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Accepting or Transgressing the Failure: Derrida and Agamben on Kafka's *Before the Law*

Mostafa Taherkhani

Abstract, This paper explores Derrida and Agamben's reading of Kafka's *Before the Law*. As a highly symbolic text, Kafka's short story has elicited numerous interpretations, among which Derrida and Agamben proffer, to some extent, opposing readings that exemplify their broader philosophical projects. By elucidating the parallels between Kafka's parable and the modern legal system, this paper analyses the different angles of Derrida and Agamben's views in their interpretations. Upon examining various aspects of their analyses, which encompass their philosophical reflections on difference, origin, command, messiah, event, threshold, and outside, the paper concentrates on the concluding moment of the story. This particular juncture proves to be the most challenging, manifesting a profoundly intriguing question in critical philosophy, and the disparate interpretations of the two philosophers underscore this intellectual challenge. The paper argues that Derrida's reading which accepts the failure of the village man without seeking any victory going beyond the legal system is a position that critical legal thinking needs to consider, while Agamben's, here exceptionally, transgressive tendency in pursuit of an extra-legal space is something that should not be of concern for critical legal thinking. The paper argues that Derridean acceptance of failure constitutes a radical force for the deconstructive standpoint, immunizing it against reconciliation and identification.

Keywords, Kafka, Derrida, Agamben, *Before the Law*, deconstruction, transgression

INTRODUCTION

The parable *Before the Law* was published both as a part of Kafka's *Trial* and as an independent story. The depth and nuance of this very short parable are so profound that it "has some right to be considered the focal point of the novel".¹

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This brilliant piece “has an undeniable distilled force that seems to pull the book as a whole into its vortex”² and “[i]t is well known that Kafka wanted the entire novel destroyed with the exception of this story”³ Walter Benjamin believed Kafka “took all conceivable precautions against the interpretation of his writings”⁴; but still many philosophers have commented on this piece and examined it from multiple perspectives, from Benjamin and Gershom Scholem to Theodor Adorno, Gilles Deleuze, Giorgio Agamben, and Jacques Derrida.

Jacques Derrida and Giorgio Agamben never directly debated but they had a lot of mutual respect despite their differences. Derrida considered Agamben his friend.⁵ Agamben also dedicated *The Idea of Thought* and *The Thing Itself* to Derrida.⁶ Later, Agamben confronted Derrida’s philosophy more frankly⁷ to the extent that some believe that many aspects of Agamben’s thought have been formulated in opposition to Derrida’s deconstruction.⁸ In the last few years, with the publication of Derrida’s lectures, especially *The Beast and The Sovereign*, in which Derrida criticized Agamben’s intellectual project in the third and twelfth sessions of the first volume⁹, this debate was raised again. Generally, these two thinkers can be considered the main pillars of the “Left Heideggerian” school of thought, and for this reason, the importance of each one for the other is to be expected.

During the decades of Giorgio Agamben’s philosophizing, he considered Jacques Derrida as his primary interlocutor and there is an endless dialogue with Derrida in many of his texts and intellectual concepts. According to Kevin Attell, Agamben considers Derrida’s deconstruction to be the most important philosophical project in the postwar period, and therefore, he constantly measured the quality of his work and thought by facing this philosophy. This is why the key concepts of Agamben’s philosophy can be identified in his engagements with deconstruction.¹⁰ There is almost no concept or position left in the complex system of Derrida’s thinking for which Agamben has not coined a critical equivalent or a concept in its criticism and rejection.

The theoretical clash here should not be reduced to the disagreement between two philosophers. It can be considered the confrontation of the farthest poles of contemporary critical thoughts. More importantly, it could be seen as the battle of two philosophical generations, two genres, two *geniuses*¹¹, two spirits: May 68 against the contemporary left, the *difference* against returning to the politics of truth, the disjointed time against the presence of *Kairos*, the pure an-archè in the unholy life against the retrieved archè, the death of the messiah against messianic politics, and failure against emancipation.

Kafka’s *Before the Law* was a text in which these two thinkers found the reflection of their genre and their position. The text is *genius* enough that both of them could conjure the specter they liked. It was no surprise then that referring to this short parable over and over was part of the philosophical/theological journeys that Derrida and Agamben took.

Reading the two interpretations provides us with two legal/political standpoints or, more accurately, two political standpoints on the question of law. Both Derrida and Agamben had numerous engagements with law and it was at the center of their philosophizing. Derrida saw law schools as the home of deconstruction¹² and for Agamben “a key focus is the relation between law and life”¹³ and he was the one who brought law to the heart of discussions about the modern state and *oikonomia* and the ontology of command.

Despite the high level of importance of the juridical in the thoughts of both, their standpoints are vastly different. While Derrida calls for a juridical ethics that listens to the call of justice through law¹⁴, Agamben’s image of justice necessarily treats law as dysfunctional¹⁵ and, in common with Benjamin, calls for a pure and non-judicial space¹⁶; an image that, for Derrida, signifies nothing but a metaphysical dream that reproduces the sovereign’s gesture. In the same way, while Agamben’s endorsement of Benjaminian divine violence looks like a redemptive move against legal violence¹⁷, for Derrida, imagining violence without law is not possible as it is born with the latter.¹⁸ More than that, Derrida sees a risk of fascism¹⁹ in Benjamin’s effort to find an absolute pure non-legal violence. Overall, while Agamben is looking for somewhere beyond and outside the law, for Derrida there is no such thing as outside or beyond.

