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Fall 10-21-2011

## **Guantánamo Bodies: Law, Media, and Biopower**

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### **MSU Digital Commons Citation**

Federman, Cary and Holmes, Dave, "Guantánamo Bodies: Law, Media, and Biopower" (2011). *Department of Justice Studies Faculty Scholarship and Creative Works*. 15.

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## **GUANTÁNAMO BODIES: LAW, MEDIA, AND BIOPOWER**

**CARY FEDERMAN & DAVE HOLMES**

“What’s worse than a Muselmann?  
Does he even have the right to live?”  
—Agamben (1999, 171)

### **Introduction**

The purpose of this article is to explain the status of those who are detained at Guantánamo Bay. Stated broadly, in assessing that status, we will emphasize the connection between the altered meaning of sovereignty that has accompanied the placing of prisoners in an American penal colony in Cuba and the biopolitical status of the prisoners who reside there. More particularly, we will locate the points of convergence among the factors (the war on terror, sovereignty, and the media) that have produced and reconstituted the legal and ethical status of Guantánamo detainees. In this Introduction, we describe the three factors that have framed the detainees’ status as something other than prisoners of war by connecting the situation of the detainees to the idea of the Muselmann, the outcast of the Auschwitz concentration camp system.

First, the war on terror. Apart from the reality of war on the battlefield, the war on terror also exists within a discursive framework. The war on terror has revived an interest in the theological and political differences between Christianity and Islam. It has created a discourse of dangerousness based on the religion of those who hijacked the planes that crashed into the World Trade Center on September 11, 2001, as well as the religion of those captured in Iraq and Afghanistan (Sengupta and Masood, 2005). Casting the war on terror in theological and political terms, Alberto Gonzales, President George W. Bush’s Attorney General, told some journalists that al Qaeda is different from all other enemies America has faced because it does “not cherish life” (Hersh, 2004, 5). Indeed, President Bush went further than his Attorney General by characterizing the war against al Qaeda as only part of the larger global war on terror. For President Bush, the global war on terror is one that may never end,

because the enemy is stateless, relentless, and potentially everywhere. Consequently, President Bush, in an important address to the American people following the events of September 11, saw fit to flesh out the implications of fighting an enemy that does not cherish life by warning the American people that they “should not expect one battle, but a lengthy campaign, unlike any other we have ever seen,” because the global war on terror will not be limited by the requirements of the laws of war. Effectively, a state of emergency had created a state of exception, where the norms of lawful behavior recede in favor of the more pressing concerns over security and the meaning of life itself:

It may include dramatic strikes, visible on TV, and covert operations, secret even in success. We will starve terrorists of funding, turn them one against another, drive them from place to place, until there is no refuge or no rest. And we will pursue nations that provide aid or safe haven to terrorism. Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime. (Bush, 2001)

In the second part of this article, we discuss the reconfigured meaning of sovereignty as a factor in the reconstitution of the Guantánamo detainee as an enemy combatant who can be denied the privileges of prisoners of war. The traditional goal of sovereignty is to “establish the essential unity of power” on three “elements”: “subject, unitary power, and law” (Foucault, 2003, 44). For Michel Foucault, however, the “juridical existence of sovereignty” no longer categorizes subjectivity. “For a long time,” Foucault writes, “one of the characteristic privileges of sovereign power was the right to decide life and death” (1990b, 135). Now, wars are “waged on behalf of the existence of everyone” (1990b, 137). He called this insight “biopower.”

Biopower deals with the social body and its effects in producing norms. Foucault recognized that life gained new meaning in the classical age and again during the advent of capitalism. The concern over life (its ordering, maintenance, and subsistence), for Foucault, is a modern invention, and biopower represents a positive force in the sense that it produces new meaning to life. It assembles the forces of power and the effects of knowledge operating on subjects. The alteration in the view of sovereignty, then, from an institutional structure (premised on natural balances) to that which “obliges obedience” (Foucault, 2008, 303) means that, today, it is less important to focus on sovereignty as a political and institutional structure than as one element among many that structures subjectivity.

There is, for Foucault, a clear movement in history and philosophy away from concerns over the best regime and the proper ordering of the soul to the various and unrestricted elements that constitute the soul. For Giorgio Agamben, similarly, but with significant differences in emphasis, the meanings of sovereignty and of subjectivity have been irredeemably altered; Agamben argues that the concentration camp has replaced the city as the paradigmatic object of inquiry into sovereignty, subjectivity, and citizenship (Ek, 2006). This alteration has as its most significant trope the Muselmann.

In the third part of our essay, we discuss not a factor in the reconstitution of the detainee but the outcome of the two factors mentioned above. The idea of the detainee as a Muselmann contains within it important implications for the new understanding of sovereignty in the era of Guantánamo, in an age of exception. In Arabic, one who submits to the will of God is a Muslim. However, in the argot of Auschwitz (but not in all the concentration camps of the Third Reich), the Muselmann is the one who was “given up by his comrades ... a staggering corpse, a bundle of physical functions, in its last convulsions” (Amery, 1980, 9). In Auschwitz, the Muselmann became a classification of a certain kind of person unworthy of life, a product of Nazism’s peculiar ordering of rank among human beings in confinement.

Yet rather than categorizing the Muselmann as an outlier who is brought within the “juridico-political order” (Agamben, 1998, 18), Agamben sees the Muselmann as the being that constitutes the political order in modern times because that order no longer lives by the distinction between inside and outside, between the political animal and the slave. Such distinctions have crumbled in the presence of the Nazi concentration camps. Thus, the state of exception which brought forth the Muselmann is neither a legal phenomenon nor a political one, strictly understood. It is, rather, the space which validates the juridico-political order (Agamben, 1998, 19). Sovereignty, Agamben writes, is reconstituted here, on the threshold of the new order of the ages, and whose symbol is the concentration camp. The camp and its effects have overturned all moral qualities, all distinctions between human and animal, particularly with the advent of the Muselmann, whose presence we are only beginning to witness, but whose affect on power we cannot avoid. “*It can even be said that the production of a biopolitical body is the original activity of sovereign power*” (Agamben, 1998, 6; italics in original). For Agamben, the Muselmann reframes sovereignty at the point of convergence within the liminal spaces of sovereignty, Guantánamo, and biopower.

Fourth, then, we turn to the final factor in the altered status of the detainee, bioconvergence. The Bush Administration's legal tactics regarding detainees took place, in part, under cover of the media's failure to report the full story of the war's effects, both in battle and at Guantánamo, which allowed the Bush Administration to implement policies that both ignored legal norms and stretched the meaning of legal norms (Kurtz, 2004, A1; John, Domke, et al., 2007). And yet, two years after the war began, the media's newfound focus on the arrests and the conditions of imprisonment of those deemed "enemy combatants" provided the public with insight into the Bush Administration's thinking regarding friends and enemies. Through published pictures in major newsweeklies, the shrouded detainees of Guantánamo have become (and continue to be) the site of convergence for the effects of biopower on those deemed unworthy of national and international legal protections. Thus, at the intersection of sovereignty, the war on terror, and the media lies a convergence of ideas and practices that fundamentally alter the meaning of being a detainee.

