and holy redemption, and in their place, existence as the scorned, if not heroically out-sized, heathen/savage. Outlawry was a matter of being condemned to a life beyond the protection and the redemption of the laws of either church or state (to be, in other words, free as a bird [*vogelfrei]*).[99]

On May 26, 1521, the Roman emperor Charles V issued the "Edict of Worms," outlawing Martin Luther:

> For this reason we forbid anyone from this time forward to dare, either by words or by deeds, to receive, defend, sustain, or favor the said Martin Luther. On the contrary, we want him to be apprehended and punished as a notorious heretic, as he deserves, to be brought personally before us, or to be securely guarded until those who have captured him inform us, whereupon we will order the appropriate manner of proceeding against the said Luther. Those who will help in his capture will be rewarded generously for their good work.[100]

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[94] Ibid., 21-2.
[95] Matthew R. Bardowell, "The Problem of Emotion: Legal Codes and the Medieval Icelandic Outlaw," *Intégrité: A Faith and Learning Journal*, Vol. 16, No. 1 (Spring 2017), 43.
[96] Riisøy, "Outlawry: From Western Norway to England," 109.
[97] Ibid., 108.
[98] Article 241, quoted by Ronald Jones, "Outlawry: A Tale of Kissin' Cousins," (Wetterling Gallery, https://www.wetterlinggallery.com/sites/default/files/artists/files/2014_backstrom_jewels_catalogue_ronald_jones.pdf , 2014), 1.
[99] Ibid., 2.
[100] Michael Grzonka, *Luther and his Times*, (Lulu.com, 2016), p.105-106.

The German edict also used the word "*vogelfrei*," meaning that loyal subjects were encouraged to kill him, after which he would be refused burial and left to be eaten by animals.[101] As a political enemy, Luther's outlawry was extended to his ideas and supporters, several of whom were prosecuted and executed.[102] The concept remains in the language until recent times. Marx used it to illustrate how even emancipation left one vulnerable. The Nazi government declared enemies of the state *vogelfrei*, as did their allied regime in Croatia.[103]

Central to Anglo-Saxon law was the concept of "the preservation of peace," meaning the authority of a king, and from this concept, a penal system was developed that was based on outlawry as punishment, as well as property confiscation and corporal and capital punishment.[104] The Legatine Capitulary of 786 produced by a delegation from the Pope to North Umbria ("to correct both unorthodox practices within the English Church and sinful activities in lay society") and endorsed by local kings after, seems to be the earliest surviving record of not only "cooperative application of secular and ecclesiastical justice in Anglo-Saxon law," but also a legal expression for outlawry: the phrase, in Capitulum XII, "*utroque iure caruerunt*," "they [unnamed parties, having killed a lord] were deprived of both laws."[105] The context makes it seem that the idea of depriving someone of the protection of the law as a punishment for breaking the law was already "firmly ingrained" in contemporary legal thought, and it was understood that "deprivation of law likely led to their deaths, albeit indirectly," similar to the Scandinavian penalty described above, in which "all legal measures penalizing acts of

[101] Ibid., 106.
[102] Ibid., 106-107.
[103] Lazo M. Kostich, *The Holocaust in the Independent State of Croatia*, (Chicago: Liberty, 1981), 6, 19; and Liselotte Hassenstein, "I could not send them away," https://kehilalinks.jewishgen.org/brody/hassenstein.htm.
[104] "Anglo-Saxon Law," *Encyclopædia Britannica*, (Encyclopædia Britannica, Inc., 8 February 2012), https://www.britannica.com/topic/Anglo-Saxon-law. A study by Felix Liebermann (written in German) about the development of Anglo-Saxon outlawry from the broader Germanic tradition centered on 'loss of peace' (*Friedlosigkeit*) is cited in van Houts, "The Vocabulary of Exile and Outlawry in the North Sea Area around the First Millennium," 13: F. Liebermann, 'Die Friedlosigkeit bei den Angelsachsen', in *Festschrift für Heinrich Brunner zum siebzigsten Geburtstag dargebracht von Schülern und Verehren* (Weimar: Hermann Böhlaus Nachfolger, 1910), pp. 17–37.
[105] Bryan Carella, "The Earliest Expression for Outlawry in Anglo-Saxon Law," *Traditio*, Volume 70, (2015), 113-4, 143.

violence against him, even his murder, or requiring feud on the part of his kinsmen to support him, had been formally lifted."[106] The second law of which the condemned was deprived would probably be the religious law, meaning that they were excommunicated and/or forbidden from seeking a sanctuary in a church.[107] Scholars date the entry of "outlaw" into English (from Scandinavian) to the 10th century AD, and it quickly overtook the indigenous words for related concepts, either because of Anglo-Saxon rule over new Danish subjects, or because of Anglo-Saxon problems with Scandinavian mercenaries,[108] but by the 11th century, records show people being outlawed (and pardoned from outlawry) by their kings, with some confusion about whether it was the exclusive prerogative of the king or a result of legal process.[109] Outlawry was "a declaration of war by the commonwealth against an offending member" before becoming an almost routine way to threaten subjects into submitting to the courts,[110] and it remained a penalty in its own right, especially as punishment for avoiding or resisting the legal process, and resulted in both exposure to being killed with impunity and forfeiture of property to the king.[111] This continued after the Norman Conquest: during the time of William the Conqueror, the French invaders were apparently able to clear their charges of outlawry through combat, whereas convicted English were not.[112] Outlaws were linguistically removed from humanity,[113] declared as having *caput lupinum*, a wolf's head, meaning they not only could be killed with impunity but should be, "knocked on the head, like a wolf."[114] Children born to him after the crime in question were not allowed to inherit from him or anyone.[115] The extent to which outlawry was essentially a legal death is shown by the status of the outlaw even if the

[106] Ibid., 115, 131-2.
[107] Ibid., 132.
[108] Van Houts, "The Vocabulary of Exile and Outlawry in the North Sea Area around the First Millennium," 14-5, 18-21.
[109] Ibid., 24.
[110] Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I*, 2nd Edition, Volume 1, (Indianapolis: Liberty Fund, reprinted 2010), 54-5.
[111] Ibid.
[112] Ibid., 24-7.
[113] Women were not "outlawed," because they were not considered human enough to be covered by any law, but the practice of "waiving" – declared a "waif" – was an equivalent punishment: ibid., 508.
[114] "Caput Lupinum," *A Law Dictionary*, ed. Henry Campbell Black, (St. Paul: West Publishing, 1910); and Pollock and Maitland, *The History of English Law before the Time of Edward I*, 502.
[115] Ibid.

king were to "inlaw" him: "he comes back into the world like a new-born babe … capable indeed of acquiring new rights, but unable to assert any of those that he had before his outlawry."[116]

The State of Exception

A state of civil war or insurrection is used to justify a state of exception suspending normal rights, and the state of exception becomes normalized.