All these points of disagreement are present in a lively fashion in their interpretations of *Before the Law*. The way these two thinkers interpret every detail of this highly symbolic story is, if nothing else, a prominent example of patient reading. The reading that indispensably betrays and emancipates the author.²⁰

In this paper, I will try patiently to read these two philosophers’ readings. I seek to see the nuances in their exegesis and to trace their more general philosophical gesture in their reading of the story. In doing so, I will first say a few words about Kafka’s parable and try to make a comparison between his image of the village man and law with the modern legal system’s relation to humanity. After that, Derrida’s and Agamben’s interpretations, concerning their general positions, will be discussed. To do so, the questions of difference, origin, command, messiah, event, threshold, and outside will be examined in the context of the parable. In the end, I will try to make a rather direct confrontation between their interpretations of the final stage of the story which supports a Derridean reading of both the law-humanity relation and the parable.

My argument is Agamben’s effort in picturing the final scene as the victory of the village man is not radical and, against what he says, Derridean acceptance of the failure, which is visible in Derrida’s interpretation of Kafka and also in his general ethics of deconstruction, is the most radical gesture towards the law. Derrida’s strategy, in my view, is not negotiating with the law, but acceptance of the law’s victory and man’s failure. This acceptance, however, is the only way of immunization against a metaphysical/institutional desire. On the other hand,

Agamben's position in trying to reach a space, an *outside*, without the law's contamination, is what makes a critical standpoint not radical/hopeless enough. I will argue that what a position towards law needs is not drawing a pure absolute space freed from law, but picturing the stage as horrifying as it is, without making any effort to propose lines of escape. In other words, hopelessness is necessary for a radical gesture and Agamben's position is not hopeless enough.²¹ This is why eventually I will show that Agamben's position on the story is against his criticisms of *transgressive tendencies*, and his standpoint here is trapped in that tendency.

On the other hand, what deconstruction does here is accept hopelessness in its most performative way because instead of infinite negotiation, it envisages what happens on the border, *Before the Law*, between the law and the man, without any effort to draw any emancipatory project, any transgressive alternative, or any positivity or identification. Therefore, I call deconstruction a politics of radical failure, an ethical choice to accept failure without trying to dissolve it and reach somewhere outside and, I think, this is what makes deconstruction "capable of enduring the intolerant, the undecidable and the terrifying".²² Finally, I will argue that this Derridean approach to an extra-legal space is what critical legal scholars need to consider in order to get rid of the infinite discussion about staying inside the law or going beyond it.

1. WE ALL STAND BEFORE THE LAW

Firstly, I will try to demonstrate that Kafka's story is highly capable of being the symbol of the relationship humanity has with the law in the modern legal system. The importance of Kafka's parable lies in creating a world that has the ability to adapt to the world in which we live.²³ Walter Benjamin believes that Kafka's story emphasizes our contradictory position *Before the Law*; an image that depicts our non-relationship with the law.²⁴

We are always *Before the Law*. Always under the rule of law. Always guilty. From the law's point of view, "humans are guilty in the same sense that fish are aquatic"²⁵ and the phrase "guilty people" does not "qualify some humans in comparison to others; it functions rather like a species name".²⁶

In trying to access the law, we are always confronted with the guardians of the law. "The most holy temple of justice is a text and like any such it is vulnerable and hence the guards, the secrets, the secretion."²⁷ The parable's guardian is the embodiment of lawyers, judges, and law enforcement officers in general; those who protect the law and eliminate the possibility of direct confrontation with it²⁸; those who believe that to be bound to the law is "incomparably better than living freely in the world".²⁹

The law claims to be general as much as singular. It fluctuates between its desire to be general and its claim to be singular. Law's statements are general while their applications are singular. This fluctuation is reflected in Kafka's text in "the singularity of the Law as it is described at the end by the doorkeeper, and the generality of the Law that the man from the country assumes".³⁰

It is already mentioned that Benjamin remarks on the resistance of Kafka's text to interpretation. For Derrida, this is another similarity between the parable and our real life. The law, like Kafka's text, does not speak of itself, does not reveal itself, and does not allow us to reveal it.³¹ The fact that the law "is given to us to be read does not mean that we shall have proof of or experience of it (law)".³² Therefore, our position is not that far nor that different from that of the village man.

In Kafka's parable, the law is silent, and nothing is said about it. As the guardian and the village man, we also do not know who and where the law is. We all stand *Before the Law*. As members of society, we are predestined not to know what the links of our relationship with the law are. In other words: "The aporetic account of the law constitutes at the same time an aporetic account of community".³³

We are facing a story without a story. Kafka's parable, a story that refuses to be read, is an example of the law itself. Then again, we can use Benjamin's insights and say that in Kafka's story the content is merged into the form, and everything that the content seeks to express is manifested in the form of the parable: the text, like the law, does not lend itself to interpretation. It avoids being revealed because "the essence of a secret code is that it should remain a mystery".³⁴ Its secret is elusive. It repels us and does not allow us to enter. Kafka's text "neither describes nor tells anything but itself".³⁵ The law "is silent, and of it nothing is said to us. Nothing, only its name, its common name and nothing else".³⁶

Law, when it recognizes us as a person, does not give us the right to choose whether to accept it. We are standing before it, but unable to see behind it. Unable to question its history, source, and authority. Law, hence, is quite similar to pure morality. Just as morality, which needs to be without history to have authority, law, in order to perform its authoritative function, does not allow entry into its palace, lest its story is revealed.³⁷ The only person who has permission to narrate the law is the law itself. It has no temporo-spatial beginning and ending. We are faced with a "placelessness".³⁸

"Lured by a law that is unreadable, delayed by a judgment that fails to appear—that is growth e entry to the law appears".³⁹ Kafka's *Before the Law* is the normal and yet terrifying situation of a man who cannot reach the law. The law has transcended him. The law is supreme, and its presence is always elusive. It has a divinity that makes it beyond the reach of humanity. A transcendental⁴⁰

and theological (non)entity, and a man who is stuck in front of it but not even able to look at its guardian. The village man is trapped in this structure, like all of us.