### **I. The War on Terror**

On December 28, 2001, the *New York Times* reported that, as a result of finding no suitable place to detain those captured in the war on terror, detainees would be held in "the least worst place" (Seelye, 2001), Guantánamo Bay, Cuba. In January 2002, the United States, which has jurisdiction over Guantánamo through a 1903 treaty with Cuba, opened a number of detention camps there for the express purpose of holding those captured in the war on terror in a place the law could not reach. The Bush Administration argued, as Supreme Court Justice Antonin Scalia later wrote, that Guantánamo "is outside the sovereign 'territorial jurisdiction' of the United States" (*Hamdan v. Rumsfeld*, 2006, 670). By the end of January 2002, the detention camps at Guantánamo were operating at full capacity and the military was planning to add 1,000 more prisoners within the next few months (Seelye & Erlanger, 2002). Overall, only five detainees have been convicted of terrorism charges. An unknown number have been released without trial, after years of confinement. As of November 2010, there were 174 detainees remaining (Williams, 2010).

Between the events of September 11, 2001 and the establishment of detention camps in Cuba, Congress passed a resolution, the Authorization for Use of Military Force (AUMF). Section 2(a) of the AUMF grants the president the authority to:

use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized,

committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons. (Authorization for the Use of Military Force, 2001)

On November 13, 2001, President Bush issued an executive order subjecting non-citizens captured by U.S. armed forces to detention and trial by military tribunals. Section 2(a) defines those subject to the order as follows:

The term “individual subject to this order” shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:

(1) there is reason to believe that such individual, at the relevant times,

(i) is or was a member of the organization known as al Qaida;

(ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or

(iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order. (Military Order, 2001)

The Bush Administration characterized the events of September 11, 2001 as an act of war by non-state actors against the United States, though “the use of force by private persons rather than organs of a state has not traditionally constituted an ‘act of war’” (Elsa, 2007, 14). Because of the ill-defined nature of the “global war on terror,” that is, that it is a war and not a legal strategy to contain terrorism, but it is a war fought against non-state actors, where the guarantees of the Geneva Conventions are lower than for state actors, the Bush Administration argued that: (i) those detained by U.S. armed forces in Iraq and Afghanistan would be subject to trial by military tribunals, where the protections of due process are lower than in civil courts; (ii) detainees would have no right to habeas corpus; and (iii) the detainees could be subject to harsh tactics, including torture, to elicit information, with the participation of health officials (Physicians for Human Rights, 2010).

By the end of 2002, those in charge of Guantánamo's prison camps had been given a "72-point matrix for stress and duress," which laid out types of coercion and the escalating levels at which they could be applied. These included the use of harsh heat or cold; withholding food; hooding for days at a time; naked isolation in cold, dark cells for more than 30 days, and threatening (but not biting) by dogs. It also permitted limited use of "stress positions" designed to subject detainees to rising levels of pain (Barry et al., 2004).

An investigation into claims of torture by U.S. soldiers at Abu Ghraib prison, in Iraq, revealed "the following acts":

- (1) Punching, slapping, and kicking detainees[, and] jumping on their naked feet;
- (2) Videotaping and photographing naked male and female detainees;
- (3) Forcibly arranging detainees in various sexually explicit positions for photographing;
- (4) Forcing detainees to remove their clothing and keeping them naked for several days at a time;
- (5) Forcing naked male detainees to wear women's underwear;
- (6) Forcing groups of male detainees to masturbate themselves while being photographed and videotaped;
- (7) Arranging naked male detainees in a pile and then jumping on them;
- (8) Positioning a naked detainee on a ... Box, with a sandbag on his head, and attaching wires to his fingers, toes, and penis to simulate electric torture;
- (9) Writing 'I am a Rapest' (sic) on the leg of a detainee alleged to have forcibly raped a 15-year old fellow detainee, and then photographing him naked;
- (10) Placing a dog chain or strap around a naked detainee's neck and having a female Soldier pose for a picture;
- (11) A male MP [military police] guard having sex with a female detainee;
- (12) Using military working dogs (without muzzles) to intimidate and frighten detainees, and in at least one case biting and severely injuring a detainee; and
- (13) Taking photographs of dead Iraqi detainees. (American Journal of International Law, 2004, 594-595)

In 2004, the Bush Administration repudiated a 2002 Office of Legal Counsel memo that had argued that the torture of detainees was legally permissible, provided that legal distinctions were made between acts that "constitute cruel, inhuman, and degrading treatment" and torture (Bybee, 2002, 31; Levin, 2004). Although the use of torture seems to have been more widespread in Iraq than at Guantánamo, the prison camps at Guantánamo remain places where torture and extreme punishment have occurred and those in charge have not been punished (Physicians for Human Rights, 2010;

Woodward, 2009). The Obama Administration had stated that it would close the prisons at Guantánamo (and relocate the prisoners to Illinois), but it missed its own deadline and later abandoned the idea that prisoners be moved to Illinois. It has also stated that it plans to keep using military tribunals to prosecute some detainees at Guantánamo Bay (Baker and Herszenhorn, 2009). The issue, then, of the status of those held at Guantánamo turns, to some extent, on the meaning of sovereignty, and has implications for understanding biopower in the age of the concentration camp.

### *Legal Exceptions*

In this section, we will examine two key cases that made their way to the United States Supreme Court from Guantánamo with much difficulty. In the first case, Salim Ahmed Hamden, who was not an American, was deemed by the Bush Administration to be an enemy combatant and denied the right to petition for his release. In the second case, the Bush Administration considered Yasir Hamdi, an American, an enemy combatant and denied him his rights to an attorney and to petition federal courts. The question in both cases is whether those captured in the war on terror have the right to petition federal courts for relief. But the answers are not simple. Traditionally, non-state enemy combatants, particularly non-American non-state enemy combatants, have not been accorded the full panoply of rights guaranteed by both the U.S. Constitution and the Geneva Conventions. Americans who engage in war against the United States are also in a gray zone of legal protections.

During the invasion of Afghanistan, U.S. armed forces captured Salim Ahmed Hamdan, a citizen of Yemen and a chauffeur for Osama bin Laden. In June 2002, Hamdan was transferred to Guantánamo Bay, Cuba, and subsequently charged with one count of conspiracy to commit terrorism. President Bush, acting under an order his office issued on November 13, 2001, declared Hamdan suitable for trial by military commission, despite Hamdan's claim that he was a civilian, not an armed soldier in the war between the United States and Afghanistan (Johnson v. Eisentrager, 1950, 765; Goodman, 2009). A Combatant Status Review Tribunal (CSRT) declared Hamdan to be an enemy combatant. Hamdan then filed a writ of habeas corpus in the United States District Court for the District of Columbia.

