The Lore of the Laws of War:

Textual Constructions of Archetypal Identities in the War on Terrorism

By

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A Dissertation Presented in Partial Fulfillment of the Requirements for the Degree Doctor of Philosophy

Approved April 2014 by the Graduate Supervisory Committee:

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May 2014

ABSTRACT

Since 9/11 a wide range of violent practices including indefinite detention, torture, and targeted killing have been employed by the United States and the "international community" against "international terrorism." Modern laws of war are portrayed as the bright line that distinguishes the "international community" from "unlawful combatants." The threat posed by unlawful combatants has been portrayed as so exceptionally grave that the international community is justified in the transgression of those very laws of war that constitute the distinction between "us" and "them." In consequence the efficacy of modern laws of war to provide humanitarian protections has been cast into doubt and many characterize humanitarian laws of war as obsolete.

Existing work on the politics of exception and the exclusion of Guantánamo Bay detainees from US federal law does not frame the problem of the exception in terms of international law. Though many consider the prerequisites for politics of exception absent in the international system, I argue that a dispersed notion of sovereignty and constructivist approaches to law resolve obstacles to considering the exception at the level of the state system. I explore system level exceptional politics through a critical reading of modern laws of war. Rejecting essentialist historical narratives, I first conduct a genealogical study of laws of war from ancient Greece through the Middle Ages. I then conduct a critical reading of three texts from the War on Terrorism; Barack Obama's 2009 Nobel Peace Prize acceptance speech, John Brennan's "The Ethics and Efficacy of the President's Counterterrorism Strategy," and Medea Benjamin's interruption of John Brennan.

I argue that modern narratives of war law venerate codification and textually privilege a "mystical" figure of modern law. This figure empowers a universalized "international community" as law's privileged agent. Violence employed by this archetypal community, even when outside the law, is rendered ethically pure and historically necessary. In consequence modern humanitarian law as a bright line always permits excluded archetypal identities and vast powers of violence are mobilized by the "international community" against discrete individual human bodies who are identified with this excluded archetype, or who simply find themselves in the way.

For Evelyn who has lived for years in the shadow of this project, who has sacrificed and
supported, and who has always maintained a ridiculous, unfounded, unfaltering,
preposterous faith that we can do it.

For Ollie and Hanna who always let me know when it's time to take a break and play.

And for Chris Weller, my high school English teacher, who patiently inspired a wild love of literature and writing, who made a compassionate computational error, and who passed away before I could say thank you.

ACKNOWLEDGEMENTS

I would like to thank Evelyn, Ollie, and Hanna for all their sacrifice and support. I am extremely grateful for my Mom, Dad, Cindy, Lynn, and Luisa who have traveled the country to provide years of tireless, cheerful, patient grand-parenting so that I could work on this project. I would like to thank my brilliant comrades Brian and Stefan who have been ever inspiring. Brian for making graduate school exciting, dangerous even, and making it seem important. For bringing it all to life. Stefan for being an oracle, the devil's advocate, and a friendly face on a foreign shore. Both of them for the best thousand conversations I have ever had. I would also like to thank those who patiently listened and encouraged me to keep trying to explain what exactly this dissertation is about: Evelyn, Julian, Stefan, Brian, Lynn, Luisa, Jean, and DB Cooper.

I would like to thank Roxanne Doty, Richard Ashley, and George Thomas for serving on my committee and exposing me to ways of studying international relations that are exciting, vital, creative, and worth the while. I would also like to thank Sheldon Simon, Okey Iheduru, Jack Crittenden, Avital Simhony, Rodolfo Espino, and Terence Ball for much appreciated mentorship and encouragement.

Thanks to the University of Washington and the Gallagher Law Library for their hospitality.

And finally, I would like to thank the United States Air Force for ten years of invaluable patronage and a liberating indifference to what use I make of it.

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1 INTO THE DARKNESS

All I want to say is that there was "before" 9/11 and "after" 9/11. After 9/11 the gloves come off.

Cofer Black, Director of CIA's Counterterrorist Center, 1999-2002

The Gloves Come Off

On December 1st, 2002 a man named Dilawar left his home in Yakubi, Afghanistan to drive a taxi in Khost where he picked up three men. On the way back to Yakubi they were stopped by militia members guarding US Camp Salerno. Camp Salerno had been attacked by rockets that morning and the four men were detained and handed over to the Americans as suspects in the attack. Dilawar and the three others spent the night handcuffed in positions to prevent them from sleeping and were transferred the next day to a detention center at Bagram airfield. There Dilawar was repeatedly beaten, receiving what one interrogator estimated to be over one hundred blows in a single twenty four hour period. "It became a kind of running joke, and people kept showing up to give this detainee a common peroneal strike just to hear him scream out 'Allah'" (Golden 2005b). He was subjected to extended periods with a black hood over his head and interrogation methods designed to be deeply culturally offensive. Each of the nine nights he spent in captivity Dilawar was hung in a wire cage by shackles so that any relaxing of his legs would induce substantial pain and prevent sleep. By the eighth day Dilawar was requesting medical treatment from his interrogators and expressing fear that he would soon die. Sometime after an extended beating on the ninth day, while suspended in his cell, he did.

The three men riding in Dilawar's taxi spent over a year at Guantánamo before being released without charge. The militia leader who handed Dilawar over to the Americans was later arrested due to suspicion that his group had been orchestrating attacks on the base and then detaining innocent Afghans. By the time of his death "most of the interrogators believed Mr. Dilawar was an innocent man who simply drove his taxi past the American base at the wrong time" (Golden 2005b). His body was quietly returned to his family in Yakubi and his death was publicly attributed to natural causes. Dilawar's death certificate, written in English, was left with his Pashto speaking family where it remained unread until a New York Times reporter saw it and discovered that the official cause of death was marked "homicide." The US Army autopsy concluded that blunt force injuries to his legs had caused Dilawar's heart to fail. One of the coroners compared his injuries to someone who had been "run over by a bus" and indicated that his legs would have required amputation had he survived.

Dilawar was not the only detained to have such an experience. A man named Habibullah also died hanging by his arms in his cell from the same type of leg injuries administered by the same group of interrogators at the same detention center less than a week before Dilawar. Habibullah and Dilawar were joined by the asphyxiation death of Manadel al-Jamadi at different site in a manner consistent with "crucifixion." In late 2003 former Iraqi general Abed Hamed Mowhoush turned himself into US custody

¹ For more on this case see the documentary *Taxi to the Dark Side* (Gibney 2009) as well as (Cowell 2005; Golden 2005a; "Patterns of Abuse" 2005, "US Soldier Jailed in Afghan Abuse" 2005)

² "Asphyxia is what he died from as in a crucifixion." Dr. Michael Baden as cited in (Shamsi 2006, 11)

seeking the release of his son and two weeks later he was suffocated during interrogation after suffering numerous broken ribs from beatings with a variety of instruments.³ The body of Nagem Sadoon Hatab, who died by strangulation in US custody, was left on the tarmac near Bagdad long enough to destroy his internal organs and the bones from his neck were "lost" preventing any possible prosecution of his killers.⁴ These deaths fit a wider pattern of death by interrogation at the hands of United States personnel. By 2006 nearly one hundred detainees had died in United States custody, thirty four of which have been ruled homicide or suspected homicide by the United States military.⁵ Eleven more were identified as the result of interrogation practices and eight were simply "tortured to death" (Shamsi 2006, 1).⁶

Those who have died make up only a very small percentage of those who have been detained and subjected to brutal interrogation methods by the United States and its partners since 2001. The widespread abuse of detainees has been explained away as the misbehavior of a "small number" of "creeps" or sadistic "bad apples" (McCoy 2006, 5–6) and a handful of low ranking soldiers have been convicted for their involvement while every high ranking individual investigated has been exonerated. The question of why low level soldiers would willingly participate in atrocities is not a new one and the

³ (McCoy 2006, 144–145; Shamsi 2006, 2; White 2005)

⁴ (Shamsi 2006, 2)

⁵ See (Jehl and Schmitt 2005; McCoy 2006, 124–125)

⁶ For a more complete account of death and abuse of detainees see *Command's Responsibility: Detainee Deaths in U.S. Custody in Iraq and Afghanistan* (Shamsi 2006, 1)

the most interesting question regarding US abuse of detainees is how simultaneously occurring acts of torture and brutality across the "archipelago" of US detention sites could be explained away as "disgraceful conduct by a few American troops who dishonored our country and dishonored our values" (McCoy 2006, 146) when US civilian and military leaders at the highest levels had been repeatedly, publicly saying that they intended to do just that.

With the issuing of the Military Order of November 13th, 2001 *Detention,*Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism the George

W. Bush administration began laying out a vision for the treatment of what would come to be known as "unlawful combatants" in the War on Terrorism. These "unlawful combatants" were characterized by the extraordinary threat they posed to the United

States. The conditions of "extraordinary emergency" produced by the September 11th attacks, the ongoing international terrorist threat, and the need to "identify terrorists and those who support them, to disrupt their activities, and to eliminate their ability to conduct or support such attacks" rendered "not practicable" the normal "principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts" (Bush 2001). Two months later Donald Rumsfeld (2002) informed the Joint Chiefs of Staff that al Qaeda and Taliban personnel would not be entitled to

⁷ I will use the Bush administration's term "unlawful combatant" to refer to the archetypal enemy function in War on Terrorism related discourse. I will also occasionally use "international terrorist" or "terrorist" interchangeably with "unlawful combatant."

prisoner of war treatment, and by that February President Bush (2002) informed his administration that "none of the provisions of Geneva apply to our conflict with a1 Qaeda in Afghanistan or elsewhere throughout the world."

The inapplicability of the Geneva Conventions provided cover for the Bush administration to transfer prisoners around the world and deliver them into the custody of other nations, a practice known as "extraordinary rendition," which is expressly prohibited by Article 49 of the Fourth Geneva Convention. Using this "rendition" program the United States could transfer prisoners into the custody of other states willing and able to use methods of interrogation that are questionable or illegal under United States law. A Moroccan intelligence official described the advantages of "rendition" in the following terms: "I am allowed to use all means in my possession ... We break them yes. And when they are weakened, they realize that they are wrong" (McCoy 2006, 117). The Moroccan comparative advantage in the provision of torture would soon begin to slip, however. On August 1st, 2002 Jay Bybee (2002b) sent a memorandum to Attorney General Alberto Gonzales outlining "standards for conduct for interrogation." This "torture memo" effectively relaxed the definition of "torture" to include only that which was explicitly *intended* to cause "death, organ failure, or serious impairment of bodily

⁸ See memorandum from Jay Bybee to John Ashcroft of June 8, 2002 (Bybee 2002a); at this time prisoners started being transferred to Egypt, Jordan, Morocco, Saudi Arabia, Syria, and Pakistan as part of the "rendition" program.

functions." Even if an interrogator knew that methods *might* cause these effects the definition of prohibited "torture" would not be met.⁹

The novel approach that the Bush administration was taking toward suspected terrorists was not limited to secretive legal maneuvering. Beginning with his address on the evening of September 11, 2001 President Bush characterized the adversaries in the War on Terrorism as "evil" "murderers" who would have to be fought in new and unconventional ways. On September 16th, 2001 Vice President Dick Cheney was interviewed on *Meet the Press* and stated that the United States would have to operate on "the dark side, if you will," "in the shadows in the intelligence world," and that "what needs to be done here will have to be done quietly, without any discussion, using sources and methods that are available to our intelligence agencies." The United States would need to cooperate with some "unsavory characters" and engage in a "mean, nasty, dangerous dirty business out there, and we have to operate in that arena. I'm convinced we can do it; we can do it successfully. But we need to make certain that we have not tied the hands, if you will, of our intelligence communities in terms of accomplishing their mission."

The most explicit statement of what the Bush administration had in mind was voiced in testimony before Congress on September 26, 2002. Cofer Black, then head of the CIA's Counterterrorist Center, directly addressed the American people "looked them

⁹ "Even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent" (Bybee 2002b, 4).

in the eye," and bluntly stated that "operational flexibility" in the War on Terrorism is "a highly classified area. All I want to say is that there was 'before' 9/11 and 'after' 9/11.

After 9/11 the gloves come off" (Black 2002). In the context of his speech, laced as it is with images of "murdered innocents," there can be little doubt what Black means by "the gloves come off." Though the details were secret, and probably not fit for public discussion, America and the world could rest assured that something was being done to these "terrorists" to make them pay for their attack on the United States.

This phrase proved to be attractive shorthand for the Bush administration's approach to "unlawful combatants" and made numerous reappearances as it percolated from the head of the CIA's Counterterrorist Center through successive layers of military and civilian intelligence to the individuals who carried out the torture of detainees. ¹¹ It appears in an August, 2003 email circulating among military intelligence interrogation specialists in Iraq: "The gloves are coming off gentlemen regarding these detainees, [redacted] has made it clear that we want these individuals broken. Casualties are mounting and we need to start gathering info to help protect our fellow soldiers from any further attacks" (Redacted 2003). This phrase ultimately appears in the testimony of

¹⁰ Cofer Black earlier assured President Bush that al-Qaeda and the Taliban would soon have "flies walking across their eyeballs" (Bergen 2011, 53)

Fraught as it is with political and normative implications the term "torture" is particularly problematic for this discussion. It most commonly used to implicitly invoke a boundary between acceptable and unacceptable practices with various practices being labeled "torture" to explicitly assert their impermissibility. Though no use of the term can escape this dynamic I will use the word "torture" as shorthand to refer to any level of anguish, physical or mental induced by captors in order to bring about compliance on the part of the victims of torture. The definition of "torture" in this way is so broad that it partially mitigates the implication of condemnation as it would include the disciplining of children, normal methods of law enforcement, and so on. This problem of using the word torture is one instance of the larger problem of limitation/legitimation of violence that is central to this project.

Chief Warrant Officer Lewis Welshofer who was tried, convicted, and sentenced to sixty days of limited travel for his role in the beating and suffocation death of General Mowhoush: "Basically [an August 30, 2003 memo] said that as far as they [senior commanders] knew there were no ROE [Rules of Engagement] for interrogations. They were still struggling with the definition for a detainee. It also said that commanders were tired of us taking casualties and they [told interrogators they] wanted the gloves to come off Other than a memo saying that they were to be considered unprivileged combatants we received no guidance from them [on the status of detainees]" (Shamsi 2006, 1).

The Archetype of the Enemy

September 11th has been described as a "bolt of lightning that emerged from an already stormy atmosphere and illuminated the contours of a political landscape that was previously shrouded in darkness" (Williams 2008, 10). For the Bush and Obama administrations, as well as members of the international community, the post-9/11 "political landscape" has remained shrouded in darkness even after 2001. The brief glimpse provided on 9/11 did not finally illuminate reality but rather illustrated the persistence of darkness and uncertainty. It also illustrated to many "Westerners" that out there in that darkness the landscape has changed. It is for this reason that the efforts of the Bush and Obama administrations and "the international community" have been fundamentally oriented towards illuminating as much of this landscape as possible in order to neutralize whatever is threatening within it. Consequently a vast new intelligence gathering operation has been underway since 2001 and detained individuals

are seen to be vital containers of intelligence that, if "broken," might shed light on some of that darkness.

The metaphor of a "bolt of lightning" illustrates one of the most persistent fault lines in the debate over the conduct of the War on Terrorism. Some argue that reality, the political landscape out there in the darkness, has fundamentally changed and this "new reality" is driving the policies of the United States and "the international community." This new reality is believed to harbor imminent, existential threats to the security of the United States and the liberal values for which it stands. A "new kind of enemy," unencumbered by legal restraint, flaunts the laws of war and turns the conventions of "Western civilization" into an Achilles heel. "Unlawful combatants" cloak themselves in this extra-legal space and conduct a kind of guerilla warfare from beyond the law. This leaves those who are convention-bound in the untenable position of being perpetually exposed to the hit and run tactics of international outlaws while constrained by existing international law that is fundamentally inadequate to the task of addressing this new threat. The problem for international law and the laws of war in particular, is that modern international law is based on the pre-9/11 international political landscape. The argument that this landscape has changed calls into question modern international law and preexisting norms of state behavior. Hence this war must, for the time being, be carried on partially *outside the law* in Dick Cheney's "darkness."

Others argue that the most alarming change since 9/11 has been this "mental shift" itself. This perspective holds that the "new enemy" is more imagination than reality and the "darkness" beyond the borders of "Western" civilization provides a space

for the projection of "Western" insecurities. ¹² The real danger is unchecked executive power and a serious erosion of humanitarian ideals. Many have charged that the Bush administration purpose built a "legal black hole" in which the treatment of detainees was intended to be beyond any law domestic or international. Many legal scholars and human rights activists argue that humanitarian law ¹³ has no outside and that all that happens in the War on Terrorism has an appropriate legal status and category under international law. The prospect of detained individuals spending their lives in detention subject to torture without recourse to courts in which to challenge their detention is antithetical to the entire project of humanitarian international law. International law, they argue, is universal and the Bush and Obama administrations' policies are simply and egregiously in violation of it.

This central fault line is then centered on questions of the identity of the adversary. What is not in doubt is that there are individuals in the world that are willing to use deadly violence for political ends whether this is the hijacking of airliners, suicide bombing attacks, "targeted killings," nuclear strikes, or any other means of organized political violence. Instead, the debate over the nature of the adversary in the War on

¹² This project will seek to examine and ultimately complicate the distinction between lawful and "unlawful combatants." I will argue that these two identities are constructed through ongoing practices of articulation and hence any term used to refer to any of these identities is also always incomplete, ambiguous, and misleading. For this reason I will persist in using deeply problematic identity terms such as "unlawful combatant", Western, terrorist, international community, civilization, barbarian, etc, often in quotation marks to illustrate the idea that all of these identities remain an open question.

¹³ International humanitarian law "is broadly, that branch of public international law that seeks to moderate the conduct of armed conflict and mitigate the suffering it causes." (Mofidi and Eckert 2003, 61) I will use the terms international humanitarian law, humanitarian law, war law, laws of war, and laws of armed conflict interchangeably.

Terrorism, "unlawful combatants," indefinite detention, torture, and targeted killings is a question of *how* this figure of the enemy is invoked. How is the abstract figure of the enemy, the archetypal "international terrorist," the idea that is signified by the signifier "unlawful combatant" articulated and produced? The term "unlawful combatant" and the image it evokes may resemble or describe particular individuals to a greater or lesser degree at any particular time. The "unlawful combatant" is an idealized figure of an enemy, a constructed identity, an ambiguous umbrella term, a suspicion, an incomplete picture, an endless request for further information. The figure "unlawful combatant," or "international terrorist," functions much like a national flag, providing an image of an overarching hostile force against which war can be declared. The abstract "unlawful combatant" is not, strictly speaking, *real*. It is rather a silhouette in the collective imagination of those "Westerners" who search the dark corners of the globe for its likeness.

To say that the "unlawful combatant" is a socially constructed identity, a figure of "Western" imagination, is not necessarily to say that this identity doesn't fit. It could be that the term "unlawful combatant" is identical to a well-defined group of militants who can be engaged as a single, unified entity. Yet the no-holds-barred effort by the "international community" to gather intelligence on, and from, "unlawful combatants" illustrates the extent to which they *don't already know* this "new threat" in its entirety. The extraordinary measures taken in pursuit of intelligence suggest both the incompleteness of the state of current knowledge and the overwhelming desire for more. Who is the enemy today? What are they up to? What are their capabilities? What do they desire to do? This archetype of the new enemy is the essence of the changed reality

against which vast violent power has been marshaled since 2001 yet this archetype is incomplete, ambiguous, and partially unknown. The search to better know the abstract figure, the question of the nature of the enemy, what they are, what they represent, and what they are capable of is conducted using exceptional measures which are themselves justified by already having the answers to these very questions. In the War on Terrorism the "unlawful combatant" is simultaneously endowed with a tremendous determinate meaning and tremendous ambiguity. The enemy is "evil," "murderous," "fanatical," "monstrous," and so on and for this reason the "gloves come off." Yet the "gloves come off" precisely because intelligence must be obtained at all costs in order that individuals be forced to reveal those secrets they hold on behalf of the archetype. Detainees must be forced to reveal the true identity of the "unlawful combatant" even as the individual can never fully live up to this ideal. This one must tell "us" who "they" are in an endless process of specification of the archetype that then retroactively justifies the very measures used to obtain this specification.

Considered this way the question of the "unlawful combatant" is not what the "unlawful combatant" is but rather how this archetypal identity is produced. The archetype itself is a site of struggle rather than a single defined thing that has some concrete relationship to an underlying material reality. The meaning of this figure is always in play, always contested, and always open to further revision. Consequently the idea of a new political landscape, which hinges on this figure of the new enemy, is

¹⁴ This suggests the problem of "signifying overflow" (Barthes 1982, 41) or "iterability" (Derrida 1982b) which will be considered at length below.

likewise a contested idea that is an open question of interpretation rather than a fixed identity. With so much violence, so many lives, such vast "blood and treasure" hanging in the balance the most pressing question, and the one that will be explored in this project, is how this figure of the "unlawful combatant" is produced. How can the "unlawful combatant" be known as an archetype? How is an idealized image, a silhouette, articulated such that it can effectively stand in for reality? Most fundamentally, how do certain figurations of this enemy, which exist solely in political discourse, come to be understood as identical with reality? The question of how this identity is produced is tremendously important because it is this abstract figure of the enemy, not any discrete individual, which is used to mobilize vast powers of violence on behalf of the "international community" against those discrete individual human bodies who are identified with this abstract figure, or who simply find themselves in the way. ¹⁵

Project Outline

In order to approach the problem of the "unlawful combatant" I will first conduct a review of the contemporary debate regarding the treatment of detainees in the War on Terrorism and the legal construct of "unlawful combatant." This review will begin with a consideration of the first use of the term "unlawful combatant" by the United States in the *Ex parte Quirin* case during World War II. This section will briefly survey the implications of conflict status and combatant status in the context of modern laws of war.

¹⁵ The inability of any individual to fully manifest the "unlawful combatant" is demonstrated by the death of Osama Bin Laden, the archetype is there ever was one, which did little to alter the trajectory or momentum of the War on Terrorism or in the purposefully prosaic language of the Obama administration "overseas contingency operations." He was killed, his body quietly dumped into the sea, and the "war" carries on.

I will survey some of the main arguments relating to the legal category of "unlawful combatant" and the relationship of this construct to the laws of war and international humanitarian law as they have been invoked and debated since 2001. Arguments made by the Bush and Obama administrations about the exceptional nature of "unlawful combatants" will be explored as well as arguments made in favor of a universal interpretation of humanitarian law.

Most of the debate about post-9/11 politics centers on the question of the "exceptional" nature of post-9/11 global reality. Chapter three will explore the problem of the "unlawful combatant" in the context of the politics of exception. For all the work that has taken place considering the treatment of Guantánamo Bay detainees as an instance of sovereign exceptionalism there is a persistent tendency to frame these question in terms of how domestic legal order is either corrupted or preserved by such practices. Much of this work tends to import into the problem, largely unexamined, reified concepts of the exception, the excluded other, and the sovereign decision without broad appreciation for the historicity of these concepts. Those that do exhibit a concern for historicity tend to problematize some elements while continuing to leave others unquestioned. The result seems to be work on exceptionalism and the Global War on Terrorism that remains firmly wed to the sovereign state as the largest unit of analysis in global politics. Consequently this approach to the politics of exception is limited to questioning the boundaries of a particular domestic body. Even those that "de-center" the sovereign state by questioning the "locus" of sovereignty tend to emphasize how sovereignty is dispersed *down* from a single sovereign position to a society that continues to be bounded by these now dispersed sovereign practices.

As practices of sovereignty become dispersed the concrete existence of discrete borders becomes called into question. How a distinction is created between this community and that community, between domestic and international becomes part of the question itself. With the boundary between domestic and international in question there is an opening to explore global practices of exceptionalism and sovereignty at work in the problem of the "unlawful combatant." ¹⁶ If, as Richard Ashley (1989, 303) argues, "modern statecraft is modern mancraft" what are the possibilities for exploring constructions of global politics that likewise produce and serve a figure of a modern subject? Giorgio Agamben's concept of the "sovereign ban" combined with dispersed notions of sovereignty seems to provide tools needed to undertake such an exploration. Also, if the "unlawful combatant" is in some sense a practice of knowledge-power whereby a thing that is not real, the archetypal "unlawful combatant," nonetheless becomes something, "something that continues not to exist," (Foucault 2010, 19) how exactly do practices of dispersed sovereignty work to, at the same time, deploy already "existing" categories, cognitive spaces, prejudices and also articulate discrete bodies such that they can be assimilated into the project?

Chapter four will then turn to laws of war as a site of state system boundary production and corresponding practices of exceptionalism at the level of the state system.

Narratives of the laws of war will be explored as textual practices in which certain idealized communities and archetypal identities are constructed. I will argue that modern

¹⁶ This corresponds to the questions suggested by (Walker 2006)

narrative accounts of the laws of war produce an image of modern law that relies on a foil of pre-modern law. Pre-modern law is depicted as particular, rather than universal, unwritten, rather than codified, and more often disregarded than observed. For this reason pre-modern laws of war are often dismissed as ineffective "rules" rather than laws, and pre-modern warfare is depicted as mostly unrestrained barbarity. Using this foil of pre-modern law, and pre-modern warfare, modern laws of war are presented as the fulfillment of those deficiencies identified in pre-modern law. I argue that this narrative functions as a legitimizing foundation for accounts of modern laws of war. I argue that this approach to historical inquiry relies on an essentialization of law that takes a modern form of law as law *par excellence* and then searches the ages for this true image of law. Of course this effort is pre-disposed to fail and to find only deficiency and want in those ages past where this contextually particular modern form could never be found. The consequence of this "failure" is the exultation of modern laws of war as the first manifestation of *true* law.

Rejecting this mode of constructing and employing essentialized identities I will instead undertake a genealogically inspired alternative reading of the "history" of laws of war. I will argue that there is no fixed, identical history of the laws of war because this history is in fact a history of struggle, of attempts to overcome this or that position, and the outcome is not simply ordained by God and driven by the hand of transcendental beings, human or divine. I will explore how the laws of war have functioned not only to limit certain types of violence but also as a powerful tool with which certain others can be cast beyond the pale and against whom unlimited violence can be justified. In other words, the laws of war have often functioned as a means by which "international"

political communities impose and police a collective border via politics that can be called exceptional. Narratives of modern laws of war *explain* practices of exclusion that serve to legitimize such practices in universal terms in the eyes of their practitioners. Modern accounts the laws of war through history function to make particular political practices appear universal and objective, and obscure the "mystical" (Derrida 1992) foundations of their authority. There hidden between the lines of this long story of progress, somewhere in the margins of the ever growing expressions of man's best humanitarian instincts, somewhere between these lines are silences that arise not due to concurrence with the prevailing narrative but due to the imposition of silence by the narrative itself. These same political textual strategies of exteriorization and exceptionalism are used today to found and advance claims to the legitimate use of unrestrained force against contemporary iterations of the enemy with which no faith or peace is possible.

In the final chapter I will return to the concept of the "unlawful combatant" as it has been employed in the context of the Global War on Terrorism. I will conduct a reading of three texts. These include Barack Obama's 2009 Nobel Peace Prize acceptance speech, John Brennan's "The Ethics and Efficacy of the President's Counterterrorism Strategy," and Medea Benjamin's interruption of John Brennan. The purpose of these readings will be to explore how the laws of war function as a discursive field of political play, a contested "intertext" where subjects are incorporated, political boundaries are inscribed, exceptions are articulated, and violent practices are deployed. I

¹⁷ For more on the "mystical foundation of authority" see (Campbell 1994; Derrida 1992)

will argue that archetypal identities including the "unlawful combatant," "the modern subject," and "the international community" are all produced through narratives that obscure their metaphysical foundations. I will argue that acts of political violence, and practices of warfare upon which the stability of these identities hang, always overflow practices of signification and attempts to impose boundaries on what they can and do mean. Ultimately, I will argue that modern laws of war are constitutively amenable to both the desire to control violence and the desire to justify unrestrained violence because the modern laws of war are deeply entangled in processes of identity construction. Hence the laws of war are a fundamentally flawed tool for any universal approach to minimizing actual casualties in war because the laws of war are fundamentally oriented towards the ability to competently and precisely employ violence in such way that it produces a singular, discrete meaning, and reinforces unified, stable identities.

The stakes in this debate are extraordinarily high. The potential ramifications touch many of the hysterical extremes of modern liberalism: terrorizing violence, unchecked power, the dissolution of legal order, and the crumbling of humanitarian ideals. Policies, especially those with physically violent implications, have significant real world effects for the people involved in them. Policies are driven by plausible articulations of meaning so these struggles for meaning have far reaching, often tragic, consequences. With stakes this high, questions of how political meanings are created and imposed are paramount. The bottom line is that beginning on September 11, 2001 the United States and its partners have undertaken a mobilization of violence directed at an adversary that exists, insofar as it exists at all, only within discourse itself. Yet the violence that is mobilized against this discursive figuration is applied to discrete human

bodies on the "global battlefield" of the War on Terrorism. This battlefield includes homes, villages, and detention centers across the world yet the adversary is *never actually there*. What are the consequences of such a mobilization of violence against a silhouette, an imagined figure, a textual construction? Where does this violence go and what does it do there? And, above all, how is a narrative explanation produced for this practice when the armies of the "international community" are effectively firing into the dark? If the archetypal enemy is never actually killed, who is?