The law is driving us away. It says: Don't come to me. I order you not to come to me, for now. I am the law, and you obey my will without having access to me.⁴¹ The law presents itself to us, but as a forbidden place. It does not make itself completely undiscoverable but wants us to be aware of nothing more than its existence. We know it exists, but we don't have permission to access it.

Law is prohibition, not in the sense that it forbids, but in the sense that the law itself is forbidden, a forbidden place. Therefore, it is not that the law completely hides under the veil. On the contrary, it introduces itself and is present, but in a way that should not be seen. Thus, we are faced with simultaneous presence/absence. We know the law exists, but "we do not know what it is, who it is, where it is. Is it a thing, a person, a discourse, a voice, a document, or simply a nothing that incessantly defers access to itself, thus forbidding itself in order thereby to become something or someone?"⁴²

The law does not prevent us from reaching it but always postpones it. One should not enter the law, one should not be aware of what it is; although not perpetually, just for now.⁴³ This rule, this ban, is not eternal, it is just for now! Like an exceptional state of emergency which is supposed to be provisional. It keeps us hopeful. It does not let us turn away from it. It wants our eyes to stare at it, until the end. Until we don't have much eyesight left.

The law says: Stay with me but do not come inside, just for now. Be hopeful that you will finally come in. Accept, like the village man, that you may come inside soon. Here we have a promise: the law's promise. A law that promises and wants us to believe its promise. Therefore, we *expect* something from the law. Believing the law's promise means being in a moment of expectation or awaiting.

However, this awaiting and expectation is perpetual. Our relationship with the law, like Kafka's story, is always postponed and never finished. Our inability to know the village man's fate is also true about ours, wandering in the Law's corridors, waiting for the final verdict, final destination, final fate, final story, just like Josef K in *The Trial*, whose "whole story revolves around the way in which he enters more deeply into an unlimited postponement".⁴⁴ An interminable and necessarily indefinite story.⁴⁵

We are left *Before the Law*. In the middle of an aporia, an impasse. The burden of original sin is always on our shoulders and the law's commandment makes it emerge.⁴⁶ We are all sinners and at the same time, incapable of facing the boundaries of the law. It is neither Kafka nor Derrida who created this aporetic situation; the village man, the guardian, the priest, lawyers, judges, law professors, and students of law departments are all involved in making this aporia.⁴⁷

What choice do we have? How can we find salvation? Let's get back to the story: how should we read the old man's reaction? Do we have to wait like him? Should we turn our back on the law and look for emancipation *outside*, or still *hope* for the law's permission? Would the old man's approach end in a victory or in a disgraceful failure? The following is an effort to address these questions with the help of Derrida and Agamben.

2. LAW'S DIFFERENTIAL (NON)ORIGIN

Derrida's point of departure in his reading of the story is the paradoxical position the village man faces: although the gate of the law is open and exists only for him, he cannot pass through it. Derrida believes that this aporia is the main and fundamental paradigm of the antagonistic relationship that exists between the singular person and the official universal law.⁴⁸

The man's entry into the law never happens, and he never finds a foothold and a place on which the law is based because there is no such place. It is only the suspense that keeps the village man always *Before the Law*.⁴⁹ This kind of suspense can also be seen in Kafka's other writings. For example, in *The Castle*, K. is told: "You have been engaged, you say, as a land surveyor, but unfortunately we don't need a land surveyor. There wouldn't be any work for you here at all... no one is keeping you here, but that doesn't amount to being thrown out."⁵⁰

The suspension or "epokhe" that law commands "keeps the promise as a promise," and "the aporia as an aporia"⁵¹, and does not let it be passed until the last moment, the moment of death. For Derrida, the impenetrability and contradictory nature of the prohibitive structure shown in the story precisely indicates the impassability of this suspension. He writes:

Their potency is differance, an interminable differance, since it lasts for days and "years" indeed, up to the end of (the) man. Differance till death, and for death, without end because ended. As the doorkeeper represents it, the discourse of the law does not say "no" but "nor yet," indefinitely. ... What is delayed ... and deferred forever till death is entry into the law itself, which is nothing other than that which dictates the delay.⁵²

This place, this *Before the Law*, for Derrida, is the place in which the originary event of law takes place: "holding the man purely in its power yet leaving him free".⁵³ In fact, although the starting point of Derrida's interpretation is the spatial paradox of *Before the Law*, since he focuses on the origin of law and

expresses its contradictory nature, he also raises the question of time and blurs the conceptual boundary between the temporal and spatial situation.⁵⁴

In other words, In Derrida's opinion, "*Before*" *the Law* has not only a spatial dimension, but also a temporal one. More precisely, when facing the aporetic essence of law, Derrida makes its temporal dimension spatial and its spatial dimension temporal. This double movement leads him to claim that the "before" in *Before the Law* is not merely about the situation of the village man and the guardian standing in front of the law, but also indicates their participation in an event that occurred prior to the law.⁵⁵ The image of the gate, which is open but impassable, and commands without asking, is the true nature of the infinite suspension at the very (non)foundation of the structure of law.