In state and federal criminal cases, a writ is applied for after conviction, to contest the legal grounds used to convict. If granted, the prisoner is either set free or retried according to a different set of legal criteria. Hamdan, however, applied for habeas corpus before the military tribunal convened, citing a



“substantial” claim that the commission lacked jurisdiction to try him. The district court ruled in Hamdan’s favor, on the ground that the government first had to prove that Hamdan was a prisoner of war before trying him by military commission. The United States Court of Appeals for the District of Columbia Circuit reversed the lower court’s decision. The appellate court ruled on a number of important legal issues, but for our purposes it is notable that the appellate court held that the Geneva Convention, as a treaty among nations, does not confer rights or remedies on individuals (*Hamdan v. Rumsfeld*, 2005, 38-39). The Supreme Court reversed the appellate court’s ruling (*Hamdan v. Rumsfeld*, 2006).

No straight line runs from Hamdan’s arrest in Afghanistan to his petition for habeas corpus from a cell at Guantánamo, Cuba, to a court in Washington, D.C. While Hamdan was at Guantánamo, Congress passed the Detainee Treatment Act. “Under the 2005 Detainee Treatment Act, detainees may appeal decisions of the military tribunals to the District of Columbia Circuit, but only under circumscribed procedures, which include a presumption that the evidence before the military tribunal was accurate and complete” (Stout, 2008). The government’s position regarding Hamdan’s claim was that the Supreme Court had no jurisdiction to review the appellate court’s ruling. In other words, Hamdan and other non-American detainees at Guantánamo have no right to petition American federal courts for habeas corpus relief from unlawful imprisonment because that right is reserved for Americans. The government also argued that Congress has the power to curtail the Supreme Court’s habeas jurisdiction, though this is a point of dubious legality. The government argued that it was free to hold Hamdan and all non-American detainees at Guantánamo until the cessation of the war on terrorism or until a court finds that the detainees are no longer a threat to American security interests (*Hamdan v. Rumsfeld*, 2006, 671; *Hamdi v. Rumsfeld*, 2004, 510-511). In an *amicus curiae* brief submitted to the Supreme Court on behalf of Hamdan, 304 British and European parliamentarians wrote that to deny detainees the right to contest their confinement in American courts would thrust them into a “shadow world where neither the Constitution nor the Laws of the United States nor the rules of international law ... afford any appropriate protection whatsoever” (Amicus Brief, 2006, 5).

Taking seriously the claim that Guantánamo could be considered “a geographic area in which certain legal rules, otherwise regarded as embodying fundamental policies of the larger legal system, are locally suspended” (Neumann, 1996, 1201), Supreme Court Justice John Paul Stevens, writing for the majority in *Hamdan*, said that military tribunals are “neither mentioned in the Constitution nor created by statute.” They were “born of military necessity”

(*Hamdan v. Rumsfeld*, 2006, 590), and have been used in every American war, including the American Revolution (Fisher, 2004). For Stevens, however, the context of the creation and use of military tribunals during war or war-like conflicts, rather than providing the Bush Administration with grounds to continue using military tribunals, created, rather, a reason to scrutinize the use of military tribunals for those detained at Guantánamo, particularly as the president claimed to have the power to create them as part of his constitutional powers during an emergency. Two important questions flow from Justice Stevens' opinion: Must military—not civil—courts try Hamdan out of a perceived necessity that Hamdan posed a national security risk? If so, what emergency has prevented Hamdan from obtaining relief in a civil court? (Relyea, 2001; Relyea, 2006).

The government argued, first, that Hamdan would be tried by a legally constituted military tribunal, complete with the possibility of making a defense, and in the event of failure, with the possibility of appeal. Second, the government argued that Hamdan had no claims as a prisoner of war under the Third Geneva Convention (Avalon Project, 1969). He was an enemy combatant, subject to military law. Although all signatories to the Convention are bound by its terms to respect prisoners of war, “there is no suggestion of judicial enforcement” outside the parameters established by American law, the government argued (*Hamdan v. Rumsfeld*, 2005, 40). Hamdan, in this view, is subject to “humane treatment” and the “judicial guarantees which are recognized as indispensable by civilized people” (*Hamdan v. Rumsfeld*, 2005, 41). But no more.

The Supreme Court disagreed with the Bush Administration's arguments. Apart from the procedural weaknesses that favor the prosecution's narrative over the defendant's—for example, statements made under duress or coercion can be admitted, witnesses need not be sworn, and guilt can be determined by a two-thirds vote—the Court made a number of important statements regarding the establishment of military tribunals. Although the Supreme Court declined to answer the question whether the president has the sole authority to establish military tribunals based on inherent powers bestowed on him by the Constitution and by the exigencies of war (*Ex parte Quirin*, 1947, 28), the Court was reluctant to accept the argument that the president can create “military commissions when he deems them necessary” (*Hamdan v. Rumsfeld*, 2006, 593). The idea that Congress, not the president, has the power to create military tribunals, Justice Stevens argued, has not been repealed by the executive orders and laws passed in the wake of September 11. Nor have the laws of war, to which the United States is a signatory, been repealed. Moreover, Congress never declared a state of emergency. Civil courts remained open

following the events of September 11, 2001. Regarding adhering to and implementing the Geneva Conventions, Justice Stevens rejected the court of appeals' opinion that "the war with al Qaeda evades the reach of the Geneva Conventions" (*Hamdan v. Rumsfeld*, 2006, 628).

Although the Supreme Court ruled against the Bush Administration regarding Hamden's status as a detainee with rights against his captors, the Bush Administration did not stray too far from a reasonable interpretation of how to treat non-Americans captured in a theater of war. The more difficult case is figuring out what rights Americans have when captured by U.S. forces in a theater of war, where the assumption is that the American had joined an enemy of the United States and had taken up arms against it.

Yaser Hamdi was born in Louisiana to two Saudi subjects. At the time of his capture in Afghanistan, he was an American citizen. He no longer is; he has been stripped of his citizenship and dispatched to Saudi Arabia. He was transferred to Guantánamo and, when it was discovered that he held an American passport, to a military brig in South Carolina. He was then held in solitary confinement for two years, never charged with a crime. He had little contact with lawyers and no military tribunal has ever determined his legal status. But because he was a fighter for the Taliban, he was designated as an enemy combatant.

The Department of Defense argued that American citizens who are considered to be enemy combatants could have access to an attorney, provided that "such access will not compromise national security" (Respondent's brief, 2004, 8). The government, moreover, argued that during times of war, "the President, as Commander in Chief, has the authority to capture and detain enemy combatants" (Respondent's brief, 2004, 9). The problem with this argument is the following: if the war on terror is endless, what use are the other institutions of government in the war on terror? Has the war on terror turned the United States into a presidential dictatorship? Has the exception overcome the rule? According to the Constitution, if the president wants to hold American citizens indefinitely during wartime, the remedy is simple: have Congress suspend the writ of habeas corpus by declaring, in accordance with Article I, section 9, clause 2—which grants (somewhat ambiguously) the authority to Congress to suspend the writ during times of rebellion—that the United States is under a state of emergency.