2 THE ACHILLES HEEL OF THE INTERNATIONAL COMMUNITY

It is a mean, nasty, dangerous dirty business out there, and we have to operate in that arena.

- Vice President Dick Cheney, *Meet the Press*, September 16, 2001

Ex parte Quirin

The War on Terrorism is not the first time that the United States has employed the concept of "unlawful combatant." While the term does not actually appear in written international humanitarian law, the United States Supreme Court employed the term in the 1942 Ex parte Quirin case. Many have seen the Quirin decision as a template for the Bush administration's use of military commissions to handle detainees in the War on Terrorism. In late May of 1942 eight Germans boarded submarines on the French coast bound for the United States. Two weeks later one group landed at Amagansett, Long Island and the second group near Jacksonville, Florida. Trained for espionage the eight men boarded trains and dispersed throughout the eastern United States. Instead of initiating a campaign of espionage, one of the men traveled directly to Washington D.C. and turned himself into the FBI. By June 27th all eight of the men were arrested. ¹⁸

Initially it seemed that the would-be saboteurs were going to be indicted in federal court. However the most serious federal crime that the conspirators actually committed was participation in the conspiracy which carried a maximum federal sentence of three years. The Roosevelt administration's desire to execute the conspirators led Roosevelt to decide to try the conspirators by military commission. President Roosevelt issued a

¹⁸ For a more detailed narrative of this case see (Fisher 2002).

proclamation entitled "Denying Certain Enemies Access to the Courts of the United States" stating that all enemies who entered the United States to commit "warlike acts" would be "promptly tried in accordance with the law of war." The invocation of "laws of war" is important because it removes the matter not only from civil law but also from Congressional oversight through the regular courts-martial process. The men were also expressly denied access to civil courts.

Several unique features distinguished the military commission established by Roosevelt from civil courts or regular courts-martial. The number of votes required for a death sentence was decreased and reviewing authority was granted exclusively to the President himself.¹⁹ Also, the Commission had the authority to determine when it would be governed by existing regulations and when it would not. Effectively the Commission could "discard procedures from the Articles of War or the Manual for Courts-Martial whenever it wanted to" (Fisher 2002, 8). As the Judge Advocate General of the Army, Maj. Gen. Myron C. Cramer said "the Commission has discretion to do anything it pleases; there is no dispute about that" (Fisher 2002, 8).

Behind heavy black curtains the closed, secret tribunal began on July 7th, 1942.²⁰ The counsel for the defense quickly filed a writ of habeas corpus in federal court

¹⁹ "The order states that the concurrence of "at least two-thirds of the members of the Commission present shall be necessary for a conviction or sentence." Two-thirds of the commission could convict and sentence the men to death. Under a court martial, a death penalty required a unanimous vote." (Fisher 2002, 7)

Several reasons for the secret military tribunal have been suggested. First, the quick arrests of the conspirators and foiling of the plot was due not to any particular aptitude of the FBI but to the decision of George John Dasch to turn himself in and cooperate with the arrests of the other conspirators. The

challenging the constitutionality of the Presidential order that established the commission and denied the conspirators access to civil courts. The writ was denied by a lower court and appealed to the Supreme Court. Barely two months after the men landed on the beaches the Supreme Court issued a decision upholding the jurisdiction of the military tribunal.²¹ The tribunal concluded on August 3rd when all eight were convicted and sentenced to death. Five days later six of the men were electrocuted and the remaining two had their sentences commuted to thirty years and life.

The *Ex parte Quirin* case may have more to say about 21st century challenges than is often acknowledged. The Supreme Court issued its full opinion in the case on October 29th, 1942 almost three months *after* six of the conspirators, whose fate the decision concerned, had already been executed. The drafting of this decision "under the shadow of six executions" (Fisher 2002, 45) effectively predetermined the court's rationale and prohibited any suggestion of dissent or miscarriage of justice. The extraordinarily expedited appeal to the Supreme Court, and the rendering of the initial decision one day later, created an impression of a rush to judgment. More disturbing than the irregularities pertaining to the Supreme Court was the hasty and opaque nature of the military tribunals themselves. Justice Felix Frankfurter, troubled by the entire process, requested a review of the case by an expert on military justice.

Roosevelt administration wanted to discourage future infiltration attempts by maintaining the perception "that the executive branch had the capacity to intercept enemy saboteurs." The second was that even if the conspirators were convicted of attempted sabotage in federal court, which seemed unlikely, the maximum sentence was thirty years, a sentence that the Roosevelt administration felt was too light to adequately discourage future attempts. (Fisher 2002, 4)

²¹ (Fisher 2002, 12)

Frederick Bernays Wiener and subsequent analysts all concluded that the direct involvement of the President and the use of the United States Attorney General and Judge Advocate General as prosecutors created a situation that tossed aside "almost every precedent in the books" (Fisher 2002, 36). President Roosevelt in effect created a military tribunal that was run by fiat rather than regulated by law and judicial review. The Supreme Court, marching to the President's war drums, acted as little more than a rubber stamp and, though preserving the "form" of judicial review, "gutted it of substance." Roosevelt "disabled his principal legal advisers by assigning to them the task of prosecution" (Fisher 2002, 36) and attempted to take the entire process outside any effective legal review whatsoever. Not only was this circumvention of judicial review illegal but it was also without precedent. Never had an Attorney General been asked to assist the prosecution and the only precedent for the involvement of the Judge Advocate General was one "that no self-respecting military lawyer will look straight in the eye: the trial of the Lincoln conspirators" (Fisher 2002, 37). ²²

While many identify a precedent of denying enemy combatants access to courts a second and more interesting precedent lies in the post-script. In 1944 the Roosevelt administration got a second chance to deal with a dilemma of "unlawful combatants"; Germany again attempted to infiltrate saboteurs via submarine and again they were captured in short order. At first it seemed that the second set of conspirators would be tried identically to the *Quirin* conspirators. However the irregularities of the first military commission led many to believe that a repeat would have "unfortunate results" including the mistreatment of captured United States service men and a public relations disaster. The Roosevelt administration decided to try the second set of conspirators according to normal procedures for military commissions. The second commission was overseen by the Secretary of War rather than the President and subject to review by authorities without direct involvement in the case. Though the men were again sentenced to execution their sentences were not carried out prior to the end of the war and were ultimately commuted by President Truman (Fisher 2002, 43–44).

Today the Ex Parte Quirin case functions more as a cautionary tale than a precedent. The German conspirators were not subjected to indefinite detention or torture. Though the first commission was not, strictly speaking, "regularly constituted" the Roosevelt administration did not claim that international law as it then existed was inapplicable to the conspirators. The conspirators appeared to be in violation of the laws of war in a time of declared war and their prosecution by the United States by military tribunal was, as the Supreme Court decided, legal under domestic and international law. Thus there are significant differences between the eight Germans in World War II and detainees in the 21st century. In both cases it is the invocation of the laws of war that enables the administration to justify the resort to military tribunals. The "wars" in question, however, bear little resemblance. World War II was a formally declared interstate war while the "war" on terrorism is far more ambiguous. As a consequence the Supreme Court's decision on the legality of military commissions is based on a set of circumstances that may not be similar to those of today. As the resort to military commissions hinges on the applicability of laws of war I will now turn the question of the status of the "war" on terrorism under international law.

Conflict Status

The decision to wage a "war" on terrorism is the decision that opens all questions of combat, lawful and unlawful, and is worth some preliminary exploration. The Geneva Conventions base legal categories of combatants on the nature of the conflict they are involved in. In order to determine which legal protections apply to particular individuals

the first question is of the nature of the conflict.²³ The right of a state to use armed force, known as jus ad bellum, is established by the United Nations charter. The right of states to engage in armed conflict with another state is limited to two scenarios: first, states may use force when they are specifically authorized by the U.N. Security Council. Second, states have an inherent right of self-defense against armed attack lasting until the Security Council is able to act to maintain peace.²⁴ This right of self-defense was invoked by the United States in its efforts to pursue those responsible for 9/11. The question of selfdefense then hinges on the definition of "armed attack." Many have argued that there is sufficient cause to consider the 9/11 attacks to be "armed attacks" under the United Nations charter.²⁵ This position does not allow the United States wide latitude in its employment of force, however. As an act of self-defense, the use of force by the United States can only be directed at those who participated in the attack and those who pose a continuing threat to the United States. Consequently the legality of a US military response against those who conspired to commit the 9/11 attack is generally taken to be on firm legal footing. The attack on the Taliban government, on the other hand, is much

²³ "In view of the fact that an international conflict is subject to the law of war, while this is not so with a non-international, the issue of classification becomes of major significance, particularly in so far as the law concerning 'atrocities' and other 'breaches' is concerned." (Green 2000, 65–66) as cited in (Solis 2010, 149–150)

²⁴ United Nations Charter, Article 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

²⁵ See for example (Herz and Shibata 1976; Mofidi and Eckert 2003, 76; Murphy 2002; Paust 2001, 2003b; Solis 2010)

more problematic and this discussion will leave aside entirely the question of the invasion of Iraq in 2003.²⁶

If some military response by the United States is legally justifiable there remains the far more difficult problem of determining the nature of this conflict under international law. Though, in principle, the Bush administration's decision to use military force to respond to the 9/11 attacks is widely accepted, the characterization of this self-defense action as a "war" is not. Determining the legal status of a particular conflict under existing international law is often a complex and contentious task. Under international law armed conflicts are governed by the Geneva Conventions. In order to not overly limit the scope of their applicability, the Geneva Conventions are somewhat vague about what exactly constitutes an "armed conflict."

The 1949 Geneva Conventions contain two categories of armed conflict. First, Common Article 2 defines a category of armed conflict existing between two or more Geneva Convention High Contracting Parties in which war has been declared, even if not recognized, by one of the parties.²⁷ This category covers inter-state armed conflicts and results in these kinds of conflicts being subject to the Geneva Conventions and 1977 Geneva Protocol I Relating to the Protection of Victims of International Armed Conflicts, known as Additional Protocol I (API). This is warfare in the most conventional sense

²⁶ "The mere inability of a state to control terrorist activity within its borders does not constitute an armed attack by that state. Decision of the International Court of Justice strongly suggest that a substantial degree of state control over the acts of an individual or individuals is necessary before these acts can be legally attributed to the state," (Mofidi and Eckert 2003, 75). See also (Paust 2001).

²⁷ See 1949 Geneva Convention, Common Article 2, (Roberts and Guelff 2000, 244)

where two or more states bring their militaries to bear on each other in order to impose some kind of political will.²⁸ Even in the event of inter-state conflict the dividing line is not particularly bright. For example, distinguishing between an "incident" and "armed conflict" can be challenging. What amount of violence constitutes an inter-state armed conflict? Violent exchanges or incidents between the forces of states occur frequently yet most are not characterized as armed conflict under Common Article 2. There is no universally applicable metric for intensity or duration of violence to constitute "armed conflict." Rather, the status of such an incident or conflict is dependent on the intentions of those involved. If all parties agree that a violent exchange was not an "armed conflict" then it simply isn't one under the law. However, if any party involved *intends*²⁹ to engage in what that party characterizes as "armed conflict" then all parties are bound by Common Article 2. The important point here is that the status of any particular conflict remains dependent on the circumstances and context of that particular conflict and the intentions of the parties involved.

A second category of armed conflict is defined in Common Article 3 of the Geneva Conventions. This category is armed conflict "not of an international character

²⁸ It is important to note that a declaration of war is not technically required for inter-state conflict to trigger the applicability of the Geneva Conventions: "The last declaration of war was on August 8, 1945, when, one day before Nagasaki was atom-bombed, Russia declared war on Japan. Given the UN Charter, we are unlikely to see another formal declaration of war. Call it war, a police action, or a conflict, if it is an armed conflict between two or more states, it is a common Article 2 conflict in which all four Geneva Conventions and Additional Protocol I apply." (Solis 2010, 151)

²⁹ (Solis 2010, 152)

occurring in the territory of one of the High Contracting Parties."³⁰ Common Article 3 applies to conflicts of an "internal" nature where conflict occurs within the territory of a state and in which the opponents of the state government are not fighting on behalf of the armed forces of another state. Again, there is no universal metric for determining when internal conflict becomes an "armed conflict." Conflicts in this category are bound by certain provisions within Common Article 3 itself but not the remainder of the Geneva Conventions. Those bound by Common Article 3 must treat persons not taking an active part in conflict, including sick, wounded, surrendering, and detained fighters, humanely. Specifically, murder, mutilation, cruel treatment, and torture are prohibited. Also, humiliating, degrading treatment, and "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."³¹ This is one of the most important distinctions between a Common Article 2 and Common Article 3 conflict. Lawful combatants participating in an Article 2 "conventional war" are entitled to prisoner of war status which prevents them from being tried by a detaining power for their conduct as lawful combatants. They are legally indemnified against prosecution for legal wartime acts such as the killing of adversaries and the destruction of military targets. Common Article 3 combatants, who are not participants in a traditionally defined war between two states, do not receive this protection and can be tried by the state for their wartime acts within the legal guarantees

³⁰ See 1949 Geneva Convention, Common Article 3, (Roberts and Guelff 2000, 245)

³¹ 1949 Geneva Convention III, Common Article 3, (Roberts and Guelff 2000, 245)

provided by Article 3. Put broadly, members of state militaries engaged in a conventional war are protected from prosecution for the killing of members of the adversary's military. Insurgents, revolutionaries, and other unconventional forces do not necessarily enjoy this same protection from prosecution for the killing of their adversary's military forces. Neither category provides protection from prosecution for the killing of non-combatants and other unlawful acts.

Terrorist organizations, as non-states, cannot be High Contracting Parties to the Geneva Conventions and thus cannot be party to a Common Article 2 inter-state armed conflict or "war." Counter terrorism using military force can, however, be an instance of Common Article 3 "internal" conflict. So called "extraterritorial law enforcement" using military force to fight terrorists operating on the soil of another country has gained some limited international legal recognition particularly since 2001. With the host government's consent, another state can use military force as tool of counter terrorism, outside its borders, in what is technically a law enforcement action, that law being customary international law allowing states to defend themselves from attack. 33

³² "More than a half century ago, Professor Oppenheim expressed the traditional law of war view: "To be war, the contention must be *between States*." (Solis 2010, 157)

In spite the compilation of lists of customary international law by the International Committee of the Red Cross and others there remains significant ambiguity regarding the "enigma" (Goldsmith and Posner 1999, 1114) of customary law. Though laws of war may be codified in particular treaties their universal applicability beyond those states that have signed and ratified them remains dependent on the recognition that the laws in question are customary. Customary law is derived from the conduct of states, from accumulated patterns of practice which become so widely accepted that states consider them binding *as if they were law*. For detailed analysis of customary law see ICRC Study on customary international humanitarian law, (Henckaerts 2005, 179–180). Herein lies the distinction between habitual patterns of practice and customary law; customary law is understood to involve an obligation to continue observation of the rule. This sense of legal obligation, *opinio juris*, is the "central concept" (Goldsmith and Posner 1999, 1117) of customary international law according to the standard modern

"Terrorist attacks, if the terrorists have a sufficient organization and if the attacks are sufficiently violent and protracted, may be instances of non-international Common Article 3 conflicts. If not sufficiently organized, and if the attacks are not lengthy in nature, they are simply criminal events" (Solis 2010, 157). Neither a Common Article 3 conflict nor law enforcement are wholly excepted from international law though those involved may be punishable under the domestic or military laws of the state concerned as "unprivileged combatants."

It is also possible to have "dual status" conflicts. For example, in 2001 the Taliban government in Afghanistan was in a conflict with the Northern Alliance which is most often characterized as a Common Article 3 internal conflict. At the same time the Taliban was in a conflict with the United States which, due to both being High Contracting Parties, is generally seen as a Common Article 2 inter-state conflict.³⁴ These two conflicts, with their distinct statuses, were occurring simultaneously in Afghanistan.³⁵ In this case individuals captured by the Taliban would be entitled to different treatment under the Geneva Conventions based on which party they belonged to. The initial armed conflicts between the United States military and the armed forces of

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legal definition. Once a rule is identified as customary international law then all states are understood to have that particular obligation even if they do not observe the rule or agree with its status as law. In this way universally binding international law arises even in the absence of unanimous consent and explicit inclusion in treaty law. The recognition of a rule as customary international law renders applicability universal regardless of the signature and ratification status of any particular state.

³⁴ The Bush administration "considered denying the Taliban fighters POW status because it could be argued that the Taliban regime, recognized diplomatically by only three other nations, did not constitute a valid government." (Mintz 2002) and did deny the applicability of laws of armed conflict to the Taliban government until February 8, 2002. (Paust 2003b, 325)

³⁵ See (Solis 2010, 156) for discussion of dual status conflicts.

the Taliban government, and likewise against the Iraqi military under Saddam Hussein, are both Common Article 2 conflicts as Afghanistan and Iraq are both high contracting parties to the Geneva Conventions. ³⁶ Interestingly, the United States has characterized its post 9/11 counterterrorism efforts as a broader armed conflict within which the invasions of Afghanistan and Iraq took place. The nature of this broader conflict is much less clear because the War on Terrorism is between the United States and "international terrorism" which is seemingly neither a high contracting party (common Article 2) nor a noninternational conflict (common Article 3). As the United States fought the Taliban, presumably a common Article 2 conflict, the U. S. was also engaged in a self-defense action against Osama bin Laden, al Qaeda, and international terrorism, and later another common Article 2 (and common Article 3?) conflict in Iraq. Thus on the one hand there seems to be multiple conflicts taking place under the heading of the War on Terrorism with different conflict statuses under international law yet at the same time the United States speaks of the War on Terrorism as if it is one broad struggle of self-defense. In consequence there are many unresolved questions about the precise nature of this conflict in the context of international law, questions which have wide ranging implications for the legal status of individuals involved in the conflict.

The Principle of Distinction and Individual Status

Leaving aside the question of the nature of the "war" on terrorism, I will now move to the question of individual legal status. The crux of the issue of classification

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³⁶ This claim is itself not free of debate, see note 22

under the Geneva Conventions is what is known as the "principle of distinction" between combatants and civilians. This distinction, "a cornerstone of international humanitarian law," (Engeland 2011, 1) is intended to address the fact that noncombatants often make up a staggering proportion of the victims of conflict. Since the middle of the twentieth century civilians have died in war at a rate ten times that of soldiers.³⁷ The principle of distinction is the critical element of humanitarian international law which is aimed at protecting noncombatants from the violence of war. If a distinction can be established and maintained between those who are in combat and those who are not, then presumably noncombatants could be more effectively avoided and some of the seemingly unnecessary costs of war could be reduced. Consequently humanitarian international law as embodied in the Geneva Conventions strives first and foremost to establish this distinction by creating distinct legal categories.

Combatants under the Geneva Conventions are those who are legally entitled to participate in combat. Article 43 of Additional Protocol I defines combatants: "members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities." Civilians, who join an armed force and become lawful combatants, gain the right to participate in hostilities but loose the protections from intentional targeting afforded to civilians. They can now potentially be targeted by adversaries even when far from the field of battle, out of uniform, asleep, or

³⁷ (Tavernise and Lehren 2010)

unarmed.³⁸ Individuals cannot become a combatant by simple fact of participation in conflict, however. Only certain armed forces are entitled to participate in conflict and by extension only legitimate members of authorized armed forces can legally participate in hostilities.³⁹ The criteria that establish legal participation have undergone some adjustment over time and there are several significant differences in the 1977 Additional Protocol I definition of an armed force from the traditional requirements for armed forces as established by the Law of The Hague seventy years before. ⁴⁰ Of particular note is the omission of the requirement to carry arms openly at all times and the wearing of a uniform. ⁴¹

- 1. To be commanded by a person responsible for his subordinates;
- 2. To have a fixed distinctive emblem recognizable at a distance;
- 3. To carry arms openly; and
- 4. To conduct their operations in accordance with the laws and customs of war. In countries where militia or volunteer corps constitute the army or form part of it, they are included under the denomination 'army.'" (Roberts and Guelff 2000, 73)

³⁸ (Solis 2010, 188)

³⁹ The armed forces of a Party to a conflict "consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict." (Roberts and Guelff 2000, 444)

⁴⁰ As outlined in Section I, Chapter I, Article 1 of the Annex to 1907 Hague Convention IV Respecting the Laws and Customs of War on Land: "The laws, rights and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

⁴¹ See (Engeland 2011, 41) "It was decided that further rules were needed to encourage armed groups, or guerrilla groups, fighting for self-determination to respect the laws of war. The idea was also to provide them with legal protection. The two articles combined with customary law and Article 4 GCIII result in the categorization of guerrilla movement fighters as combatants. This means they are also entitled to the prisoner of war status, as long as they fulfill the four conditions. Considering that guerrilla movement fighters hardly take these four conditions into account as mentioned earlier, Protocol I relaxes the obligation to wear an insignia at all times, but they must distinguish themselves from civilians at all times. The accent has been set instead on carrying arms openly during the hostilities and before the attack. If guerrilla fighters do not respect these rules, they forfeit their status as combatants: they are civilians in arms and can be prosecuted domestically."

Those who meet these criteria are entitled to prisoner of war status if they fall into the hands of the enemy. Generally, those who are members of the organized armed forces of a state as well as militia and volunteer forces would qualify as prisoners of war. Also, organized resistance groups that are not members of regular armed forces may be entitled to prisoner of war status provided that they meet certain criteria including conducting their operations in accordance with the laws of war. Finally, Article 4 of the third Geneva Convention on the Treatment of Prisoners of War (GCIII) extends protections to civilians who take up arms to resist an invading force.

Violations of certain laws of war do not place one *outside* the laws of war nor deprive individuals of the rights to be considered combatants, or to receive prisoner of war status upon capture, provided certain criteria are met.⁴⁴ First, combatants must not try to hide among civilian populations "while they are engaged in an attack or in a military operation preparatory to an attack." This provision of Article 44.3 API,

⁴² Article 4, GCIII: "members of other militias and member of other volunteer corps, including those of organized resistance movements, belonging to a party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

⁽a) That of being commanded by a person responsible for his subordinates;

⁽b) That of having a fixed distinctive sign recognizable at a distance;

⁽c) That of carrying arms openly

⁽d) That of conducting their operations in accordance with the laws and customs or war."

⁴³ Article 4.6 GCIII: "Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war."

⁴⁴ Article 44.2 API "While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant, or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4."

consistent with the spirit of Article 4 GCII, gets to the heart of the principle of distinction, as embodied in Articles 57 and 58 API which requires armed forces to refrain from attacking civilians. In order to avoid targeting civilians, armed forces must be able to make a distinction between combatants and civilians. If combatants disguise themselves as civilians then this principle of distinction,⁴⁵ the "cardinal provision" of API,⁴⁶ is imperiled. The requirement for combatants to distinguish themselves contains a clause recognizing that not all situations will permit it. A combatant retains combatant status provided that "he carries his arms openly" during "each military engagement" and "during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate."⁴⁷ In the *Quirin* case the US Supreme Court upheld the trial by military commission of German saboteurs who had infiltrated the United States via submarine. The saboteurs were found to be lawful combatants but who were in violation of the laws of war and thus subject to trial and punishment for their wartime actions.⁴⁸

The question here is whether one's status as a combatant or civilian changes based on one's current activity. If a combatant adheres only to the above requirements and carries arms openly during engagements only, what is his or her status at other times? "[Article 51 (3) API] explains that when a person takes a direct part in the hostilities, he

⁴⁵ For more on the principle of distinction see (Engeland 2011, 28)

⁴⁶ (Frits Kalshoven and Zegveld 2011, 86)

⁴⁷ Article 44.3 API

⁴⁸ See (Paust 2003b, 331) for further discussion of the *Quirin* case in the context of the War on Terrorism.

becomes for such time a legitimate target. This means that he can recover his status of civilian if he ceases his direct participation. This approach is being contradicted by the supporters of the membership approach, who understand that when a civilian supports a group like Hamas, he becomes affiliated with it and loses the status of civilian for good" (Engeland 2011, 43). The so called "membership approach," holds "that anyone who is affiliated with a party to the conflict is not a civilian. This would mean anyone belonging to Hamas in the Gaza Strip directly takes part in hostilities and is a legitimate target" (Engeland 2011, 43) even if they do not physically participate in hostilities themselves.

In the case of many members of al Qaeda it may be fairly straight forward that they do not in fact conduct their operations in accordance with the laws of war due to their intentional targeting of civilians as well as their general failure to meet other of the criteria of an organized resistance movement. If an individual is captured who has not met the requirements outlined above then he "shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol."

Presumably these equivalent protections refer to the prohibitions of violence, cruel treatment, torture, and outrages on personal dignity that prisoners of war are protected against by GCIII. In addition to the protection provided to prisoners of war, with the exception of immunity from trial for lawful acts of warfare, persons who fail to meet the

⁴⁹ Article 44.4 API

above requirements are also covered by Article 75 API.⁵⁰ Article 75 API provides a kind of "catch all" category for those who do not fall into another category, for those who are "unprivileged" under international law, and who do not "benefit from more favorable treatment under the Conventions." This article again prohibits certain kinds of treatment of captured persons and provides regulations in the event that such a captured person is to be held legally responsible for actions that took as an unprivileged combatant.⁵¹ A captured person cannot be convicted of an offense "except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principle of regular judicial procedure" including that the individual is "informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defense." Accused persons can only be held responsible for what they have done personally and they cannot be penalized more severely than applicable national or international law allowed at the time of the offense. There is a presumption of innocence until proven

Article 45.3 API: "Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favorable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol. In occupied territory, any such person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his rights of communication under that Convention."

Article 75.2 API: "The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents: Violence to the life, health, or physical or mental wellbeing of persons, in particular: Murder; Torture of all kinds, whether physical or mental; Corporal punishment; and Mutilation; Outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault; The taking of hostages; Collective punishments; and Threats to commit any of the forgoing acts."

guilty, a right to be present at trial, and a right to examine the witnesses presented against the accused.⁵²

The New Normal

Now that I have surveyed some of the most relevant points of international humanitarian law with respect to combatant status I will consider arguments made by the Bush administration and others on the status of adversaries in the "War on Terrorism." As argued above there is considerable consensus that a legal basis for treating the September 11th attacks as an "armed attack" exists and that a military response by the United States in self-defense was, in principle, permitted under international law. In his 2002 State of the Union Address, President George Bush warned that "what we have found in Afghanistan confirms that, far from ending there, our war against terror is only beginning.... Thousands of dangerous killers, schooled in the methods of murder, often supported by outlaw regimes, are now spread throughout the world like ticking time bombs, set to go off without warning" Donald Rumsfeld repeatedly argued that "this will be a war like none other our nation has faced" (Crawford 2003, 5). Colin Powell argued that "it's a kind of war we've never fought before... It's not a war where you see your

⁵² Article 75.4 API

^{53 &}quot;The use of military force by the United States in Afghanistan on October 7, 2001 against Mr. bin Laden and members of his al Qaeda network was permissible under both international and US constitutional law. Bin Laden and several of his followers were non-state actors who ordered, perpetrated, or were complicit in continuous terroristic attacks on the United States, including the September 11th attacks on U.S. soil and previous armed attacks against the U.S.S. Cole, U.S. embassies in Kenya and Tanzania, and other U.S. military and nationals abroad. Such ongoing processes of armed attack justify use of selective and proportionate armed force in self-defense under Article 51 of the United Nations Charter (the Charter)." (Paust 2001, 533–534). See also (Murphy 2002, 47–50).

enemy laid out on the battlefield, you can say you've won" (Powell 2002). While the conditions for victory or an end to the war might not have been foreseeable to Powell, the common interest in this war among all nations was evident. "Here was something that had nothing to do with contests between two competing ideologies: communism and capitalism. Here was an enemy that affected us all" (Powell 2002).

In the preface of the 2006 Quadrennial Defense Review, the Office of the Secretary of Defense of the United States emphasized that the United States was engaged in a new kind of conflict that did not resemble those of the past. The US Secretary of Defense argued that the Cold War posture of the Department of Defense was not adequately prepared to respond to non-state, non-super power military threats. Many analyses of twenty first century warfare echo this position and attempt to understand the transition from a multipolar world to a unipolar one. Yet this "new reality" is not limited to a tactical and strategic adjustment of US defense policy. For its proponents, this new era is categorically different and there is no possibility of return to a more simple time. We have gone "from a time of reasonable predictability – to an era of surprise and uncertainty" (Rumsfeld 2006, ix) which is not limited to the ever shifting and unpredictable nature of the international system of states. It is understood as a horizon over which the faces and relationships may change but where an uninterrupted "long global war" (Rumsfeld 2006, ix) constitutes a "new normal." ⁵⁴

⁵⁴ "As Vice President Dick Cheney explained shortly after September 11: "Many of the steps we have now been forced to take will become permanent in American life," part of a "new normalcy" that reflects "an understanding of the world as it is." Indeed, today, two years after the terrorist attacks, it is no longer

On September 11th, 2001 the Bush White House began working with Senate and House leaders to develop a joint resolution authorizing the use of military force in response to the attacks on New York and Washington, D.C. A draft resolution was provided by the White House to Congress the day after the attacks which would have authorized the Bush Administration to take action against those connected to the 9/11 attacks as well as actions "to deter and pre-empt any future acts of terrorism or aggression against the United States" (Grimmett 2007, 2). This broad, practically limitless, 55 authorization was scaled back and the final text of the *Authorization for Use* of Military Force was passed by Congress and signed by the President on September 18th, 2001. It states "the President is authorized 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" (Grimmett 2007, 6). Though the final language of the law does not provide the nearly unlimited authorization to use force sought by the Bush White House, it does extend the authorization to "organizations and persons" in addition to states.

possible to view these changes as aberrant parts of a short-term emergency response. They have become part of a "new normal" in American life" (Acer 2003, i).