Derrida focuses on this (non)foundation of the structure of the law, which is the constituent event of Kafka's story, and considers it a non-event. The gate of the law was created only for the village man, and it is necessary for him to enter that gate, but this entry has been made impossible by a guardian, and finally, the village man dies without ever having access to the law. The originary event of law was a non-event, i.e. it never happened. The condition of the possibility of law, which makes it law, is this concealment.⁵⁶ Therefore, the inability and failure to discover or reveal the origin of the law lies at the heart of Derrida's interpretation of *Before the Law*.⁵⁷ This failure, however, is not in contrast to a victory, but a delusion. In other words, the confession to this failure in a journey toward origin is necessary because at the point of origin there is no initial event, but just a withdrawal.⁵⁸ A withdrawal that is a kind of escape and oblivion⁵⁹ instead of presence and remembering. A reference not to an event, but to oblivion.

At first glance, the constituent event of law must have happened because the law itself exists. Before us, however, there is a law that forces, without commanding anything. The law whose greatest prohibition is that of not facing itself. A law that commands without any indicia, accuses without clarifying what it has accused us of, and condemns without the convict realizing the reason for her condemnation. Kafka, retroactively, shows that this situation is because we have not been faced with a law-making event in the very beginning, but with a non-event, and for this reason, understanding the origin of the law will lead nowhere but contradiction and confusion. All the efforts to present the law, the genealogy of the law, and the narration of its history are happening in the gap between one failure and another.⁶⁰

3. LAW AS AN EMPTY COMMAND

Agamben considers Kafka's story as a text that "represented the structure of the sovereign ban in an exemplary abbreviation".⁶¹ For Agamben, this parable shows "how the law may be rendered inoperational or how the man from the country

manages to close the door of law forever".⁶² For him: "The parable holds a way out of law and specifically the juridical order".⁶³ A transition from what the law is, to showing what we can do with the law. He says:

Nothing - and certainly not the refusal of the doorkeeper - prevents the man from the country from passing through the door of the Law if not the fact that this door is already open and that the Law prescribes nothing.⁶⁴

First, for a better understanding of a law that has force but does not have a specific content and prescribes nothing, it is necessary to look at the discussion between Gershom Scholem and Walter Benjamin. In their discussions about Kafka, Scholem points out that in Kafka's world, there is law, but the key to decipher it is lost and, therefore, it has reached a zero point where there is no positive content. However, there is still a hollow formal existence that has validity but no content and is "in force without significance".⁶⁵

Scholem references Josef K. in the novel *The Trial* or K. in the novel *The Castle*: Although the protagonists know that there is a law that applies to them, they also know this law can change at any moment and every second, and therefore they do not really know its real content. They are left to suffer the misery of arbitrary rule by those who act in the name of the law.⁶⁶

In response to Scholem, Benjamin makes an intriguing point: in such a situation where the law is known, but the time and content of its implementation and fulfillment remain unclear, the law actually applies to anything, anywhere and anytime. Such a law becomes inseparable from life itself. It becomes life itself.⁶⁷

Agamben sees Benjamin's position not in conflict with Scholem, but as its completion. According to Agamben, understanding the law as something that forces without having any content and needing no understanding render it as something that is inseparable from life itself. These two situations, at the end, are two definitions of a Kafkaesque situation.⁶⁸ Here, for Agamben, the executive dimension of law succeeds by making life indistinguishable from law.⁶⁹ In other words, this law can be applied to any form of life (social, political, moral, aesthetic).⁷⁰ This law, for Agamben, is actually the force of law. A law that has force but does not have any content; a state of exception that is not the exception anymore but the rule.⁷¹

4. EVENT OR NON-EVENT?

In all these discussions so far, Agamben and Derrida are on the same page. The difference, however, lies in reading the ending of the story. Agamben offers a

messianic and subversive understanding. The open but impassable gate of the law, for him, is an accurate picture of Law's contentless existence with all its forces.

Derrida had said that the importance of Kafka's story is in expressing "an event which arrives at not arriving, which manages not to happen".⁷² A decade later, Agamben claimed that Derrida's interpretation was saying the exact opposite of the story's true meaning:

The final sense of the legend is thus not, as Derrida writes, that of an "event that succeeds in not happening" (or that happens in not happening: "an event that happens not to happen", un évènement qui arrive a ne pas arriver), but rather just the opposite: the story tells how something has really happened in seeming not to happen.⁷³

Agamben thinks something happens *Before the Law*; the actor, however, is not the law or the guardian, but it is the village man. In *Homo sacer* we read:

If it is true the door's very openness constituted, as we saw, the invisible power and specific "force" of the Law, then we can imagine that all the behavior of the man from the country is nothing other than a complicated and patient strategy to have the door closed in order to interrupt the Law's being in force. And in the end, the man succeeds in his endeavor, since he succeeds in having the door of the Law closed forever.⁷⁴

For him, the village man's patience for days and years is neither a failure nor an endless procrastination. It is precisely a successful strategy that, instead of leading to the recognition and acceptance of the empty but powerful space of the forbidden structure of rule and law, destroys the sovereign's prohibition. From this point of view, this action of the village man is a kind of "worklessness" in a Blanchotian sense.⁷⁵ Instead of going back to his ordinary life, he decides to be indecisive. Decides to wait. He stays there and does not return to his home, even when he is forbidden to enter.

The village man, therefore, never wanted to have access to the law. His plan, instead, was to delay its executive power. The gate is always open, but not to entry or exit. The apparent failure of the village man is his victory because it frees life from law. With this action (or non-action), he breaks the empty force of law. Even when the village man sneaks a peek inside, he returns back in horror as he realizes that inside the law is nothing but emptiness. If the law does not have a meaning, then it should not have force and authority.