The United States District Court for the Eastern District of Virginia ordered Hamdi released but the United States Court of Appeals for the Fourth Circuit reversed this order, arguing that, as Hamdi was captured in a zone of conflict—which offered him only minimal legal protections, according to both

U.S. and international law—the district court needed to defer to the president’s war powers regarding detaining enemy combatants. The Supreme Court, however, was confident that the United States was not undergoing a rebellion, and therefore held that Hamdi was entitled to all the constitutional protections given to any American citizen. Although there was no clear majority on the Supreme Court for the position announced either by the district court or the court of appeals, eight justices agreed that the president does not have the sole authority to hold American citizens indefinitely without due process of law. Going even further than the majority, Justices Scalia and Stevens argued that:

Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime. Where the exigencies of war prevent that, the Constitution’s Suspension Clause, Art. I, §9, cl. 2, allows Congress to relax the usual protections temporarily. Absent suspension, however, the Executive’s assertion of military exigency has not been thought sufficient to permit detention without charge. No one contends that the congressional Authorization for Use of Military Force, on which the Government relies to justify its actions here, is an implementation of the Suspension Clause [i.e., the clause that allows Congress to suspend habeas corpus during times of rebellion]. (Hamdi v. Rumsfeld, 2004, 554)

In the eighteenth century, Britain created two “exempt jurisdictions” in which habeas corpus relief could not be obtained: the Channel Islands and India. Persons sent to those places could be detained indefinitely with no right to petition a judge for relief (*Boumediene v. Bush*, 2008, 2249). Is this the Bush Administration’s model, putting prisoners on an island off the coast of the United States, that the United States controls but does not possess, and making that island-prison a place where prisoners have no legal claims against their captors? (*Rumsfeld v. Padilla*, 2004, 465). In fact, the connection between the exempt jurisdictions of the British Empire and Guantánamo is thin, and also largely irrelevant. The British maintained some degree of control over their imperial possessions and courts were open but unavailable for certain detainees. By contrast, there are no federal courts at Guantánamo and the de facto captor is the Secretary of Defense or the President of the United States, who can only be reached by writs of habeas corpus filed in federal courts on the mainland of the United States. More important, as the Supreme Court stressed in *Boumediene*, “given the unique status of Guantánamo Bay and the particular dangers of terrorism in the modern age, the [British] common-law courts simply may not have confronted cases with close parallels to this one”

(*Boumediene v. Bush*, 2008, 2251). Although Cuba has ultimate jurisdiction over the island, the United States has effective jurisdiction over Guantánamo Bay. Therefore, it could be argued that Cuba has *de jure* sovereignty over Guantánamo, because it is part of Cuba, but the United States exercises “practical sovereignty” over Guantánamo because it has “maintained complete and uninterrupted control” over the bay for 100 years (*Boumediene v. Bush*, 2008, 2258).

To be sure, Guantánamo is not the legal void it once was (*Haitian Refugee Center, Inc. v. Baker*, 1992). “Guantanamo Bay is in every practical respect a United States territory” (*Rasul v. Bush*, 2004, 487). It is a place where the United States holds those (including civilians) it classifies as enemy combatants, whose rights are ranked lower than prisoners of war. And because of that juridical designation, the government has argued that those detained at Guantánamo have no rights against the United States, in part because of the government’s view that Guantánamo is outside the United States’ territorial jurisdiction, but also because those detained there are not state actors with definable rights under U.S. and international law (United Nations, 2006, 12).

It is not, however, the purpose of this paper to examine the rights of those detained at Guantánamo. Rather, we seek to situate the detainees within the broader discursive field that relegates them to a lower status than prisoners of war because of the state of exception that they inhabit. Following the events of September 11, President Bush characterized the war on terror as a war that demands the full strength and power of the national security apparatus. This would be a war like no other the United States has engaged in:

I know that some people question if America is really in a war at all. They view terrorism more as a crime—a problem to be solved mainly with law enforcement and indictments. After the World Trade Center was first attacked in 1993, some of the guilty were indicted, tried, convicted, and sent to prison. But the matter was not settled. The terrorists were still training and plotting in other nations, and drawing up more ambitious plans. After the chaos and carnage of September 11th, it is not enough to serve our enemies with legal papers. The terrorists and their supporters declared war on the United States—and war is what they got. (Bush, 2004)

In a situation governed by a war mentality rather than by the formalities of criminal justice, where the protections of due process are higher, the Bush Administration abandoned concerns for abiding by established judicial norms regarding prisoners of war (Mayer, 2007). Attorney General Gonzales argued

that “this new paradigm [the global war on terror] renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions” (Barry et al., 2004, 3). In this new configuration, Guantánamo is the rule by which the exception is defined. And because the status of the Guantánamo detainees signifies more than a legal void, in the next two sections, we turn to three key thinkers on the question of sovereignty, biopower, and the state of exception (Foucault, Agamben, and Carl Schmitt), to discuss the contested meaning of sovereignty and the implications for understanding the role of the excluded in an age of exception.

## II. Sovereignty

### *Friends and Enemies*

The German legal theorist, Carl Schmitt, is regarded as the first thinker to characterize modern society by the distinction “friend” and “enemy.” “War is the existential negation of the enemy” (Schmitt, 1996, 33, 26). Friends and enemies are to be “understood in their concrete and existential sense” (Schmitt, 1996, 27). Schmitt speaks of the “real possibility of physical killing” in the contest between friends and enemies (Schmitt, 1996, 33). He does so because the enemy is more important, existentially, than the friend. And this is so because for Schmitt, unlike for Thomas Hobbes, the state of war takes place not among individuals, but “of groups, and especially of nations” (Schmitt, 1996, 8, n. 14). Schmitt thus elevates the political existence of the state and of society above other forms of organization within the state and society. He attacks liberalism in the name of that to which it is most opposed: the centralization of power for the purpose of exposing the contradictions of the rule of law for governance. The enemy, and not an abstract pursuit of happiness, provides the state and its inhabitants with meaning. The exception—the suspension of the norm—is the ground upon which the political is restored. Thus, the political is not the equivalent of the “moral, aesthetic, and economic” ways of constituting the state. The political rests “on its own ultimate distinctions” (Schmitt, 1996, 26).