⁵⁵ "This language would have seemingly authorized the President, without durational limitation, and at his sole discretion, to take military action against any nation, terrorist group or individuals in the world without having to seek further authority from the Congress." (Grimmett 2007, 2)

The shift to an armed combat paradigm in dealing with terrorism is often treated as a stark change occurring in the wake of 9/11. However as Smith et al (2002) argue, US approaches to counterterrorism were evolving in the decades prior to 2001 away from the prosecution of terrorists as "common" criminals. In 1983 Federal guidelines were implemented that created less stringent standards for investigations of domestic terrorist groups versus general crimes. A series of trials of domestic seditious groups in the 1980s, which resulted in acquittals, represents for Smith et al a time when Federal prosecutors were developing an approach to domestic and international terrorism suspects which "explicitly politicized" the motives of the individuals on trial. The trials of the first World Trade Center attacks which ended in 1997 resulted in the convictions of 24 defendants and is a demonstration of this new approach to the prosecution of defendants as terrorists rather than as "common criminals." Also, compared to the sophistication of the 2001 attacks, prior instances of international terrorism perhaps did not present such a visceral image of a powerful, ongoing threat. The perpetrators of the 1993 World Trade Center attack were publicly perceived to be incompetent conspirators who, though they managed to successfully detonate a bomb in the parking garage of the World Trade Center, were so clueless that their attempts to retrieve the security deposit on the vehicle used for the bombing caused them to be arrested one by one.⁵⁷

⁵⁶ (Smith et al. 2002, 316)

⁵⁷ This was perhaps a tragic under appreciation of the sophistication of the first World Trade Center bombing and one among many possibility conditions of the 9/11 attacks; see (National Commission on Terrorist Attacks 2011, 99–100)

The use of military force as a tool of counter terrorism by the United States is also not new. After the 1998 bombings of US embassies in Kenya and Tanzania the Clinton administration responded by invoking the right to self-defense. Cruise missile attacks were launched against suspected al Qaeda training camps in Afghanistan and a Sudanese facility that was suspected of producing chemical weapons. However, these attacks were ultimately seen as a bit of a black eye for the Clinton administration because no suspected terrorist leaders were killed in the strikes and the Sudanese facility was represented as nothing more than a pharmaceutical plant attacked in an act of US military aggression. In spite of this unsuccessful attack, the Clinton administration continued to look for opportunities to use cruise missiles to attack Osama bin Laden and elements of al Qaeda. The Predator unmanned aerial vehicle program was employed for the first time in Afghanistan in 2000 specifically to remedy the lack of sufficiently timely and accurate intelligence to launch further cruise missile strikes. Also, after the bombing of the USS Cole in 2000, the Clinton administration began to develop plans to use airstrikes against the Taliban. Other than ultimately abandoned consideration of the use of special operations forces in Afghanistan no plans for a ground invasion of Afghanistan had been considered by the Clinton administration. Due to these events and other factors the United States generally preferred to treat acts of terrorism as criminal activity until $2001.^{58}$

⁵⁸ See (National Commission on Terrorist Attacks 2011, 512)

However, the treatment of accused terrorists as criminals did not entirely satisfy US policy makers. Though "explicitly politicizing" international terrorists seems to have been an effective prosecutorial strategy in some cases the overall conviction rate for international terrorism cases in US Federal courts from 1980-1998 was 77% which is considerably lower than the 97% overall Federal average and 84% for domestic terrorism cases.⁵⁹ Just looking at the 1990s this conviction rate decreased even further as international terrorism cases became less likely to plead guilty. This lower conviction rate is attributed, in part, to issues of classified evidence and the discovery process at trial. "Discovery involves the fundamental right of an accused to know the evidence to be used against them in court so that adequate defense can be prepared" (Smith et al. 2002, 327). During the discovery process in many trials defense teams have requested evidence that would force the revelation the names of undercover operatives, informants, and intelligence practices by which the evidence had been acquired. In more than one instance federal prosecutors have dropped charges rather than produce evidence in discovery⁶⁰. These factors lead Smith et al to conclude that the changes in approach employed by the Bush administration starting in 2001 do not constitute a clear break from the past and a radically new approach, but are rather the continuation of certain threads of change in federal approaches to international terrorism. Until 2001 the US federal government seems to have been trying to walk a fine line where international terrorism was handled differently than domestic crime but was still within the "outskirts" of

⁵⁹ See (Smith et al. 2002, 327)

⁶⁰ (Smith et al. 2002, 328)

existing federal law: "the argument, of course, that has constrained US lawmakers and law enforcement authorities to remain within the outskirts of unmodified criminal law is that the treatment of international terror through change in law and law enforcement must automatically be accompanied by the unacceptable danger of abuse of the increased authority, that is, that the possible cure is worse than the disease" (Amos and Stolfi 1982, 76). It seems that the attacks in 2001 overrode these concerns about increased federal authority.

President Bush signed an executive order on *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*⁶¹ which includes the assertion that "international terrorists" including al Qaeda have carried out attacks "on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces." This assertion of a "state of armed conflict," along with the language of war used generally by the Bush administration, framed the conflict in terms warfare. As pointed out by Luisa Vierucci (2003, 287) this was "the first time since the Vietnam conflict a US President has consistently employed the term 'war' in public speeches and official documents." While the Bush administration argued that al Qaeda created a state of war with the United States in 2001 Osama bin Laden claimed at least as early as August 23, 1996 that the United States had created a state of war against which Muslims must fight a *defensive* jihad. The title of a message delivered by Osama bin Laden in 1996 has been widely translated as "Declaration of War against the Americans Occupying the Land of

⁶¹ Signed on November 13th, 2001

the Two Holy Places." In this "declaration of war" bin Laden calls on Muslims to expel the United States from the Middle East and to kill Americans to achieve this goal. The Bush administration pointed to these words along with the scale of terrorist attacks around the world to argue that a state of war exists. 63

It seems that the Bush administration shared the perspective that the War on Terrorism does not much resemble the concept of "armed conflict" under international law. The divergence is in the conclusion drawn from this perspective. Rather than concluding that the War on Terrorism is not a war the Bush administration argued that the Geneva Conventions and existing international law simply could not accommodate or adequately address this new kind of war. It is not, according to the Bush administration, that the United States lacks a commitment to international law but rather that international law is silent on this new frontier, and like the American Wild West, law and order must be brought to a lawless area through the efforts of latter-day frontiersman, in this case the United States and its partners. On November 13th of 2001 President Bush (2001) issued an order entitled Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism which clarified how the administration understood the War on Terrorism. Within twenty four hours of the September 11th attacks President George W. Bush spoke of a "war with a new and different kind of enemy" referred to broadly as "international terrorism" that "if not detected and prevented, will cause mass deaths, mass

^{62 (&}quot;Bin Laden's Fatwa | PBS NewsHour | Aug. 23, 1996" n.d.)

⁶³ For discussion of the Bush administration's claim that the "war on terror' is no mere metaphor" see (Brooks 2004, 717)

injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government" (2001). By explicitly invoking an existential threat to the citizens and the government of the United States the order provides a justification for finding that the United States will employ its armed forces in military operations to "disrupt" and "eliminate" terrorists. Individuals who are detained will be tried by military tribunals rather than civilian courts. However, due to the fact that this "extraordinary emergency exists for national defense," the Bush administration finds that it is "not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts" (Bush 2001). Those detained in the military operations outlined in the November 2001 order would thus be subject to neither US domestic criminal law nor normal military law nor international law as established in the Geneva Conventions.⁶⁴

The Bush administration referred to the detained (and those who have not yet been detained or killed) as "unlawful combatants." The Bush administration characterized these agents operating outside the law, as outlaws, 65 but in a new sense, not just fugitives from justice but actually *beyond the law*, hence a "new kind of enemy." "International terrorism" as articulated by the Bush administration engages in war

⁶⁴ "The tribunals were to be *sui generis*, operating outside the ordinary military or civilian criminal justice system." For details on the tribunal procedures see (Amann 2003, 268–270).

⁶⁵ See (Amann 2003, 286); The Bush administration "sought to deflect the discourse of rights and thus to make judges see, and treat, certain persons as outlaws, beyond the reach of the law and unworthy of even the most basic rights that law ordinarily accords human beings."

unconventionally and so conventions, whether those of Geneva, customary international law, or even domestic law, are simply outdated, obsolete, and inapplicable. More than that, the "unlawful combatant" is able to use these outmoded conventions against those who continue to insist on them. From this perspective this "new" enemy must be confronted on new terms. The United States, indeed all civilized nations, must take the fight to the enemy out there, on their turf, *outside the law*. 66

In late 2001, then Vice President Dick Cheney stated "somebody who comes into the United States of America illegally, who conducts a terrorist operation killing thousands of innocent Americans... is not a lawful combatant... they don't deserve to be treated as prisoners of war" (Hardy 2009, 38). As Cheney indicates, the term "unlawful combatant" is not simply a matter of semantics but indicates that persons so categorized would be considered unprotected by existing international law. Shortly thereafter the Bush administration began developing policies for those individuals who were either captured during combat operations or who were transferred to US custody by other countries. Two policies in particular were developed. A long term detention facility was planned at "beautiful, sunny Guantánamo Bay, Cuba" (D. Rumsfeld and Pace 2002, 02) and military commissions were planned for the prosecution of individuals accused of violations of laws of war.

⁶⁶ This concept of interiority and exteriority relative to international law will be explored at length in the next chapter.

The Office of Legal Counsel was asked to consider these two policies in the context of the Geneva Conventions and other relevant international treaties or federal laws. In a January 2002 memorandum John Yoo and Robert Delahunty (2002) of the Office of Legal counsel responded that al Qaeda and Taliban members were not covered under any Geneva Convention. Furthermore they argued that customary international law is not binding upon the President of the United States. On January 18, 2002 President Bush decided that detained persons would not be protected by prisoner of war status under the Geneva Conventions and the next day Secretary of Defense Rumsfeld (2002) issued a memorandum on the status of Taliban and al Qaeda in which he instructed Combatant Commanders that "al Qaida and Taliban individuals under the control of the Department of Defense are not entitled to prisoner of war status for purposes of the Geneva Conventions of 1949." Detained persons would be treated in a manner that is "consistent" with the Geneva Conventions in accordance with military necessity based on the assessments of subordinate combatant commanders. This policy was announced publicly by Secretary Rumsfeld and the same day Assistant Attorney General Jay S. Bybee sent a memo to White House counsel and General Counsel at the Pentagon which argued that President Bush was not bound by the Geneva Conventions or the War Crimes Act of 1984 in the treatment of detainees from Afghanistan due to the fact that Afghanistan was a "failed state" (Bybee 2002b). The decision of the Bush administration was that the GCIII does not apply to the conflict in general and thus does not need to be evaluated in any particular individual case.

On January 26, 2002 Colin Powell (2002) sent a memorandum to the Counsel to the President outlining potential consequences of the decision that GCIII does not apply

to the conflict in Afghanistan. Powell laid out the two options under consideration and pros and cons for each. Either the GCIII does not apply to Afghanistan as a whole based on the "failed state" interpretation or the GCIII does apply to the conflict in Afghanistan, but Al Qaeda and Taliban members may not be entitled to protection individually or as a group. Powell cautioned that if the GCIII was not applied to the conflict as a whole that this would constitute a reversal of "over a century of US policy and practice in supporting the Geneva Conventions and undermine the protections of the law of war for our troops, both in this specific conflict and in general" (2002). In addition Powell pointed out several potential disadvantages in terms of diplomacy, international opinion, and international support. Furthermore he argued that the decision would undermine an important legal basis for the President's decision to use military courts to try detainees.

However Attorney General John Ashcroft recommended that President Bush determine Afghanistan to be a failed state in which case legal challenges "will be resolved more quickly and easily if they are foreclosed from judicial review under the *Clark* case by a Presidential determination that the GCIII does not apply based on the failed state theory" (Ashcroft 2002). Ashcroft's argument was based a legal precedent in which a "determination" by the President that a particular treaty was not applicable to a particular situation is "fully discretionary and will not be reviewed by the federal courts" (Ashcroft 2002). If, on the other hand, the President were to "determine" that the treaty does apply to the conflict in Afghanistan and then "interpret" the Taliban to be "unlawful combatants" this interpretation could be subject to judicial review, legal challenges, and even criminal liability for US officials.

President Bush sent a memorandum to Colin Powell, John Ashcroft, Donald Rumsfeld, Dick Cheney, as well as the Chairman of the Joint Chiefs of Staff and others with a decision on the matter of detainees and GCIII. President Bush stated that "the war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our nation recognizes that this new paradigm – ushered in not by us, but by terrorists – requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva" (Bush 2002). Thus the Bush administration presented the War on Terrorism as neither a Common Article 2 nor Common Article 3 conflict. Nonetheless the adversary, "unlawful combatants," would be engaged as a collectivity, akin to a hostile force, and individual combatants would not be entitled to having their status determined, in court, solely based on their individual actions. They would be targeted, instead, due to their identification⁶⁷ with the enemy. In doing so George W. Bush articulated a "new" kind of war which is an armed conflict but not conforming to any of the Geneva Conventions categories of conflict. A consequence of this interpretation is the position, made explicit by the Bush administration, that detained individuals in the War on Terrorism have no legal rights under international law. If the United States treats them in a manner "consistent with the principles of Geneva" this is an act of charity rather than an obligation by law. The idea that the United States will treat detainees as appropriate under a "new thinking" of the laws of war and consistent

⁶⁷ How any particular individual can be definitively identified with the ambiguous archetypal identity "unlawful combatant" in the absence of individual due process is the central questions of this project and will be explored in remaining chapters.

with the Geneva Conventions indicates this perception of new ground, not yet colonized by law and order. The Geneva Conventions are to be used as a kind of guiding principle upon which law enacted in this new space will be created.

President Bush's November 13th order states that detained individuals, when tried, would "be tried for violations of the laws of war and other applicable laws by military tribunals." This order empowers the Secretary of Defense to establish rules and procedures for military commissions and specifically prohibits jurisdiction of any US, foreign, or international court over individuals subject to the order. By this order there can be no appeal to any court at all outside of the military commissions established by the order. The explanation and justification provided in the order is that "given the danger to the safety of the United States and the nature of international terrorism... it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." Further explanation is provided using the language of an emergency: "having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency" (Bush 2001).

"Human Rights Law Abhors a Vacuum"

The stance taken by the Bush administration on the problem of captured individuals in the War on Terrorism has been seen as problematic by a wide range of scholars, international law experts, and other observers. In general, as argued by Rosa Brooks, advocates of humanitarian legal protections have advocated a rigid, perhaps inconsistent, ⁶⁸ approach to the interpretation of protected status and the applicability of international law and the Geneva Conventions. They argue that the conventions not only apply to this particular case but to all possible scenarios. Many point to the commentary to the fourth Geneva Convention which makes clear the intention of the Conventions to provide distinct legal categories that are applicable to every individual involved in armed conflict including those who do not intend to be involved at all: "every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel or the armed forces who is covered by the First Convention. There is no intermediate status: nobody in enemy hands can be outside the law" (Solis 2010, 187).⁶⁹

⁶⁸ "It is somewhat ironic for any in the human rights law community to insist on a rigid and traditional reading of the law of armed conflict when it comes to the war on terror, since in many other contexts the human rights community has appropriately been at the forefront of calls for progressive and flexible interpretations of international law." (Brooks 2004, 680)

⁶⁹ Jean Pictet, ed., Commentary, IV Geneva Convention, 51, as quoted in (Solis 2010, 187)

First, many consider humanitarian law to be fundamentally oriented towards universal applicability to human conflicts. The premise of humanitarian law, they argue, is transcendence of particular political problems and the provision of basic guarantees to all. In this sense there can be no human space *outside* humanitarian international law. If international law permits the United States to plausibly argue that indefinite detention, torture, and targeted killings are not prohibited then what possible guarantee of humanitarian norms can international law provide? If indefinite detention, torture, and killings are permitted within this legal space without due process and without the protections otherwise afforded by international law then how can one meaningfully speak of law at all? These observers argue that there is no space outside of international law for "unlawful combatants" and expeditionary forces to inhabit and that existing international law is as relevant and applicable today as it was in the past. This perspective holds that individuals designated "unlawful combatants" are well within the reach of, and subject to, the laws of war as is the United States in its conflict with them.

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Nee, for example, the preamble to Protocol Additional to the Geneva Conventions (API) which reaffirms the applicability of the Geneva Conventions "in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict." The Geneva Conventions create categories of combatants and civilians which, as argued below, are intended to cover all individuals involved in a conflict. Thus the preamble to API reaffirms that all people are subject to the Geneva Conventions regardless of the nature of the conflict or the motivations of those engaged in it. (Frits Kalshoven and Zegveld 2011, 83–85) point out that this is only a claim to applicability of the Geneva Conventions to all conflicts. This does not mean that all Parties to all conflicts have identical legal standing. The Geneva Conventions provide for certain protections for lawful combatants and guarantees for the just treatment of those accused of crimes. The applicability of the Geneva Conventions does not generally guarantee any party immunity from prosecution should they be found to be in violation of national and or international law.

Nee 28 Yale Journal of International Law 2003 which contains a symposium on "Current Pressures on International Humanitarian Law" and sketches "the point of encounter" between the War on Terrorism and international law. ("Symposium: Current Pressures on International Humanitarian Law: Foreword" 2003, 317)

This is not to say that international law is unchanging or perfected but that its reach is universal.

Second, many have also argued that the War on Terrorism simply is not a war under international law. Jordan Paust argues that while the United Sates can conduct military activities in self-defense against organizations such as al Qaeda this does not constitute a "state of war." "The lowest level of warfare or armed conflict to which certain laws of war apply is an insurgency" (Paust 2003b, 326) and al Qaeda and other non-governmental organizations do not meet the criteria of an insurgent group including a "semblance of a government, an organized military force, control of significant portions of territory as its own, and its own relatively stable population or base of support within a broader population" (Paust 2003b, 326). The only other possible category would be that of a belligerent which requires all the criteria of an insurgent group as well as the additional requirement of recognition, as such, by at least one other state government which al Qaeda and other groups lack. As al Qaeda is neither an insurgent group, nor a belligerent party, an armed conflict or war cannot take place between the United States and al Qaeda under international law. As a consequence laws of war do not apply to this conflict but the adversaries also cannot be treated as combatants. Paust makes the point that "applying the status of war and the laws of war to armed violence below the level of an insurgency can have the unwanted consequence of legitimizing various other combatant acts and immunizing them from prosecution" (Paust 2003b, 327). If terrorist acts are acts of war then the US military and its civilian chain of command would become legal targets. In this case an attack on the Pentagon by a non-state actor, at any time, would be a legal attack, assuming legal weapons were used, rather than an airplane full of civilians. Attacks on the President and US military elements would also be permissible, under laws of war, at any time, including when military members are out of uniform and far from any battlefield they are aware of.

Kenneth Roth, Executive Director of Human Rights Watch, has pointed out that the Bush administration did not seem to be using the term war metaphorically but actually intended to "give itself the extraordinary power enjoyed by a wartime government to detain or even kill suspects without trial" (Roth 2004, 2). Roth points out the implications of a state of war between the United States and terrorists: "Under the administration's logic, then, Padilla could have been gunned down as he stepped off his plane at O'Hare, and al-Marri as he left his home in Peoria. That, after all, is what it means to be a combatant in a time of war" (Roth 2004, 4). The shooting on sight of individuals in the airports and on the streets of the United States seems particularly extraordinary and Roth argues this is because in these cases a clear sense of the urgency of such lethal actions is missing. In the absence of such urgency law enforcement actions are more appropriate. The use of extraordinary wartime powers results in more mistakes and less oversight and is only appropriate when more careful and measured approaches are impossible.

If the War on Terrorism is no war then international law does not permit recourse to the laws of war upon which the Bush administration partially based their justification of the category of "unlawful combatant." To adequately make the case for a state of war, Roth argues that the Bush administration must establish that "an organized group is directing repeated acts of violence against the United States," that a particular suspect is

an active member participating in hostilities, and that "law enforcement means are unavailable" (Roth 2004, 7). Though Roth argues that better guidelines are needed for when to apply war law, "the Bush administration should recognize that international human rights law is not indifferent to the needs of a government facing a security crisis" (2004, 6) and that certain temporary flexibilities are available in such cases.

The above arguments share the position that the question of the status of the conflict itself is already within the purview of international law and that however this question is resolved, either war or not war, the conflict falls well within the scope of international law. Yet even considering the problematic nature of the "war," and the possibility that it could be a kind of conflict that was not envisioned by the Geneva Conventions, Anicee Van Engeland (2011, 47) summarizes the argument that the Geneva Conventions have a legal category for every possible status:

Regular combatants meeting the criteria set forth in Article 4 GCIV and Articles 43 and 44 API will be regular POWs; fighters who are member of armed groups will also be combatants under Articles 43 and 44 API as long as they meet the conditions set forth (either the four conditions or the lose conditions set forth in API) and will therefore be regular POWs. If they do not fulfill the criteria, as explained above, they become unprivileged combatants protected by Article 75 API, which is part of customary law. Civilians who directly take part in hostilities are not entitled to POW status but are considered as unprivileged combatants and are protected by Article 75 API. All articles are carefully laid down so as to avoid any possibility for the detaining party to use discretionary power. If there is a doubt as to whether someone is entitled or not to the status of prisoner of war, the status will be determined by a competent tribunal (Article 5 GCIII and Article 45.1 API).

In short, if one is entitled to participate in combat, but does not, then one is considered a civilian. If one is not entitled to participate in combat, and does, one is still a civilian but can be held criminally liable for acts they have committed. "There are

therefore no illegal or 'unlawful combatants,' only civilians who directly take part in hostilities and benefit from minimal protection. There is no grey zone in international humanitarian law, and people who are caught in between become unprivileged combatants" (Engeland 2011, 117–118).

The distinction between "unprivileged combatant" and "unlawful combatant" gets to the heart of the question at hand. "Because terrorists are not states and generally refuse to fulfill the requirements for becoming an identifiable warring party under Geneva Convention III, terrorists, by definition, are never engaged in a legal act of war under accepted customary definitions" (Mofidi and Eckert 2003, 74). The term "unprivileged combatant" is situated well within the purview of international law; it is a distinct, well recognized legal category that has corresponding legal ramifications. If those captured in the War on Terrorism are unprivileged combatants they are subject, individually, to trial and punishment for their actions and they retain some protections under the Geneva Conventions. Additional Protocol I extend additional clarification and protections to certain kinds of combatants. First, Article 1 states that "in cases not covered by this Protocol or by any other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience." Though API explicitly applies to international conflicts it also, somewhat controversially, extends and relaxes some of the distinctions contained in

the 1949 Conventions. 72 Article 4 API expands on Common Article 2 conflicts to include "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to selfdetermination, as enshrined in the Charter of the United Nations..." This controversial addition opens the applicability of API to additional types of conflicts that are not limited to those between High Contracting Parties. As mentioned above this language creates a very broad range of conflicts potentially covered under API, particularly given the inclusion of "alien domination" which, if interpreted liberally, could be applied to most of the conflicts that have occurred throughout history. Despite the "elasticity" of this wording, in practice API has not been interpreted so broadly: "it was not the intention of the drafters that henceforth any conflict a group of self-styled 'freedom fighters' designates as a 'war of liberation' would thereby automatically fall within the category of international armed conflicts" (Frits Kalshoven and Zegveld 2011, 84). The intention was for this provision to apply to "wars of national liberation" occurring within the context of decolonization and there are several specific criteria that must be met for a non-High Contracting Party to petition Geneva to be recognized as involved in such a conflict. Though many groups have claimed to be engaged in struggles for selfdetermination there has not been a successful petition for recognition under Article 1.4

Article 1.3 API indicates that API applies to "the situations referred to in Article 2 common to those Conventions" however Article 4 API expands the applicability beyond international conflicts addressed in common Article 2.

API since its inception. However, the status of any particular conflict is always subject to judicial review and could be so designated even in the absence of such a petition.⁷³

The United States has signed, but not ratified, API. However much of what is contained in API is considered customary international law which requires no ratification to be in force. Thus the lack of ratification of API by the United States does not exempt the US from following those elements that are customary in spite of the fact, according to Van Engeland, that the United States "felt entitled to ignore Article 75 API, which grants these ad minima rights, since the country has not ratified the Protocol." Article 75, as "ad minima," applies in all situations that are not covered by additional protections in the Geneva Conventions. Thus between the protections afforded in the Geneva Conventions and Article 75 Van Engeland argues that "no one falls outside the scope of international humanitarian law" (Engeland 2011, 48).

"Another misconception is that there are certain areas on earth that are so-called 'legal no-man's lands' wherein human beings have no protections under relevant international law. Such a misconception might be confused with a notion that there are certain illegal no-legal-protection lands where actions take place in violation of international law. In any event, under international law no locale is immune from the

⁷³ (Frits Kalshoven and Zegveld 2011, 84–85)

^{74 &}quot;This is how their prisoners became so-called "unlawful combatants", losing all protection, which paved the path to abuses. Meanwhile, the United States violated customary humanitarian law; there is no legal limbo in humanitarian law, and therefore, the United States violated its obligations under customary international humanitarian law by not respecting the standards set by Article 75 API." (Engeland 2011, 56)

reach of relevant international law" (Paust 2003a, 1346). Paust argues that Afghanistan and Iraq are subject to international law due to the conflicts taking place there. Also human rights law and laws of armed conflict would be applicable on US vessels and aircraft and to Guantánamo Bay by virtue of the United States presence there. Not only is there no territory on earth beyond the reach of international law, but "no human being is without protection under international law and the types of protection are many" (Paust 2003a, 1350). Paust goes on to specifically argue for the unlimited reach of the Geneva Conventions which, in "some forms of protection," are "absolute." "Any person detained, whether a prisoner of war, unprivileged belligerent, terrorist, or noncombatant, has at least minimum guarantees "in all circumstances" "at any time and in any place whatsoever" under common Article 3" (Paust 2003a, 1351). Put differently: "Human rights law abhors a vacuum; specifically, the relegation of human beings to an existence emptied of human rights protection" (Amann 2003, 315).

Luisa Vierucci points to "well known precedents" that demonstrate "the tendency of the state executive power to deny POW status unless the fighter belongs to a category of combatants that is so evident that it could not be reasonably refused" (Vierucci 2003, 299–300). As a consequence most combatants plausibly fall somewhere into this yawning grey zone. In an effort to address this problem the Geneva Conventions stipulate that in case of doubt the protections of the Geneva Conventions apply. At the same time there is no clearly established case where conflict exists that the Geneva Conventions do not apply. Consequently the Geneva Conventions apply in all cases where there *is* doubt that they apply except in those cases where this is no doubt that they apply. In other words, the Geneva Conventions apply in all cases without exception.

"The very aim of GCIII, which is the protection of combatants from the rage of the enemy under any circumstances, including 11 September attacks" (Vierucci 2003, 305). It is to the question of the possibility of exceptions to international law that I will turn next.

Constructing the Past

The Bush and Obama administrations are hardly alone in identifying a new underlying political reality that has rendered existing international law alarming out of date. Many have argued that a war was raging even before the United States belatedly recognized the fact in 2001 and that exceptional measures are required to fight an enemy such as al Qaeda. Many have pointed to globalization as an underlying cause of the essential difference of modern times. Changes associated with globalization have induced a breakdown of formerly distinct categories such as war and peace. This breakdown in international social, political, and legal fabric has allowed the Bush and Obama administrations to plausibly make legal arguments that fundamentally undermine the rule of law. The activities that have found a home in this legal space, what others have called a "legal black hole" (Steyn 2004) or "legal no man's land" (Paust 2003a, 1346) include indefinite detention of detainees, indefinite detention and execution of US citizens without due process, and the global expansion of the battlefield, what Rosa

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⁷⁵ See for example (Wedgwood and Roth 2004)

⁷⁶ See (Brooks 2004) and also (Amann 2003) for the argument that formerly distinct legal categories have become less distinct.

⁷⁷ See (Savage and Shane 2013)

Brooks (2004) calls "war everywhere." The Bush and Obama administrations have been able to get away with this, to run roughshod over international law, because, according to Brooks, their claims "are based on loose, but not implausible, readings of the law of armed conflict" (2004, 678).

This perspective holds that laws of armed conflict are predicated on a clear distinction between peacetime and war time. War, or "armed conflict," must be identifiable and definable in order for courts to know when to apply what type of law and when to immunize the kinds of acts that, while permissible in wartime, are criminal in times of peace. The breakdown of clear distinctions did not begin on September 11th but has become much more apparent in the aftermath. The "increasing incoherence and irrelevance" (Brooks 2004, 677) of traditional legal categories of war and peace, combatant and civilian, battlefield non-battlefield, and temporal limits on warfare have rendered existing legal paradigms obsolete in this new world post-9/11. Acknowledging this fact and moving towards a radically new conception of laws of armed conflict is necessary. "The existence of reasonably clear boundaries between conflict and nonconflict, combatants and noncombatants, and 'lawful' and 'unlawful' belligerents is what allows us to determine which legal rules apply in different situations, and, even more critically, allows us to identify people and rights meriting protection" (Brooks 2004, 681). The erosion of what Brooks calls the "logical underpinnings" of traditional categories leads to an "era of War Everywhere" (2004, 681).