Derrida, on the other hand, sees the moment of closing the gate of the law as a suspension whose postponement game is the (non)source and (non)origin of law. The village man's entry into the law is not prevented directly but postponed indefinitely through the mysterious guardian. A guardian whose presence is merely the first link in the endless chain of these procrastinating thresholds:

Guardian after guardian. This differential topology adjourns, guardian after guardian, within the polarity of high and low, far and near, now and later. The same topology without its own place, the same atology, the same madness defers the law as the nothing that forbids itself and the neuter that annuls oppositions. The atology annuls that which takes place, the event itself. This nullification gives birth to the law.⁷⁶

This is why Derrida describes the title of the parable as a “topological indication”⁷⁷ and why in his own article, he also examines the topology of law.⁷⁸ For Derrida, the gate of law is forever open and impassable, and the important point is that he considers us condemned to this situation. According to him, any attempt to go beyond this threshold, and reach inside the law, is a metaphysical illusion, because it seeks to reach a “self” and the “presence” of that self. The inaccessibility of law is the last aporia that Derrida condemns us to be in facing the law.⁷⁹

For Agamben, however, what Derrida cannot see is that in the law that remains in force, but does not command anything, is not merely the representation of a postponement, but the basic structure of sovereignty that must be overthrown. According to Agamben, Derrida reads the story in a way that sheds light on the logic of law and sovereignty but does not (or cannot go) beyond that. Agamben writes: “law applies to him in no longer applying, and holds him in its ban in abandoning him outside itself”.⁸⁰

In conclusion, Agamben sees the desire to enter the gate of the law and its simultaneous hesitation until the end as the main limitation of deconstruction. In this situation, it is impossible to imagine the overthrow of the ruling structural prohibition and this is why Derrida does not see anything but death in the scene of the closing of the gate.⁸¹ Agamben remarks that the story does not say that he is actually dead, but only that he is “close to the end”.⁸²

5. THRESHOLD AND MESSIAH

Although Agamben agrees with Derrida that the story illuminates the deferred topology of sovereignty, he quickly breaks away from deconstructive interpretation and suggests that this structure is not the final limit of thought. For him,

it is exactly this ambiguous threshold that Kafka's story seeks to destroy.⁸³ If, in the gesture of Kafka's story, Derrida sees standing on the threshold and remaining there, Agamben seeks to cross this threshold.

Agamben believes that deconstruction "push[es] the aporias of sovereignty to the limit but still do not completely free themselves from its ban."⁸⁴ For him, deconstruction's perpetual and tactical negotiation with the law is insufficient. To strengthen our position in the fight against the *exception* that always stands in the place of the rule, our task is to create a completely supra-legal space that can create a *real state of emergency*⁸⁵ for the ruling power. We can see that here Agamben, like Benjamin, wants to reach a space completely external to the law; a pure *outside*, which Derrida considers fundamentally impossible.⁸⁶

Agamben finds this desire to reach the extra-legal space in the final scene of the story: the man is not staying in an endless suspension but he has a patient strategy that ultimately leads to the closing of the gate of law and overthrowing the ruling structure. Therefore, the "end" that the story refers to is not the end of the village man's life, but the moment of overthrowing the law. This is how the aporia of the story, for Agamben, eventually becomes euphoria and "the two terms distinguished and kept united by the relation of ban (bare life and the form of law) abolish each other and enter into a new dimension."⁸⁷

Therefore, Agamben considers a Messianic and revolutionary mission for the village man, whose mission is completed by closing the door of law.⁸⁸ It is from this dimension that he compares the action of the village man with the revolutionary act that Walter Benjamin insists on in his *Theses on the Philosophy of History*: an action with the ability "to blast open the continuum of history"⁸⁹ and to create "a Messianic cessation of happening".⁹⁰ That is why, for Agamben, Benjamin has the same Messianic intuition that Kafka had.⁹¹

For overcoming this situation, Derridean Messianism is not enough for Agamben and that is why he calls deconstruction a "thwarted messianism, a suspension of the messianic".⁹² For Agamben, real messianism requires the non-functioning of the law and liberation from biopolitics and nihilism and, in a nutshell, messianic time ends chronological time. While for Derrida, the messianic force always invades our present, puts pressure on it, disintegrates and breaks it apart, but it never disrupts or brings a pure rupture in the chronological time in a meta-interpretive way. To put it simply, it never *presents*.⁹³

6. DECONSTRUCTION: ACCEPTANCE OF FAILURE

After discussing the different positions Derridean deconstruction and Agamben's eschatology take on the law-human relation with the help of the parable, now I will try to conclude by arguing that Derrida's interpretation has more radical and less metaphysical implications. For doing so, I will first talk about the idea

of outside and the possibility of imagining a pure non-legal space. Then I will try to apply this point to the subject.

6.1. OUTSIDE THE LEGAL SPACE

Agamben speaks of true Messianism as an idea that is able, here, to close the door of law. The strategy of the village man is messianic and victorious because it is able to close the door of law and makes life liberated from being the law's dominance. Here, I would like to analyze the structure of this argument from a Derridean point of view.

Agamben's argument is based on the distinction between a life dominated by law, and a life liberated from it. A life merged with the law and a life beyond this juridical structure. For Derrida, however, the idea of outside or beyond is questionable. One cannot speak of having a notion, a concept, or a space that is defined as being separated, freed, beyond, or outside something else. What one thinks of as an outside, or as a detached and cleaned space, is nothing but a metaphysical delusion. The idea of something outside or detached from what we already live in, "bears... a relationship that is ... anything but simple exteriority. The meaning of the outside was always present within the inside".⁹⁴

Derrida insists that "there is no sure opposition between outside and inside"⁹⁵ and on the same logic, "even the concepts of excess or of transgression can become suspect".⁹⁶ The relationship between inside/outside for Derrida is far more complex than a simple opposition. In this relation, he finds "an effect of difference ... , a translation on the outside of what was constituted inside".⁹⁷ The outside, then, is not detached, separated, cleaned, or purified from the inside; but it is constituted on it.