Because Schmitt invests the sovereign with the power to decide who are the friends and enemies of the state, the sovereign has the power to decide who lives and who dies. Schmitt sees the sovereign not as a judge, a legislator, or an executive. The sovereign is not a dictator. The sovereign stands outside of these categories even as it is invested in making decisions that involve legislative, executive, and judicial domains. The sovereign makes these decisions and distinctions but is not part of these decisions and distinctions. The sovereign

stands outside of law and yet is part of law. The peculiar position the sovereign has in regard to the law grants the sovereign a monopoly over decision making. The sovereign determines the qualities of the emergency, the limits of the crisis, and the state of exception. “Sovereign is he who decides the exception” (Schmitt, 2005, 5). The exception, the suspension of law in its crudest sense, creates the space for the sovereign to act against those who are not its friends. “The sovereign decides not the licit and illicit but the ordinary inclusion of the living in the sphere of law” (Agamben, 1998, 26).

Schmitt’s contention is that the modern state refuses to acknowledge the importance of violence to governance because it desires a peace established out of the fractured parts of a whole working antagonistically yet peacefully to achieve temporary power. This is untenable for Schmitt. In this view, modern liberalism transforms the enemy into a competitor for power; sovereignty is reduced to jurisdiction. Power means the separation of powers. The mantra of American separation of powers theory—“The government of the United States is supreme within its sphere of action” (*Dobbins v. Comm’rs of Erie County*, 1842, 447)—encapsulates the essence of modern liberalism’s desiccated understanding of power. To further divide sovereignty in the name of freedom, liberalism makes a distinction between normal and emergency powers (Lobel, 1989).

Attacking liberalism over these core issues, the true threat to peace, Schmitt writes, is not the economic competitor or the smaller jurisdiction. The enemy does not follow the logic of economic rationality or the constraints imposed by modern liberalism (Hobbes, 1962, part II, ch. 28). Because Schmitt sees the challenge to sovereignty as an existential and ontological threat, the outsider is not to be accorded any place outside the regime, as an effect of power, a remainder, which is how the law regards enemy combatants. To view the outsider this way is to downgrade the importance and the centrality of the enemy’s place in constituting the political. The outsider is not outside the political, “morally evil or aesthetically ugly.” The threat is moral, but not abstractly moral. The friend/enemy distinction is “specifically political” (Schmitt, 1996, 26). The enemy must be “the other, the stranger” (Schmitt, 1996, 27). The enemy is determined by the “mode of behavior” that clearly evaluates “the situation” and correctly distinguishes the friend from the enemy (Schmitt, 1996, 37). The enemy “is solely the public enemy” (Schmitt, 1996, 28). For this reason, the sovereign keeps its gaze on the “dire emergency” (Schmitt, 1996 105). The sovereign is free to create a state of exception in the presence of the enemy.

Schmitt empties modern political life of the vestiges of classic European rationality (Weber, 1958). The “glamorization of violence” (Scheuerman, 1997, 20) in Schmitt’s work leads to the abandonment of any ethic of responsibility on behalf of the state or state actors toward those previously deemed outlaws of “humanity” but now considered as enemies (Schmitt, 1996, 79). The violation of legal norms can now be discussed openly (Harris, 2005). Consequently, the resolution of the friend/enemy distinction is not a question of jurisdiction or of political competition. The question of friends and enemies cannot be resolved by discussion between parties or among those with shared convictions or those with conflicting interests in the governance of the state (Schmitt, 1988). Rather, the sovereign must make decisions; “the decision is the event through which the subject constitutes itself” (Papacharlabous, 2010, 57). The decision to act is best done in a moment of crisis for the state, when it confronts the enemy. “There exists no norm that is applicable to chaos” (Schmitt, 2005, 13).

Agamben asks, regarding Schmitt’s friend/enemy distinction: what is the structure of sovereignty that it “consists in nothing other than the suspension of the rule?” (Agamben, 1998, 17). For Agamben, the state of exception is not a state of chaos. The state of exception is the “situation that results” from the suspension of the rules (Agamben, 1998, 18). What defines chaos is not excess but its existence within a state. With the suspension of the law, the “juridical order’s validity” (Agamben, 1998, 18) is suspended, withdrawn, and abandoned; the outside and the inside collapse on each other. The sovereign has now created and defined “the very space in which the juridico-political order can have validity” (Agamben, 1998, 29). But the validity of the juridical order is, at the same time, ambiguous. What is outside and what is inside now exist in a “zone of indistinction” (Agamben, 1998, 19). Under these conditions, the state of exception moves to the forefront of politics, redefining norms along the way. And in this process of redefinition, the meaning of life for Agamben is clarified: the status of the enemy is one of bare life.

The state of exception “implicated bare life within it” (Agamben, 1998, 83). What is bare life? Agamben writes that in Roman law, *homo sacer* is the one who is both sacred and damned. *Homo sacer* can be killed but not sacrificed.

*The sovereign sphere is the sphere in which it is permitted to kill without committing homicide and without celebrating a sacrifice, and sacred life—that is, life that may be killed but not sacrificed—is the life that has been captured in its sphere.* (Agamben, 1998, 83; italics in original)



In a world bereft of nature, history, and a deity as a ground for ethics, life loses its meaning as a thing-in-itself. The sovereign is the “guarantor” of the situation of life (Schmitt, 2005, 13). But what does Schmitt mean by life? Agamben locates two meanings for life in modernity. “The Greeks had no single term to express what we mean by the word ‘life’” (Agamben, 1998, 1). They used two distinct terms for life: *zoe*, “which expressed the simple fact of living common to all living beings,” and *bios*, “which indicated the form or way of living proper to an individual or a group” (Agamben, 1998, 1).

For Agamben, the central image (and producer) of life during a time shrouded in the friend/enemy distinction is the concentration camp. The camp is a “no man’s land between coma and death” (Agamben, 1998, 161). The camp comes into existence as a political concept when the state of exception is normalized. The camp is not a temporary camp, a displacement camp for refugees on their way to someplace else, but a permanent feature of the modern world, modern politics, and of modern thought (Agamben, 1998, 174). It is a place to house the *zoes* of the world (Agamben notes that in Greek, *zoe* has no plural; 1998, 1). Because it houses the exceptional, it is a space of exception. When Heinrich Himmler created “a concentration camp for political prisoners,” Agamben writes, he placed it “outside the rules of penal and prison law” (Agamben, 1998, 169). With the construction of prison camps in Guantánamo as places outside the law, the exception once again becomes the norm.