According to this perspective the proper functioning and effectiveness of international law is predicated on clear boundaries. This is to say that with the

breakdown of boundaries it becomes more and more difficult to say that anything is permitted or not permitted by international law. Thus the United States can justify virtually any policy under international law no matter how seemingly inhumane. This breakdown of boundaries would not specifically privilege the United States more so than any other entity except to the extent that law's check on power, if weakened, would benefit those who have the ability to do the things that they want to do. With the breakdown of boundaries the efficacy of law over power becomes weakened to the point of obsolescence. This is an argument that policies associated with the War on Terrorism pose a challenge to humanitarian law except that it isn't quite this simple; the War on Terrorism is rather an effect, a symptom of a breakdown already occurring. The "legal black hole" was already there, created by an expanding gulf between new "realities" and "old" law. Rather than create this legal space, the Bush administration has simply recognized it.

Brooks calls the erosion of boundaries an "inescapable social fact" (Brooks 2004, 681). In this sense Brooks' argument is a fitting example of a widespread perspective that the nature of contemporary challenges has become distinctly different from that of the past. The question remains what is it exactly that has changed? Has the nature of the social elements changed, such as the nature of warfare, the nature of those participating in war, or have the boundaries themselves changed through, for example, ever broader precedents of interpretation? For Brooks clearly the former is the case; she repeatedly points to the "changed nature of twenty-first century conflict and threat" and as a consequence a "new analytical framework" (2004, 684) is needed to respond to a new social reality. Brooks identifies the underlying problem being that the Bush

administration has had to apply "anachronistic" international law to fundamentally new phenomena. This sort of mismatch between old law and new threat creates the zones of plausibility that have expanded to include almost all possible scenarios. Though it is often not stated explicitly this is effectively an argument for the exceptional nature of contemporary international reality. The new realities that Brooks identifies were not foreseen by the law and the law cannot adequately address them; they are exceptional circumstances as far as international law is concerned. According to this line of thought exceptional circumstances are always possible because no law can ever anticipate every possible circumstance or be immune to finding itself "anachronistic." This understanding requires an allowance in the understanding of law for exceptions. The consequence of the current situation is one of war everywhere, all the time, in which rule of law has been thoroughly undermined. In the interim between this legal paradigm and the next actions like those of the Bush administration cannot be said to be strictly legal or illegal.⁷⁸ Instead, they are simply "plausible."

The breakdown in the distinction between crime and conflict is exemplified by the 9/11 attacks. These attacks represent a phenomenon that is neither conflict, "classically" understood, nor simple domestic crime, "classically" understood. The breakdown of previously relevant distinctions makes *plausible* the kind of arguments made by the Bush administration. This plausibility, which makes policies of indefinite detention and

⁷⁸ "These anachronistic categories and assumptions, applied to the struggle against terrorism, lead not implausibly to the conclusions the Bush administration has drawn. They do not compel the legal conclusions of the Bush administration, but neither do they offer a firm basis for regarding the administration's conclusions as unlawful." (Brooks 2004, 745)

extrajudicial killing possible, "virtually eliminates the rule of law as we have come to know it" (Brooks 2004, 720). Though Brooks ostensibly criticizes the Bush administration she logically supports the Bush administration's general position. The true nature of international reality *has* changed and this change has effectively swept away existing international law as a relevant constraint on state behavior.

This line of argumentation in one form or another has become prevalent since 2001. For this reason many have been tempted to see this experience of exception making through the lens of Carl Schmitt's work. In this way the "black hole" at Guantánamo has been seen as an instance of sovereign decision making on the part of the Bush administration. This perspective raises many interesting questions about the policies of the War on terrorism in the context of United States law. However, most of this work has not seriously engaged how or if this concept of the exception can be applied to thinking about international law. How should sovereignty and norm, two crucial elements of Schmitt's thought, be understood in the context of international law? These questions will be taken up at length in the next chapter.

3 THE LAWS OF WAR AND THE POLITICS OF EXCEPTION

A New Global Reality?

Claims about the exceptional nature of 21st century global politics are most often framed in an explicitly global appeal. "International terrorism" is often presented as a threat that looms large over all civilized nations and the subsequent struggle against this specter is presented as a challenge to the international community as a whole.

International terrorism is represented as a threat to all civilized peoples by a barbarian element that simply has no legitimate place in the world. To civilized, modern subjects international terrorism represents a horrifying regression from modernity and the figure of the terrorist inspires an almost instinctive duty towards violent remediation. Whether beyond the law entirely or simply criminally deviant there is wide consensus that the phenomenon known as international terrorism is a global problem distinct from particular problems of crime and internal security.

In making the claim that the exceptional challenges of the 21st century are global in nature the George W. Bush and Obama administrations have insisted that these are not challenges facing the United States or any particular state alone. Though the United States has taken the lead in many aspects of the Global War on Terrorism one of the most defining elements of this war is that it is represented as a "global" rather than particular

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⁷⁹ From *The Call of Cthulhu* by H.P. Lovecraft (1982, 22); the narrator relates a tale of seamen who are attacked by a ship of uncivilized pacific islanders and 'half-castes' whose extremely foreign and barbarous nature seemed to provoke a natural enmity in civilized man; "There was some peculiarly abominable quality about them which made their destruction seem almost a duty, and Johansen shews ingenuous wonder at the charge of ruthlessness brought against his party during the proceedings of the court of inquiry."

of many of "those who were missed by the bombs" yet the detention center at Guantánamo Bay represents only one node of what has elsewhere been called an "archipelago of exception" (Weizman 2005). Detainees accused of participation in international terrorism are detained, interrogated, tortured, and killed at sites around the world. Those suspected of terrorism who survive to see the inside of a court room present particular problems for the United States and others who come into possession of their still living bodies. In these instances the living human body which figures prominently in discourses of modernity as the vessel of inalienable human rights is also the presumed bearer of an identity that is deprived of at least some of those rights. The still living "unlawful combatant" is then a kind of contradiction in itself, an ambiguous figure, and an exception situated somewhere in the geographical and temporal margins of the modern world.

Most claims to the exceptional nature of the Global War on Terrorism are framed in explicitly global and international terms. "International terrorists" pose an existential threat not simply to the United States, or any particular state, but to the state in general.

⁸⁰ An unnamed member of US Congress cited by Slavoj Zizek on the back cover of (Agamben 2005)

⁸¹ Guantánamo detainees have also alleged that detainees have died due to abuse from US personnel; "I was subjected to pernicious threats of torture, actual vindictive torture and death threats - amongst other coercively employed interrogation techniques ... The said interviews were conducted in an environment of generated fear, resonant with terrifying screams of fellow detainees facing similar methods ... This culminated, in my opinion, with the deaths of two fellow detainees, at the hands of U.S. personnel, to which I myself was partially witness." as quoted in (Neal 2010, 81)

⁸² See the statement made by Avraham Shalom who led the Israeli internal security service Shin Bet from 1980 to 1986. In a documentary on the Shin Bet Shalom stated that his perspective during his time at Shin Bet was "I didn't want any more live terrorists in court." ("The Gatekeepers" 2012)

Consequently "international terrorism" is a threat to the "international community" such that exceptions must be made to international norms and laws of war. Most scholarly works on the politics of exception, however, approach the problem from a perspective that treats the sovereign state as the largest unit of analysis in global politics. 83 Inspired by Carl Schmitt's articulation of the sovereign as "he who decides on the exception," most work on the politics of exception shares Schmitt's commitment to an idealized sovereign state as the natural frame of reference in the study of politics. The question of the exception with all of its attendant possibilities of salvation from existential threats to authoritarian abuse is considered in the context of how the exception detracts from or bolsters a particular state's aspirations to be the state, or what R.B.J. Walker (2003, 282) calls the regulative ideal of modern sovereignty. The politics of exception are then lauded or critiqued insofar as they perfect or corrupt a particular state in its aspirations to fully realized modern sovereign statehood. Framing the question of the exception in this way, as the corruption or perfection of the ideal sovereign state, assumes a position for the state as the relevant and natural actor and point of reference that is either saved or lead astray by the politics of exception.

Questions regarding the composition of the exceptional, archetypal "unlawful combatant" are curiously silent or even silenced in most arguments about the nature of the "unlawful combatant" and post-9/11 international reality. Most arguments instead

⁸³ Following Andrew W. Neal (Neal 2010, 31) I will to use the term 'exceptionalism' to refer to discourse around "the problem of 'the exception'. 'The exception' is shorthand for the problem of certain events and situations, such as 9/11, being designated as 'exceptional' in order to legitimate exceptional policies, practices, executive measures and laws."

treat the identity of the "unlawful combatant" and the nature of international reality as material entities that can be known and communicated without the intervention of a representative archetype. Most observers make arguments about what the world essentially is rather than how the human world is understood and represented with language.

These kinds of questions are by now familiar: was a fundamentally *new* reality revealed on September 11, 2001? Has a gap, a blind zone, a "legal black hole," heretofore unnoticed, now appeared? Has an exceptional contingency arisen that imperils the norm? Do contemporary threats in the form of technologically adept international terrorists constitute a radical break from the past? Has the international security environment fundamentally changed? Are the Geneva Conventions and other international laws of war now outdated? Is there a need for new laws that can provide a home for the legal category of "unlawful combatant" and provide a guide for action in the post-9/11 world? Has war law become simply irrelevant when dealing with those who respect no law? In short: has "everything changed" after 9/11? These questions presuppose, and implicitly assert, that there *is* an underlying reality of global politics and the identities that inhabit it, and this reality may either change or remain the same. Most importantly, modern observers can potentially discover and communicate this reality accurately, faithfully, and correctly.

A second set of questions then hinge on the first. These questions pertain to whether actors have either correctly or incorrectly interpreted this reality. These questions are likewise familiar: was the Bush administration correct in its assessment of

the danger posed by modern "unlawful combatants"? Are acts of "international terrorism" acts of war or acts of crime? Are detained individuals entitled to protections under the Geneva conventions as prisoners of war or are they "unlawful combatants"? Do "international terrorists" have the same rights of due process as regular criminals? Does "international terrorism" create a situation of "extraordinary emergency" that provides license for "exceptional" measures? Is humanitarian law really universal?

Historical Change, Continuity, and International Relations Theory

Questions about the identity of the "unlawful combatant" touch on some of the deepest questions in the study of international politics. First, is the international political landscape materially or socially constructed? Second, can it be known by humans and if so, how? Depending on the answers to those questions a third question might be posed, which most accounts take as the first question: have the Bush and Obama administrations correctly assessed and acted on post-9/11 international reality?

These first two questions relating to the nature of the underlying reality of global politics and how humans may know it are obviously central to the discipline of International Relations. For many global politics is understood to be a realm of recurrence and repetition through time from Thucydides to the present day. War is a struggle for survival where all is fair and many are skeptical about the possibilities for international regimes, cooperation, and long term change in the international system. 85

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⁸⁴See for example Martin Wight (1960), Why is there no International Theory?

⁸⁵See particularly offensive realism: (Jervis 1978; Mearsheimer 2001)

The meta-theoretical assumptions of realist and neo-realist perspectives are often generalized as assumptions about unchanging realities, whether human nature, or the structure of the international system. Despite unchanging aspects of human nature "classical" realist "thought," such as the work of E.H. Carr (1964) and Hans Morgenthau (1985), remained concerned with issues of peaceful change, a concern that fades in the work of many associated with neo-realism. Neo-realism focuses instead on unchanging aspects of global reality and a condition of anarchy in the international system that determines the behaviors of individual states. For some neo-realism provides a means for international relations to become a "cumulative" (Vasquez 1999) science that can begin to build a human understanding of the true nature of international reality. Though some conceits may be necessary, such as treating the sovereign state as if it is a unitary, rational actor, these approaches are "useful" (Gilpin 1984; Jervis 1998) for their practitioners' efforts to model international reality.

Many other "liberals" have explored the implications of an unchanging reality of international anarchy for the behaviors of states and the possibilities of cooperation. As Keohane and Nye (1977) argue, military security is assumed to be the dominant goal of states, and military force will always be the most effective means of securing state survival and interests. The balance of power and international security situation are the primary drivers of high politics and international institutions will simply reinforce and

⁸⁶ See Waltz's (1990) Realist Thought and Neorealist Theory.

⁸⁷ See Ashley (1984) for a critique of Waltz's (1979) implied statist commitment that precedes the overt structuralism of *Theory of International Politics*.

serve state interests. Nonetheless there is considerable room for cooperation under conditions of anarchy. While complex interdependence perspectives tend to share some of the same meta-theoretical assumptions of (neo) realism they leave room for effective international institutions and linkages which are not simply instruments of state's self-interest. This perspective opens the door to certain kinds of change in the international system. Keohane (1993, 271) argues that institutionalist theory "assumes that states are the principal actors in world politics and that they behave on the basis of their conceptions of their own self interests." Relative capabilities and self-help are still important in world affairs but "institutionalist theory also emphasizes the role of international institutions in changing conceptions of self-interests" (1993, 271). 88

Alexander Wendt (1992, 1994, 1995) and others have illustrated a particular shortcoming of both realist and liberal approaches to international relations. As "rationalist" theories both realism and liberalism (broadly construed) take the self-interested state to be the starting point of the study of international relations. The structure of the international system, global reality, can influence the behaviors of self-interested states but it can never impact their essential identity as self-interested state

⁸⁸Koehane and Nye (1977) identify three main characteristics of complex interdependence: multiple channels, an absence of hierarchy among issues, and the minor role of military force. These assumptions result in a view that goals and instruments of state policy will vary by issue area and that agenda setting and institutional efforts can mold how states understand the self interests they pursue. Barnett and Finnemore (2004) develop additional meta-theoretical institutionalist assumptions. Particularly, they attempt to theorize a basis for authority and autonomy of international institutions, aspects which are suspect if not non-existent in most (neo) realist theory. They identify four broad categories of international organization's authority: rational-legal, delegated, moral, and expertise. These very sources of authority carry some amount of autonomy. They also argue that it is in the interests of states to give IOs some level of autonomy in order to accomplish their mission.

because this identity is simply presumed. This taking for granted of the identity of the state "blinds" rationalist theories to the ways that identities and interests are formed socially and in turn change structures. This inter-subjective element is the focus of constructivist theories which take an alternate "metaphysical stance" (Adler 2002, 96) towards the idea of an underlying global reality, and the knowledge that humans produce. On this account actors including states are socially constructed rather than objectively given, and participate in ongoing processes of social construction which are limited, not by social meanings derived from concrete realities, but rather from practice and representation. While this perspective comprehends the possibility for change in the international system it, at the same, limits the ability to argue that an underlying reality of the system has changed because actors and the system are socially constructed. What are accessible to exploration instead are the practices by which social reality is produced.

In more "radical" (Adler 2002, 98) forms, constructivist approaches shift their focus from material reality to the ways that reality is represented in discourse, narratives, and texts. ⁸⁹ Here practices of representation become the primary object of inquiry and the writer is always implicated in the work. ⁹⁰ "The ideal of the objective, disinterested, independent theorist, which might hold true for the natural sciences, does not hold true for the social sciences" (M. Hoffman 1987, 232). The scientist, theorist, and scholar are all contextually bound, and to a certain extent they are the product of their particular time

⁸⁹ For a brief, general treatment of "radical constructivism" see (Adler 2002, 98)

⁹⁰ For such an exploration of practices of representation in International Relations see (Ashley and Walker 1990, 378; C. Weber 1994)

and place. A truly objective standpoint removed from any particular perspective is not possible for human observers who are always conditioned by their environment and act according to their particular will. In the words of Robert Cox "theory is always for someone and for some purpose" (1986, 207). To a certain extent the practitioner always chooses where to focus their inquiry and their point of intervention into particular problem sets. Individuals bring their own particular perspective to bear on the question of which problems are most pressing and how they should best be addressed. Though "more sophisticated" theory will reflect on and "transcend" its own particular perspective this transcendence has limits. Even the most critical of approaches depends on the very conventions, suppositions, and practices they criticize in order to have meaning. Thus ultimate transcendence of perspective should not be the goal of theory but rather the ability to "give an account of itself" (M. Hoffman 1987, 237) even if this account can never be finished.

The individual theorist or scholar can never claim a position or perspective that is not itself partially determined by the context in which the theorist exists. At the same time these contexts in which theorists, or agents, exist, operate, and practice are themselves never finally independent of the agents from which they are made. This agent-structure relationship is ultimately undecidable yet the imperative to decide, which is constitutive of much international relations theory, has created an "aporia" (Doty 1997, 97) or "self-engendered paradox" beyond which those so inclined have been unable to proceed. This "unsettling" position has the advantage of permitting "poststructuralism to pose the question of historicity that modern theory and practice excludes" (Ashley 1989, 272). The concept of historicity refers to "the effect of presence" that enables concepts to

be treated as though they have "an identity and continuity of meaning independent of interpretation and practice" (Ashley 1989, 262). This is to say that any "effect" or appearance of an underlying reality is never attributable to a timeless universal but instead to ongoing practices tending to, in the words of Foucault, "make what does not exist (madness, disease, delinquency, sexuality, etcetera), nonetheless become something, something however that continues not to exist" (Foucault 2010, 19).

As Roxanne Doty points out "poststructural" approaches that are amenable to irresolvable indeterminacy provide hope, not of resolution of these paradoxes, but rather of un-foreclosing certain avenues and possibilities that are rendered unthinkable via other approaches. If neither agents nor structures have an ontological priority, if meaning cannot in the last measure be attributed to either, then the hope of a final social and political meaning is lost to an infinite field of play where no meaning is ever final and the worst fears of its critics threaten realization: "no statements can be more valid than others, nothing can be done to assess the validity of normative and epistemic claims, and science is accordingly just one more hegemonic discourse" (Adler 2002, 98). This vision of a "surrender" of historical man's agency, the ability to finally know and control the world, presents a "sorry spectacle from which one instinctively turns away" (Ashley 1989, 279). Yet this revulsion is only for those who think that the role of international relations and science more generally is to confront the material world and pry from its clutches the incontrovertible truth. This truth search depends upon a central, objective position from which meaning can be attributed to the elements in play in man's world. From this central God-like position both structures and agents can be seen to have an essential meaning, their play can be limited, and man can know the *truth* of reality.

Poststructuralists, however, insistently question this central position, or presence, which must be placed beyond question for truth-seeking activities to function. Thus a poststructuralist style of inquiry looks for the historicity of the very central position and subjectivity, the "never finally completed effect of practices of representation, practices which are inherently contingent and might always fail" (Doty 1997, 378). This undecidability or historicity then becomes the "central presence" (Ashley 1989, 278) of this kind of approach to the study of global politics.

Skepticism towards truth claims can be extended beyond the underlying reality of the past versus present to a generalized skepticism toward any single underlying reality of any particular identity and all identities can be explored in their "historicity." Consequently the most interesting questions pertaining to the phenomena of the "unlawful combatant" in the War on Terrorism relate to how particular identities of us and them, then and now are constructed in order to create stable foundations for the justification of political practices. How has an idea of the laws of war been articulated that serves to separate an *inside* the law from an *outside*? How do the laws of war function discursively, not only to protect individuals and limit violence, but also to justify some of the extraordinary violence undertaken in the name of the War on Terrorism? How has a unitary figure of the "unlawful combatant" been produced such that a wide range of discrete individual bodies have been killed, captured, tortured, and deprived of humanitarian protections under international law? How has a corresponding figure of civilization and modernity been articulated that has justified itself in operating outside the law in these ways? How has a War on Terrorism been articulated where both parties to the conflict are in a certain sense outside the law, simultaneously engaging in practices of

unrestrained violence? If these identities upon which the safety, security, and fate of so many hang do not actually exist then how has global political life come to revolve around them in the early twenty-first century?

The usual buzzwords that open the door to question of the politics of exception have a traditionally problematic status when considered in the context of global politics. They are problematic because the central concepts invoked in consideration of the exception are in many cases taken to simply not exist at the international level. First and foremost is the lack of a sovereign position in the international system that could decide on the exception. Quite the contrary the international system is generally considered to be an anarchic realm, an "abode of war," conspicuously lacking not only centralized power but even the basic social elements that might provide the basis for a differentiation between norm and exception. If the international system is understood as a pure zone of chaos and anarchy, broken only by islands of sovereign statehood, there is little basis for either normal or exceptional sociopolitical practices. However the claim that the international system is exclusively anarchical, with no reasonable basis for norms and exceptions, is not the final word. There is much work that calls into question this idea. Furthermore, as will be seen below, dispersed and critical accounts of sovereignty call into question the basis for asserting the notion that sovereignty is a phenomenon that stops "at the water's edge" (Ashley 1987, 404) of the state. What remains is the question of how it might be possible to think the politics of the exception on a more global basis and what perspective this may provide on phenomena related to the Global War on Terrorism.

Interregnum

As I have argued above, much international legal commentary on the challenges posed by the "unlawful combatant" holds that the United States has simply improvised an extra-legal space at Guantánamo in order to ignore international law. 91 Others have argued that it is not possible to say, strictly speaking, whether the treatment of "unlawful combatants" is outside the law or not. The "unlawful combatant" is an exceptional phenomenon that transcends the normal legal order in a way that is not exactly in conflict with legal order in general. This perspective has been argued by Rosa Brooks who locates the underlying cause of exceptional politics of the 21st century in a changed political reality. The change that has occurred is, for Brooks and others, in the actual nature of the threats, their *reality*, and as a consequence they no longer neatly fit into legal categories that themselves have a given and stable status. Brooks argues "both international and domestic law take as a basic premise the notion that it is possible, important, and usually fairly straightforward to distinguish between war and peace, emergencies and normality, the foreign and the domestic, the external and the internal" (Brooks 2004, 676). Law functions normally due to the fact that everyday occurrences fit fairly neatly into legal categories. The proper function of law is predicated on the notion that law is able to anticipate contingencies and is not challenged by them, but rather reinforced by the fact that events reassert the relevance of pre-established legal divisions of social and political phenomena. "Normal" legal life continuously reaffirms juridical

See for example (Danner 2007; Dormann 2003; Gill and Van Sliedregt 2005; M. H. Hoffman 2002; Maxwell and Watts 2007; Mofidi and Eckert 2003)

order by conforming to juridical order's compartmentalization of reality and affirming the relevance of that order by being pre-encompassed by it. Brooks' concern is that though this normal functioning, based on relatively stable "binary distinctions," worked in the past it has become untenable due to a changed reality. 92

The argument presented by Brooks is representative of a wide range of perspectives on the issue of the Global War on Terrorism and the politics of exception.

The perspective holds that law has a breaking point at which contingencies arise in reality that are beyond what the law could reasonably anticipate. This results in the kind of situation faced in the 21st century where elements of the law, whether domestic or international, have fallen to contingency and must be replaced with new laws that are capable of once again anticipating contingency until the next time that they come up short. This cycle of legal order and its eventual disruption by novel contingencies is an "inescapable social fact" for Brooks. The practical problem is that this fact results in the ability of elites, such as the Bush and Obama administrations, to articulate an ever wider

⁹² "In almost every sphere, globalization has complicated once-straightforward legal categories, but this is nowhere more apparent and more troubling than in the realms of armed conflict and national security law" (Brooks 2004, 677) Alain de Benoist points out that "this logic becomes entangled, however, by the fact that in all wars, murder is legitimate – even when it involves civilians, victims of terror bombings or 'collateral damage'." (de Benoist 2007, 80)

⁹³ "What the Administration is trying to do," explained John Yoo, then Deputy Assistant Attorney General, "is to create a new legal regime." (Amann 2003, 265)

variety of "extraordinary measures" that are all plausible due to the increasingly indeterminate applicability of law. 94

In the interregnum between the failure of old law and the institution of new law the Bush and Obama administrations have ever wider latitude to *decide* rather than apply law. As Brooks and others argue, this creates a tendency toward decisionist policies as formerly clear criteria are no longer clearly applicable; there is no prescription for policy and action that would obviate the need for decision and thus someone must *decide*. Decisions, strictly speaking, are opaque rather than transparent. The opacity of decisionist policies denies citizens as observers the ability to critique these policies and thereby do their duty as the individual members of the state and ensure that this state lives up to the "regulative ideal" or "cultural model" of modern sovereign statehood.⁹⁵

Carl Schmitt and the Politics of Exception

Framed in the language of exceptions to the rule of law, and unaccountable decisions on the part of the sovereign, many have turned to the work of Carl Schmitt to explore questions related to the War on Terrorism. Schmitt's famous formulation of the sovereign as "he who decides on the exception" (Schmitt 2006, 5) has been widely

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⁹⁴ See (Davis 2008) for discussion of the military commissions being outside the normal process and thus "extraordinary measures."

⁹⁵ See (Walker 2006). This concept is also similar to the "world cultural models" discussed by (Meyer et al. 1997). World culture approaches argue that isomorphism among nation states can be understood as consequences of a pervasive rationalized culture that is increasingly shared globally. From this point of view nation states are not simply organic entities that spring from local conditions and develop according to local culture and historical practices. Rather, nation states are embedded in world cultural and social context(s) and develop as much in accordance with pressures and practices outside the nation-state as those within.

employed as a point of entry for considering elements of the War on Terrorism through the lens of the politics of exception. 96 Writing in the interwar years in Europe, Schmitt was explicitly concerned with "the exception" as "that which cannot be subsumed" and which "defies general codification" (Schmitt 2006, 13). Schmitt explicitly rejected the idea that the rule of law can ever be absolute and permanent. Any such understanding of the nature of law is doomed to failure because the nature of human existence ensures contingencies will arise that will not be "subsumable" under existing norms. In this sense there is always, necessarily an "outside" to the law; no law can comprehend all possible future contingencies and any given system of laws and norms sooner or later will prove inadequate to the times. Inevitably, contingencies push old legal systems and norms beyond their breaking point. The nature of human life makes impossible the task of anticipating all future possible contingencies and providing for them in a system of law, no matter how complex. As a result "all law is situational law" (Schmitt 2006, 13) and, in the words of Tracy B. Strong, "the rule of men must always existentially underlie the rule of law" (Schmitt 2006, xvii).

Schmitt's notion that the buck does not stop with juridical process but rather in the human life behind it causes him to resist understandings of politics that neglect what he considers this human element. Occurrences that cannot be adequately addressed strictly within the law are inevitable and thus political theory must not shrink from

⁹⁶ See Claudio Minca who claims that "the human cages of Guantánamo are a black hole in the geography of American – and western values, but they are also an extraordinarily potent space of exception." (Minca 2005, 406) as well as (de Benoist 2007; Huysmans 2004; Johns 2005; Neal 2010; Neocleous 2006; Odysseos and Petito 2007; Tagma 2009).

acknowledging exceptional politics but rather incorporate the exception into accounts of the political and political concepts such as sovereignty. In this context one might be able to look at exceptional policies taking place under the War on Terrorism not as aberrations and violations of legitimate political expression but part and parcel of the function of sovereign states and political, that is human, life.

For Schmitt, this human element of existence is never finally reducible to, or governed by, a definable calculus and never perfectly predictable. There are elements of chaos in human behavior, and chaos is ungovernable by norm, thus human behavior is never finally governable by any particular set of norms or laws. This aspect of humanity is what gives rise to Schmitt's accounts of politics, sovereignty, and the decision.

Schmitt's account of the sovereign who decides on the exception is an account of sovereignty that is a "borderline concept" which pertains to the "outermost sphere."

(Schmitt 2006, 5) This "border" inhabited by the sovereign is the "outermost" edge of the norm, of the juridical order, of domestic space, and of normal life. It is "outermost" because sovereignty pertains precisely to that which is wholly other than norm, that which is wholly "outside," and therefore ungovernable or un-subsumable under existing norms.

Only the sovereign can inhabit this last "outer" border because this position simultaneously exists within and outside the rule of law. The impossibility of ever subsuming all human life to law is the opening of an "exteriority" to law and the implication of a sovereign position that can enable the persistence of situational law and juridical order when situations change. It is for this reason that "the exception is more

interesting than the rule" (2006, 15) for Schmitt. The quality of simultaneously existing beyond the law, of being able to decide the exception, and of inhabiting this outermost border region is the quality that distinguishes the sovereign from all others, and in fact makes the rule possible in the first place. With one foot inside and one foot outside the sovereign inhabits the only position that could possibly define a realm of order as the negation of chaos.⁹⁷

The human element for Schmitt is not limited to the contingency of events but is also manifest in his concept of the decision. The sovereign's decision on the exception and the norm is a "decision in absolute purity" (2006, 13) that is absolutely ungoverned, restrained, or influenced by prescriptions, rules, or norms. "Every concrete juristic decision contains a moment of indifference from the perspective of content, because the juristic deduction is not traceable in the last detail to its premises and because the circumstance that requires a decision remains an independently determining moment" (2006, 30). Though the decision does not take place in a vacuum the last moment or defining element that constitutes a decision *per se* is that the decision is not determined in its entirety by existing norms or rules. The decision itself is an act of pure volition on the part of the sovereign that originates somewhere other than the legal and political context. The decision is purely of the sovereign, opaque in the extreme, and untraceable through

⁹⁷ "There exists no norm that is applicable to chaos. For a legal order to make sense, a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists" (Schmitt 2006, 13).

any discrete path of calculus. It is indistinguishable from a purely arbitrary act and, in the words of Kierkegaard, a moment of "madness" (Derrida 1992, 26).