Demosthenes cites a fifth century B.C. decree that was "inscribed on a bronze pillar and deposited on the Acropolis," declaring one Arthmius of Zeleia (a town in Asia Minor) "to be an outlaw and enemy of the Athenian people and its allies, himself and his descendants […] because he brought the gold from the Medes into the Peloponnese."[117] The man in question was a Persian subject acting on behalf of his king, but the sentence was brought against him and his family so as to make them available to be killed "without pollution;"[118] the war with the Persians is the state of war that justifies the outlawry for the internal enemy. Later, with the development of the concept of citizenship,[119] *atimia* came to mean full or partial disenfranchisement for citizens of rights related to participation in government and courts, although it is argued that the full threat of death and plunder remained into the classical period,[120] based on evidence of specific examples of the sentencing (and sometimes murder) of Athenians convicted of treason.[121]

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[116] Ibid.

[117] Demosthenes 9.41-4 in *Demosthenes, Speeches 1-17,* trans. Jeremy Trevett, (Austin: University of Texas Press, 2011), 167-8.

[118] Ibid., 168. "Pollution (*miasma*) was thought by some to spread from a killer to the community at large unless he was brought to justice, but a justifiable homicide did not give rise to it."

[119] Brook Manville, "Solon's Law of Stasis and Atimia in Archaic Athens," *Transactions of the American Philological Association (1974-),* Vol. 110, (1980), 213- 221.

[120] Scafuro, "Atimia" in Bagnall et al., ed., *Encyclopedia of Ancient History,* 923. For more discussion of later, softer or more general applications of this term, see Sima Avramovic, "Katoikodomeö in Isaeus, VIII41: Imprisonment, hybris and atimia in Athenian Law," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung,* Volume 127, Issue 1, 2013.

[121] Sviatoslav Dmitriev, "Athenian Atimia and Legislation Against Tyranny and Subversion," *The Classical Quarterly,* 65 (2015), 37, 49-50.

In Rome, the crimes that brought outlawry were either crimes of actual insurrection or treason or crimes that violated the social fabric (as mentioned by Agamben), such as the violation of the oath taken by soldiers, attacking a tribune, or moving property borders to steal land. [122] The more common form of outlawry in the written history was that placed upon citizens that went into exile in order to avoid consequences by staying "beyond the reach of Roman authorities:"[123] some sought to avoid trial before it began, to avoid condemnation if trial had begun, or to avoid capital punishment if already sentenced.[124] Fundamentally, the choice of the exile to take himself beyond the reach of the law resulted in penalties that cast him outside the protection of the law: the interdiction practically deprived the condemned of legal protection, and so the death sentence, even if not carried out by the state, could be executed by any civilian.[125] These latter examples made the state of exception a norm of Roman power such that even unorganized violations of the order were seen as major.

Full outlawry in Scandinavia was for those convicted of murder, "manslaughter at the legal assembly" (to be compared with the Roman idea of the sanctity of the governing institutions)[126], killing a slave defending his master (implying that the murder happened in the course of trying to kill the free owner),[127] arson (because of the added violation of attacking people in the safety of their home), and swearing false oaths.[128] Murder was distinct from manslaughter in that manslaughter was possible to atone for, whereas murder "was irredeemable because it was committed in stealth and the killer refused to

[122] Kelly, *A History of Exile in the Roman Republic*, 28-29, and Berger, *Encyclopedic Dictionary of Roman Law*, 687-9, 732.
[123] Kelly, *A History of Exile in the Roman Republic*, 3.
[124] Berger, *Encyclopedic Dictionary of Roman Law*, 463.
[125] Ibid., 507. In general, though, capital punishment seems to have been exceedingly rare for Roman citizens, according to Andrew M. Riggsby, *Roman Law and the Legal World of the Roman*, (Cambridge: Cambridge University Press, 2010), 198-199. For a discussion on Roman principles of law and their relationship to the institution of exile as a way of avoiding acts of brutality against citizens, see Kelly, *A History of Exile in the Roman Republic*, 7-15, and 39: "An analogy can be drawn with *patria potestas*, which gave a Roman *paterfamilias* the power of life and death over his family. A father who actually exercised this right could still be prosecuted and convicted for this act."
[126] *Medieval Scandinavia: An Encyclopedia*, ed. by Phillip Pulsiano and Paul Leonard Acker, (Taylor & Francis, 1993), 116.
[127] Ruth Mazo Karras, *Slavery and Society in Medieval Scandinavia*, (New Haven: Yale University Press, 1988), 103.
[128] Riisøy, "Outlawry: From Western Norway to England," 107, 109.

assume responsibility."[129] Swearing false oaths was "equally reprehensible," because of the importance of trust to social order.[130] Essentially, breaking the law and trust was anti-social behavior, to be punished with exclusion from society.[131]

Luther's crime was also a violation of the divine order of papal authority, an act of religious war.

The focus of British outlawry on those who did not submit themselves to the courts is because of the passive insurrection against state authority it suggests.

The Sovereign(s)

The sovereign can deputize citizens to act as vigilantes, or any man can act as a sovereign over the outlaw by killing him with impunity or choosing to spare him. The sovereign and his deputies keep their impunity as long as the state of exception continues.

The Athenian sentence of *atimia* mentioned above includes that anyone could (and sometimes did) kill the one sentenced, just as in Rome.

Full outlawry in Scandinavia was also "effectively a death sentence," especially if the Icelandic sagas can be believed that "many might try to effect a killing for the honor or reward that resulted from slaying an outlaw."[132]

As mentioned, Luther being designated *vogelfrei* left him open to attack by any vigilante.

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[129] Ibid.
[130] Ibid., 108.
[131] Bardowell, "The Problem of Emotion: Legal Codes and the Medieval Icelandic Outlaw," 43.
[132] William Short, *Icelanders in the Viking Age: People of the Sagas*, (Jefferson: McFarland & Company, 2010), 29. Whereas slaves in Scandinavian society often did not get the rewards of their hunting, it is suggested that if a slave killed an outlaw, he may have been able to keep the reward: Karras, *Slavery and Society in Medieval Scandinavia*, 234 n. 86.

Helping to capture an outlaw in England was seen as a duty, and providing him shelter was a capital crime.[133]

The Generality and Specificity

Because of the seeming permanence of the global civil war and the full normalization of the state of exception, everyone is in some way in a camp, but there are also different levels of dehumanization in the camp, with the gravest represented by the Muselmann.

Roman exile, as mentioned above, had a range of degrees of severity.