Because the exception has taken over for the norm such that the two are “indistinguishable” (Agamben, 1998, 170), the camp is the realization of the normality of the exception. Guantánamo as a liminal space is the natural place for those held captive in the war on terror because those it holds “do not value life.” The inhabitants of the camp are those who have been denationalized, stripped of their “political status,” and “deprived of their rights and prerogatives” (Agamben, 1998, 171) to such an extent that any harm committed against them no longer appears as a crime (Bybee, 2002; Savage, 2010; Optional Protocol to the Convention on the Rights of the Child). The inhabitants of the camps are *zoe as such*. They are the remnants of the active life, made bare by their status as enemies of the sovereign. For Agamben, the creation of the friend/enemy distinction no longer relies on law (if it ever did). Rather, following Foucault, Agamben posits the creation of the *zoe* as an aspect of the onset of biopolitics. Biopolitics is the result of a certain “art of government” (Foucault, 2008, 2) that arose at a particular time in western history and thought as an effort to “rationalize the problems posed to governmental practice by phenomena characteristic of a set of living beings forming a population” (Foucault, 2008, 317). Biopolitics has no sovereign will driving its application; there is no Being behind it. Rather, it is an application of

rationalities and consequently, for Foucault, it has a contingent quality to it. For Agamben, however, it is a strategy for governance amid the presence of the enemy. Agamben actualizes the *homo sacer* because the *homo sacer* is “exemplary of biopolitics” (Ansah, 2010, 147).

### *The Suspension of the Norm*

Like the first Iraq war—which Jean Baudrillard famously argued did not “take place” (Baudrillard, 1995), by which he meant that the war was a media (and mediated) event—the current wars in Iraq and Afghanistan continue to be seen from a distance (Stolberg, 2004; Rhee, 2009). But these wars differ from the first Gulf war in that they are being fought between the army of a state and those who are seemingly stateless. More important, the second war in Iraq has revealed a problem—the management of prisoners—that is more than merely “organizational-technical” in nature (Schmitt, 2005, 65). To be sure, the prisoner problem is both old and new. It is old in the sense that all wars create prisoners and refugees and their concomitant administrative problems: where to put them, how long to hold them, and how to treat them, etc. (Arendt, 1994; Arendt, 1958, chap. 9).

What is new is that the Bush Administration intentionally placed prisoners captured in the war on terror in a “law-free zone, a place where the government could do whatever it wanted without having to worry about whether it was legal” (American Civil Liberties Union, 2008). The war on terror, then, has produced a different set of strategies for the containment of prisoners of war and enemy combatants than previous modern wars because it has removed prisoners of war and enemy combatants from the protections afforded by both the U.S. Constitution and by international treaties. It has reframed the conflict over prisoners as an existential struggle between friends and enemies. It has brought back the concept of executive decisionism and exposed the weaknesses of liberal thought on the rule of law (Schmitt, 1996, 35, 37), because the creation of a penal colony that exists in a gray zone of legality does more than highlight an administrative problem for the war on terror. The emergency created by the war on terror presents itself as the central meaning of the war because it turns a common administrative problem of war into the prime ethical problem that plagues modern thought: the management of bodies according to the valuation of their worth. It is in this sense that Guantánamo has reframed the identity and the status of the prisoners held there, legally and ontologically, by removing any stake they might once have had in a “qualified life” (Agamben, 1998, 1), that is, in a life beyond mere existence. Guantánamo has reduced its inmates to life as such, forcing these bodies to

exist at a point of convergence among biopolitical, bioethical, and biocultural realms.

For Agamben, the connection between life and sovereignty occurred not in the classical age, which Foucault understands as the sixteenth and seventeenth centuries, but in classical Greece and Rome. Agamben differs from Foucault in this respect, and the implications for their different understandings of sovereignty lie here. Because Agamben is not as reluctant as Foucault to approach a unifying theory, he writes that there is a “point at which the voluntary servitude of individuals comes into contact with absolute power” (Agamben, 1998, 6). Within a “zone of indistinction,” the norm and the exception collapse, and the emergence of biopower in history represents the true meaning of sovereignty because it connects the concern for life with the forces of power. Agamben then locates the origins of that concern in classical Greece. In this sense, Agamben’s ontology contains a critique of the concept of the political, but one that goes beyond Schmitt’s understanding of the limitations and possibilities of the political as such. The *zoe*, for Agamben, functions as a paradigm which he uses to explicate the meaning of sovereignty and subjectivity in the age of the camp. Biopolitics “fulfills the potential of its origin in turning against that origin” (Norris, 2000, 39). The emergence of the *zoe*, of the man who can be killed at will—the *homo sacer*—in the Nazi camps, as well as in all other places of confinement, is Agamben’s basis for his argument that “bare life has the peculiar privilege of being that whose exclusion founds the city of men” (Agamben, 1998, 7).

What, then, is Guantánamo’s place in the structure of Agamben’s thought? Guantánamo is not only a biopolitical space but also a place of anomie because, though the law has been suspended (the detainees have no legal classification outside of being enemy combatants, which means, despite some success in the Supreme Court, they can remain in confinement for the duration of the war on terror), it still exists as a reality (the rule of law is upheld in the absence of a law governing enemy combatants). What Guantánamo has created, in this view, is a peculiar hybrid: an institution of restriction and an entity that decides who lives, who is known, and who disappears (Meek, 2003). Guantánamo appears as the rupture in modern thought between the norm and the exception. Its appearance highlights the collapsed distinction between nature and law, and therefore represents the normality of the “state of exception as a permanent structure of juridico-political de-localization and dis-location” (Agamben, 1998, 38). As the state of nature always exists within the state of civil society, the state of exception exists within the norm.

To be sure, outside the camps, the prisoners exist as (not yet) legal entities pressing claims in American courts against their captors. But this situation only reduces them to life “purely insofar as it is political” (Rose, 1996, 26). In Agamben’s words, life and law (*bios* and *nomos*) become indiscernible in the state of exception, creating “*a juridical rule that decides the fact that decides on its application*” (Agamben, 1998, 171; italics in original). Law no longer has the force of law, insofar as law is no longer regarded as a set of institutions that act on the command of the sovereign. This is not lawlessness or anarchy. The law is being governed by a *biological* impetus that expresses the fragility of life and uncertainty of the modern condition. Speaking not of internment camps as such but of places that become places of internment, Agamben writes, “the normal order is de facto suspended,” and the determination of atrocities turns not on law “but on the civility and ethical sense of the police who temporarily act as sovereign” (Agamben, 1998, 174).

Whereas Foucault viewed the Nazi state and its camps as a “paroxysmal space in which sovereign power and biopolitics coincided” (Gregory, 2006, 406), Agamben views the camp itself, whether as an extermination camp or a detention center, as the “sign of the system’s inability to function without being transformed into a lethal machine” (Agamben, 1998, 175). Agamben reinterprets Foucauldian biopolitical sovereignty by collapsing any distinction Foucault made (or implied) between sovereignty and biopower, ancient and modern power. Agamben seeks to correct or complete the Foucauldian analysis of biopower and sovereignty by placing the camp within the concept of man’s being-in-the-world, and not by demarcating it as an extension of modern thought (Agamben, 1998, 9). “The politicization of bare life as such,” Agamben writes, “constitutes the decisive event of modernity and signals a radical transformation of the political-philosophical categories of classical thought” (Agamben, 1998, 4). This “transformation,” Andrew Norris writes, “is made possible by the very metaphysics of those very ancient categories” (Norris, 2000, 39). In other words, Agamben, unlike Foucault, sees the concern with the ordering of life to be without disjunction.