For Schmitt this arbitrary, opaque, decisionist element of politics is not to be avoided but should in fact be embraced. The danger of liberalism lies, for Schmitt, precisely in the desire to distance itself from the raw experience of the political. Politics "cannot be made safe" and the substitution of "procedure for struggle" (Schmitt 2007, xv) does not eliminate politics but merely hides it. It is precisely in this kind of decision based politics that Brooks and others see a subversion of political process and the rule of law. Where Schmitt attempts to domesticate and normalize exceptionalism by characterizing it as a constitutive element of sovereignty many see a more nefarious obfuscation of the motives of sovereign decision making and, in this lack of transparency, a slippery slope to corruption. Against Schmitt liberal institutionalism aspires to a minimization of this kind of arbitrary decision making and an aspiration to a boundless rule of law. 99

From Strauss's comments on *The Concept of the Political*; "Schmitt's task is determined by the fact that liberalism has failed. The circumstances of this failure are as follows: Liberalism negated the political; yet liberalism has not thereby eliminated the political from the face of the earth but only has hidden it; liberalism has led to politics' being engaged in by means of an anti-political mode of discourse. Liberalism has thus killed not the political but only understanding of the political, sincerity regarding the political" (Schmitt 2007, 100).

⁹⁹ The thing is that modern statecraft is deeply involved in this process of exclusion and inclusion, in the process that Agamben suggests is at work in the sovereign ban. It is not that states already are and are then dealing with ambiguity in the system but rather that practices are underway by which these states are understood as well bounded. Thus exceptionalism in some of its forms is very much a participant in this practice of statecraft that Ashley identifies which attempts in its explanations of the world to smuggle in the state as its constituent basic elements; see (Ashley 1989).

The Ontology of the Exception

Contemporary arguments that attribute the problem of the "unlawful combatant" to a new political reality share this Schmittian ontology of the exception. The exception itself is a necessary condition arising out of a new reality that is ambiguous and confounds the existing legal order. The ambiguity attending the "unlawful combatant" and the eulogies widely offered for pre-9/11 international order might initially elicit the argument that the "unlawful combatant" is disruptive to a sovereign project of categorizing and defining global order. Perhaps the dislocatory effect of the "unlawful combatant" reveals an arbitrary imposition of borders and boundaries, of voices and silences, and of possibilities and impossibilities of what global politics is or can be. Yet questions about the legal status of detainees take for granted that these concepts themselves have some kind of specific ontological status and that the important questions merely pertain to revealing the true topology of legal space, and the arrangement of entities within or outside that space. Only on this foundation of a certainty of ontological content, an underlying *reality*, can the question of a *necessary* exception to that reality be posed. In order to debate legal categories for an identity there must first be a stable identity to be categorized. It is far from clear, however, just how real and unified this underlying reality is. Just how homogenous is this group labeled "unlawful combatants"? How has an essence been ascertained, a true nature that links all of these individuals into one identity? How has a unified entity been identified which can be labeled "unlawful combatant"?

Not only is this underlying reality an open question but, if the unity of the concept is problematized, it appears to be an ongoing project of articulation. In this case every

invocation of the "unlawful combatant" is also an assertion, a normative claim of what the "unlawful combatant" fundamentally is. In this light each of these acts of articulation and construction can themselves be seen as political acts. For this reason the more critically inclined tend to eschew these questions aimed at discovering the underlying reality of political and social phenomena. Instead they focus on how claims of exceptionalism function politically. A shift away from determining the nature of underlying reality towards exploring how human reality is constructed and understood through practices of representation in language, speech, and text opens up lines of inquiry foreclosed by a more positivist truth search. These tend to be the how questions: how are entities, actors, and policies articulated as exceptional, and what are the political implications of these acts of representation? How do practices of representation create the appearance of political and social reality and how are these practices employed? How can exploration of practices of representation provide insight in the articulation and construction of "political reality"?

How do particular positions on "unlawful combatants" and international law assert or articulate particular conceptions of what these entities *are*? How do these debates create the concepts they take as relatively unproblematic? Practices that attempt to *reveal* the nature of the "unlawful combatant" can be understood as practices that attempt to create that nature, to define it. The problem of the "unlawful combatant" is a problem of control of the meaning of an adversary, for the power to construct and

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¹⁰⁰ For discussion of 'how' questions in post-positivist IR see (Ashley 1989; Doty 1993, 2007)

articulate this identity, and, in a sense, to create the "unlawful combatant" as an ongoing project. In this context battles rage not only in diverse locations around the world but figuratively, over control of symbols, and a discursive battle continues for control of the meaning of constructed identities that are applied to detained individuals. If today the security environment of the United States and other civilized nations is so exceptional what is the nature of the normal state of affairs that today is an exception to? How is the nature of the past constructed such that it was ruptured in the awful birth of the present? How is today determined to be truly exceptional?

The initial claim that the "unlawful combatant" itself is disruptive to conventional ways of ordering global politics cannot be sustained if the unity of the "unlawful combatant," as well as the lawful combatant, and international criminal are put in question. Once the question becomes how the concept of a unified and present "unlawful combatant" is constituted and sustained the potential critical purchase offered by certain approaches to exceptionalism becomes apparent. Instead of Schmitt's attempt to render the exception "necessary" due to inescapable facts of reality, others look to practices of inclusion and exclusion whereby identities are articulated and borders are imposed. In this way entities that Schmitt and others would take for *real* are explored as constructed. Through the work of Agamben and others this approach provides significant tools for thinking limits and borders but generates new questions. How can the politics of exception be conceived without incorporating the sovereign state, be that sovereignty localized in the person of the executive or dispersed downwards through domestic society, as a necessary precondition?

Agamben and the Sovereign Ban

Schmitt's Hobbesian embrace of a Leviathan-like sovereign is based on his argument that the conscious experience of the political is a more authentic experience of human life. Exceptional events are a fact of human life that cannot be eliminated by the best efforts of liberal institutions. Thus humans should not shy away from the reality of exceptions and exceptional politics but attempt to understand and situate them. Giorgio Agamben is much more suspicious of the politics of exception and draws on Schmitt's account to develop a more cautionary and qualified theory. For Schmitt, the exception is a rare occurrence, "a case of extreme peril, a danger to the existence of the state, or the like," (2006, 6) that proves the rule. Agamben, on the other hand, sees the exception becoming a routine tool of government founded not on an objective condition of necessity but rather in the desire of the sovereign.

Agamben's account of the exception is developed most thoroughly in his work *Homo Sacer: Sovereign Power and Bare Life* (1998) and later applied to the War on terrorism in *State of Exception* (2005). In *State of Exception* the starting point is the question of borders, specifically the border between the legal and the political, between law and fact. "The state of exception appears as the legal form of what cannot have legal form" (2005, 1) and "a threshold of indeterminacy between democracy and absolutism." (2005, 3) He argues that the military order of November 13, 2001, issued by President Bush, is an example of "the original structure in which law encompasses living beings by means of its own suspension" (2005, 3). Though for Agamben the exception is far from new, his concern is that the exception has overtaken the rule as the primary method of government. The state of exception "has today reached its maximum worldwide

deployment. The normative aspect of law can thus be obliterated and contradicted with impunity by a governmental violence that - while ignoring international law externally and producing a permanent state of exception internally – nevertheless still claims to be applying the law" (Agamben 2005, 86). Drawing on Walter Benjamin¹⁰¹ he argues that rather than a rare occurrence that proves the rule "the state of exception … has become the rule" (Agamben 2005, 6).

Benjamin saw emerging crisis as the norm and that the perception of "states of emergency" as aberrant was a symptom of a historicist position that actually enables phenomena such as the Third Reich. ¹⁰² In *On the Concept of History* Benjamin argues that a misunderstanding of history leads to experiences such as the Nazis always being encountered as an aberration. The "amazement" that accompanies the experience of such "aberrations" is due to a conception of history that is predicated on a faith in an uninterrupted trajectory of human progress. By assuming history as a narrative of human progress "exceptional" phenomena are, on the one hand, normalized because they are

Benjamin makes the claim that the exception is actually the rule in the eight thesis of On the Concept of History: "The tradition of the oppressed teaches us that the "state of emergency" in which we live is not the exception but the rule. We must attain to a conception of history that is in keeping with this insight. Then we shall clearly realize that it is our task to bring about a real state of emergency, and this will improve our position in the struggle against Fascism. One reason why Fascism has a chance is that in the name of progress its opponents treat it as a historical norm. The current amazement that the things we are experience are "still" possible in the twentieth century is not philosophical. This amazement is not the beginning of knowledge –unless it is the knowledge that the view of history which gives rise to it is untenable" (Benjamin and Arendt 1986, 257).

Benjamin was a contemporary of and exchanged correspondence with Carl Schmitt even sending Schmitt a copy of *The Origin of the German Mourning Play* in which he states that he was "indebted" to Schmitt "for its presentation of the doctrine of sovereignty in the seventeenth century" (S. Weber 1992, 5). For discussion of the relationship between Schmitt and Benjamin see (S. Weber 1992) as well as (de Wilde 2011) and http://harpers.org/blog/2010/05/benjamin-history-and-the-state-of-exception/

incorporated into this narrative and, on the other hand, underestimated due to an assumption that positive human progress has been vouchsafed by destiny. Thus there is an implicit acceptance that though Nazism is destined to rise it is likewise destined to fall and the alarming implication that, rather than action, all one might need to do is wait. This understanding contributes to a dangerous loss of agency on the part of individuals who would actually have to bring about that fall and who actually enabled the rise. Thus in stating that the "task" is to bring about a "real state of emergency" Benjamin calls for an understanding of history that is not predicated on a faith in narratives of human progress.

Agamben shares Benjamin's conviction that the exception has become the rule if for different reasons. For Agamben "the state of exception is not a special kind of law (like the law of war); rather insofar as it is a suspension of the juridical order itself, it defines law's threshold or limit concept" (Agamben 2005, 4). Agamben identifies two separate legal traditions that locate the exception either in the sphere of law or in the sphere of politics. The first views necessity as an autonomous source of law and thus the exception is actually part of positive law. The second sees it as an aspect of a state's drive for self-preservation and an instance of political fact trumping law. Agamben suggests that the exception is neither wholly inside nor outside. An instance of the suspension of the juridical order cannot be wholly contained within juridical order yet, if the exception is wholly outside and contrary to law, why does "the order contain lacunae precisely where the decisive situation is concerned?" (Agamben 2005, 23).

Abandonment: Inclusive Exclusion

Though *State of Exception* directly takes up the question of detainees in the War on Terrorism Agamben's earlier work *Homo Sacer* provides more thoroughly developed tools for exploring the politics of exception. *Homo Sacer* has as its "protagonist" the eponymous figure of Roman law who "is situated at the intersection of a capacity to be killed and yet not sacrificed, outside both human and divine law" (Agamben 1998, 73). *Homo sacer* describes an individual who is reduced to "bare life" or life in a purely biological, natural sense. "Bare life," *zoe*, was classically not the concern or object of politics which was instead oriented towards the "good life" or *bios*. The designation of certain people *homo sacer* deprived them of legal status and they became non-entities in the eyes of the law, as well as the eyes of the gods. It is for this reason that they could be killed by anyone with impunity yet not sacrificed.

Homo sacer is distinctly different from the individual who breaks the law and is condemned by it. The punishment of transgressions of law is part of the normal workings of law and law breaking is in no way exceptional; the breaking of laws is in fact part of the norm in a legal system. The suspension of law itself is exceptional, however, and it is the exclusion from the law of homo sacer that interests Agamben. It is interesting because this exclusion is at the same time a kind of inclusion. In being excluded from the law, by the law, homo sacer occupies a kind of "zone of indistinction" in which outside and inside blur. The exclusion of homo sacer is not pure and total; homo sacer does not become a stranger to the law but remains designated by the law as an outsider. Whoever is excluded is exposed to death in a way that they were not before and in a way that they would not be if they were a stranger from beyond the border. Homo sacer is actively

exposed to death. Though the law withdrawals it does not leave the individual as they were in some primordial state of nature. They are instead exposed to lethal violence due to finding themselves in what Agamben calls "the sovereign ban." The excluding act of the sovereign does not return an individual to the wild, or make them invisible to the law, but rather places them in a special condition of mortal hazard that is very much within the gaze of the sovereign.

A section in Plato's Laws illustrates this inside/outside ambiguity and contains an image of figure very much like homo sacer. In Book IX of Laws there is a discussion of the penalties for various crimes. Anyone who willfully commits murder will be "deprived of legal privileges," "shall not pollute the temples," can be killed by anyone, and their body is excluded from the country of the victim. What is most interesting about this section of Laws is that the discussion continues to the case of a "beast of burden or any other animal" that causes a death. In this case, if the animal is found guilty, "they must kill it and throw it out beyond the frontier of the country" (1997b, 1. 873e). The exclusion of the corpse of an animal, after being convicted and executed, seems to indicate that the act of exclusion itself is invested with some enduring significance. Otherwise what does it matter the disposition of an organic entity that biological processes will soon enough render to dust? Consider the even more interesting case that if an inanimate object causes the death of a person it will be judged, and if condemned, "the condemned object must be thrown over the frontiers, in the way specified in the case of animals" (1997b, l. 874a).

These objects, animate or inanimate, upon being expelled, do not simply join an undifferentiated foreignness that exists beyond the border. When an expelled object comes to rest after being thrown over the border it is still not identical to all of the other objects that occupy foreign space. The expelled object retains a relationship of exclusion with the community. In this sense the excluded object remains "under the spell" of the community, held at arm's length, but not let go. The being or object that has been excluded is not, once taken outside, washed in otherness and wiped clean of all markers of former identity. The excluded object does not immediately become an indistinguishable element of the wholly other and nameless. Those who take the object beyond the border could not immediately bring it back in as a found object. Though taken outside, the excluded object is in a sense held out there, submerged in otherness, but not let go. This object is the one that is taken outside and among all other anonymous objects beyond the border this one uniquely cannot be brought back in. Unlike other objects beyond the border this one remains held at arm's length. 103

In this way the concepts of inside and outside become indistinguishable at what Agamben calls "the limit." There are at least two kinds, or zones, of outside: the outside in the sense of the wholly unknown, chaos, the undifferentiated unnamed, the absolutely foreign that has yet to intrude into the realm of knowing and naming. But there is also this second sense of outside that is the space of excluded objects which are held outside,

A 'holding at arm's length" that has correlates in many modern 'knowledgeable practices;' see Richard Ashley's discussion of familiarity as a means of holding things, for example post-structuralism, at arm's length. (Ashley 1989, 259)

"taken outside," and in this way constituted and constructed *as outsiders*. The important distinction is that these elements that are "taken outside" cannot be said to be absolutely foreign and other, they remain in a certain sense in the embrace of the "inside" and it is this indistinct zone between outside and inside that Agamben describes as the sovereign ban.

In consequence "it is literally not possible to say whether the one who has been banned is outside or inside the juridical order.... It is in this sense that the paradox of sovereignty can take the form 'there is nothing outside the law'" (Agamben 1998, 28–29). That which is expressly excluded experiences the oddly political life of the exile that has not simply been returned to the wild but remains subject to the sovereign ban. He is outside the law "yet he is in a continuous relationship with the power that banished him precisely insofar as he is at every instant exposed to an unconditioned threat of death. He is pure *zoe*, but his *zoe* is as such caught in the sovereign ban and must recon with it at every moment, finding the best way to elude or deceive it. In this sense, no life, as exiles and bandits know well, is more 'political' than his" (Agamben 1998, 183–184).

The "nothingness" outside the law can be read in two ways corresponding to the two conceptions of outside or otherness mentioned above. On the one hand there is nothing outside the law because those specific named elements that are designated as

¹⁰⁴ This is not to presume that 'inside' is somehow more stable than 'outside' nor to propose "an absolute boundary" (Ashley 1989, 290) between the two. The 'inside' is likewise 'taken inside.' The purpose here is to illustrate a particular concept of how boundaries are imposed. Later in this chapter this approach to boundary construction will be employed to implicate the simultaneous articulation of both outside and inside through always ongoing practices.

"excluded," outside the law, are still partly inside the law through their very exclusion. On the other hand those elements that are absolutely outside the law have no specificity, they are that which has escaped or not yet fallen within the sovereign gaze, and though they may have physical corporeality they have not (yet) been named and are thus not (yet) anything. The specifically "taken outside" element is not the absolutely other, and most importantly, it is not simply the other side of a diametrically opposed situation; there is not simply inside constituted by a zone of *nomos* and an outside of *anomie*. The excluded outside is not already there, waiting to be populated by those expelled from the city but is created as an "exception" which is also an act of naming. "The state of exception is thus not the chaos that precedes order but rather the situation that results from its suspension. In this sense, the exception is truly, according to its etymological root, *taken outside* (*ex-carpe*), and not simply excluded" (Agamben 1998, 17–18).

"The 'ordering of space' that is, according to Schmitt, constitutive of the sovereign *nomos* is therefore not only a 'taking of land' (*Landesnahme*) – the determination of a juridical and a territorial ordering (of an *Ordnung* and an *Ortung*) – but above all a 'taking of the outside,' an exception (*Ausnahme*)"(Agamben 1998, 19). This intermediate inside/outside that distinguishes the sovereign gaze from pure chaos is the habitat of both those who have been cast out from the inside as well as those who have been discovered amongst the chaos, given a name, and thereby excluded. The nothingness wholly beyond the law is a chaos that is unknown, unnamable, and unruleable so long as it remains outside the sovereign gaze and thereby unnamed.

The exception, the sovereign ban, the zone of indistinction between inside and outside is, for Agamben, the device by which law and juridical order gain validity. In order to take hold of chaos it must "first be included in the juridical order through the creation of a zone of indistinction between outside and inside, chaos and the normal situation – the state of exception" (Agamber 1998, 19). The juridical order does not gain validity through individual applications of "justice." The rule gains validity in its independence from individual cases. This creates the rule precisely due to the rule's ability to apply to the next case, not the last one. A rule is a rule by virtue of its abstract applicability. In this way Agamben sees the juridical order as proximate to language: "a word acquires its ability to denote a segment of reality only insofar as it is also meaningful in its own not-denoting ... so the rule can refer to the individual case only because it is in force, in the sovereign exception, as pure potentiality in the suspension of every actual reference" (Agamben 1998, 20). This abstract applicability is what allows applicability in any particular case. Because it does not only refer to one particular it can refer to any. If it only referred to one it would not function as a common noun but rather a proper noun.

Language must maintain a relationship with the non-linguistic so that it may, at any moment, articulate what was formerly nonlinguistic. So, says Agamben, "the law presupposes the nonjuridical ... as that which it maintains itself in a potential relation in the state of exception. The sovereign exception (as zone of indistinction between nature and right) is the presupposition of the juridical reference in the form of its suspension" (Agamben 1998, 21). Law, like language, is law by virtue of its abstract applicability. In any particular instance, where fact is included in the juridical order,

there is an act of exceptionalism because this particular application of the rule is not the rule itself, in a sense this example is itself removed, or this particular example is itself exceptional, and the law must be particularly applied to it. Thus, for Agamben, the incorporation of fact into the juridical order is always exceptional.

This is one of the most significant differences between Agamben and Schmitt. For Schmitt the exception itself is a necessity, an objective event or condition that requires the action of the sovereign to preserve the juridical order. For Agamben the exception is always produced by the sovereign through an act of decision making. But by giving the sovereign volition with regard to the ontology of the exception Agamben's sovereign comes to fulfill a very different function. This decision on the exception is not a reaction to fact but instead the process by which law takes hold of humans; the sovereign ban is not an act that is simply a necessity to preserve law but is an "originary" practice by which sovereign power is constituted. "The fundamental activity of sovereign power is the production of bare life as originary political elements and as threshold of articulation between nature and culture, zoe and bios" (Agamben 1998, 181). The exception for Agamben is then the original political act, the means by which humans as animals became humans as political beings. "Not simple natural life, but life exposed to death (bare life or sacred life) is the originary political element ... There is no clearer way to say that the first foundation of political life is a life that may be

[&]quot;The originary relation of law to life is not application but Abandonment. The matchless potentiality of the nomos, its originary "force of law," is that it holds life in its ban by abandoning it" (Agamben 1998, 28–29). This act of abandonment is then the original politicizing act; "human life is politicized only through an abandonment to an unconditional power of death" (Agamben 1998, 90).

killed, which is politicized through its very capacity to be killed" (Agamben 1998, 88–89).

Dispersed Sovereignty

The picture that arises in both Schmitt and Agamben's account of the politics of exception is that the possibility of exception making reveals an indeterminate, undecidable space between inside and outside the law, a space of blurred boundary, of both inside and outside that is, while neither strictly legal nor illegal, nonetheless constitutive of juridical order. Here naked sovereign power decides on exceptional circumstances that authorize emergency powers and a suspension of the legal norm, and in so doing, constitutes itself as sovereign in a process that both founds, and confounds, legal order. This concept of the exception opens a host of new questions when considered in the context of international law where the idea of an overarching sovereign power capable of deciding the exception is traditionally alien.

One of the strengths of Agamben contra Schmitt is that Agamben resists the notion of an objective state of exception in the form of a real necessity externally imposed upon the sovereign. As Andrew W. Neal argues, Schmitt's position conflates the exceptional event, sovereign decision on the exceptionality of the event, and sovereign response to that event. Schmitt's "necessity" of exceptional politics would actually eliminate the decision, strictly speaking, on the part of the sovereign because the

^{106 &}quot;This move rests on dubious metaphysical ground because it blurs and conflates three different things: first, the exceptional event, situation or lacuna; second, the nominalist sovereign decision that the event or situation is indeed exceptional; and, third, the exceptional sovereign response to the event or situation" (Neal 2010, 84).

sovereign's actions would be determined by necessity rather than volition. Alternatively, Agamben's sovereign is engaged in what could be called a *practice* of exception making in which the sovereign decides, in the absence of an external imposition of necessity, on the exception and, by "taking" the exception outside, the sovereign, at the same time, constitutes the norm and the exception by the creation of an excluded "space" of indistinction between inside and outside.

Though Agamben's work on the politics of exception provides some particularly interesting tools for thinking limits, such as the sovereign ban, he also tends to treat the sovereign as a "privileged signifier" (Tagma 2009, 409) that simply decides and as such he "pays no attention to the constitution of modern sovereignty itself" (Neal 2010, 92). 107

Agamben's move to problematize the exceptional event itself, to concede the historicity of exceptional events and exceptionalism, continues to maintain the sovereign decision as an instance of purity above and beyond history. Agamben's sovereign is one who intervenes in history to cleave the intelligible world into those who are "inside" and those who are "outside" subject to the sovereign ban. In much the same way that Schmitt conflates several areas of practice into a single concept of a necessary exception,

Agamben conflates numerous dispersed practices and historical conditions of possibility into one single concept of the sovereign decision.

Neal points out that Schmitt was intensely concerned with questions of the constitution of sovereignty which he discusses at length in *The Concept of the Political*. See (Neal 2010, 92) and (Schmitt 2006, 8)

This tendency is questioned by Fleur Johns who criticizes the reading, "implicit or explicit in most international legal writing on Guantánamo Bay," that Guantánamo Bay "may be understood as a singular, grotesque instance of law's breakdown – an insurgence of 'utter lawlessness' in the words of Lord Steyn of the House of Lords" (2005, 614).

Johns argues that Guantánamo Bay is not an instance of a space yet to be colonized by law but rather a space where law operates *in excess*. Guantánamo Bay often "looks and sounds" like an instance of pure sovereign exceptionalism, and has thus "soaked up critical energies" due to the exception ringing "liberal alarm bells" (2005, 628–629).

Johns presents a more complex account of the politics of exception at work at Guantánamo Bay. Johns sees not law's breakdown at Guantánamo but "elaborate regulatory efforts by a range of legal authorities" (2005, 614).

For Agamben, President Bush's order of November 13, 2001 "radically erases any legal status of the individual, thus producing a legally unnamable and unclassifiable being" (Agamben 2005, 3). Arguing against Agamben's claim that detainees at Guantánamo are "entirely removed from the law," Johns argues that "far from a space of utter lawlessness" Guantánamo Bay is "a space filled to the brim with expertise, procedure, scrutiny and analysis" (2005, 618). If anything, detainees have been *renamed* as "unlawful combatants" and classified in numerous and varied ways. At the same time this critique of Agamben by Johns hinges on particular conceptions of lawlessness. The "painstaking work of legal classification" that takes place at Guantánamo, "an elaborate and multi-stage screening and evaluation process" (2005, 617) overseen by an extensive collection of experts and analysts of various flavors is a far cry from a situation of *anomie* or complete normlessness and lack of order. This data making and classification

"process," employing a "panoply of regulations" and administrative reviews, constitutes for Johns an excess of legality rather than an exception *from* legality.

The "excess" of legality at Guantánamo is not only reflected in the systematic treatment of detainees, however. Officials from the local level at Guantánamo Bay to the highest levels of the administration explicitly characterize the policies there enacted as deriving from rules, laws, and norms rather than "emanating from nothingness" (Schmitt 2006, 31–32). United States policy with regard to Guantánamo Bay (and the War on Terrorism generally) is "repeatedly cast as pre-codified in presidential and government statements" (Johns 2005, 629). The words of administration officials indicate that their jobs consist of "implementation" rather than decision making. This extensive effort to frame Guantánamo policy as rule bound and procedurally codified "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, wherever possible, avoided" (Johns 2005, 631). The whole experience of Guantánamo, with its extensive regulations and codifications of behavior, is an effort to remove every vestige of decision making, to reiterate and reinforce that these actions that the United States is taking are not a matter of choice on the part of the United States or program-implementing "functionaries," (2005, 635) but have been forced by the actions of "terrorists" and, if not the written laws of man, the higher laws of mankind. This veering away from an embrace of arbitrary decision making renders Guantánamo Bay a "profoundly antiexceptional legal artifact" (Johns 2005, 615). Rather than admitting any ambiguity or necessity of decision making the practices associated with Guantánamo are

overwhelmingly oriented towards producing a situation of "no option, no doubt and no responsibility" (Johns 2005, 615).

The problem Johns is interested in is that if Guantánamo Bay is an instance of sovereign exceptionalism in the form of pure decision making, why do United States officials in every instance point to a determinate code by which every policy and action is dictated including those actions taken by the presumptive sovereign in the form of the President of the United States? "At times, the 'code' is said to be that of 'freedom,' 'democracy' or 'justice.' At other times it is that of God" (2005, 629–630). Johns dismisses the possibility that this legitimization and justification is simply part of an effort to obfuscate the underlying workings of raw power, a kind of liberal whitewashing of the unconditioned sovereign will. Rather than just trying to "spin" their actions for positive public relations those who justify their actions according to such codes (read: norms) seem to actually "experience" decision making in a way that is characterized by "deferral and disavowal" (2005, 631) rather than "unfettered" prerogative.

Ellis Island at Guantánamo Bay

In short Johns argues that the entire apparatus of Guantánamo Bay and the orientation of the United States towards detained individuals are, for better or for worse, undertaken in good faith. Yet it seems that Johns' argument rests on a presupposition that "unlawful combatants" already are ambiguous and essentially *new* upon their first

⁰⁸ This is not to say that Johns is endorsing Guantánamo Bay but that she argues that those involved in this aspect of US policy do not seem to be covering up or disingenuously representing their actions; "functionaries" and officials actually "experience" what they are doing as following law and procedure.

encounter with the United States. In much the same way that Rosa Brooks argues that underlying social reality has changed Johns presents a situation in which Guantánamo Bay is an instance of the legal order of the United States confronting an ambiguous other. In the first few pages of her article she discusses the numbers of "unlawful combatants" who, "captured in Afghanistan," have been transferred to Guantánamo Bay. Her argument then proceeds to explore the ways that law and procedure go to work "in excess" on the bodies of these *new* foreigners in an attempt to domesticate them and avoid any necessity of arbitrary decision-making. For Johns Guantánamo Bay becomes a kind of figurative Ellis Island where a *new* kind of individual first arrives on the shores of the United States from the undifferentiated otherness beyond. This first coming into view of these nameless others results in the frenzied efforts of sovereign power not to ignore them but to classify, categorize, and domesticate them.

In this way Johns partially neglects one of the most significant contributions of Agamben's thinking on the exception. Those subject to the "sovereign ban" do not simply arrive from outside but are *taken* outside. Johns' account begins with the arrival of orange jumpsuit-clad "huddled masses" appearing on the shores of Guantánamo Bay, Cuba in a way that completely ignores any conditions of possibility for this arrival. Yet the "unlawful combatant" was not born on the shores of Guantánamo Bay but was rather constructed, as a figure of the enemy, in practices of articulation that began prior to any of the actions that ultimately brought still living bodies to Guantánamo Bay. Johns' simple importing of bodies, already ambiguous, thereby hides from view much of what might be explored as practices of exceptionalism.