The Scandinavian full outlawry mentioned above is contrasted with lesser outlawry:

> Lesser outlawry forced the outlaw (*fjörbaugsmaðr*) to leave the country and stay away for three years after which his goods were restored to him and he could continue living as if nothing had happened. While he was away his dependents, and in particular his wife and children, were looked after with some of the income from his possessions set aside for this purpose. The full outlaw (*skógarmaðr*) was outlawed for life, lost his legal status and persona, and was doomed to live a life as if a wild animal in the forest. His goods and lands were forfeited, and he was not allowed any contact with others. Punishment of support for a full outlaw in turn consisted of full outlawry. [134]

Those sentenced to lesser outlawry were still protected by the law in that they were "immune from attack." Lesser outlawry was for crimes like manslaughter, killing a slave,[135] "hostile blows, assisting an outlaw, wounding, maiming, mutilation, eye-gouging," and failing to pay fines; it could also be avoided by paying compensation to the victim and a fine to the king.[136] Outlaw sagas like Gisla saga and Grettis saga discussed the intense suffering of the fully outlawed, and the constant attention needed to stay alive.[137] East Norse laws, specifically, though, did not outlaw slaves for the

[133] Pollock and Maitland, *The History of English Law before the Time of Edward I*, Volume 1, 503; and Volume 2, 534.
[134] Ibid., 21-2.
[135] Karras, *Slavery and Society in Medieval Scandinavia*, 103. "According to Egils saga 81, the killing of a slave was punished with outlawry if compensation as not paid within three days. Eyrbyggia saga 43 states that the compensation price was twelve ounces of silver and the men ringing the payment had to start their journey by the third day" (230, n. 36).
[136] Riisøy, "Outlawry: From Western Norway to England," 106.
[137] Ibid., 103, 105-6.

crimes above, some specifying that this was because slaves "might consider outlawry desirable."[138]

The Camp(s)

The state can detain people who have not committed a crime, and so camps are the physical manifestation of the institution of outlawry. Some camps are about maintaining or expanding the imperial-colonial relationship, others about cleansing the national people of internal enemies or the unassimilable, and others simply about housing refugees without letting them into the state fully.

Roman exile mentioned above sometimes included confinement (on certain Italian islands or a place in the Libyan desert).[139] Otherwise, though, incarceration seemed broadly to be associated only with normal criminal cases and not the crimes (or exceptions) associated with outlawry.

Conclusion

The pre-modern legal histories support the argument made by Agamben for a broadly Western tradition of outlawry, in which the *homo sacer* is an early figure and exemplary of the dynamics present across Europe. The fact that outlawry was, in the pre-modern cases, associated more with exile than with prison camps also supports his argument that the camp is the entry point into modernity. In analyzing the United States of America, a nation-state modern from before the time of its independence, these evidences are not only points of reference and resonance but also a contrast for the depth of the American institution of outlawry.

[138] Karras, *Slavery and Society in Medieval Scandinavia,* 232 n. 61
[139] Berger, *Encyclopedic Dictionary of Roman Law*, 432.

Chapter 3: Muslims as American Outlaws

"The correct question to pose concerning the horrors committed in the camps is, therefore, not the hypocritical one of how crimes of such atrocity could be committed against human beings. It would be more honest and, above all, more useful to investigate carefully the juridical procedures and deployments of power by which human beings could be so completely deprived of their rights and prerogatives that no act committed against them could appear any longer as a crime."[140]

In this chapter I argue that the ideal model of outlawry theorized by Agamben (synthesized in Chapter 1) and the Western historical precedents (discussed in Chapter 2) culminate in the outlawry of Muslim American citizens. Of course, not every Muslim American citizen is declared *homo sacer*, but they do not have to be declared so explicitly for the relation to hold true: as Agamben writes, when the normal order is suspended, "whether or not atrocities are committed depends not on law but on the civility and ethical sense of the police who temporarily act as sovereign."[141] The legal precedents given under the categories below (drawn from the ideal type) illustrate that suspension, the existence of the state of exception, and the fact that such precedents stand without rectification are a sign that the state of exception is still in effect.

Literature Review

It must be first acknowledged that many scholars have furthered Agamben's analysis of his theory in the context of the War on Terror, but the greatest weakness in these analyses is that they seem to miss what is Agamben's most terrifying point: that the *homo sacer* was a citizen before being disenfranchised. American law always differentiated between the rights of citizens and foreigners (and slaves and natives), but this citizenship now that is failing to protect the Muslims that hold it.

[140] Agamben, *Homo Sacer*, 171.
[141] Ibid., 176.

Hamid Dabashi is at the forefront of working with Agamben's theory and trying to develop a response, and in the process discusses as homo sacer Abeer Qassim Hamza Al-Janabi (the 14-year Iraqi girl raped and murdered by American soldiers)[142] and Palestinians as a group[143] – but he does not apply the concept to Muslim American citizens until an article he writes about himself (presumably an American citizen) and an experience of extra screening at the American border.[144] Reece Jones has a study of Muslims at the border between India and Bangladesh dealing with Indian border agents – he mentions that Muslim citizens of India are also sometimes treated as an "exception."[145] Huma Dar, responding to an "Islamophobic" claim by an NYU professor that even apparently integrated Muslim Americans might one day "go Muslim" (a play on the phrase "going postal," or killing indiscriminately), says that the author has made the American Muslim a *homo sacer*, but she does not touch the legal realities, focusing instead on the otherization of Muslims, and insists as part of her defense that Muslims really are integrated and not dangerous.[146]

That non-citizens – whether residing in the United States or abroad – are a legal exception is built into American law the same way that states of emergency are written into the US Constitution. Even Supreme Court rulings to the contrary, like the cases brought by Guantanamo detainees demanding the constitutional right to a trial and decided in their favor, have generally not been respected or enforced by the other branches. We can make the ethical argument that this is wrong, that honoring the human rights of only citizens is inhuman, but this is a legal reality that has already been well-established by the literature mentioned above. What seems to be absent in the

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[142] Hamid Dabashi, *Islamic Liberation Theology: Resisting the Empire*, (New York: Routledge, 2008), 183-4.
[143] Hamid Dabashi, *Being a Muslim in the World*, (New York: Palgrave MacMillan, 2012), 115.
[144] Hamid Dabashi, "Consenting Muslims in America," *Al Jazeera*, 2013, https://www.aljazeera.com/indepth/opinion/2013/11/consenting-muslims-america-201311174401944685 2.html.
[145] Reece Jones, "Agents of exception: border security and the marginalization of Muslims in India," *Society and Space*, 2009, volume 27, 26 March 2009, https://www2.hawaii.edu/~reecej/Jones%202009%20Society%20and%20Space.pdf.
[146] Huma Dar: "'Going Deeper' not 'Muslim': Islamophobia and its Discontents," *Pulse*, 3 December 2009, https://pulsemedia.org/2009/12/03/going-deeper-not-muslim-islamophobia-and-its-discontents/.

applications of Agamben's thought to the War on Terror is that the exception that was the foreign terrorist is now the Muslim citizen as well, such that the rights supposedly guaranteed him by virtue of his citizenship are now differentiated by his Islam even more than by his crimes being associated with terrorism.[147] This point, that even Muslim citizens are being removed from the protection of American law, is the substance of the body of this chapter.