For Foucault, the rise of biopower is connected to the rise of the natural and social sciences in the nineteenth century. He saw an intensification of power over life during this period. But Agamben is in search of the “point of intersection” “at which techniques of individualization and totalizing procedures converge” (Agamben, 1998, 6). And once the paradigm is isolated in the camp and through the Muselmann, he can then connect the idea of the power over life and death from Aristotle to Auschwitz and through to Guantánamo. What Agamben sees in Guantánamo is biology, law, and humanity subjected to a relentless logic of exclusion, classification, and fear

that determine the outcome of events. The detainees are thus understood to “reside in the liminal, in-between spaces that survive at the borders and frontiers of the social order” (Nishime, 2005, 34). The Guantánamo detainees are the twenty-first century’s Muselmann.

### III. The Muselmann

Fleur Johns has argued that by anchoring Guantánamo securely within the American jurisdictional orbit, the Supreme Court has not imbibed “the language of Schmittian exceptionalism. Rather, it is suggestive of efforts to construct a series of normatively airtight spaces in which the prospect of agonizing over an impossible decision may be delimited, and where possible, avoided” (Johns, 2005, 631). In other words, the Supreme Court has responded to the Bush Administration’s argument for the inherent powers of the president during war time by forcing the executive branch into a legal battle, thereby denying any claims to a suspension of the norm (Johns, 2005, 614). The policies of the Bush Administration may have been done without regard for international law, but the law has not been overtaken.

To be sure, following the events of September 11, 2001, the Constitution was not suspended (though habeas corpus effectively was, for non-Americans, and some Americans, such as Jose Padilla, were held without charges and transferred between prisons without notice), courts were open, and those outside the orbit of American law were brought within it (though some remain at Guantánamo, in a legal limbo, while others have been sent home, mentally impaired from what they endured) (Cratty, 2008). While this view has a lot to recommend, there is another way to look at Guantánamo, using the insights of Agamben.

Whereas for Aristotle, the *polis* determined the line between *zoe* and *bios*, for Agamben, the Muselmann is the reconfigured sign of the times, the limit-figure of late modern thought. In other words, the dominant figure in modernity can no longer be the politically active man or the man of contemplation, but the one who is subject to disciplinary institutions and discourses that affect his being, whose life is solely determined by the act of the sovereign. With the Muselmann, action loses “its somatic prerequisites” (Sofsky, 1997, 201). In Auschwitz, action is not willed action, it is only reaction, and man is reduced to mere existence. The sacredness of life has no metaphysical content and no desired end. Rather, “Life is sacred only insofar as it is taken into the sovereign exception” (Agamben, 1998, 85).

Agamben sees a connection between the “structure of sovereignty and the structure of *sacratio*” (Agamben, 1998, 83) that “illuminates” the significance of *homo sacer* in modern thought. The affirmation of life is not because life is sacred of itself; rather, life gains meaning by being premised on the negation of the other. It has long been thought that every act of sovereignty requires the “concealment of impurities” (Connolly, 1995, 138). It is no longer possible to do so. With the presence of the Muselmann in the camp, Agamben turns upside down Aristotle’s elevation of the *zoon politikon* as a creature who leads his life according to reason.

Rather than accepting the idea that a clear line demarcates the state of nature from civil society (or reason from unreason), Agamben demonstrates how the existence of *zoe* presupposes the existence of a *bios*. “Bare life is a necessary part of the good life, in that the good life is what bare life is not and what bare life becomes” (Norris, 2000, 41). Once the traditional understanding of reason as that-which-is-not-unreason has been overturned, Agamben can then destroy the image of the best regime as an ahistorical trope, because the city no longer plays the defining role in structuring subjectivity. Along with this destruction, law too will lose its privileged place. The logic of sovereignty can no longer reside in the fictive creation of the best city whose likeness is reflected in the best man and remains so for all time, but in the negation of life. Death is “not an exceptional event in the camp” (Sofsky, 1997, 204).

The immiseration of the Muselmänner in Auschwitz (and perforce in any carceral sphere) represents a concomitant “destruction of the social sphere” (Sofsky, 1997, 200). Agamben provides us with a picture of the destruction of the city and of man’s degraded place in the city by the intensification of biopower on emerging subjects. His archaeological method reveals that the debased condition of the Muselmann has replaced as the limit-figure of thought Freud’s neurotic, Plato’s philosopher-king, and Aristotle’s *zoon politikon*. This is, Agamben writes, “a catastrophe” (Agamben, 2005, 56), which is why, in truth, “no one wants to see the Muselmann” (Agamben, 1999, 50). But it is a catastrophe that must be seen and understood, even if our understanding is circumscribed by our status as non-prisoners; we, being neither Muselmänner nor survivors, can only believe or disbelieve the witness (Lyotard, 1988, 42-43). The witness, therefore, occupies a privileged place in bringing into the light the meaning of the Muselmann. The camp survivor, however, is not the best witness, for he or she has not endured the full effect of biopower. It is the Muselmann who is the “complete witness” (Agamben, 1999, 165) because he has seen “the Gorgon” and has been rendered “mute” by the experience (Levi, 1989, 83-84). For Primo Levi, as for Agamben, it is the Muselmann who is the “complete witness,” for he is the “rule, we [survivors] are the exception” (Levi,

1989, 84). The Muselmann has been rendered visible by the forces that constitute sovereignty and subjectivity.

Their life is short, but their number is endless; they, the Muselmänner, the drowned, form the backbone of the camp, an anonymous mass, continually renewed and always identical, of non-men who march and labour in silence, the divine spark dead within them, already too empty to really suffer. One hesitates to call them living: one hesitates to call their death death, in the face of which they have no fear, as they are too tired to understand. (Levi, 1996, 90)

Not man as a social animal, nor man as a neurotic, nor law in its majesty, but the power over life and death pervades the idea of sovereignty. For Agamben, the Muselmann occupies the critical juncture in the development of the modern state. The forces operating on and against persons are no longer as they were in the eighteenth century, as Foucault has shown, “addressed to bodies,” but are now directed to “man-as-species” (Foucault, 2003, 242). For Agamben, this is more than a development of a new technology of surveillance. The existence of the Muselmann “inaugurates a new juridico-political paradigm in which the norm becomes indistinguishable from the exception” (Agamben, 1998, 170). The inhabitants of the camps are “denationalized” (Agamben, 1998, 171) denizens, whose lives are determined by the exigency of the situation. Not law, but the “extreme situation” (Agamben, 1999, 55) of the war against enemies determines the norm.