If the historicity of the "unlawful combatant" is taken seriously rather than excluded, as it is by Johns and many others, practices of exceptionalism are seen to be very consistent with a preponderance of procedure, deferral, and legality. It is important to remember that in terms of the "sovereign ban" the excluded entity, as in the case of Guantánamo, is precisely that: actively excluded and actively maintained in this excluded condition. One should not anticipate utter lawlessness and chaos to constitute the experience of exceptionalism because that which is abandoned continues to be held at arm's length; that which is excluded is excluded through a process of sovereignty by which the sovereign gaze reveals the nature of the excluded element as that which must be excluded. Yet this gaze is also at work in creating and constituting the excluded entity, in populating spaces of exceptionalism, and it is precisely this practice which is obscured from view. Those entities within the sovereign ban are not entirely outside the law and as such the notion that they would be attended by utter normlessness or lawlessness is essentially missing the entire point. The vital point at work in the concept of the "sovereign ban" is that those who are excepted are still very much within the gaze of the sovereign. Only those who have yet to be named could be thought of as inhabiting a space of utter lawlessness, only that which is nothing, not even an explicitly excluded body, is truly outside the law.

Modern practices of exceptionalism exclude bodies and entities based not on explicit and overt practices of construction of self and other that are ultimately arbitrary in nature. On the contrary modern practices of exceptionalism are predicated on sovereign determinations that the *nature* of the entity being excluded is not compatible with the *nature* of existing norms. So modern practices of exceptionalism take for

granted certain knowledgeable practices and regimes of truth such that sovereign man can pronounce the nature of that entity which therefore necessarily is excluded, not due to the capricious decisions of historically situated and constituted individuals, but on the ability of modern subjects to speak what Richard Ashley calls "suprahistorical truth." As a result, that which is excluded is always also the site of vigorous practices of construction and articulation such that this particular body can be articulated as fully embodying an instance of the excluded archetype.

Though Johns' argument neglects these kinds of sovereign practices at work in producing the ambiguous archetypal abstraction that is then "concretely" encountered at Guantánamo Bay, she does raise interesting questions about the coherence of the sovereign decision. So long as the sovereign is conceived of as a centralized, unitary figure outside of history then no accounting is necessary of the sovereign decision and this entire project works. The decision itself does not have to be accounted for because it is simply an act of volition on the part of a god-like sovereign who stands outside history

[&]quot;Modern discourse presupposes an unexamined metaphysical faith in its capacity to speak a sovereign voice of suprahistorical truth" (Ashley 1989, 264) The question, Ashley points out, is how this or that standard of interpretation are privileged. This question cannot be broached precisely because the discourse in question is predicated upon it already being answered. Were it not answered then this discourse would be deprived of the authority to speak definitively. This leads to the monological understanding of history adopted by modern discourse; if there is one standard of interpretation then there is one corresponding narrative of history. This closure of historical possibility and openness to interpretation gives rise to Ashley's charge that modern discourse situates itself at the end of time, the completion of history because it has attained the vantage point from which all that has came before can finally be pronounced and situated in its true meaning.

See (Doty 2007, 130, 132) for the difficulties that arise when a named enemy (or named we) must be sutured to a real living body; Doty discusses the challenges posed by applying abstracted definitions of citizenship to discrete individuals. She turns this same question on applying abstracted conceptions of self to discrete bodies.

and context. The decision emanates from a singular instance of madness located in the person of the sovereign and this moment of madness is itself the only pure instance of unaccountability, undecidability, and chaos. Once the sovereign has made a decision every "functionary implementing a programme" (Johns 2005, 635) on behalf of the sovereign's decision is by no means running amok in a state of chaos. The implementation of exceptional policies can be entirely governed by rule and procedure and documented *ad infinitum* and be none the less "exceptional." Those who carry out the decision at the local level, John's "functionaries," Tagma's "petty bureaucrats," and Judith Butler's "petty sovereigns," are not volatile agents of *anomie* but are hierarchically arranged instruments of the sovereign will. Rather than taking actions based on their own decisions they are, in the words of so many such men and women, "just following orders."

The question posed by Johns, as well as at Nuremberg and other war crimes trials, is "who decides?" If the only instance of actual decision making takes place at the level of a centralized sovereign entity then the defense offered by low level officials that they were simply carrying out orders would seem to hold some validity. The fact that it traditionally has not provided a sufficient legal defense may be some indication that the above account of the sovereign decision is inadequate. It would seem then that responsibility and authority for decision making must be in some sense more dispersed than the unitary sovereign figure present in much political theory and international

¹¹¹ See (Butler 2006, 56)

relations in particular. In Johns' modified Agambenesque version of exceptionalism she has followed Agamben in dispensing with the objective necessity that imposes a need for decision on the sovereign yet not followed Agamben in the "taking outside" of the excluded other. The result is a figure of sovereignty with unlimited power and a figure of everyone else as "functionaries" who simply carry out the will of the sovereign all the while maintaining an airtight separation between themselves and the human experience of politics. ¹¹²

Johns solution to this caricature of politics is to "acknowledge the immersion of decision-making in the social, and thus the impossibility of a sovereign state retaining a monopoly on decision" (2005, 632). By dispersing sovereign decision making down from a sovereign center to those who carry out the everyday practices of exceptionalism Johns hopes to retain Schmitt's human capacity for political experience and action. In this sense the sovereign decision on the exception actually takes the form of dispersed micro-decisions in the everyday actions of individuals. Though this dispersion saddles those who work in camps and elsewhere with responsibility for their actions it also empowers them to resist objectionable practices. Though at the theoretical level sovereignty may be most often treated as unitary in the figure of the sovereign state, it would seem that in practice, at war crimes tribunals for example, this dispersed account of sovereign decision making is most prevalent.

¹¹² In Schmittian sense of an unvarnished appreciation for the arbitrary decisions involved in creating a friend/enemy distinction presented here in Fleur John's words cited earlier: "deferral and disavowal" common among "functionaries" 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, wherever possible, avoided" (Johns 2005, 631).

This solution in the form of dispersed sovereignty, presumably the same one implicit in most international tribunals, continues to retain the imported concept of the other, in this case the "unlawful combatant", as originally ambiguous. This dispersion of sovereignty downwards only seems to empower individuals once they have been confronted by the other who has come in from the wild. In this case both the "unlawful combatant" and the accountable, responsible "functionary" are born on the shores of Guantánamo. What is needed then is an account of how a dispersed notion of sovereignty might be employed to explore the ways that particular others such as the "unlawful combatant" are "taken outside" in the first place in order that individual particular bodies may be encountered as concrete instances of those abstract excluded others.

In his own work on Guantánamo Bay Mustafa Tagma, drawing on William Connolly, has argued that sovereignty is not "a simple decision made at the top level" but is supplemented by "rural" and "neighborhood" forces at work at local "micro" levels (2009, 416). Looking specifically at Guantánamo Bay detainees, Mustafa turns to the role of "petty bureaucrats" and the "sovereign subjects" who empower them in practices of exceptionalism. This "dispersion" of sovereignty is used to problematize and critique Agamben's notions of a centralized, unitary sovereign. In inverting what he sees as Agamben's prioritization of exceptionalism over biopolitics, Mustafa illustrates an account of sovereignty in which exceptionalism is a tool or instrument of regimes of truth whereby boundaries between self and other, and inside and outside, are drawn through ongoing practices at work at dispersed locales from halls of power to the bleachers at children's soccer games. This account, returning explicitly to Foucault's concept of

biopolitics, now provides a better developed account of sovereignty that is dispersed and participating in the "taking outside" of others through shared knowledgeable practices rooted in regimes of truth.

Tagma counters Agamben by attempting to invert Agamben's prioritization of unified sovereignty over biopolitics. He identifies exceptionalism as a "regime of truth" that has long operated in tandem with, though in a sense subordinate to or derivative of biopolitics. Sovereign power in the form of exceptionalism is only operative in moments of crisis where everyday normalizing forms of biopolitics appear inadequate to the task. Under every day circumstances the prison, the mental hospital, and the morgue are sufficient tools to delimit and maintain "normal" society. However during moments of crisis when challenges rise to the level of "security issues" "sovereign power constructs domains 'outside' of law and 'normal' society, such as in Guantánamo Bay, which in turn makes possible 'normal' law and 'normal' society" (Tagma 2009, 414). Yet the question again arises how a security issue is recognized such that sovereignty might reveal itself in the form of exceptional practices. Is a security issue, like Schmitt's exceptional event, an externally imposed necessity that is in need of no accounting?¹¹³ Likewise how is a clear

For example, Ole Waever and the Copenhagen School have argued that 'securitization' is best understood as a speech act. Labeling something a security issue, in this case an exceptional threat, allows for breaking the rules and using exceptional means. Thus for the Copenhagen school the center of the issue is the practice of securitization rather than an effort to determine, define, and finally classify the nature of events, actors, and practices. See Neal, Andrew W. Exceptionalism and the Politics of Counter-terrorism: Liberty, Security, and the War on Terror. Taylor & Francis, 2010 for discussion and critique of securitization theory; Neal critiques securitization insofar as it does not provide a ground for evaluating particular efforts at securitization, no ethic of securitization. Due to its 'methodological objectivism' securitization claims an objective standpoint from which to evaluate how any particular securitization effort is undertaken. "Even though having knowledge of these practices of 'securitization' may indeed facilitate forms of politics that can avoid or reverse such practices, the theory itself entails a 'basic ambivalence' about these practices." (2010, 105).

distinction made between the mental hospital and Guantánamo Bay, between the city morgue and the battlefield?

Mustafa Tagma's petty bureaucrats who enact exceptional policies are not simply automatons programmed by "a roguish sovereign." They are instead accomplices of the sovereign who, along with many others, act according to a "regime of truth" "that identifies certain marks of difference (and carriers of those marks) as inferior and dangerous" (Tagma 2009, 421). Thus individuals at all levels enact the sovereign program. The "regime of truth" in effect supplants the sovereign as determinant of the actions of the individual *if* the fact that *these particular individuals bear those markers* is taken for granted. Drawing as he does on post-colonial thought it seems that Tagma has in mind physical markers of difference such as skin color and other ethnic markers that can be simply recognized as fact. Rooted in simple "racism" (2009, 424) the petty bureaucrat is again confronted by an individual from the wild who must then either be categorized as same or other according to how some particular regime of truth reacts to the attributes that are immanent to the individual in question.

Again this account is insufficient because it neglects the means by which the other is excluded in the first place. If sovereignty is dispersed then the "taking outside" in the first place must also be occurring in dispersed locales. Petty sovereigns, functionaries,

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¹¹⁴ This is probably an over-simplification of Tagma's argument. He points to "cultural racism" which is perhaps not as simple as physical markers immanent to the individual yet he also points to regimes of truth responding to "marks of difference on a subjects body" (2009, 424). He also discusses the scientific gaze (2009, 425) which seems to be more in line with his later discussion of Richard Ashley's concepts of sovereign subjectivity (2009, 415–416).

and petty bureaucrats must not be simply reacting to the other as they arrive on shore but must actually constitute the other, must be populating that constitutive outside that is inbetween self and nothingness, that is within the "sovereign ban." That which is in the ban does not arrive out of nothingness from over the horizon but instead is *taken* off shore from the within the "inside." In this way individuals at the local level are not reactive but rather proactive in constituting both those held within the sovereign ban and the "inside" that holds them there.

Like Tagma, Andrew W. Neal turns to Foucault's biopolitics as an "antidote" (2010, 143) to the problems raised by exceptionalism. Neal points out that the crucial element contributed by Foucault is an understanding of practices whereby "the coupling of a set of practices and a regime of truth" that "form an apparatus (*dispositif*) of knowledge-power that effectively marks out in reality that which does not exist and legitimately submits it to the division between true and false" (Foucault 2010, 19). It is in this division between true and false, or in Agamben's terms the "sovereign ban" that the individual "functionary" confronts bare life that is overlain with functions of "knowledge-power" that insist *this one* is an instance of an archetype (a reality which continues not to exist).

This is also the question that Roxanne Doty takes up with regard to another instance in which abstract conceptions of centralized sovereignty come into tension with every day politics. In her study of states of exception on the US-Mexico border she points out that the identification of the "enemy" (and likewise the "we" and likewise the "sovereign center") becomes difficult in actual practice. In consequence individuals in

diverse locales must interpret concrete reality and decide who the enemy and "we" are by populating abstract categories through the incorporation or exclusion of discrete bodies. Looking at the practices of civilian border security activists, Doty asks "what happens when decisions on the friend-enemy distinction slip from the firm grip of the state and/or elite members of society positioned in powerful institutions?" (Doty 2007, 116). The question Doty is posing is not what happens on those rare occasions when the ability to decide slips from the center, but rather what happens when this centralized, unitary concept of a "self-identical" sovereign is never already there and instead an aspiration of sorts. What happens, Doty answers, is a "gaping hole at the heart of the belief in a definitive locus of sovereignty" is revealed. Rather than a unitary phenomenon, "sovereignty is ethereal and hovers unsteadily around us, not firmly anchored, not solely public or private, legal or extra-legal. Everyone is potentially "the police," faceless creators and upholders of the social order" (Doty 2007, 132).

Conclusion

The politics of exception provides some compelling tools for thinking about the "unlawful combatant" and the War on Terrorism. Since 2001 a widespread narrative has emerged that international reality has fundamentally changed. Many have argued that pressures of globalization combined with increased technology have produced dangerous actors in global politics that are essentially new. The consequence for international relations is that traditional norms and international legal categories are no longer sufficient to address contemporary challenges. In consequence post-9/11 international relations are experiencing a kind of interregnum between modern international law as it currently exists and the international law that will be required by this "new normal."

This narrative has led many to consider the War on Terrorism, and particularly detainees held at Guantánamo Bay, through the lens of Carl Schmitt's work on the politics of exception. Schmitt's idea that all law is susceptible to contingencies that not are not "subsumable," and which require the making of exceptions, seems to conform very well to the narrative that post-9/11 reality renders "old" laws obsolete. Yet the works of Schmitt, Agamben, and others on the politics of exception remain confined to the domestic politics of the state which provides a sovereign center, perhaps dispersed, to implement such an exception. What this work has generally not considered is how a politics of exception might be at work with regard to international law. Though the perquisite of a sovereign to decide on the exception, and perhaps the existence of law itself in international politics may be denied by some there is an opening to such an approach if reality of such identities in the first place is questioned. The works of Fleur Johns, Mustafa Tagma, and Roxanne Doty approach sovereignty as a set of dispersed practices rather than a discrete identity. In this case the traditional obstacles for exploring an international or global politics of exception dissipate if practices of producing sovereignty transgress both the traditional horizontal and vertical "boundaries" of global politics.

Finally Agamben's concept of the sovereign ban suggests that exceptional threats are never simply encountered as an imposition from some outside or beyond the law. The exception is a practice of "inclusive exclusion" where excluded others are abandoned or actively taken outside. The figure of an essentially new identity that has simply materialized in global politics obscures the extent to which sovereign practices construct the very identities that are excluded and often encountered as foreign and outside the law.

This dimension of Agamben's politics of exception provides a starting point for exploring how the "unlawful combatant" as archetypal identity is not simply, originally encountered on the shores of Guantánamo Bay but is actively produced in its abstract, archetypal form by practices of identity construction. The next chapter will explore the laws of war as exactly this kind discursive field of identity construction and active abandonment.

4 THE LORE OF MODERN LAWS OF WAR

In civilized war a soldier penetrated by a small projectile is wounded, withdraws to the ambulance, and does not advance any further. It is very different with a savage. Even though pierced two or three times, he does not cease to march forward, does not call upon the hospital attendants, but continues on, and before anyone has time to explain to him that he is flagrantly violating the decision of the Hague Conference, he cuts off your head.

Sir John Ardagh speaking for Britain and the United States against a proposed ban on exploding bullets at the Hague Convention of 1899. 115

What are the Laws of War?

In order to explore the idea of a politics of exception in the context of international law many first seek to clarify the concepts they wish to explore. First among these would likely be the concept of the laws of war. Many are tempted to ask: what *are* the laws of war? What is the phenomenon known as laws of war and what are its characteristics? What are the established boundaries that define the concept and permit the classification of certain individuals as protected by the law, in violation of the law, or wholly outside the law? What is the nature of such a law that is binding between nations in times of war in the absence of a higher sovereign power to make and enforce it? If these questions are posed, in this form, a wide array of authors and works are encountered with a variety of responses. The very persistence of this question is attested to by the proliferation of works attempting to address it. Renewed interest since 2001 has led to a wide variety of books, journal articles, and white papers on the laws of war. Though many of these differ in just where they draw their lines, and just how they

¹¹⁵ As cited in (Jochnick and Normand 1994a, 73)

classify individuals and actions with regard to the laws of war, the standard approach is to start with the question "what are the laws of war?"

Most attempts to address this question employ a similar method and the opening steps share a great deal of similarity from one work to another. The observer begins by gazing out over the expanse of human history in order to locate and define the concept in its true form. The initial inquiry is temporal in nature and involves surveying the past from the dawn of history to modern times for an instance of the object of this inquiry. In the past, however, the object is never to be found. Most observers find only a faint trail of breadcrumbs leading through the ages always forward to the modern age and the first instances of *true* laws of war. In consequence a standard narrative of modern laws of war has formed. This narrative holds that attempts to regulate armed conflict are as old as war itself but attempts prior to the modern age are deficient and do not constitute actual laws of war. ¹¹⁶ Modern laws of war are the first instances of true laws of war and though modern law is far from perfect it is at least law *per se* and provides the hope of a genuine, if immature, steward. ¹¹⁷

¹¹⁶ See for example Rosa Brooks *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror* (2004, 688).

¹¹⁷ See *The Law of Armed Conflict: International Humanitarian Law in War* (Solis 2010, 4–5). *The History and Evolution of the Law of War Prior to World War II* (Noone 2000) groups all war law prior to 1850 in one (brief) category. In *The Law of War* (2000, 151–155) Detter mentions the existence of agreements on the treatment of POWs in 1400 BC and Indian proscription of poisoned weapons in the sixth century BC before stating that "elsewhere barbaric practices" were often the norm apparently because "it is often cruelty, rather than restraint, that comes naturally to man." In *Of War and Law* David Kennedy (2006) alludes to "legal ideas about war long before the traditional international legal system of the late nineteenth century" and then points out the strategic use of origins in arguments about the laws of war: "when commentators wish to stress law's role - actual or potential - as the reservoir of enduring ethical principles and vision of "justice,' they begin the story far earlier." (Kennedy 2006, 48).

In this chapter I will argue that as tempting as this question may be it harbors a particular danger. Phrasing the question in this way presupposes that there is a referent object for the term "laws of war" that is, in pure form, outside of history and independent of particular context. Though it may vary in certain particulars the notion that law is or is not present in any specific context depends on a discrete definition of law that functions as a universal form. To employ the phrase "true law," or "real law" is to invoke a universal that is either present, absent, or in transition to one of these two pure states in any given context. This assumption of the existence of a kind of Platonic form of law enables an observer to then search for it, to identify the failure of certain forms and practices to live up to it, and to trace its outline in elements of modern conventions. Inquiring about the laws of war in this way predisposes the observer to attempt to mark off that which is the laws of war from that which isn't. In so doing the true form of the laws of war is supposedly revealed which resides underneath or behind the obfuscation inherent in fallible human practice. Statements such as "there have been rules for the battlefield for thousands of years... there have been *laws* for the battlefield – laws of war - only in the past hundred years or so" (Solis 2010, 20)¹¹⁸ depend critically upon an idea

See International Law and Armed Conflict (McCoubrey and White 1992, 210–17) for the ancient and Middle Age antecedents of modern Jus in Bello. Also The Contemporary Law of Armed Conflict (Green 2000, 20–30), The Law of War (R. I. Miller 1975, 3), Law of War Workshop Deskbook (Bill 2004, chap. 1), The Law of Warfare: A Summary of Its Recent History and Trends in Development (Frits Kalshoven 1973), and The Law of Armed Conflict: Constraints on the Contemporary Use of Military Force (Hensel 2005).

Solis argues that the law of the Hague, particularly Regulation IV which included the a requirement for violators to pay compensation, "was the first time a penalty provision is found in a multinational treaty involving the regulation of battlefield conduct; the first time, one might argue, that rules of war became laws of war" (2010, 54). This tendency to label pre-modern laws of war "rules" is in sharp contrast with the fact that since antiquity the term "laws of war" and "laws of nations" have been the prevalent phrasing. See also Classical Greek Times (Ober 1994, 12) for the argument that it is "important to

of a pure form of law that provides a unitary model of law for all times and all places. The wide variety of responses to this particular question, in one way or another, offer just such an answer. They attempt to provide a particular definition of the laws of war that transcends particular subjective positions and offers instead a definitive answer of what the laws of war, here and now, essentially *are*.

Transcendental models of the laws of war that are proposed in response to the above question vary widely from observer to observer but some common boundaries are invoked consistently. First, the laws of war are marked off as a legal domain that is distinct from criminal law; laws of war apply to warfare rather than crime and other forms of organized violence that do not themselves live up to *true* warfare. Second, the legal order of the laws of war is set against the chaos that always threatens to take hold in the absence of the law. To a greater or lesser degree the laws of war function to tame these forces, to proliferate civilized order against threats of disorder, and "violated or ignored as they often are, enough of the rules are observed enough of the time so that mankind is very much better off with them than without them" (Bill 2004, 2). Finally, modern laws of war are distinct from all "rules" of warfare that existed prior to the modern period or which now exist outside the modern international legal order developed since the mid-nineteenth century.

separate the relatively informal, socially mandated and enforced rules of war from legally enacted laws of war."

It is to this last distinction that I will initially turn in this chapter. This chapter will explore how the creation of a pre-modern foil for modern laws of war fulfills a powerful narrative function for the legitimation of certain accounts of the nature of the laws of war. In these accounts a distinction between pre-modern and modern law is invoked in order to found an account of modern laws of war. The impotence of premodern laws to tame the barbarity of pre-modern warfare provides a negative model against which modern laws can be defined. In this narrative pre-modern law represents the absolute negation of the virtues that are found in the form of modern law. Premodern law is represented as an everywhere failed project that is externalized and juxtaposed with modern law. Modern law is then represented as all that which premodern law was not. Pre-modern law simultaneously functions as a kind of danger that lurks outside modern law, a Dickensian phantom of ages past that haunts the spatial and temporal "exterior" of modern law. Of course modern law is everywhere acknowledged as a yet-to-be-finished project that still only aspires to the highest model of judicial efficacy embodied in the modern sovereign state. Nonetheless, in contrast to pre-modern law, it is clear that mankind can now venture to hope that the evolutionary progress of the laws of war will continue to extend and advance its dominance over the chaos outside time and space and at the same time dread any threats of regression to a more barbaric age.

In spite of the lengths to which most modern narratives go to excise this image of pre-modern law from the narrative of modern law this exteriorization is only ever

partially effective. This is because these accounts of pre-modern law and this narrative division of pre-modernity and modernity are the very building blocks out of which these modern narratives fabricate their own history. These accounts of pre-modern law are fundamental elements in the construction of narratives of what modern laws of war *are*. Thus the particular figure of pre-modern law is an integral, constitutive part of the answer to the question "what are the laws of war?" and, try as they might, narratives that make use of this distinction for their own textual and narrative practices can never obtain a complete separation between the two. The explication of the modern laws of war that is produced using a particular negative figuration of pre-modern law is ever dependent on just that figuration that provides the negative mirror image of the glory of modern law.

In this sense the particular image of pre-modern law is held in a kind of sovereign ban of its own, an "exclusive inclusion" where one particular articulation of pre-modern laws of war is constructed and then "taken outside" in an act of sovereign will, an exceptional moment, which thereby provides the possibility condition for the inside in the form of modern law. The narrative of modern laws of war is produced by a kind of textual exceptionalism in which the author-as-sovereign attempts to create several stable images at once; the excluded other in the form of pre-modern law held in the sovereign ban, the included self in the form of a well-defined, bordered, and stable image of modern laws of war, and the authoritative, sovereign voice that is able to carve heterogeneous

Modern narratives of the laws of war are far from monolithic or homogeneous themselves. For critical accounts see *The Legitimation of Violence: A Critical History of the Laws of War* (Jochnick and Normand 1994a) and "unlawful combatants" or Prisoners of War: The Law and Politics of Labels (Mofidi and Eckert 2003) among others.

human experience in homogeneous identity in a way that is presented as merely revelatory of underlying reality rather than a subjective, arbitrary, willful act. 120

Insofar as modern narratives can never fully divest and distance themselves from this Frankenstein's monster of pre-modern law they remain dependent on the continued acceptance of the "truth" of these accounts of pre-modern law. The acceptance of these accounts is critical for the continued stability of the mutually implicated figure of modern law and the sovereign voice that speaks it. In this sense these cursory accounts of premodern law bear a narrative weight that is entirely disproportionate to the dismissive manner in which they are treated. This narrative of pre-modern laws of war provides an excellent opening for a critical account of the laws of war. If pre-modern laws of war can be shown to be other than, or more than these modern accounts make them out to be, then the corresponding account of modern laws of war and the sovereign voices that produce them are thereby destabilized. If the narrative distinction that has been constructed between pre-modern and modern law can be complicated, if the historicity of this distinction can be illustrated, the sovereign grip of the modern narrative that everywhere "arrests ambiguity and controls the proliferation of meaning by imposing a standard and standpoint of interpretation that is taken to be fixed and independent of the time it represents" (Ashley 1989, 236) may be loosened. In so doing alternative avenues for thinking limits on political violence may be opened.

¹²⁰ For a discussion of Foucault's account of historical writing which tend to "erase the difference of the past and justify a certain version of the present" and place "the historian in a privileged position." Furthermore this kind of practice empowers the writer of this history and produces a certain incentive to conceal the very practice of history making itself (Poster 1982, 120).

The Narrative Foil of Pre-Modern "Rules" of War

Pre-modern laws are generally characterized in this narrative as regressive, particular, and ignored. Yawning gulfs of centuries pass between isolated instances of attempts at "law." From the "pre-dawn light" of recorded history this modern narrative finds minimal evidence of attempts to regulate armed conflicts and to protect the "weak," "inhabitants," "war victims," and "prisoners of war." These efforts are always associated with frustration and an assured recurrence of barbarity. The earliest evidence is often located in the Old Testament where only those who "rejected God" were subjected to limitless violence. 121 There is evidence of "complex" Sumerian and Egyptian 122 "rules" for warfare and the Code of Hammurabi, written between 1700 and 1600 BC, provides for "protection of the weak against oppression by the strong and ordered that hostages be released on payment of ransom" (Noone 2000, 183). The Hittites in the thirteenth century BC and 7th century BC Persians recorded regulations on the treatment of enemy wounded and in the ninth century Muslims were legally obligated to refrain from killing prisoners of war unnecessarily. The first caliph, Abu Bakr, ordered his armies to maintain faith with their enemies 123 and in the sixth century Sun Tzu advocated compassion as a matter of military necessity and practicality. Around 200 BC Hindu texts outlined rules against the killing of surrendering soldiers, the wounded, and

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¹²¹ (Green 1999, 5–6)

¹²² (Noone 2000, 183), see also (Solis 2010, 3–6), (Detter 2000, 151)

¹²³ (Green 1999, 11)

noncombatants as well as practices offensive to human conscience. The *Ramayana* and the *Mahabharata*, Sanskrit epics from the 3rd century BC, contain prohibitions on the use of barbed, poisoned, or burning weapons and protections for the wounded, surrendering, and retreating. Certain classes of people including support personnel, foragers, women, children, and the elderly were supposed to be protected. 125

With the Greeks and Romans modern observers encounter more extensive evidence of laws of war. Greek laws of war, by some accounts more extensive than those found today, ¹²⁶ were generally followed in intra-Greek warfare though these "rules" of war began to breakdown between 450-300 BC in a return to the barbaric status quo. Others, such as McCoubrey and White (1992, 18), largely dismiss pre-Roman efforts altogether and identify the rise of the first "enduring legal concept" with the Romans. In spite of their comparatively advanced state of law the Romans are more widely known for unrestrained barbarity towards their enemies. Robert Stacey (1994) argues that Roman warfare "was essentially unrestrained. Prisoners could be enslaved or massacred; plunder was general; and no distinction was recognized between combatants and noncombatants. Classical Latin, indeed, lacked even a word for civilian" (Stacey 1994, 27). Accordingly Roman warfare was characterized by "merciless savagery" at least

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¹²⁴ (Solis 2010, 4–5)

¹²⁵ (Green 2000, 7–8).