Dehumanization

The dehumanization and otherization of Muslims has deep roots in European and American thought. The European context of crusades, Reconquista, and conflict with the Ottomans made the otherization of Muslims a defining feature of European-Christian unity.[148] Many of the Africans enslaved by Euro-Americans were Muslims, and Islam in that context was seen as an identity that gave slaves too much sense of strength and

[147] Arshad Ali introduces his article about Muslim American citizenship with reference to Agamben ("The Impossibility of Muslim Citizenship," *Diaspora, Indigenous, and Minority Education,* 2017). Sohail Daulatzai does not cite Agamben (rather calling directly on, and reversing, Foucault's narrative of progressing into an "age of sobriety in punishment" by suggesting the public nature of the torture in Guantanamo and Abu Ghraib as revealing a new "age of excess"), but he does connect the "carceral logic" of the contemporary War on Terror to the *historical* exception which was Black Muslims in American prisons (*Black Star, Crescent Moon*, 175-6). Su'ad Abdul Khabeer, in the conclusion of a book very much about the racialization of Islam from within American Muslim communities, cites Alexander Weheliye's response to Agamben that centered race (and specifically Blackness) in how the state manages life and death – the implications of the citation in the context of talking about the Black experience in America points down this road without walking it (*Muslim Cool*, 220-1). Josh Bowsher efficiently links Agamben and the concept of homo sacer to the British Muslim citizens that had their citizenship removed by the government as a result of alleged links to banned organizations – that the American government has not even needed to remove the citizenship of Muslim citizens before disenfranchising them is worthy of note, but the application of Agamben's theory to disenfranchisement of citizens by their own state comes closer to the way that outlawry traditionally operated and to how Agamben theorized it ("Denaturalising Terror Suspects in the Age of Drone Strikes: British Sovereignty and Homo Sacer in the 'War on Terror,'" *The Critical Moment*, University of Nottingham, 20 March 2013), http://blogs.nottingham.ac.uk/criticalmoment/2013/03/20/denaturalising-terror-suspects-in-the-age-of-drone-strikes-british-sovereignty-and-homo-sacer-in-the-war-on-terror/. Simon Bonneau makes a similar argument as Bowsher but in the context of a debate about instituting a similar policy in Australia ("Homo Sacer Australis," Sungrammata, 3 July 2015, http://sungrammata.com/homo-sacer-australis/.) Finally, Ananya Vajpeyi names Syed Abdul Rahman Geelani, an Indian Muslim professor who faced false charges, torture, and a vigilante assassination attempt, as an Indian homo sacer ("Bare Life: If Geelani is wounded, it is our freedom that lies bleeding," The Telegraph India, 15 February 2005, https://www.telegraphindia.com/1050215/asp/opinion/story_4366601.asp).

[148] Gil Anidjar, *The Jew, the Arab: A History of the Enemy*, (Stanford: Stanford University Press, 2003); and Anouar Majid, *We Are All Moors*, (Minneapolis: University of Minnesota Press, 2009).

capacity for organized rebellion.[149] Islam continued to be associated with Black militancy, taking new root in the early 20th century heterodox movements like the Moorish Science Temple and the Nation of Islam. American media has otherized Islam throughout that period, first in a more passive orientalism, then in line with its imperial vision.[150] The dehumanization of Muslims in European and American imaginations was also literal, creating Muslim monsters as "stock characters," to be used again and again over the centuries.[151]

The results match the underpinning system. In 2016, 38% of Americans had negative views of Muslims and 56% had negative views of Islam.[152] In 2017, half of Americans said that Muslims were not a part of mainstream American society.[153] These numbers may be enough to prevent a meaningful portion of the population from defending Muslims from sovereign exclusion, as studies showed that dehumanizing Muslims and Arabs was linked to support for drone strikes and torture of these populations.[154]

The (Un)Civil Wars

Stasis applies to the American context at several levels: the domestic civil war, the global civil war, and the global uncivil war, and although they all have roots in conflicts with non-Muslim peoples, they have converged now in the War on (Muslim) Terror.

[149] Sylviane Diouf, *Servants of Allah: African Muslims enslaved in the Americas*, (New York: New York University Press, 1998); and Manuel Barcia, "'An Islamic Atlantic Revolution:' Dan Fodio's *Jihād* and Slave Rebellion in Bahia and Cuba, 1804-1844," *Journal of African Diaspora Archaeology and Heritage*, Volume 2, (2013).

[150] Edward Said, *Culture and Imperialism*, (New York: Vintage Books, 1994); and Deepa Kumar, *Islamophobia and the Politics of Empire*, (Chicago: Haymarket Books, 2012).

[151] Sophia Rose Arjana, *Muslims in the Western Imagination*, (Oxford: Oxford University Press, 2015), 2.

[152] Shibley Telhami, "American Views Towards Muslims and Islam," Brookings Institute, (11 July 2016) https://www.brookings.edu/research/american-attitudes-toward-muslims-and-islam/.

[153] "How the U.S. general public views Muslims and Islam," Pew Research Center, 26 July 2017, http://www.pewforum.org/2017/07/26/how-the-u-s-general-public-views-muslims-and-islam/.

[154] Nour Kteily and Emile Bruneau, "Americans see Muslims as less than human. No wonder Ahmed was arrested." *Washington Post*, 18 September 2015, https://www.washingtonpost.com/posteverything/wp/2015/09/18/americans-see-muslims-as-less-than-human-no-wonder-ahmed-was-arrested/?utm_term=.c2c6d0c722d2.

Settler Conquest and the Natives

From the very beginning of the European conquest of the continent, settlers had an indigenous population to control, kill, or move, creating a constant tension and military posture within the newly claimed homeland. Broadly, European-American policy towards the native people was one of displacement and genocide.[155] The belief in European-Americans' exclusive authority over the land and its indigenous inhabits was rooted in a "European discourse of conquest," and, in the case of the English, a Protestant Christian narrative of control and conversion, and "was so entrenched that white Americans rarely questioned it."[156] Five approaches were considered and experimented with by the Europeans in regards to their legal relationship with the indigenous:

> […] assimilation and incorporation of the Indians as equals, integration of Indians into colonial society but as a subordinate people, domination and regulation of Indians while keeping them separated from white communities, recognition of Indian tribes as independent and autonomous entities, or removal of Indians from white society completely through either extermination or expulsion.[157]

Records also show that some Indians were taken and sold as slaves.[158] After U.S. independence, the new nation's military weakness resulted in Americans acknowledging again the right of Indians to own their land, and so sought treaties with them to purchase land, but later strength and ensuing Indian inability to defend themselves reversed this policy again.[159] A US Supreme Court ruling from 1823 about the validity of private purchases of frontier land defended concepts of right through "discovery" and "conquest" as well as the inferiority of the tribes:

> Chief Justice John Marshall explained that ordinarily conquered people "are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected . . . and that the rights of the

[155] Sidney L. Harring, *Crow Dog's Case: American Indian sovereignty, tribal law, and United States law in the nineteenth century*, (Cambridge: Cambridge University Press, 1994), 251.
[156] Deborah A. Rosen, *American Indians and State Law: Sovereignty, Race, and Citizenship, 1790-1880*, (Lincoln: University of Nebraska Press, 2007), x, 1, 7. For more on American narratives justifying power over the tribes, see David E. Wilkins and K. Tsianina Lomawaima, *Uneven Ground: American Indian Sovereignty and Federal Law*, (Norman: University of Oklahoma Press, 2001).
[157] Ibid., 1.
[158] Ibid., 7.
[159] Ibid., 12-3.