To be sure, the inmates of Guantánamo are not in the same situation as the inmates of the Third Reich (Agamben, 2005, 4). For the most part, the former have been captured on the battlefield and are not slated for death in gas chambers or forced marches. Many have been released. As the Supreme Court has made clear, detainees have rights against their captors. But the understanding of the meaning of Guantánamo cannot be restricted to the empirical or the literal. Nor can it be limited to what the law has allowed and restricted. Following Agamben, Guantánamo must be understood in its “coherent biopolitical meaning” (Agamben, 1998, 131). What this means is that the elaboration of power over those deemed unworthy of life must be understood as an unfolding of power that reveals itself with the “anatomopolitics of the human body” and the “*regulatory controls*” of a “*biopolitics of the population*” (Foucault, 1990b, 139; italics in original).

The long view regarding the evolution of Guantánamo as a species of biopower that has roots in the classical distinction between *zoe*, or bare life, and *bios*, a life within a political community, seems to us more appropriate than an

alternative view that sees Guantánamo as a site of power and resistance that tugs at, but does not question, the concept of the political. “The ‘body’ is always already caught in a deployment of power,” Agamben argues (1998, 187), and it is necessary to see how that deployment of power has turned into the concept of sovereignty where the *Muselmann*, and not the political animal, is the focal point. Indeed, to understand Agamben’s point, it is important to set Guantánamo within the context of the capillary nature of power, that is, by investigating the practice of power relations on and within the “social body” (Foucault, 1990a, 118). To concentrate on the detainees’ success in chipping away at the Bush Administration’s restrictive approach to legal remedies for detainees is to continue to operate within the “juridico-political discourse” (Foucault, 1990b, 88) that established Guantánamo in the first place. Power must be examined as something that is “always already there”; we must recognize that one is “never ‘outside’” power (Foucault, 1980, 141), a view not normally associated with legal liberalism.

It is, at the same time, important to recognize Guantánamo as one link in a biopolitical chain that has brought to light the effects of biopower on sovereignty. A more detailed exposition of this thought would have to include Agamben’s discussion, at the end of *Homo Sacer*, of the politicization of death in the field of health care ethics (Agamben, 1998, 160-165). But here let it suffice to say that the detainees’ debased moral standing, for Agamben, cannot be the result of a failed effort to establish the proper forum necessary for trying those held outside the territory of the United States. Rather, the *Muselmänner* are “the site of an experiment in which morality and humanity themselves are called into question” (Agamben, 1999, 63). As they move in an “absolute indistinction of fact and law” (Agamben, 1998, 185), Agamben understands their presence neither as an effect of war nor as a representation of a rupture in law, but in ontological terms, because the state of war or of exception has become the norm by which subjectivity is formed and reformed. In this very real sense, the camp has replaced the city as the paradigmatic structure of modern times that informs subjectivity.

Guantánamo is the outcome of a rationality that accelerated in the late nineteenth century, but whose origin can be traced back to antiquity. Both the attempt to restore the *polis* for romantic or antiquarian reasons, or the need to define the modern by contrasting it with the *polis*, represent examples of critical thought, but not the thought that is necessary to rethink ontological questions that inform the concept of the political, now that this concept is understood in biopolitical terms. For Agamben, we “no longer know anything of the classical distinction between *zoe* and *bios*, between private life and political existence, between man as a simple living being at home in the house and man’s political



existence in the city” (Agamben, 1998, 187). Because the break with the ancients is premised on their own terms over the meaning of life, Agamben’s archaeology of knowledge and genealogy of ethics reveal that there “is no return from the camps to classical politics” (Agamben, 1998, 187). The sovereignty of law is over. For Agamben, the core meaning of biopower is that it has forced an abandonment of the “juridical model of sovereignty” (Foucault, 2003, 265) and the political structure of the best regime. For this reason, Agamben argues that the bestowal of rights on the *zoe* is not, in itself, a negation of his argument that Guantánamo represents an anomic space. The *zoe* is not without rights. Once politicized, the *zoe* passes through the “boundaries separating life from death in order to identify a new living dead man, a new sacred man” (Agamben, 1998, 131).

#### IV. Bioconvergence

The popular image of Guantánamo detainees is of shackled, hooded men in orange jump suits, surrounded by barbed wire. The “space of the camp,” Agamben writes, washes up “against a central non-place, where the *Muselmann* lives” (Agamben, 1999, 51-52; italics in original). The camp is the place for bioconvergence, an intersection of image, biopower, and the law. For many Americans, these images have defined what it means to be Muslim (Sengupta and Masood, 2005). The images of Guantánamo have created, on a global scale, the meaning of the camp as a place of biopolitical convergence.

The *homo sacer* is the site upon which “sovereign power is founded” (Agamben, 1998, 142). The sovereign authority that governs Guantánamo has the power over life and death, the power to decide who shall become a *zoe* and who a *bios*. It is not a lawless entity, but a law-giving entity, even as it has suspended the law’s power. The force of law remains in effect “as the power that informs life from the beginning in all its extension, constitution, and intensity” (Esposito, 2008, 81). But other forces can be discerned that have produced counter-narratives. By creating an archive of the lost voices from the war on terror, the press and international organizations have revealed that Guantánamo is more than a prison; it is a “norm-producing” entity (Johns, 2005, 615). The prison camps in Cuba have helped frame the understanding of the war on terror as premised on biological-political rationalities. The ground of that reality is the value of life itself, measured by the body of the prisoner.

According to the Red Cross:

The detainee would be photographed, both clothed and naked prior to and again after transfer. A body cavity check (rectal

examination) would be carried out and some detainees alleged that a suppository (the type and the effect of such suppositories was unknown by the detainees), was also administered at that moment.

The detainee would be made to wear a diaper and dressed in a tracksuit. Earphones would be placed over his ears, through which music would sometimes be played. He would be blindfolded with at least a cloth tied around the head and black goggles. In addition, some detainees alleged that cotton wool was also taped over their eyes prior to the blindfold and goggles being applied....

The detainee would be shackled by [the] hands and feet and transported to the airport by road and loaded onto a plane. He would usually be transported in a reclined sitting position with his hands shackled in front. The journey times ... ranged from one hour to over twenty-four to thirty hours. The detainee was not allowed to go to the toilet and if necessary was obliged to urinate and defecate into the diaper. (Danner, 2009)

These detailed, biopolitical regulations over life and death at Abu Ghraib surpass any legal regulation of disciplinarity, of the regulation of bodies for the sake of greater productivity. These are willed regulations, staged for effect, and designed to diminish resistance. The prison camps of the war on terror do not represent the appearance of the extension of the legal bureaucratic matrix to the war on terror or to the application of those who are without a country. The camps mean that the realm of biopolitics, with its emphasis on the convergence of “medicine and politics” (Agamben, 1998, 143), seek to achieve the assimilation of biological existence with political existence (Foucault, 1990b, 142). They are sites for the re-formation of political, cultural, and ethical understandings of what it is to be human in the twenty-first century. But at their core, they look back to the twentieth century, not to the regulations of the self that Foucault detailed in his final works. They are, then, the final integration of the tactics, techniques, and strategies used during the Third Reich.

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