The text "does not have an inside that can be clearly distinguished from an outside".⁹⁸ In fact, "[t]he importance of the discovery of performative speech acts by Austin for Derrida lies in the fact that a performative speech act does not have its 'reference' outside of itself. It in other words does not refer to something that exists beyond language and prior to language".⁹⁹ This is why the idea of outside or beyond, for Derrida, gets its meaning *within* what it tries to get separated from. In other words: "There is no 'outside' of philosophy. There is rather an outside within philosophy".¹⁰⁰ Outside, if such a thing exists, is completely indistinguishable from inside.

This approach to the very distinction between inside and outside is visible in different texts of Derrida's, including the more *political* ones. Based on this point of view, the Idea of justice, for example, is not outside or beyond the current situation or what is called the status quo. It "would not simply be put in the service of a social force or power, for example an economic, political, ideological power that would exist outside or before".¹⁰¹

In the same line, “the maintenance of hope in justice outside law”¹⁰² will also be questioned. Imagining justice as a non-legal idea or phenomenon is as metaphysical as the idea of outside itself. The idea of justice cannot be non-legal, as it cannot be nonpolitical or non-theological. Conceptualizing a notion pure from its others is certainly a metaphysical move that can bring back any system that one tries to fight or resist again. Any resistance against an institution trying to become completely cleaned, detached, and uncontaminated from it takes the risk of bringing back a dame? Institution because the very idea of an institution or nomos is based on making such a distinction between inside/outside.¹⁰³

Hence, the possibility of imagining something beyond the law, or imagination of the moment that the door of law is closed, and the time of the law’s sovereignty is finished, the imagination of a strategy through which the law will be deactivated, or speaking of a day that comes in which humanity is liberated from the law¹⁰⁴ all are a metaphysical gesture. While speaking of liberation from the law or legal system one should be aware that “the presumed interiority of meaning is already worked upon by its own exteriority. It is always already carried outside itself. It already differs (from it- self) before any act of expression”.¹⁰⁵ A non-legal space, therefore, carries its own exteriority, the legal space. There is always something inside that is “as troubling as the outside”.¹⁰⁶

Derrida was suspicious of the emancipatory ideas that seek a liberatory detachment from the current legal system, whatever it is. “The two examples of historic emancipatory battles that Derrida cites, the Declaration of the Rights of Man and (not the legality but) the abolition of slavery, are both, as he puts it, ‘juridico-political battles’”.¹⁰⁷ He did not call for an action outside law, not simply because he believed in legal action, or because he considers the law so universally dominant that it is impossible to be freed from, but because he did not think such pure and uncontaminated space exists.

6.2. ACCEPTANCE AS A RADICAL GESTURE

Now, by applying this standpoint to the story, I try to finish this text by arguing that Agamben’s interpretation, despite trying to be drastically radical, is still trapped in the metaphysical gesture. While Derrida’s radicalism, for me, comes out of trying not to be radical, out of the gesture that accepts the impossibility of fundamental emancipation and complete liberation. This very acceptance saves him from reproducing a metaphysical/institutional standpoint and, finally, being deeply radical while not trying to theorize a theory of radicalism.

From Agamben’s point of view, Derrida’s gordian knots, his aporias and his “undecidable” are the fearful situation that we must overcome and leave behind. For him, accepting the inevitability of suspension at the threshold leads to a kind of political escapism: we, like the village man, are under the authority of

the absolute power of law, which does not demand anything special from us and can potentially find us guilty in any position. For this reason, Agamben departs from Derrida's point of view regarding the best possible strategy to resist the ruling law: "it is precisely concerning the sense of this being in force (and of the state of exception that it inaugurates) that our position distinguishes itself from that of deconstruction."¹⁰⁸ Rather than freeing humanity from the "blackmail of law as a text" deconstruction accepts the state of exception as our inevitable future.¹⁰⁹ The disadvantage of deconstruction, accordingly, is that it risks reducing thought and politics to an endless negotiation with a guard in front of an impassable gate. What Agamben wants is a space detached or disjointed from law; a life beyond law; an "unsubstantial leap into a distinct episteme".¹¹⁰

Derrida, on the other hand, is willing to highlight the textual structure that Kafka establishes between the village man and the law. What causes the village man's life to be wasted is his inability to understand that appearing *Before the Law* is equal to standing before a text. "The law of law" is to be textual, to be always somewhere between inside and outside, to be unable to remove the textuality, that is to reach transgression or liberation. Therefore, any attempt to approach the thing-in-itself and represent it, any attempt "to enter into a relation with it, indeed, to enter it and become intrinsic to it"¹¹¹ is doomed to failure. For this reason, the man's journey from the village to the law never ends. It is destined to continue forever. Sometimes it is possible that through the door, our eyes catch the light of the law, but it is always beyond our reach. It is silent. What causes the village man's predicament, in other words, is his *hope*.

Therefore, it is precisely in this desire to overcome, to pass beyond, and to reach outside the confusion that Derrida sees a trace of the sovereign's character. Because deconstruction "governs nothing, reigns over nothing, and exercises [no] authority" and is "not announced by any capital letter" but it also "instigates the subversion of every kingdom. Which makes it obviously threatening and infallibly dreaded by everything within us that desires a kingdom, the past or future presence of a kingdom."¹¹² It is from this point of view that Agamben's desire for the complete realization of liberation in the ending scene of the story, and the triumph of messianic time over chronological time, is a great example of metaphysical illusion.