> conquered to property should remain unimpaired." But, Marshall wrote, such a policy was not possible in North America because "the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness." It was "impossible to mix" with the Indians in such a way as to form a common society, nor could they be allowed to retain exclusive control over their underdeveloped territory.[160]

This thinking was part of a broader policy of forced separation, removing Indians from their land and pushing them further west.[161] For the Indians that remained, though, they were either forced into citizenship by some states or left to apply for it by others, and then were subject to the laws that governed "free colored persons," so that they "experienced the lethal combination of unequal protection and discriminatory enforcement of criminal laws: they were more likely than whites to be charged with criminal behavior and less likely to be protected by criminal laws."[162] Indians were and continue to be victims to white vigilantism, in which whites are able to kill Indians with impunity.[163] And a US attorney argued as late as 1879 that Indians "were not even 'persons,' entitled to a writ of habeas corpus."[164]

Slavery as Constant War

The enslavement of Africans and Natives in the Americas also set up a domestic civil war, even before the Civil War in which slavery and its abolition was an issue: the force needed to control a captive population even in times without rebellion kept the slaveholders in the posture of an "armed camp."[165] Some southern defenders of the institutions of slavery and the outlawry of slaves appealed directly to "ancient

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[160] Ibid., 13. For more on landmark legal cases around Indian sovereignty, see Bryan H. Wildenthal, *Native American Sovereignty on Trial: A Handbook with Cases, Laws, and Documents*, (Santa Barbara: ABC-CLIO, 2003).

[161] Ibid., 15. For a regional study on land disputes and the law, see Vanessa Ann Gunther, *Native Americans and the Law in Southern California, 1848-1890*, (East Lansing: Michigan State University Press, 2006).

[162] Rosen, *American Indians and State Law*, 108-115.

[163] Ibid., 210; and Harring, *Crow Dog's Case*, 251.

[164] Ibid., 18.

[165] Mark A. Yanochik, Bradley T. Ewing & Mark Thornton, "A New Perspective on Antebellum Slavery: Public Policy and Slave Prices," *Atlantic Economic Journal*, Volume 29, No. 3, (September 2001), 331.

precedent," including both early Roman law and a concept of "penal slavery" of war captives, making the relationship between slaveowner and slave one rooted in a global war brought domestic.[166] Another defense of outlawry recalls the medieval European portrayal of outlaws as "evil, dangerous men" outside of civilization and immune to its civilizing power: a South Carolina law declares "negroes and other slaves ... are of barbarous, wild, savage natures, and such as renders them wholly unqualified to be governed by the laws, customs, and practices of this Province."[167] This defense aligned with the American posture towards the indigenous population, where the domestic conflict was just a local example of a global task for the civilized to civilize the uncivilized and subject the rest to their control.

Even though literal outlawry had been either removed from law books or fallen out of use in most of the country by the early 1800s, "fugitive slaves," as the law called people who had escaped from their conditions of enslavement, were frequently subjected to outlawry proceedings until the Civil War.[168] North Carolina had the most explicit outlawry procedures, declaring it lawful to "kill and destroy such slave or slaves, by such ways and means as he shall think fit, [that] stay out and do not immediately return home."[169] A 1791 state law "proposed to treat the killers of slaves equally with the killers of free people," except in the case of "a slave outlawed" and "any slave in the act of resistance to his lawful owner or master, or … any slave dying under moderate correction."[170] Tennessee's statute providing for the outlawry of slaves used the same language. Many other southern states, including South Carolina, Georgia, and Virginia, had similar laws, even if the word "outlaw" was not used, giving whites the right to kill

[166] Deborah A. Rosen, "Slavery, Race, and Outlawry: The Concept of the Outlaw in Nineteenth-Century Abolitionist Rhetoric," *American Journal of Legal History*, Volume 48 (Oxford University Press, 2018), 128 n. 6. Rosen cites "a leading legal treatise that included discussion of ancient Greek and Roman practices as part of a defense of American slavery": Thomas R. R. Cobb, *An Inquiry into the Law of Negro Slavery in the United States of America, to which is Prefixed an Historical Sketch of Slavery*, (Savannah, Ga., W. Thorne Williams 1858; Philadelphia, T. & J. W. Johnson & Co. 1858).

[167] Rosen, "Slavery, Race, and Outlawry," 129.

[168] Ibid., 127-8. For more on discussions around fugitive slave clauses in the Constitutional Convention, see Emily Blanck, *Tyrannicide: Forging an American Law of Slavery in Revolutionary South Carolina and Massachusetts,* (Athens: University of Georgia Press, 2014).

[169] Rosen, "Slavery, Race, and Outlawry," 128.

[170] Quoted in ibid.

runaways and slaves that "resisted their authority."[171] Further, as pirates were considered outlaws, charges of piracy were brought against two groups of captives who took control of the slave ships transporting them (*La Amistad* in 1839 and the *Creole* in 1841), because they were legally stealing property, even if the property was themselves – this legal maneuver positions the economic (a property issue) within an extranational conflict (where the non-citizen who has been turned into a citizen's property now takes on the role of a non-citizen again in stealing himself from the citizen).[172]

The (Literal) Civil War

Agamben himself uses the American Civil War, as did Schmitt, in analyzing the state of exception. It was mentioned in Chapter 1 and does not need repeating except to remind of the importance of the legal precedent of Lincoln suspending *habeas corpus* and opening camps for the indefinite detention of domestic enemies.

American Imperialism Abroad

As the early history of the United States was written and rewritten, theories of the frontier came to not only define the American character (and economic and political success) in relation to the early conflicts with nature and native but also motivate American expansion to preserve that character and expand on those successes.[173] This movement took the America from a domestic civil war (or, more specifically, a war that sought to exclude the native and include his land) to what Agamben referred to as a global civil war.

[171] Ibid.
[172] Ibid., 135.
[173] William Appleman Williams, "The Frontier Thesis and American Foreign Policy," *Pacific Historical Review*, Vol. 24, No. 4 (November 1955); and Richard Slotkin, "Theodore Roosevelt's Myth of the Frontier," *American Quarterly*, Vol. 33, No. 5, Special Issue: American Culture and the American Frontier (Winter, 1981).

Domestic Threats: The Cold War and Black Militancy

The Cold War, although between the Western bloc led by the US and the Soviet bloc, made the American Left a suspect community, one that the government thought could be deployed by the USSR against them. At the same time, Black liberation movements, even without foreign support (but with growing international attention and networking) were seen as a domestic threat to the national order.[174]

The War on Terror Within

American post-Cold War imperialism had pivoted to the Muslim world (while maintaining its control everywhere else), and this new front and its backlash, American support for Zionism and its backlash, and American oppression of its domestic minorities and its backlash all culminate in the post-September 11 War on Terror. This war also fits Agamben's characterization of modern wars as being without the old formalities of states actually declaring war on each other, but it also fits that of a civil war, as the alleged airplane hijackers, although foreign nationals, were residing and studying in the United States, and the government's surveillance and policing practices came to target residents and citizens just as it did foreigners abroad.

The government's perception of this as a civil war takes fullest shape in radicalization theory and policing programs like Countering Violent Extremism. Radicalization theory, like that promoted by the NYPD in 2006, suggests that any Muslim could be radicalized - turned into a terrorist - by a number of triggers, and that there were patterns of signs that would help law enforcement decide who to watch carefully or try to preempt (or entrap) – this logic makes Muslim citizens a potential fifth column whose allegiance cannot be trusted and whose minutest behaviors must be monitored and even criminalized so as to protect the nation from being attacked by this internal menace.[175]

[174] Daulatzai, *Black Star, Crescent Moon.*
[175] Arun Kundnani, *The Muslims are Coming! Islamophobia, Extremism and the Domestic War on Terror,* (London: Verso Books, 2014).