¹²⁶ Interestingly, "it becomes evident from these examples that many of the rules of the ancients go further than what is to be found in either the Hague or the Geneva law" (Green 1999, 8). Green raises the question of whether modern laws of war are "any more known or applied in industrial states" (Green 1999, 9). This question is taken up at length in (Jochnick and Normand 1994a).

through the sixth century AD. Gary Solis notes that though Roman military law seems to have recognized many of the same criminal offenses that are recognized today there were very few limitations upon the treatment of non-Romans and enslavement, massacre, and plunder were common behavior towards combatants and noncombatants alike.¹²⁷

Many modern observers note the first signs of actual momentum towards real codified law in the Middle Ages. Here the ancient recurrence of barbarity begins to give way to a progressive *evolutionary* process. The first hints are seen in "St. Augustine, writing in the fifth century twilight of the Roman Empire," developing into a "body of theoretical treatises dealing with just war in its incidence, conduct, and resolution" and reaching a "high point ... with the writing of Francisco de Vitoria and Hugo Grotius" whose "works are acknowledged as the analytical bases of the contemporary international law of land warfare" (Hartigan 1983, 3). In the eleventh century the Peace and Truce of God attempted to develop Christian restraint in wars between Christian communities and reserved unrestrained warfare for external "pagan" enemies. This notion of fraternal protections for those of certain communities was also practiced to some extent in the late Middle Ages in the form of chivalry. Chivalric rules guided the behavior of knights and nobles with respect to each other and celebrated virtues such as compassion, mercy, charity, and giving quarter to vanquished enemies. Though adherence to the ideals of chivalry may have been no more common in practice than any of the other laws of war previously discussed the rules of chivalry were celebrated to some extent in the twelfth

¹²⁷ See (Solis 2010, 4)

and thirteenth centuries until they died along with the prisoners and pages at Agincourt in 1415 AD. 128

This brief survey of pre-modern attempts to regulate warfare is characteristic of those modern narratives of pre-modern laws of war. Pre-modern laws of war are generally dismissed as primitive and lacking in the characteristics that constitute true laws of war as codified in the "great treaties" of the nineteenth century. Many modern accounts open with several paragraphs or pages on the failure of pre-modern law to ever effectively restrain man's naturally barbaric tendencies. Though many accounts of modern laws don't even pay this limited lip service to pre-modern law those that do uniformly suggest that for as long as the desire to limit the carnage of war has stirred in the hearts of men it has remained practically latent until modern times. Evidence of inconsistencies in adherence to pre-modern laws of war and the lack of a single codified enduring international framework seem to lead modern observers to locate ancient laws of war on a primordial lowest rung of an *evolutionary* ladder of law. ¹²⁹ Though modern views of ancient antecedents of laws of war often briefly cite such widespread attempts to regulate armed conflict they tend to just as quickly dismiss these efforts due to the apparent lack of enforceability of pre-modern law. The distinction between those with

¹²⁸ At the Battle of Agincourt in 1415 Henry V had French prisoners killed and the French massacred young pages in an overrun English camp. For narrative of the battle see Shakespeare's *Henry V*, Act IV. Also, see *The Law of Armed Conflict: International Humanitarian Law in War* (Solis 2010, 5–6) and *The Age of Chivalry* (Stacey 1994) for discussion of chivalry.

¹²⁹ On the "evolution" of the laws of war see *The Evolution of the Concept of the Just War in International Law* (Elbe 1939); for a pre-Geneva treatment of the "evolution of the concept of just war" see *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror* (Brooks 2004, 687–704).

whom laws of war are possible and those with whom they are not is underappreciated in favor of a modern memory of ancients in which their efforts to regulate warfare are shamed by their practices of lawless barbarism in war. Recurring atrocities over many millennia demonstrate that pre-modern law was little more than wistful words inaudible above the din of uninterrupted battle. The presence of injunctions, whether spiritual, practical, or humanitarian tends only to further illustrate the uncontrollable nature of ancient warfare and the bestiality dominating the hearts of pre-modern military men. Abortive attempts at law demonstrate that pre-modern people in effect *knew better* but were tragically unable to elevate their practices beyond the primitive ages of which they were a part. The evolution of truly transcendental laws of war and the promise of eventual salvation from human savagery would have to wait until the modern era.

Modern "Laws" of War

This modern narrative of pre-modern laws of war provides a kind of foil for modern law; pre-modern law is the negation of those characteristics that implicitly define modern law. Where pre-modern law is isolated, particular, and ineffective the implication is that modern law is enduring, universal, and effective. Though observers readily acknowledge that modern laws of war have not yet reached their full potential, modernity is invested with the promise that it one day will. Set against the backdrop of long ages of barbarity, modern narratives identify the origin of war law in the mid-

¹³⁰ The actual effectiveness of pre-modern laws of war in preventing atrocities will not be directly taken up here. However, following Jochnick and Normand I will suggest that the common approach of employing an implication of effectiveness as a basis for distinction between pre-modern and modern laws of war is quite problematic.

nineteenth century, usually with the Lieber code.¹³¹ Though the modern narrative typically identifies the Lieber code as the origin of modern laws of war, and the Law of The Hague and Geneva Conventions as the first instances of modern laws of war, isolated precursors of true law can be identified in the late Middle Ages. In these ancestral fragments many modern observers identify some of the principles that would eventually be fully realized in true modern law. In his 1625 work *De Jure Belli ac Pacis* "the father of modern law" Hugo Grotius wrote that a lack of restraint in relation to war required the recognition of a "common law among nations" that could govern nations in their conduct of warfare and reduce the barbarous "frenzy" he observed "throughout the Christian world." With the Peace of Westphalia in 1648 modern observers identify an "emergence" from "collapsing religious empires" in which "international law was strongly influenced, if not created, by the writing of jurists," the beginning of modern law where "the source of law was the practice of states rather than the writings of publicists." (McCoubrey and White 1992, 17–18) and the "dominance of religion in

¹³¹See for example Rosa Brooks who groups "efforts to control and limit warfare" into "modern law" since Francis Lieber and laws and limitations developed through the fourteenth century that, though "elaborate, much written about, and fairly uniform", were more of a "code of social behavior" than positive law (Brooks 2004, 688). Also see (Carnahan 1998; Detter 2000; Green 1999; Howard, Andreopoulos, and Shulman 1994; Kennedy 2006; McCoubrey and White 1992; Mofidi and Eckert 2003, 61) for the identification of the origin of modern codified laws of war in the mid-nineteenth century. (Baxter 1963, 186) points to a "paucity of legal materials regarding the law of war" prior to Francis Lieber.

As quoted in (Noone 2000, 187–188); Noone (2000) argues that "modern times" begin with Hugo Grotius in 1625; see also (Jochnick and Normand 1994b, 61).

^{133 &}quot;The modern view hails the publicists for laying the foundation of the laws of war, a triumph of reason over barbarity. But the triumph was in word only. The enlightened theories of the publicists did not influence the practice of emerging European nation-states busily engaged in the imperial conquest, massacre, and enslavement of millions in the Americas, Africa, and Asia." (Jochnick and Normand 1994a, 62). The claim that modern law is not based on the normative works of jurists but rather in the

societies in the sixteenth century" gave way to the "slow emergence of the nation state in the sixteenth and seventeenth centuries" (McCoubrey and White 1992, 18). In this "transitional era" "lip service" was paid to "just war" but in fact the sovereign state was emerging as a power with absolute right to wage war based on nothing more than its own prerogative. Though writers like Grotius and Gentili struggled with balancing just war thought with the right of sovereign states "the theory of the absolute sovereign power of a state swept away any vestige of control over the use of force in international relations" (McCoubrey and White 1992, 19) by the nineteenth century. In spite of the best efforts and intentions of these forefathers the status quo of chaotic recurrence would not be truly transcended until the great codification efforts of the nineteenth century.

The Origin of Modern Laws of War: The Lieber Code

The single most commonly cited origin of modern laws of war is the Lieber Code written in 1863. During the American Civil War, Abraham Lincoln ordered that a code be developed for the conduct of the Union army. This code would come to be known as the Lieber Code after the principal author, Francis Lieber. Lieber, a professor at Columbia, received a request from General Henry Halleck who was then General in

actual practice of states is an interesting one. What then is law if it represents not a normative ideal of behavior but rather an enforcement of the behavioral status quo? What then is the source of law and what is its function?

Born in Germany, Lieber fought against the French and was wounded in 1800. He eventually made his way to the United States and became a professor at Columbia University in 1857. Prior to compiling the code, Lieber produced a pamphlet reacting to "blurred concepts of combatant and civilian" arising from recent conflicts in Europe, particularly Napoleon's Peninsular war (Solis 2010, 40). Lieber's advocacy of disciplined and rule governed warfare arose from his sense of morality and religious duty. His interest in the American Civil War in particular was due to the tragic fact that two of his three sons fought for the Union while the other fought, and died, for the Confederacy (Meron 1998, 269–270).

Chief of the Union army. The problem facing Halleck was that the Confederate army was using irregular forces, dressed as civilians, to slip through Union lines and engage in guerilla warfare. The Confederates demanded that these guerillas, when captured, be treated as prisoners of war. If they were not treated as such the Confederate army threatened to execute Union prisoners then in their custody. Lieber's response was developed into what is now known as the Lieber Code which is often regarded as the origin of modern codified laws of war and "the final product of the eighteenth-century movement to humanize war through the application of reason" (Carnahan 1998, 213). Lieber himself thought his legal manual for armies in the field was a first of its kind.

Lieber's code on the conduct of the Union army was issued as General Order 100 to the United States Army in 1863 and published later as *Instructions for the Government of Armies of the United States in the Field* (1863). While not much of what Lieber wrote was original, "the Code's genius lay in the gathering – in one accessible document – the gist of the writings of publicists and the customs of armed forces of the day" (Solis 2010, 41).

The Code was written for the Union army but would provide the foundation not only for rules adopted by the Confederate army but also for similar efforts by numerous countries around the world.¹³⁷ Lieber codified the "combatant's privilege" which is the

¹³⁵ See (Hartigan 1983, 2)

¹³⁶ (Baxter 1963, 177)

¹³⁷ Including Great Britain, France, Prussia, Spain, Russia, Serbia, Argentina, and the Netherlands (Solis 2010, 41).

right of combatants who are the agents of a sovereign government to kill, wound, and commit other violent acts without being held individually responsible for those actions. This privilege results in combatants being treated as prisoners of war when captured rather than as criminals who can be punished for their actions in combat. At the same time Lieber developed a kind of halfway category for the inhabitants of an adversary's country. Though non-combatants are to be spared hardships as much as "the exigencies of war will admit" (Solis 2010, 43) civilians can be subjected to starvation and other acts intended to bring about an end to the conflict more quickly because "a citizen or native of a hostile country is thus an enemy" (Solis 2010, 43). Lieber, "no simpering sentimentalist" by his own account, held that "the more vigorously wars are pursued the better it is for humanity" (Witt 2012, 3–4). Lieber's code allows wide latitude for armies to deny quarter and execute prisoners when military necessity or reciprocity requires it.

As indicated above Francis Lieber's "originality" is attributed not to the ideas contained within the code itself but rather to the comprehensive codification of the practices of states and armies. The actual guidelines for battlefield behavior were based not on radical normative prescriptions for substantially different (more humane) battlefield practice, but on long established practices of states and opinions of jurists. To be most precise, then, it is the *codification* in one document of pre-existing practice that is most significant in the Lieber Code though this distinction is largely lost in most modern mentions of the Lieber Code as origin of modern laws of war and The Hague convention in 1899 would largely use this codification of long established state practice as its blueprint.

The Great Treaties of the Nineteenth Century

The "great treaties" of the nineteenth century, the Law of The Hague and the Geneva Conventions, developed concurrently starting with international conferences in the 1860s. They now represent two branches of modern laws of war. The law of The Hague generally deals with the means and methods of war, ¹³⁸ while the Geneva Conventions, often referred to as international humanitarian law, deal with the treatment of prisoners of war, civilians, and tend to focus on the victims of war more than active participants in hostilities. ¹³⁹ Like the Lieber code, the laws of the Hague and Geneva are generally considered to be codifications of widespread state practice referred to as customary international law. ¹⁴⁰

The Law of The Hague

The 1868 St. Petersburg Conference was convened by Czar Alexander II with the stated purpose of "alleviating as much as possible the calamities of war" (Jochnick and Normand 1994a, 66). It seems that whatever humanitarian concerns figured into the

¹³⁸ (F. Kalshoven 1987, 3–4)

¹³⁹ "Victims" includes combatants who find themselves out of combat due to injury, illness, surrender, capture, or other circumstance; see (McCoubrey and White 1992, 257) for more on the "humanitarian" element of Geneva.

¹⁴⁰ See (Goldsmith and Posner 1999, 1117) for discussion of the inherent ambiguity of customary international law (CIL): "In theory, the practice is supposed to be general in the sense that all or almost all of the nations of the world engage in it. But it is practically impossible to determine whether 190 or so nations of the world engage in a particular practice. Thus, CIL is usually based on a highly selective survey of state practice that includes only major powers and interested nations. Increasingly, courts and scholars ignore the state practice requirement altogether. For example, they refer to a CIL prohibition on torture at the same time that they acknowledge that many nations of the world torture their citizens. It is thus unclear when, and to what degree, the state practice requirement must be satisfied."

Czar's calculations, there was at least as much interest in relative military gains. Stretched thin, Russian coffers could not support an arms race and the Czar's aim may have been to limit an increasing military disadvantage under the guise of humanitarian efforts. The conference produced the Saint Petersburg Declaration which renounced the use of exploding bullets. The Saint Petersburg Declaration remains significant for two reasons: many consider this to be the first modern international agreement to limit a technologically devised weapon on humanitarian grounds. Second, the preamble to the declaration contains the first mention of "unnecessary suffering" in such an agreement. 141 Though it is hailed as a milestone in humanitarian international law, the Saint Petersburg Declaration did little to actually address conduct considered to be "military necessity." Exploding bullets have the same immediate effects as non-exploding bullets. With time, however, exploding bullets cause considerably more suffering, more severe injuries, and are more likely to lead to eventual death. In a practical military sense exploding bullets have little real benefit as far as the outcome of a particular battle or the military capability of the adversary; a soldier shot with an exploding or non-exploding bullet will be equally out of combat. A limit on weapons that make suffering and injuries worse to soldiers who are already out of combat is a limit that, in most cases, has no real cost for military leaders. Like the Lieber Code, the St Petersburg Declaration establishes a precedent that only those practices which have no military necessity are subject to limitation. 142

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¹⁴¹ See (Solis 2010, 50)

¹⁴² Jochnick and Nomand (1994a) argue that this is a constitutive limitation of humanitarian law which renders it unable to limit the vast spectrum of practices that could be argued to be militarily necessary.

The first Hague peace conference of 1899 was again proposed by Russia, this time Czar Nicholas II. Drawing more directly on the Lieber Code, the 1899 conference established the Permanent Court of Arbitration to peaceably settle disputes and incorporated many protections for combatants and non-combatants. Of particular note is the Martens Clause which was inserted into the preamble when the great powers were unable to compromise on the status of francs-tireurs. The Martens Clause, which is widely considered to be a statement of customary law, affirms "civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience." This clause is repeated in the 1907 Hague Convention and the 1977 Additional Protocols to the Geneva Conventions. It may be that the Martens Clause was the most lasting accomplishment of the Hague convention. The specific agreements, though trumpeted as humanitarian accomplishments, only limited a very few specific types of weapons (asphyxiating gasses, expanding bullets, and balloon launched munitions) which had either yet to be proven useful in the first place, or had proven decidedly ineffective. Even so, the United States and Britain opposed the final ban in part due to their affinity for expanding bullets which they felt were particularly well suited for use against "tenacious" colonized people.

¹⁴³ Article 1-2 API (Roberts and Guelff 2000, 423)

The Geneva Conventions

In 1859, Henri Dunant was witness to horrors at the battle of Solferino and the aftermath in which neither army made serious efforts to help those who still lay wounded on the battlefield, and left to little mercy from the elements or the wicked. This scene made such an impression on Dunant that he organized a volunteer effort to help the wounded, and he later wrote a work entitled *Un Souvenir de Solferino* which was widely read worldwide. Dunant's work led to the founding of the International Committee of the Red Cross in Geneva in 1863. 144 In 1864, one year after Lieber delivered his work to the War Department, twelve European nations met in Geneva to sign the First Geneva Convention entitled the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. This meeting sprung from the idea encapsulated in Dunant's work that an organization should be established which would care for the victims of war and that an international agreement should be developed to "recognize and protect these committees" (Solis 2010, 48). The first Geneva Convention pursued this goal, and focused on the problems witnessed by Dunant in Italy, by defining legal status for medical personnel and establishing a requirement that wounded enemy soldiers were to be cared for in the same manner as friendly soldiers. This convention generally achieved Dunant's vision: medical personnel would be recognized as neutral parties and not targeted by belligerents when tending to wounded. Wounded people would be cared for without regard to which party they belonged and medical personnel would be identified by the now familiar red symbol on a white background. This first Geneva Convention

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¹⁴⁴ (Noone 2000, 190–191)

was joined by a second in 1899 applying to the sick, wounded, and shipwrecked at sea.

A third came with revisions to the first two in 1929 and the experiences of the two World Wars and the Spanish Civil War resulted in a conference in Geneva in 1949 which would further develop these into the four Geneva Conventions known today.

Problematizing the Distinction between Modern and Pre-Modern Law

The ontological discontinuity between pre-modern law and modern law presupposed by modern narratives of the laws of war suggests that modern law must have a specific origin. This origin is most commonly identified in the Lieber Code. Throughout the discussion of "modern" laws of war above both treaty law and customary law are generally based not on radical normative prescriptions but on long standing patterns of political practice that have been observed so consistently, for such a long time, that their codification is little more than a reflection of the international status quo. This renders any "origin" apparently problematic because any instance of war law, past or present, seems to be little more than a current iteration of more ancient practice. If one asks the question of what, precisely, the nature of the distinction is between premodernity and modernity one is left sorting through the implications of these modern narratives. In these implications a crucial narrative function is fulfilled by certain characterizations of pre-modern law. The implication is that if pre-modern law is characterized by recurrence, particularity, and breach then modern law, in contrast, is characterized by progress, universality, and adherence. Of course there are exceptions on both sides of the epochal divide but the narrative foil provided by particular characterizations of pre-modern law is used to substantiate characterizations of modern law and vice versa.

The qualities that distinguish modern laws of war from pre-modern laws of war should be taken with some skepticism however even if most modern observers employing the above narrative do not. First, there are inherent problems in the attempt to codify customary practice. The codification of customary law is in effect a description of how states already behave rather than a normative statement. If customary international law is simply the description of already widely established state practices what exactly is the status and function of the codification of those practices? Do states then behave according to the codified practices because they are codified or due to the exigencies that drove the practice in the first place? How could such a codification ever be complete or accurate? And what of the status of exceptions to practice which are themselves a long standing elements of state practice? The great treaties of the nineteenth century represent not simply normative ascriptions of how states should behave, though they certainly do represent this, but explicit statements of how states already behave. In fact it is this tendency of the great treaties to enshrine long established practices in law rather than to prescribe "bold innovations" that has primarily enabled the creation of these treaties in the first place. 145

¹⁴⁵ The tendency of humanitarian law to be descriptive rather than normative is illustrated by the difficulties encountered with the 1977 Additional Protocols to the Geneva Conventions. The "definitional inadequacies" (Mofidi and Eckert 2003, 66) of Common Article 3 were taken up by an additional convention in 1971. Unlike past conventions, in 1971 certain national liberation groups were invited to participate including the Irish Republican Army, the African National Congress, and the Algerian FLN. Though these groups did not have a vote at the convention their presence was felt through their influence on sympathetic states whose votes were equal in weight to major powers. This resulted in the inclusion of provisions in the 1977 Additional Protocols that were not simply reflections of customary international law and existing state practice but rather represented "bold innovations" that were resisted by the United States and other members of the "Western community" (Solis 2010, 120–121).

The idea that modern laws of war as enshrined in the great treaties of the nineteenth century consist primarily of codifications of customary international law undercuts the implication that modern laws of war are inherently progressive and normative. This is clearly demonstrated when international laws of war have pushed into the realm of "bold innovation" where they have encountered much less acceptance. In these instances states can abstain from signing and ratifying treaties and then plausibly argue that they are not bound because, as new practices, the treaties do not constitute customary international law. In consequence, like the Lieber Code and the API, modern laws of war tend to legitimize and codify the ways states have long behaved rather than constraining them from practices they would otherwise enjoy.

Also, the basis of modern laws of war in customary international law belies the notion of universal assent since customary international law does not depend on unanimity, and if it did, it would be nonsensical because there would be no need for a conventional rule. The codification of customary law is only useful for bringing states that have behaved in an abnormal way back into conformity with widespread practices that are based not on strictly normative statements about state behavior but on the observed practices of states. In this sense customary international law can be seen as simply a legitimization and legalization of the status quo and a potentially powerful socialization tool for the state system.

Rule and Law

This faith in a nineteenth century evolutionary leap forward relegates pre-modern laws of war to a familiar role as foil for modern law. A variety of textual practices are

employed in this telling of the history of the laws of war that are intended to define and marshal an authoritative account of modern laws of war. First, in order to identify the origin of modern laws of war one must be able to isolate an essence of modern law which is in fact taken to be synonymous with law *per se*. How exactly do modern observers substantiate the claim that pre-modern laws of war were not laws at all, and how do they substantiate the claim that modern laws of war constitute law *par excellence*? What about modern law exactly substantiates this distinction between modernity and pre-modernity? What exactly about modern law renders all pre-modern laws not even laws at all but rather rules? What *original* aspect of modern law was added to pre-modern law, from where did it come, and how is it known? How can modern observers first isolate an essence of law, the *signified* of the signifier "law," and then identify and account for the first appearance of that essence, its "dazzling emergence from the hands of a creator"? (Foucault 1984, 79).

As often as this distinction is invoked and implied it is rarely explored or substantiated beyond the perfunctory assemblage of anecdotes and isolated examples populating the opening pages of most works on modern laws of war. The distinction between rule and law is generally taken to be self-evident and is consequently not explored in detail. Everyone knows, after all, that pre-modern times were characterized by barbarous practices and especially so in times of war, when the marginal rule of domestic law gave way to unlimited license against the enemies of the prince. The impotence of pre-modern laws of war is, in a word, obvious. Though much work has considered laws of war throughout history and much historical work has developed more sophisticated understandings of pre-modern laws of war there has been little if any

consideration of the role that is played by this modern narrative of the laws of war in forming modern understandings of what the laws of war *are*. This is particularly interesting given the high level of ambiguity attending the simple question of what modern laws of war are. The resilience of this question is attested to by the quantity of works attempting to address it, the very same works that repeat this modern narrative of the laws of war and attempt to found an account of modern law in a dubious treatment of pre-modern law, as well as an invoked but unsubstantiated distinction between rule and law. The precise nature of the distinction is allowed to slip between the lines into the realm of implication; looking more closely there is only ambiguity, uncertainty, and serious problems for the narrative distinction between pre-modern and modern law.

Hart's Concept of Law

The question of the "essence" of law is taken up by H.L.A Hart in *The Concept of Law* (2012). Hart points out that most concede that laws are made up in part by rules. But he then raises the question what are rules? What is the difference between a rule in the sense of a generally consistent behavior of a group of people versus a rule in the sense of obligation in terms of *must* or *ought*. What is the difference between, to use Hart's examples, drinking tea daily which, as a rule, most English people do and baring one's head in church which is a rule that must be followed. There is division among legal theorists on the question of the difference between these two forms. One view is that the difference is one of consequences. Legal rules have attendant consequences for their violation whereas rules of social practice do not carry the same regularized, predictable consequences. Yet this account is unsatisfactory because a legal rule is more complex than a simple probability of a punishment. The rule is not simply a statement that the

judge is likely to punish the violation but it contains more than this; the enforcement of legal rules is not simply transactional. There is more to laws and sanctions than a simple calculation of cost versus benefit. An individual is not simply free to violate laws if he or she deems the reward of the transgression to be worth the price of the punishment and judges use rules as a guide in punishing as much to prevent future breaches as to address past wrongs.

Hart argues that in addition to a primary system of rules that associate specific behaviors with consequences a secondary system of rules regulates conditions under which primary rules may be regarded as legitimate. "If a social rule is to exist some at least must look upon the behavior in question as a general standard to be followed by the group as a whole" (Hart 2012, 56). He calls this a "reflective critical attitude"; "These views are manifested in the criticism of others and demands for conformity made upon others when deviation is actual or threatened, and in the acknowledgement of the legitimacy of such criticism and demands when received from others" (Hart 2012, 57). These secondary rules give rise to obligations in the sense that rules made according to the secondary rules gain an element of legitimacy in the "reflective critical attitude" of those subject to the rules. Not only are actions prohibited or compulsory, but in the eyes of those under the rule they *should* be. This *should* is the critical element for Hart and it is due to the "internal aspect of rules" which is in turn due to secondary rules. This certainly does not provide a definition of law as Hart repeatedly insists, and is not intended to be used to determine which system is or is not law. What it does is attempt to complicate the sovereign model of law to show that law is not simply an order backed by

a sovereign threat. In other words Hart, according to Leslie Green, attempted to "cut off the King's head" long before Foucault suggested it in 1975. 146

What Hart is proposing is a notion of rules that transcend the particular sovereign and create standards for what entities should be recognized as sovereigns. This account implies some standards for sovereignty and rules that, by their observance, *produce* and are constitutive of sovereignty. This idea is akin to the social contract, but does not consist in a long lost event but rather an ongoing observance. The social contract does not simply happen sometime long ago but is happening in the form of observance of social rules of right and succession, through the practice of "reflective critical attitude," and the ongoing production of both sovereigns and subjects. What Hart's work illustrates is that not only are certain modern concepts of law ambiguous but the very concept of rule upon which they rest is likewise characterized by ongoing debate. It is fair to say then that the distinction between modern rule and law in principle is less clear than most modern narratives of the laws of war assume.

The Metaphysics of Codification

However the difficulties in distinguishing pre-modern law from modern law extend beyond any strictly conceptual ambiguity. The most significant problem has to do with the way that an idea of modern law is invoked that is a manifestation of the true form of law, of law *par excellence*. Modern law is asserted to be true law and then a

¹⁴⁶ Of course if Green can claim that Hart has done this then it was also done by Plato in Laws through his argument that good law requires not only threats but also persuasion; (1997b, 1. 720d–721e).

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characterization of modern law is used as the measure of all law for all times and all places. Modern observers first invoke modern law *qua* law *par excellence* and then search the centuries for this particular image of law. This search is already bound to fail because it anachronistically transposes the meaning of law employed by today's observers¹⁴⁷ onto different contexts. Modern observers in a sense look to find today's concept of law in the past, and then conclude that because they do not find it, the times and places that they make the object of their inquiry simply did not have it.

Rather than searching the ages for "an unbroken continuity that operates beyond the dispersion of forgotten things" (Foucault 1984, 81) one might seek to understand how, in other times and places, law is/was conceived differently than it is here and now. The consequence, however, is that the assertion of difference rather than deficiency tends to undercut the narrative pedestal upon which the *presence* of modern law rests. This narrative pedestal is only maintainable to the extent that modern observers ignore the historicity of the concept of modern law. Modern law is not, by these accounts, simply the continuation of the practices of individuals and states that are socially regularized and recognized such that patterns of quasi-predictable social behavior *as they exist here and now* are known by the term law. Modern law by these accounts is defined by its identical relationship to the Platonic form of law, law's linguistic referent. The practices and ideas that are today defined as modern laws of war are augmented by this metaphysical notion of presence that is not an effect of social practice but rather an attribute of an underlying

¹⁴⁷ How this one meaning could ever be definitively determined in order to use it as a model with which to conduct a search of the ages is another significant question.

reality. This presence then functions as a kind of metaphorical anchor which disallows drift in the meaning of the term law over time. Law has meaning that is outside of time and place and anchored, not by the understandings of those who employ it, but by reality independent of human practice for its meaning. Even many of the more historically focused works use this approach of identifying a model of law and then searching for it in ancient times. The practices of ancients are then characterized as deficient; Achilles' abuse of Hector, "the execution of the war prisoner by Dolon and slaughter of sleeping men," the use of "projectile weapons," and the "vigorous and savage" (Ober 1994, 14) pursuit of retreating troops are used to demonstrate the failure of ancient practices to live up to true *law*. This is an alternative to inquiring what the practices of the Ancients *were*; it is the demonstration of what the ancients *were not* compared to what they could have, and perhaps should have been, and by implication, what moderns are now or can rightfully hope to soon become. ¹⁴⁸

In these "solemnities of the origin" Foucault (1984, 79) sees a metaphysical claim of presence that always depends on a faith in an underlying essence, a referent. Foucault

In a 2005 examination of Thucydides' *History of the Peloponnesian War* Steve Sheppard has criticized the way that recent works on international law give "short shrift" to works of law in antiquity and the "sense that our times are different, that we have little or nothing to gain from looking to the past for guidance" (2005, 907). Sheppard criticizes the tendency discussed above of modern legal scholars to take the form of today's law as a timeless form which is either present or not in other times and places. He points to Lassa Oppenheim's influential 1905 definition of international law as ""as a law between Sovereign and equal states based on the common consent of these States is a product of modern Christian civilization..." Even absent the religious veneer Oppenheim's definition relied on the existence of the state in the modern sense, the subject of the law, to determine the existence of international law. This emphasis on the state as the dominant (if not the only) actor in the international legal system has been both cause and result of a notion of international law dependent upon institutions that did not exist prior to modern times, or even until the later Twentieth Century" (Sheppard 2005, 907–908).

suggests instead a historical inquiry that searches not for continuity but assumes discontinuity. Foucault resists the notion of history in which the historian gazes upon the past and discerns the threads of some underlying reality that was there all along, moving beneath the surface, and slowly driving a long trajectory of progress that can now, at its fruition, finally be understood. This common approach to history assumes a position for the historian at an apex of progress and development that, though not necessarily the completion of this project is its final revealing of itself as an underlying project, an animating principle that for long ages played the puppet strings of its mostly unaware human agents. The historian reveals this true animating force and explains how it has been this essential quality all along that was determining the course of human experience in whatever field of view is in question.