Hence, instead of trying to reconcile the positions of these two¹¹³, the depth of this difference should be shown and emphasized as much as possible. If Agamben seeks to pass through the gate of law, Derrida accepts our eternal, suspended, and deferred fate before the gate. If Agamben wants to lead us to happiness, Derrida has no hope of it. If Agamben's gesture is a gesture of liberation, Derrida's gesture is a gesture of disappointment. If Agamben is a philosopher of passing, Derrida is a philosopher of limits.¹¹⁴

In a nutshell, if Agamben seeks an outside, Derrida does not believe in the possibility of such a thing. If Agamben seeks victory, Derrida embraces failure,

with all its consequences, and accepts the disappointment caused by this failure in the most radical way possible. By standing against the possibility of any outside and any purely emancipated temporal/spatial notion, deconstruction makes us invulnerable against the “empty hopes”¹¹⁵, either for entering through the door of law or for closing the door and liberation.

Accepting the suspension and not trying to imagine redemption can be the most courageous position, full of despair but free from illusion and any picture of outside. Considering Derrida’s point about centrality of such a distinction between inside/outside for an institution or *nomos*¹¹⁶, we can conclude that Agamben’s position in favor of closing the door of law, of *nomos*, is re-introducing a legal/institutional stepping stone through the back door. An act of reconciliation and identification in the sense that Adorno speaks about.¹¹⁷

From this perspective, I believe the Derridean position is more committed to *negativity* and does not look for a *positive negation*.¹¹⁸ Such positivity turns a critical position to an institutional project and neutralizes its radicalism. Derridean acceptance avoids welcoming another *nomos* by questioning the very possibility of detachment from law. On this basis we may say if there is a chance against the law, it is through conceding its victory and our failure. In the same line with Adorno’s view, Derrida supports a confession from the beginning: “[l]ike the youngest boy in the fairy tale, one must make oneself completely unobtrusive, small, a defenceless victim”.¹¹⁹ This is the only redemptive path that Kafka diagnoses. In his text, “[t]he subject seeks to break the spell of reification by reifying itself.”¹²⁰

The hope for passing the moment of this horrifying suspension and making a strategy of the kind that Agamben seeks to find in Kafka’s text is exactly the hope that makes Kafka’s heroes guilty. The village man, The Trial’s Josef K or The Castle’s K “become guilty not through their guilt—they have none—but because they try to get justice on their side”.¹²¹ They hope to find justice and that is the reason for their destiny. “They cannot overcome the inalterability of scripture. There is no message of salvation”.¹²² Whether they look for this justice inside or outside the law does not make any difference. They are guilty because they have hope. They are doomed to failure because they want victory. Deconstruction, by conceding this failure, by being committed to an absolute negativity, helps us to immunize ourselves against this metaphysical hope and desire for victory.

CONCLUSION: TRANSGRESSION AND CRITICAL LEGAL THINKING

In this paper, the points of disagreement between Derrida and Agamben in reading Kafka’s *Before the Law* have been addressed. The importance of Kafka’s parable is in its horrifying concomitance with our relation to law and Derrida and

Agamben, by their highly detailed and brilliant readings, demystify this text for us. Their exegesis on law's origin, law as an empty command, law as a non-event, and the messianic or failed figure of the village man are all about analyzing the Law of law. However, what makes their standpoints profoundly divided is where we stand as the people *Before the Law* and how we will end up there. While Agamben's position is towards going beyond and transgressing the law, Derrida is deeply against any idea that wants to go beyond and somewhere outside and that is why Derrida's image of the parable's figure is fundamentally trapped in a failure. Accepting this failure and giving up trying to go beyond it, it has been argued, is what keeps Derrida's argumentative position critical, while Agamben's transgressive tendency in reading this story has the potential to be the stepping stone to another institution, as any similar idea that seeks for the detachment from inside and getting a purely uncontaminated outside.

As the last part of this paper, what I want to address is the importance of this discussion for critical legal thinking. How this debate could be helpful for critical legal thinking and what part of the critical legal discussion is involved with the same theoretical challenge? I will also point out that what has been discussed here as Agamben's reading of Kafka's story, his transgressive tendency, has been attacked strongly by Agamben himself. Therefore, not only should Agamben not be reduced to this discussion, but his own texts are very seminal in criticizing critical legal thinking's tendency towards transgression and going beyond.

The critical legal scholars, as Peter Goodrich puts it, "manifest a paradoxical or unwitting commitment to legality: the contradictory yet complementary stances of hate and love lead eventually in this analysis to a transcendence of legality, a beyond of law, a spirit world of eros or interiority, of proximity or alterity".¹²³ This commitment to go beyond, which is exactly another form of commitment to legality, has made the object of critical legal analysis "a paradoxical image or even denial of legality".¹²⁴

This debate deals with the question of emancipation and has divided the critical legal scholars into two groups: the believers in law's use for emancipation, and the non-believers and supporters of detachment from law towards any form of redemption.¹²⁵ While the first group supports staying inside the law, the second wants to go beyond the law,

What we see is a mixing of the question of emancipation with the question of transgression or going beyond, which is close to the position that we saw in Agamben's reading of Kafka, and also is found in the whole of Agamben's project by some of the scholars who believe "[f]ar from dismissing any form of redemption, Agamben's works are constantly permeated by the search for a way out."¹²⁶ This tendency to search for a way out is also quite visible in critical legal scholars, in a way that "the radicalism of critique could be measured precisely by its distance from the substance of law".¹²⁷