The State of Exception and the Ban

Agamben himself connected Lincoln's Civil War precedent to George W. Bush's claiming of the powers of the commander-in-chief, but the state of exception in the American War on Terror is ushered in by two real acts parallel to the general public understanding: the Authorization for the Use of Military Force and the USA Patriot Act.

The original AUMF, passed on September 18, 2001, essentially gave President George W. Bush the authority to dismantle the Al-Qaeda organization and the Taliban government in Afghanistan in retaliation for 9/11 and defense of the US. The AUMF was rooted in constitutional powers, and because it was a congressional act, it seemed at first to be a normal wartime legislation that gave the President the ability to fight a transnational organization and its host country. But the Taliban was not accused of helping Al-Qaeda in its planning or execution of the plane hijackings, and was only "guilty" of allowing Usama bin Laden to reside and work in Afghanistan – the AUMF was not a formal declaration of war on the sovereign state of Afghanistan with the Taliban as its government, but a state-of-emergency act. It did not for example: "1) include parameters governing the geographic and temporal scope of authorized military operations; (2) contain politically defined end-state objectives; (3) provide guidance on operational appropriations of manpower, material, and money; and (4) comport with international humanitarian law and jus ad bellum principles."[176] The state of exception authorized by the AUMF did not only exist in America's foreign operations, either, but included authorization, according to the Supreme Court, to detain enemy combatants until the end of hostilities, even if they were American citizens.[177] The AUMF has not been repealed in the over 16 years since, and instead has been the "legal" basis for publicly reported war operations in Afghanistan, Pakistan, Iraq, Syria, Yemen, Libya,

[176] "Considerations for a New Authorization for the Use of Military Force," Center for Ethics and the Rule of Law, University of Pennsylvania, 20 April 2018.

[177] Curtis A. Bradley and Jack L. Goldsmith, "Congressional Authorization and the War on Terrorism," *Harvard Law Review*, Volume 118, Number 7, (May 2005).

and Somalia, and military black operations in over two hundred nations around the world.[178] The executive branch essentially has a blank check for total war.

The Patriot Act, passed five weeks later, rolled back constitutional protections from warrantless surveillance and search, giving intelligence agencies including the Central Intelligence Agency the authority to spy on American citizens domestically, and also created a legal space by which protest groups could be considered "domestic terrorists," among dozens of other amendments.[179] Over a million people have been placed on lists that require their subjection to extra screening in airports, with no mechanism for removing them or finding the evidence that placed them there.[180] Muslim charities have been closed and their assets seized based upon secret evidence.[181] Organizations are added to the State Department's terrorist watch list based on secret evidence, a designation that cannot be challenged in court, and it is a crime for Americans to contribute money or material support to these groups.[182] The act was an "unprecedented" suspension of constitutional protections of citizens and, although in general language, the connection of these new "legal" powers to widely reported surveillance and infiltration operations by city, state, and federal authorities of mosques, Islamic schools, Muslim-owned businesses and homes makes the act primarily an inclusion/exclusion of Muslims, suspending their rights through a juridical act.[183]

The Sovereign Vigilante

Within the state of exception, the sovereign has both the control over the life and death of the *homo sacer* and the ability to empower others to be sovereigns over them: this is

[178] Jeremy Scahill, *Dirty Wars: The World is a Battlefield*, (New York: Nation Books, 2013).
[179] "Surveillance under the USA/PATRIOT Act," American Civil Liberties Union, https://www.aclu.org/other/surveillance-under-usapatriot-act.
[180] Elaine Cassel, *The War on Civil Liberties: How Bush and Ashcroft Have Dismantled the Bill of Rights*, (Chicago: Lawrence Hill Books, 2004), 5.
[181] Ibid.
[182] Ibid., 12, 90-94.
[183] Arshad Ahmed and Farid Senzai, "The USA Patriot Act: Impact on the Arab and Muslim American Community," Institute for Social Policy and Understanding, 1 January 2004.

manifested now in both the US military's assassination program as well as rising unprosecuted hate crimes targeting Muslims.

Hate crimes as state-sanctioned vigilantism are admittedly separated by one degree without public state sanction for them, but studies show that perpetrators of anti-Muslim hate crimes see their violence within the context of the War on Terror,[184] and the fact that the state has not prosecuted many of these crimes as hate crimes gives anti-Muslim bias a normalcy in that Muslims are seen as not protected by hate crime law.[185] Regardless, reported hate crimes have generally increased (along with anti-Muslim views) with the War on Terror, and, in recent years, seem consistent with anti-Muslim rhetoric from President Donald Trump.[186]

The most literal application of outlawry today is the policy of assassination, beginning with foreign targets but now including American citizens as well, without charging, trying, or even trying to capture them first. The first known case was that of popular preacher *shaykh* Anwar al-Awlaki and his traveling companion Samir Khan: without entering a courtroom, government officials went to the media – a court of public opinion – and declared al-Awlaki an enemy of the state. His father tried to access the American legal system to give al-Awlaki a means to avoid this ending, but within weeks, al-Awlaki was killed by a drone while riding in a car in Yemen with Khan, who was likewise not charged with any crime but was believed by American officials to be affiliated with an Al-Qaeda publication.[187] Two weeks later, al-Awlaki's sixteen-year-old son Abdur-Rahman was killed in a separate strike in Yemen, even though he himself was not charged or even accused of any involvement with Al-Qaeda. When Obama

[184] Jeffrey Kaplan, "Islamophobia in America? September 11 and Islamophobic Hate Crime," *Terrorism and Political Violence*, Volume 18, Issue 1, (2006).
[185] Abigail Hauslohner, "Hate crimes reports are soaring – but we still don't now how many people are victimized," *Washington Post*, 17 November 2017, https://www.washingtonpost.com/news/post-nation/wp/2017/11/17/hate-crimes-are-soaring-but-we-still-dont-know-how-many-people-are-victimized/?noredirect=on&utm_term=.36eff187ff89.
[186] Alejandro J. Beutel, "Latest FBI numbers show anti-Muslim hate crimes continue to rise, suggest growing shift toward violence against people," Southern Poverty Law Center, 14 November 2017, https://www.splcenter.org/hatewatch/2017/11/14/latest-fbi-numbers-show-anti-muslim-hate-crimes-continue-rise-suggest-growing-shift-toward.
[187] Scahill, *Dirty Wars.*

advisor Robert Gibbs was asked about the legality and ethics of this, he responded that Abdur-Rahman should have "had a more responsible father."[188] In one of the first public military actions of Donald Trump's presidency, a raid he approved resulted in the death of more of his family members, including his daughter.

At least two other American citizens have been killed without charge or trial, with the government arguing that the military is not required to observe such laws before assassinating them if they are suspected of aligning themselves with a terrorist organization. The suspension of the right (sometimes called a human right, but in the US considered at least a civil right) to fair trial before execution, even if a wartime decision, is not one, in these examples, made about obvious enemy combatants on the other side of an American battlefield, but rather a unilateral decision made within the context of the state of exception. Here the sovereign literally has the power over life and death: President Barack Obama made himself the final decision-maker on whether or not to kill alleged terrorists by drone strike (and he called the decision to kill al-Awlaki "an easy one").[189]

The Camp

One of the most iconic symbols of the War on Terror has been the prison, particularly the military prison on the US Navy's base in Guantanamo Bay, Cuba; and Abu Ghraib, famous for the leaked images of detainees being tortured by smiling American soldiers; and the black sites and "safe houses" (visible only in the genre of counter-terrorism film and television) where American intelligence agencies work without oversight. These prisons were different, at first, than most prisons on American soil: they were for "enemy combatants" -- as opposed to "prisoners of war" – and as such were disenfranchised of rights to trial and sometimes even legal representation.[190] These

[188] Conor Friedersdorf, "How Team Obama Justifies the Killing of a 16-Year-Old American," *The Atlantic*, 24 October 2012, https://www.theatlantic.com/politics/archive/2012/10/how-team-obama-justifies-the-killing-of-a-16-year-old-american/264028/.
[189] Jo Becker and Scott Shane, "Secret 'Kill List' Proves a Test of Obama's Principles and Will," *New York Times*, 29 May 2012, https://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html.
[190] Cassel, *The War on Civil Liberties.*

prison camps were literally the borders of the inclusion/exclusion: prison camps off the American mainland but in zones of American control, spaces where legal challenges only re-inscribed the disenfranchisement.

Eventually, American citizens came to fall into the legal space represented by the prison camp, and prison wings were set up on US soil to recreate Guantanamo conditions for citizens, including limitations on communication and solitary confinement[191] (considered torture by psychologists).[192] The super-max prison is the camp-come-home, and many of the inmates are Muslims.[193] It was and still is used disproportionately to separate members of the Nation of Islam and other black militant organizations from the general population, significant not only because of the association of these groups with Islam but also because of their foundational role in War on Terror logic and the space left for prison-camp extra-legality to be expanded to American citizens of other groups.[194] These conditions are disastrous for mental health, part of a total war approach that takes bare life to the extreme of controlling not only its physical presence but its mental-emotional presence, as well. [195]

Conclusion: The Global Camp and the Muselmann

I have argued that the American Muslim citizen, like the Muslim globally, is homo sacer to American sovereignty. The camp is real, but it is also a way of thinking that goes wherever American power can reach, or in the words of Jeanne Theoharis:

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[191] Jeanne Theoharis, "Guantanamo at Home," *The Nation*, 2 April 2009, https://www.thenation.com/article/guantanamo-home-2/.

[192] Gali Katznelson and J. Wesley Boyd, "Solitary Confinement: Torture, Pure and Simple," *Psychology Today*, 15 January 2018, https://www.psychologytoday.com/us/blog/almost-addicted/201801/solitary-confinement-torture-pure-and-simple.

[193] Bonnie Kerness, "US Prisons, Muslims, and Human Rights Violations," *Frontlines of Revolutionary Struggle*, 3 September 2010, https://revolutionaryfrontlines.wordpress.com/2010/11/29/us-prisons-muslims-and-torture-in-solitary-confinement-units/.

[194] Brittany Friedman and Zachary Sommers, "Solitary Confinement and the Nation of Islam," *The Imminent Frame*, 30 May 2018, https://tif.ssrc.org/2018/05/30/solitary-confinement-and-the-nation-of-islam/.

[195] Center for Constitutional Rights, "The Darkest Corner: Special Administrative Measures and Extreme Isolation in the Federal Bureau of Prisons," September 2017, https://ccrjustice.org/sites/default/files/attach/2017/09/SAMs%20Report.Final_.pdf.

> Guantánamo is not simply an aberration; its closure will not return America to the rule of law or to its former standing among nations. Guantánamo is a particular way of seeing the Constitution, of constructing the landscape as a murky terrain of lurking enemies where the courts become part of the bulwark against such dangers, where rights have limits and where international standards must be weighed against national security. It is an outgrowth of a "war on terror" with historical precedents that took root under Clinton (in legislation like the 1996 Antiterrorism and Effective Death Penalty Act), spread like kudzu under Bush and infiltrated the fabric of the justice system. It is a pre-emptive strategy where stopping terrorism has come to mean detaining and prosecuting people who may not have committed any actual act of terrorism but whose religious beliefs and political associations ostensibly reveal an intention to do so.[196]

The prison camp is the stripping of its inmates to bare life, but the desire to preempt crime and the belief in the state's ability to do so makes the entire sphere of state power subject to the logic of the camp. [197] Within this national and global camp, it is not only Muslims that are now *homo sacer* but everyone held in suspicion – including Black, labor, environmentalist, and libertarian activists – and, as Agamben argues himself, everyone. But the *Muselmann* is the limit figure, the extreme, the border between human and nonhuman, and today, the Muslim still plays this role.

[196] Theoharis, "Guantanamo at Home."
[197] Steve Russell, "The New Outlawry and Foucault's Panoptic Nightmare," *American Journal of Criminal Justice*, Vol. XVII, No. 1, 1992.

Conclusion: Free as Birds

Thawban said, "Allah's Messenger, peace and blessings be upon him, said, 'Imminently, there will come a time when the nations gather against you, just as people gather around a feast.' A man said, 'Will it be because we are few at that time, O Allah's Messenger?' He responded, 'No, you will be numerous in those times, but you will be as useless as the scum of the sea, and Allah will remove the fear that your enemies used to possess from you from their chests, and He will place al-Wahn *in your hearts', it was said, 'What is* al-Wahn*?', he responded, 'Love of life, and hatred of death.'"*[198]

In this thesis I have attempted to synthesize Agamben's theory on homo sacer and the state of exception as an ideal type of outlawry against which to compare historical and contemporary dynamics; to survey the historical evidence of relevant Western legal traditions using outlawry according the theoretical ideal type; and to argue that the War on Terror broadly and US policy toward its Muslim citizens specifically amount to *sacratio* and a normalized state of exception, stripping Muslims to bare life in a way that advances but still stands beyond the parallel treatment of all within reach of American sovereignty.

Returning to our Purpose

The mission of *khilafah*, of taking care of what we have been given, is the practical process and application of our having perfected ourselves, working to become *al-insān al-kāmil*, and includes every facet of our lives, from the spiritual and familial to the economic and academic. Western colonization "took us into a period of confusion that continues until today," but our Islamic orientation towards our study and production of knowledge requires a clear understanding that our self-development and work should be "compatible with the Islamic knowledge tradition" and in pursuit of our aims.[199]

[198] *Musnad Ahmad ibn Hanbal* 5/278 (and others), trans. Amr Abul Rub, http://immamalbani.blogspot.com.tr/2011/05/nations-will-gather-against-you.html.
[199] Recep Şentürk, "What is a university for?", *Daily Sabah*, (https://www.dailysabah.com/feature/2017/03/04/what-is-a-university-for, 3 March 2017).