However, the arguments against this position, this transgression of law, are also visible in Agamben's own texts and his interpreters. For Zartaloudis, for example, Agamben "does not aim to destruct the law or posit a mere new law or even to provide a new principle of lawlessness, but which instead returns law, each time, to the domain of pure potentiality, to its common use(s)".¹²⁸ This is why, for Zartaloudis, "the genuine critic of the law is not to apply it or not apply it, but to study it".¹²⁹ This is quite in line with Agamben's notes on the law in *State of Exception*, where he advocates playing and studying with the law, instead of destroying it.¹³⁰ More explicitly, Zartaloudis remarks that "Agamben's work has advanced not towards a destruction of the law ... , but towards a new understanding of life (form-of-life) and a new understanding of law".¹³¹

Generally, the criticism of transgression and going beyond is quite imminent in Agamben's texts. He denounces transgression because "it always leads to a reconstitution of the sacred".¹³² For him, "transgression always plays the game of capitalism, which manipulates the symbolic like none other and always goes further in the creation of new floating signifiers."¹³³ He is expressive in denouncing the possibility of transgressing "a rule of chess", as for him transgression "simply ceases playing".¹³⁴ This statement becomes more important if we remember that for Agamben "playing" is a key towards liberation.¹³⁵ Thus, we can see that the tendency to close the door of law and redemption *from* law, is a position that is being criticized by Agamben himself too.

Therefore, both belonging and transgression, staying inside or trying to go beyond law "must be seen as part of the great metaphysical enterprise. They cannot be easily distinguished as both idealists and materialists have attempted to do in their different ways."¹³⁶ Critical legal thinking should be released from this obsession of going beyond law or staying inside law, as "[t]here is no inside or outside ... , they bleed into each other, the barrier leaks and seeps a porous flow of images, specters".¹³⁷

Thus, following Derrida's reading of Kafka, transgressing the failure produced by the legal system should not be the concern of critical legal thinking. Instead, legal theorists, as failures perpetually tied to the law, better to accept this failure and release their critical act from the obsession about the decision they want to make about staying inside or going beyond law because, as Derrida said, "what is evaded in the question propagates its effects over the entire history ... as the effect of evasion".¹³⁸

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8. See Virgil W. Brower, "Jacques Derrida in Agamben's Philosophy", In *Agamben's Philosophical Lineage*, ed. Adam Kotsko & Carl Salzani, (Edinburgh, UK, 2017), 252-261.
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11. I use genius here in the sense that Derrida did in *Specters of Marx*. Playing with the two meanings of the word, Derrida implies that a genius work has lots of genius (ghosts) that engineers itself (s'ingenier) over and over again. "a thing of the spirit which precisely seems to engineer itself [s'ingenier]. Whether evil or not, a genius operates".
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36. Derrida, "Before the Law", 208.
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39. Vismann, *op.cit.*, 14.
40. Deleuze and Guattari see this unrecognizability not because of law's transcendence, but its interiority. See: Deleuze, Gilles and Guattari Felix, *Kafka: Toward a Minor Literature*, (University of Minnesota Press, Minneapolis, 2003), 45.
41. Derrida, "Before the Law", 203.
42. Derrida, "Before the Law", 208.
43. Derrida, "Before the Law", 202.
44. Deleuze and Guattari, *Kafka: Toward a Minor Literature*, 52.
45. For Deleuze and Guattari this "unlimited postponement" is the regulating quality of the whole novel and that is why they disagree with Max Brod's arrangement of chapters based on which K's execution is the ending. See: *Ibid*, 44.
46. The New Testament, Sixth book, Epistle to Tomans, 7: "Once I was alive apart from the law; but when the commandment came, sin sprang to life and I died."
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83. Ibid, See also "The Messiah and the Sovereign", 169-171.
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85. Walter Benjamin, "Theses on the Philosophy of History", in *Illuminations: Essays and Reflections*, (Schocken Books, 1969), 257, Thesis 8:
"The tradition of the oppressed teaches us that the 'state of emergency' in which we live is not the exception but the rule... Then we shall clearly realize that it is our task to bring about a real state of emergency".
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121. Ibid.
122. Vismann, *Files*, 24.
123. Peter Goodrich, "The Critic's Love of the Law: Intimate Observations on an Insular Jurisdiction", *Law and Critique*, 10, (1999): 343-360, 344.
124. *Ibid*, 348.
125. For an example of this debate in international legal literature, compare China Mieville with B.S. Chimini. See: Mieville, China. *Between Equal Rights: A Marxist Theory of International Law*, (Haymarket Books, 2006). And Chimni, B.S. *International Law and World Order: A Critique of Contemporary Approaches*, (Cambridge University Press, 2017).
126. Gian Giacomo Fusco, *Form of Life: Agamben and the Destitution of Rules*, (Edinburgh University Press, 2022), 5.
127. Goodrich, "The Critic's Love of the Law: Intimate Observations on an Insular Jurisdiction", 349.
128. Zartaloudis, *Giorgio Agamben: Power, law and the uses of criticism*, 288.
129. *Ibid*.
130. Agamben, *State of Exception*, 64.
131. Zartaloudis, *Giorgio Agamben: Power, law and the uses of criticism*, 306.
132. Catherine Malabou, *Stop Thief!: Anarchism and Philosophy*, trans. Carolyn Shread, (Polity, 2024), 151.
133. *Ibid*, 151.
134. Giorgio Agamben, *The Use of Bodies*, trans. Adam Kotsko, (Stanford University Press, 2016), 242.
135. Agamben, 2005, *op.cit*, 64.
136. Costas Douzinas and Adam Gearey, *Critical Jurisprudence*, (Hart Publishing, 2005), 62.
137. Goodrich, "Heretical Archives: Heterotopic Institutions and Fictive Records", 59.
138. Derrida, "Ousia and Grammè: Note on a Note from *Being and Time*", 47.

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