As Ibn Khaldun studied the world, articulating an academically responsible method for transmitting history, he also developed theories in political sociology that were for the benefit of the Muslims in their political goals, looking for "lessons (*'ibar*) that would be instructive for others," and "trying to forge a new science that at once makes Islamic law more expansive and Muslim civilization more resilient."[200] To Ibn Khaldun, on the surface, history is too often just information, "elegantly presented and spiced with proverbs," but the "inner meaning of history, on the other hand, involves speculation and an attempt to get at the truth, subtle explanation of the cause and origins of existing things, and deep knowledge of the how and why of events," deriving "memorable lessons to be learned from early conditions and from subsequent history."[201]

In this thesis, I turned to study not the Muslim world for the Western academy and the benefit of Western powers, rather studying the West for the benefit of all. Ibn Haldun University as an institution can be part of this process, breaking free of the "sustainable intellectual dependency" that has trapped us for centuries, not just for the sake of freedom or rebellion but because we prioritize our Islamic purpose, epistemology, and method of education.[202] In "Beyond the Muslim nation-states," Kalim Siddiqui bemoaned the position of Muslims doing Western political science, the roots of which were "not allowed to spread of their own free will […] to draw anything from Imam al-Ghazali, Ibn Taimiyya or even Ibn Khaldun. Instead, the roots of modern political science have been shielded carefully from contact with Muslims or Islam and instead been taken directly to the ancient Greeks, the medieval Church, and back to feudal, and later national Europe. […] Western political science, western history, philosophy and the arts have all been contrived to serve the purposes of the western civilization."[203] Muslim political scientists with Western audiences, then, must:

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[200] Bruce B. Lawrence, "Introduction to the 2005 Edition" in Ibn Khaldun, *The Muqaddimah: An Introduction to History*, trans. Franz Rosenthal, (Princeton: Princeton University Press, 2005), ix, xviii.
[201] Ibn Khaldun, *The Muqaddimah*, 5, 9.
[202] Recep Şentürk, "What is a university for?" *Daily Sabah*, (https://www.dailysabah.com/feature/2017/03/04/what-is-a-university-for, 3 March 2017).
[203] Kalim Siddiqui, *Beyond the Muslim nation-states* (1977, re-published on www.kalimsiddiqui.com, 2014), 5.

> talk as a group of prisoners. They must define the scale and model of the prison in which they live. They must map the prison in detail. The three dimensions of this prison are social, economic and political. These dimensions are linked by intellectual corridors. The political scientists themselves are the leading exponents of their prison, as well as its victims. To plan and ultimately execute an escape from this all-encompassing 'open' prison, we may, for a while, have to behave like model prisoners and mix among our tormentors in a way that does not arouse their suspicion. To some extent it might even be possible to take the 'guards' into our confidence. They might even co-operate with us so long as we do not become a threat to their positions and leadership roles in the short-term.[204]

The mission of this project is to contribute to a broader analysis of the American relationship with Muslims beyond the language of liberal tolerance, rights of citizenship, and systemic checks and balances, to understand the limits of what is possible for Muslims in America. This thesis is a contribution to the study of historical and contemporary terrain that must be understood to choose appropriate goals and accurately identify a strategy forward. The scholar of history, according to Ibn Khaldun,

> needs to know the principles of politics, the nature of things, and the differences among nations, places, and periods with regard to ways of life, character qualities, customs, sects, schools, and everything else. He further needs a comprehensive knowledge of present conditions in all these respects. He must compare similarities or differences between present and past conditions. He must know the causes of the similarities in certain cases and of the differences in others. He must be aware of the differing origins and beginnings of dynasties and religious groups, as well as of the reasons and incentives that brought them into being and the circumstances and history of the persons who supported them. His goal must be to have complete knowledge of the reasons for every happening, and to be acquainted with the origin of every event. Then, he must check transmitted information with the basic principles he knows.[205]

It is my hope that this research contributes to that comprehensive research, and that the knowledge helps us grapple the question: so what is to be done?

Agamben's Vision of the Future: Law in the past

One future project may lie in following Agamben's argument to its logical conclusions. Slavoj Zizek, responding to Judith Butler's use of Agamben, insists that "Agamben's

[204] Ibid., 10.
[205] Ibn Khaldun, *The Muqaddimah*, 24.

analysis should be given its full radical character of questioning the very notion of democracy; that is to say: his notion of Homo sacer should not be watered down into an element of a radical-democratic project whose aim is to renegotiate/redefine the limits of in- and exclusion."[206] Butler and all of those who used Agamben to critique the "exceptional" cases of abuse in the War on Terror are correct that these abuses are immoral, but they are wrong that the state of exception is "exceptional." Rather, Agamben was very clear that this is normal – that Western power, whether totalitarian or democratic, always has this potential, so it can never be enough to merely try to reform it. Rather, Agamben calls on a Franz Kafka story, "The New Attorney," in which Alexander the Great's horse becomes a lawyer, studying and playing with law so as to free humanity of it:

> One day humanity will play with law just as children play with disused objects, not in order to restore them to their canonical use but to free them from it for good…. This liberation is the task of study, or of play. And this studious play is the passage that allows us to arrive at that justice that one of Benjamin's posthumous fragments defines as a state of the world in which the world appears as a good that absolutely cannot be appropriated or made juridical.[207]

This is indeed a radical vision, and partly why he calls his own work "messianic" and draws on messianic traditions: if Western legal thought is the problem, it is worth consulting the texts of different traditions, especially those that have the most "antagonistic relationship to the law."[208]

A crucial dimension of this opportunity, before we conclude, is the concept of the outlaw as a noble rebel, a folk-hero, which Eric Hobsbawm calls "one of the most universal social phenomena known to history, and one of the most amazingly uniform."[209] What unites this figure across folklore is "a relatively consistent image of a people's champion who espouses a type of higher law by defying the established 'system' of his times."[210] Muslims may find benefit in studying the opportunities here

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[206] Slavoj Zizek, *Welcome to the Desert of the Real!,* (Verso, 2002), 97-8.
[207] Agamben, *State of Exception*, 64.
[208] Adam Kotsko, "How to Read Agamben," *LA Review of Books*, 4 June 2013, https://lareviewofbooks.org/article/how-to-read-agamben/#!.
[209] Eric Hobsbawm, *Bandits*, (New York: Dell, 1969), 14.
[210] Richard E. Meyer, "The Outlaw: A Distinctive American Folktype," *Journal of the Folklore Institute*, Vol. 17, No. 2/3, (Indiana University Press, May - Dec., 1980), 94.

for embracing a prophetic-messianic model of outlawry, understanding their exclusion but looking beyond.

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SUMMARY

Cyrus McGoldrick was born in the USA of Irish and Iranian descent. He graduated with a B.A. in Middle Eastern, South Asian & African Studies from Columbia University in 2010, and worked for a number of Islamic social, human rights and media organizations, including the New York chapter of the Council on American Islamic Relations, the National Coalition to Protect Civil Freedoms, the Majlis ash-Shura of Metropolitan New York, and the Youth Coalition of South Florida. His publications include the book of poetry *I of the Garden* and a chapter on the political thought of Kalim Siddiqui in *Ad-Deen wal-Insaan wal-ʻAalam* edited by Heba Raouf Ezzat.

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