It's not just an ignorance of the historicity of modern law that characterizes modern narratives. These narratives are in fact part of an effort or strategy that actively denies this concept of historicity. These are the historians that Foucault accuses of "refusing to grow up" (1982, 144). They don't grow up because they ceaselessly occupy themselves arguing over whether this or that work is anticipated by another, whether this or that author has actually invented something, or simply taken it from an earlier source. And in this debate about the originality of historical artifacts, there is a tracing of an essence which is present to a greater or lesser degree in its transmission from the one epoch to the other. This tracing of essences, however, is not the objective activity that it

¹⁴⁹ See (Poster 1982, 117)

aspires to be but rather a dressing up of decisions made by the "truth seeker" that are deeply political, while at the same time disguising their subjective interest in the outcomes of the inquiry. The act of determining a true history is also an act that invests, or attempts to invest, the historian with a measure of power. Put differently, one who is able to employ knowledge about the past to describe the present may be better able to influence events and understandings in the present. In this way this kind of history is also a political act inclined towards a "ransacking" (1982, 144) of the past for today's political gain. This "ransacking" of the past occurs when the historical writer uses certain historical "facts" to create a narrative structure that is necessarily incomplete, politically biased, even if unintentionally, and in favor of a coherent narrative at the expense of the openness, discontinuity, difference, and irreducible richness of experiential reality. This kind of historical work is "an active, willful working on materials, a creation, a fiction, in the full sense of the term, one which, as it has been practiced by positivists, liberals, and Marxists alike, produces a discourse with a set of meanings that acts upon everyone who comes into contact with it" (Poster 1982, 119–120).

If Augustine, for example, is read looking to find whether laws of war were present or absent in his thought, the observer presumes a figure of the laws of war, a reality of law, which may be present or absent at any time. This approach presupposes a universal essence of law that, even in Augustine's time and place, is nothing other than what it is also now, and into the future, and in all times and places. Whatever the details of this figure its presupposition as universal likewise predisposes the observer to identify everywhere deficiency contra the presence of the time and place where the pure presence of law is defined. This holds true even if it is granted that today's model is not yet the

realization of a perfect form, because a pure presence is nonetheless invoked that has not yet been realized but one day will be. Thus this exemplary question, did Augustine set forth a coherent doctrine of the laws of war, or were there laws of war in his time, is an unsatisfying way of asking a question about historical modes of law. Instead of anachronistically transposing a modern concept, Augustine and others can be read without the presupposition of universals. This reading thereby opens such works to vast possibilities of meaning that have no significant limitations and instead an irreducible heterogeneity and attendant enduring mystery.

To the extent that these modern narratives depend on metaphysics of presence, rather than social practices which produce an *effect* of presence, the question becomes how this metaphysical presence could ever be known. How are modern observers able to found their narratives on a metaphysical presence that cannot be directly observed or substantiated? This line of questioning must go unaddressed in this modern discourse because the discourse itself is oriented towards producing this very effect now in question. Questions such as these are then marginalized by modern discourse because they run counter to the political effects the discourse is trying to achieve under an aspiration to objectivity. In order to pursue such a line of inquiry a different approach is required.

What is needed instead is a comparative study of how the laws of war are invoked from time to time, and of how those specific meanings are attributed to human conventions. There are certainly great differences from one time and place to another in the forms taken by regulations on conduct in warfare. If the temptation to impose on

history a monological narrative form is resisted, if history is explored as irreducible heterogeneity rather than underlying identity, the regulation of armed conflict can be explored as something that is not metaphysical but is rather political, a field of discursive practices that are employed in a variety of ways for a variety of reasons. The "laws of war" can be seen as a site of contestation that is even, in particular times and places, heterogeneous and unstable. From this perspective there is never a single underlying reality of any particular figuration or account of the laws of war. Instead the contours of contending interpretations can only be imperfectly traced. They have no fixed ontological content and are open to reading and re-reading. The range of "texts" that are relevant to this mode of inquiry is much wider than more traditional inquiries due to a relatively radical change in the inquiry itself. Instead of the nature of the laws of war, the question becomes how observers have been able to fix and articulate particular versions of that nature. Instead of proposing an authority structure which can then provide a determinant account of underlying nature, the question becomes how do observers found and craft their accounts of the nature of the laws of war? In short, the inquiry is aimed at the building blocks of political narratives and the foundations they simultaneously construct and appeal to in order to fix meaning.

In this next section I will explore ways that the ancients classified categories of organized violence according to transcendental laws. In order to do this I will read the statements of ancients as normative and pay particular attention to how these statements are grounded in transcendental laws and the metaphysical accounts that support them. The purpose is not trace the development of an underlying universal but to see the

different ways that limitations have been explained in order to gain some critical purchase on today's invocations of the laws of war.

Hellenic Law and the Deficiency of Codification

Inter-city armed conflict¹⁵⁰ was a frequent topic of consideration among ancient Greek writers and there is wide discussion of customs, rules, and laws that transcend particular political communities. Among the customs that are discussed or implied there are several that seem to have a relatively wide range of consensus. Formal declarations of war were required, truces and treaties were to be respected, and certain categories of individuals were protected. After battles, the losing side should be allowed to collect their dead, prisoners of war were to be ransomed rather than executed, surrendering troops should not be seriously abused, noncombatants should not be unnecessarily attacked, certain kind of arms should be limited or prohibited, and the pursuit of retreating troops should be limited. Though these rules are not clearly codified in something like an international treaty they are referred to by a wide range of authors and if their violation was not subject to sanctions by some international body "their breach could occasion indignant comments" (Ober 1994, 13) from ancient authors.

During the course of the Peloponnesian War both Athens and Sparta violated these informal rules on numerous occasions, massacring ambassadors, soldiers, and

¹⁵⁰ The term "war" is likewise problematic as warfare has taken many different forms across time and place. I will use the term armed conflict because of its connotations as a more loosely defined term of organized groups in physical conflict; for a discussion of the problems of studying war across times and

places see (Neff 2005, 14-29).

prisoners of war. 151 Though Thucydides has become an icon of realist political thought for some due to the famous Athenian statement in the Melian dialogue that "the strong do what they can and the weak suffer what they must," (1972, 1. 5.89) many observers argue that this perspective neglects Thucydides' extensive discussions of the ways that Greek cities attempted to regulate their conduct towards each other through (mostly) unwritten law. In *History of the Peloponnesian War* Thucydides records such widespread respect for truces in order to exchange the dead that it was notable to Thucydides when it did not happen.¹⁵² During the Athenian defeat at Delium the Boeotians sent a herald to the Athenians who delivered a message that the Athenians would not be allowed to collect their dead until the Athenians ceased "transgressing against Hellenic law"; "it was a rule established everywhere that an invader of another country should keep his hands off the temples that were in that country. The Athenians, however, had fortified Delium and were living in it. They were doing all the things there that men do in unconsecrated ground" (Thucydides 1972, 1. 4.97). The Athenian response, as recorded by Thucydides, recognized the validity of the Boeotian claim grounded in Hellenic law and denied violating the temple except "in a case of necessity"; "certainly the altars of the gods were the refuge of those who had committed involuntary crimes, and it was proper to describe as real offenders against the law not those who circumstances compelled them to take some rather violent step, but those who did evil when they were under no necessity of so

See Ober's (1994, 18) list of incidents from Thucydides History of the Peloponnesian War "Thebans by Plataeans in 431, Plataeans by Thebans and Spartans in 427, Melians by Athenians in 415, Athenians by Syracusans in 413."

¹⁵² See Thucydides *History of the Peloponnesian War* (1972, 1. 3.113 and 7.72)

acting" (1972, 1. 4.98). This exchange is interesting because in it the Boeotians claim that Athenian practice violates "Hellenic law" that transcends their particular communities. It is hard to understand by the Boeotians would attempt to have the Athenians discontinue their violations of the law if the laws were simply enforced by the gods. In that case it would seem that the Athenians would be making powerful enemies in the gods and the Boeotians would enjoy an alliance with divine enemies of their enemy. Instead it seems that the Boeotian interest is more secular and focused on upholding and preserving the law itself. This is why the Boeotian claim is made in terms intended to appeal to a sense of Greek community and the audience seems to be Athenians, Boeotians, and other Greeks rather than the gods. Likewise the Athenians made a counter-claim that it was the Boeotians who were in violation of the law due to their refusal to allow the Athenians access to their dead, even though no military necessity required the Boeotians to act in this way. In both cases it seems that the parties are interested in justifying their practices in terms of a transcendental "Hellenic law" that has meaning for their adversaries as well as themselves. Though it doesn't appear that either side's claim was actually persuasive to the other, this episode illustrates that the notion of a "Hellenic law" was significant enough that both sides used it as the foundation of their appeals that the other side should recognize their cause as just and accept their political terms. It suggests that among the Boeotians and the Athenians there is a common interest in the endurance of an idea of "Hellenic law."

In Republic Plato discusses how soldiers of the good city should treat their enemies. 153 The soldiers of the good city will neither enslave other Greeks, nor allow their enslavement by others, so that Greeks in general "will be more likely to turn against the barbarians and keep their hands off one another" (1997c, 1. 469c). The dead are not to be despoiled because their bodies are merely the "instruments" of the enemy attack. Offers will not be made at temples with the arms of defeated Greeks in the interest of the "goodwill of other Greeks." However, the concluding lines of the discussion in the Republic indicate that this is a far different state of affairs than actually practiced by Greeks in Socrates time; Greeks seem to have treated other Greeks as they should only treat barbarians including enslavement, ravaging, and other brutalities. In Laws Plato considers armed conflict from a more practically oriented position than in Republic. This time, rather than discussing the good city at maximum abstraction, Plato considers the founding of an actual city in Crete. Here, Plato's Athenian criticizes the view that warfare is the natural state among nations. Legislators that adopt foreign warfare "as their only concern" are not true legislators because the greatest good is not victory in war but peace. The legislator is a "genuine lawgiver only if he designs his legislation about war as a tool for peace, rather than his legislation for peace as an instrument of war" (1997b, 1, 628e). The goodwill and camaraderie of Greek peoples seems to be valued by Socrates because the Greeks, though they inhabit different political communities, are understood to be one people set against the barbarian outside world; "when Greeks do battle with barbarians or barbarians with Greeks, we'll say that they're natural enemies

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¹⁵³ Plato, *Republic* (1997c, 1, 471–472)

and that such hostilities are to be called war [polemos]. But when Greeks fight with Greeks, we'll say that they are natural friends and that in such circumstances Greece is sick and divided into factions and that such hostilities are to be called civil war [stasis]" (1997c, 1. 470d). For Plato the ravaging of other Greeks is like the ravaging of the self, of one's own city, as abominable as the ravaging of "their very nurse and mother" because, other than during periodic conflicts, the Greeks are conceived by Plato as one larger community, "the Greek race is its own and akin, but is strange and foreign to barbarians," (1997c, l. 470c) and most importantly for Plato, the Greeks are a "people who'll one day be reconciled and who won't always be at war" (1997c, l. 470d).

We see in the arguments recorded by Plato the idea that the natural order of the world among the Greeks was that of peace while the natural order among races, Greeks and barbarians, was one of ever looming hostility. This threat of foreign barbarian aggression seems to drive Plato's advocacy of Greek community and the threat of non-Greek aggression is a significant element throughout Plato's discussion of warfare. Plato's Athenian condemns Messene and Argos for failing to help in the defense against the Persians, and in this condemnation he explicitly condemns *Greece* for failing to come

This view of Plato, Aristotle, and others that the Greeks formed one common community set against the barbarian outside was itself only one way of understanding classical reality in contrast to another popular view. "Plato, in The Laws, had one of his speakers voice what was probably a common opinion: that peace was 'only a fiction' and that 'all states by nature are fighting an undeclared war against every other state' (Neff, p. 30). Aristotle's suggestion in *The Politics* is that, quoting Euripides, 'Hellens should rule over barbarians' who are by nature slaves (1996, l. 1252b8). Interestingly, Antiphon as an advocate of *physis*, argued against class and ethnic distinctions; "all men can grasp the necessities of *physis*, and by these standards, Greeks and barbarians are not separable, since we all use our mouths and nostrils to breathe air" (Moulton 1972, 344)

¹⁵⁵ See *Laws* (1997b, l. 685c, 692c–693d)

together in their common defense; "a detailed history of the course of that war would have some pretty ugly charges to make against Greece; indeed, there is no reason why it should report that Greece made any defense at all. If it hadn't been for the joint determination of the Athenians and the Spartans to resist the slavery that threatened them, we should have by now virtually a complete mixture of the races - Greek with Greek, Greek with barbarian, and barbarian with Greek" (1997b, l. 693a). Plato was not the only ancient writer to record this Greece versus the world attitude; Aristotle in *Politics* suggested that war with barbarian races was just, and the natural order of things. It seems that in addition to custom and their divine origin this ever present barbarian threat provided a practical imperative for the observance of rules in intra-Greek warfare. Thucydides, Plato, Aristotle, and others suggest that by following these rules peace is more easily restored among Greeks in order for them to work together in their common defense against outside invaders. 157

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Aristotle "compared war against barbarians to the use of force against wild beasts or against rebellious or disobedient persons – 'such men as are by nature intended to be ruled over but refuse', as he put it" (Neff 2005, 30).

¹⁵⁷ This view of a natural state of enduring war is contrasted by Stephen Neff with the Chinese view where "there was no idea of the world as being *intrinsically* turbulent or lawless. According to the Confucian view, therefore, even barbarians were not utterly alien. They were merely imperfectly intergraded into the great global order. The best way of dealing with them was gradually to reform them by setting a good example of what a fully civilized society was like" (Neff 2005, 32). The Chinese notion, according to Neff, was that the entire world was China, or one political community. "The Western conception of cosmopolitanism would ultimately become the basis of our modern international law. The Chinese one would not, because, in contrast to its Western counterpart, it was neither international nor legal. It was not international because the Chinese version of cosmopolitanism was, in a manner of speaking too radical. In positing that the whole world was a single *political* community, China effectively rejected any notion of a world of *independent* political communities bound together by the rule of law rather than by the sovereignty of a single emperor" (Neff 2005, 33).

The fact that Greek "unwritten customs" and "ancestral law" regarding warfare were unwritten does not lessen their importance for Plato; "although 'laws' is the wrong term for these things, we can't afford to say nothing about them, because they are the bonds of the entire social framework, linking all written and established laws with those yet to be passed. They act in the same way as ancestral customs dating from time immemorial, which by virtue of being soundly established and instinctively observed, shield and protect existing written law" (1997b, l. 793b-c). The Greek word for law, nomos, "has connotations far broader than those of the English word 'law'"; "the broad sense of nomos indicates that the Greeks failed to distinguish rules or standards that were self-consciously drawn up and enacted by legislative processes... and more nebulous customary values and beliefs, to which one subscribed because one had always accepted them, without clear knowledge of their origin" (Klosko 1994, 10). 158 It seems that both written laws and unwritten customary laws are included in this notion of *nomos*. The customary nature of laws provides an element of persuasion, right, or legitimacy to unwritten law such that the Greeks did not see a deficiency in its unwritten status but rather a kind of authority that placed longstanding customs above question.

Part of this faith in customary law had to do with a belief in the divine origins of longstanding laws. One strand of ancient thought held that laws have been established by the gods, are discoverable by mankind, and are embodied in the laws of cities and states. Recalling Hart's *Concept of Law*, customary status and long-term observance here

¹⁵⁸ Klosko's use of the term "failed" here is interesting.

function as a kind of secondary set of rules that legitimize and grant authority to these unwritten rules, even when their enforceability remains an open question. ¹⁵⁹ Those who hold reverence for customary laws and this kind of "traditional values" system don't require the threat of sanction to view these kinds of rules as binding; they should be followed because they are legitimately derived, in this case through the test of time and by implication the endorsement of the gods. 160 The traditional view is that these rules are legitimate and binding prior to, or in the absence of, their enforceability being demonstrated. This deferential orientation towards custom is on display in many works of tragedy and history among ancient Greek and Roman era writers. Homer and Hesiod both describe divine laws that determine the fates of men and Sophocles and Pericles point to the divine origin of law and a corresponding obedience owed by humans. 161 It is in lamentation of the "savage and pitiless" violation of these laws that Thucydides warned; humans, swept away by their passions, abandon "the ordinary conventions of civilized life" and "in these true acts of revenge on others men take it upon themselves to begin the process of repealing those general laws of humanity which are there to give a hope of salvation to all who are in distress, instead of leaving those laws in existence, remembering that there may come a time when they, too, will be in danger and will need their protection" (1972, l. 3.84). It seems clear that these writers explained their

¹⁵⁹ "One obeys the law not only because one has always done so and been taught to do so, but because one believes it is the right thing to do" (Klosko 1994, 11).

¹⁶⁰ See (Klosko 1994, 7–11) for the broad outlines of what he calls the "traditional view" or "traditional values."

¹⁶¹ (Klosko 1994, 7–9)

collective ability to survive ages of barbarian threat in part by reference to ancient customs of warfare that prevented permanent fracturing of a kind of Hellenic community of arms. This provides one explanation for the legitimacy of traditional customs in that Hellenic survival was in part attributed to adherence to them. All with an interest in the persistence of the Hellenes and who share revulsion at the Athenian's threat of Greek and Barbarian inter-mingling must take care that the idea of Hellenic law persists.

At least by the fifth century BC, and almost certainly earlier, this traditional view that the laws of men, whether customary or written, represent the will of the gods began to be challenged. An unquestioned faith in the congruence of the laws of one's city and the will of the gods cannot long endure extended contact with other cities with different laws, giving rise to an impulse towards a kind of ethical relativism and the development of alternative strands of thought about the nature of human reality. Socrates' interlocutors in Republic demonstrate some of the varieties of opinion and tensions within Greek (as well as Roman) thought. Glaucon, Adeimantus, Thrasymachus, as well as Callicles and Polus in *Gorgias* provide alternative theories of justice, nature, morality, and the good life. The (im)moral systems of Thrasymachus in Republic and Callicles in Gorgias are apparently popular lines of thought critical of traditional values and against which Plato is particularly interested in struggling. Plato "believes in an absolute, objective standard of justice rooted in the nature of the world, and that this standard demands compliance, without regard for consequences" (Klosko 1994, 54). Justice, both in the good city and in the soul, is loosely defined as the operation of parts, whether these are the parts of a human soul or the parts of a city, operating according to their nature. The tyrannical soul is one that is controlled by appetites that are unnatural, a person who is in this sense a

slave, and lives a kind of waking nightmare, a slave to their appetites yet unable to ever satisfy their desires. ¹⁶² They live an epitome of disharmony between nature and their actions which is, for Socrates, the worst kind of life corresponding to the worst kind of city, a tyrannically ruled one. The good city enables the good life through laws that perfect mankind.

Others came to doubt the congruence of human laws and divine will and propose instead a tension between nature and man-made conventions. Antiphon's work from the late fifth century opposes natural law to conventions that are made by men. For Antiphon, natural law does not depend on man for validity, and the benefit of living in accordance with natural law is independent of the opinions of men. In other words it is necessarily in the interest of man to follow the laws of nature though it may not necessarily be in the interests of man to follow the laws of man because manmade laws may not, and for Antiphon, usually were not, in harmony with those of nature. Nature is always oriented towards the highest good because nature is itself the highest good, truth itself, and the highest kind of life is spent in appreciation of the natural order. For this reason Antiphon counsels that man should obey the laws of man when there are witnesses but should obey the laws of nature always. Violation of the laws of man, if undetected, results in no harm to an individual but violations of the laws of nature do; "if someone breaches lawfulness and passes unnoticed by its contractors, he escapes social

¹⁶² (Plato 1997c, l. 571a–579d)

¹⁶³ For more on this *nomos/physis* (law/nature) tension or debate see (Moulton 1972) who conducts a thorough philological treatment of Antiphon's *On Truth* which many see as a strongly "natural law" oriented work though it is largely fragmentary. For a more general survey see (Klosko 1994, 18–23).

degradation and punishment. If he is observed, he does not. But if a man, exceeding limits, harms the organic growths of nature, the evil is neither less, if he passes totally unnoticed, nor greater, if all men see. For he is harmed not through men's belief but through truth" (Moulton 1972, 331).

The power of reason, which separates men from other animals, is a double edged sword because in the same way that it enables men to "search for truth" and enjoy "the discovery of obscure or wonderful things" which produce "a blessed life" and enable man to, through a virtuous life, approach "truth," (Cicero 1991, no. I.12–16) reason also allows men to "stumble, to wander, to be ignorant, to be deceived" (Cicero 1991, 1. I.18). The laws made by men are particularly dangerous because they can be in error and they can also compel individuals to live in error. ¹⁶⁴ The fallibility of man-made law was a frequent concern for ancient writers. As Callicles argues in Gorgias "the weak and the many" have made laws to their own advantage, to shame the powerful away from taking a greater share, a greater share that is due them according to natural justice which "reveals that it's a just thing for the better man and the more capable man to have a greater share than the worse man and the less capable man." From Callicles' perspective the laws of man directly contravene the laws of nature;

We mold the best and the most powerful among us, taking them while they're still young, like lion cubs, and with charms and incantation we subdue them into slavery, telling them that one is supposed to get no more than his fair share and that that's what's admirable and just. But surely, if a man whose nature is equal to it arises, he will shake off, tear apart, and escape all this, he will trample

¹⁶⁴ See, for example, Cicero *De Legibus II.6* (n.d.)

underfoot our documents, our tricks and charms, and all our laws that violate nature. He, the slave, will rise up and be revealed as our master, and here the justice of nature will shine forth (Plato 1997a, l. 483a–484b).

3rd century BC Stoics,¹⁶⁵ building on this Aristotelian notion of natural law¹⁶⁶ that transcends humanity "propounded a thoroughgoing cosmopolitan theory, which held the whole of humankind to comprise a single moral, if not political, society. In the words of Cicero, who was strongly influenced by stoicism on this point, 'the whole human race is seen to be knit together' by this universal natural law" (Neff 2005, 32–33). It is always in one's interest to live in accordance with natural law because nature is pre-disposed towards the advantage of all living things.

Therefore all men should have this one object, that the benefit of each individual and the benefit of all together should be the same. If anyone arrogates it to himself, all human intercourse will be dissolved. Furthermore, if nature prescribes that one man should want to consider the interests of another, whoever he may be, for the very reason that he is a man, it is necessary, according to the same nature, that what is beneficial to all is something common. If that is so, then we are all constrained by one and the same law of nature; and if that also is true, then we are certainly forbidden by the law of nature from acting violently against another person. The first claim is indeed true; therefore the last is true (Cicero 1991, 109–110).

This broad line of argument is associated with Aristotle's view contra Plato of a teleology of nature that is inherent not in immaterial forms, but rather through the "participation" of the material world in natural forms that tend towards, without attaining, perfect manifestation of natural form. Cicero, echoing Aristotle, explains in *On Duties*

¹⁶⁵ Just as no single school of thought can be attributed to the Greeks and the Romans no single, complete characterization of this kind of natural law thinking is possible. Nonetheless I will explore the interpretations offered by Greek and Roman authors and attempt to illustrate how these notions grounded certain Greek and Roman attitudes toward laws of war.

¹⁶⁶ See Aristotle, *The Nicomachean Ethics* (1998, 1. V. 7) and (Neff 2005, 32).

"from the beginning nature has assigned to every type of creature the tendency to preserve itself, its life and body, and to reject anything that seems likely to harm them, seeking and procuring everything necessary for life, such as nourishment, shelter and so on" (1991, I. I.11). Animals and men alike benefit from this nature but men have the additional capacity for reason which allows them to reflect on nature, "to perceive consequences, to comprehend the causes of things, their precursors and their antecedents," and "by seeing with ease the whole course of life to prepare whatever is necessary for living it" (1991, l. I.12–13). For Cicero the role of mankind is then to use their powers of reason and ability to reflect on and appreciate the perfection of nature, to search for truth in the natural order of things, and to live lives of natural harmony. "Consequently, we understand that what is true, simple and pure is most fitted to the nature of man. In addition to this desire for seeing the truth, there is a kind of impulse towards preeminence, so that a spirit that is well trained by nature will not be willing to obey for its own benefit someone whose advice, teaching and commands are not just and lawful. Greatness of spirit and a disdain for human things arise as a result" (1991, l. I.13). The honorable life lived in congruence with the beauty of nature is intrinsically honorable and "even if it is not accorded acclaim, it is still honorable, and, as we truly claim, even if no one praises it, it is by nature worthy of praise" (1991, I.14). In Cicero's words from *De re publica* III.33:

There is in fact a true law - namely right reason - which is in accordance with nature, applies to all men, and is unchangeable and eternal... to invalidate this law by human legislation is never morally right, nor is it permissible ever to restrict its operation, and to annul it wholly is impossible. Neither the senate nor the people can absolve us from our obligation to obey this law... It will not lay down one rule at Rome and another at Athens, nor will it be one rule today and another tomorrow. But there will be one law, eternal and unchangeable, binding at all

times upon all peoples; as there will be, as it were, one common master and ruler of men, namely God, who is the author of this law, its interpreter, and its sponsor. The man who will not obey it will abandon his better self, and in denying the true nature of man, will thereby suffer the severest of penalties, though he has escaped all the other consequences which men call punishment. 167

We can see then that in these accounts nature and natural order are provided a kind of privileged position, a "higher reality, belonging to the domain of logos, or pure and indecomposable presence in need of no explanation" (Ashley 1989, 261). Nature provides a kind of grounding of a system of meaning in which other elements acquire meaning relative to this central presence of nature. Relative to nature, these writers suggest that conventions are inferior and deficient because they can only intervene between reasoning mankind and its rightful destiny at the top of the animal kingdom.

Armed conflict among the Greeks is due to imperfect conventions and the errors of men who stray from natural law and who allow the appetitive, savage elements of their nature to exceed a natural balance. ¹⁶⁸

There are others again who say that account should be taken of other citizens, but deny it in the case of foreigners; such men tear apart the common fellowship of the human race. When that is removed then kindness, liberality, goodness and justice are utterly destroyed. Those who destroy them must be judged irreverent even in respect of the immortal gods; for the fellowship among mankind that they overturn was established by the gods; and the tightest bond of that fellowship is that it be thought more contrary to nature for one man to deprive another for the sake of his own advantage than to endure every disadvantage, whether it affects

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¹⁶⁷ As quoted in (Klosko 1994, 149)

¹⁶⁸ "Then the beastly and savage part, full of food and drink, casts off sleep and seeks to find a way to gratify itself. You know that there is nothing it won't dare to do at such a time, free of all control by shame or reason. It doesn't shrink from trying to have sex with a mother, as it supposes, or with anyone else at all, whether man, god, or beast. It will commit any foul murder, and there is no food it refuses to eat. In a word, it omits no act of folly or shamelessness" (Plato 1997c, l. 571c–d).

externals or the body or even the spirit itself - so long as it is free from injustice. For that single virtue is the mistress and queen of virtues (Cicero 1991, 110).

Justice is associated with a natural balance, the natural order of the world that is pristine, save for the intervention of mankind which can only "fall from the graceful presence" (Ashley 1989, 261) of the law of nature. This law of nature is common to all mankind whether they know it or not. "Hellenic law" and the ancient customs of armed conflict are, in these accounts, associated with nature rather than convention. The laws of war as the Greeks knew them have a status that is actually higher than man-made conventions, higher than codified law, and in no need of efforts to produce the kinds of documents and agreements that today define modern laws of war. The deficiency, for the Greeks, was on the side of codified law rather than customary law.

Latin Law

The idea of a natural order is associated with an idea of natural and unnatural conflict. For Plato, Aristotle, and others armed conflict with barbarians is natural and not to be deplored while intra-Greek conflict is unnatural and will one day be overcome in a permanent return to natural order. When the "natural state" is seen as peace then justification becomes necessary for disrupting this condition of peace, and thus justification for warfare becomes more integral to its conduct; "some kind of affirmative justification: specifically, a belief that the only acceptable reason for undertaking war was to uphold some larger community ideal, such as the rule of law" (Neff 2005, 34). ¹⁶⁹ This

¹⁶⁹ "The stoic-*cum*-natural-law picture of war was idealistic in the extreme. Stated with the greatest possible brevity, it was the belief that war, in its most proper and perfect sense, was a handmaiden of justice. Its purpose was not conquest or revenge or glory, but rather the vindication of the rule of law" (Neff 2005, 10).

same kind of "natural law" thinking can be found in many Roman authors and statesmen who likewise categorized conflicts by kind, and took a keen interest in how their actions would be viewed with regard to higher laws.

Ius Fetiales

The *Ius Fetiales* was an institution that arose in early Rome for ensuring that Roman foreign policy was conducted in a ceremonially rigorous way. The Fetial college¹⁷⁰ was a twenty member body of fetial priests, the third or fourth highest ranking Roman priestly college,¹⁷¹ who were chosen for life from the patricians,¹⁷² often previous consuls, proconsuls, and other leaders of the Roman state including former emperors Augusts, Claudius, and Marcus Aurelius.¹⁷³ Though there is still much debate about the precise details of a number of issues related to the *fetiales* and Roman approaches to "just war" (*bellum iustum*) there are detailed accounts in the writings of a range of ancient Roman and Greek writers that are remarkably consistent in most cases. It was the responsibility of the *fetiales* to ensure that Romans did not go to war unjustly. In order to ensure that Roman practices were just relative to potential adversaries they developed a ritualistic approach to the escalation of hostilities designed to ensure that Rome exhausted all potential recourses short of warfare, including when Rome herself had to concede the

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¹⁷⁰ For more on the *fetiales* see (Broughton 1987; Frank 1912; Nussbaum 1943, 454; Oost 1954; Penella 1987; Santangelo 2008; Wiedemann 1986).

¹⁷¹ The fetial college ranked "in dignity after only the College of Pontiffs and College of Augurs and later College of Septemviri Epulonum," (Watson 1993, 1).

¹⁷² This requirement was removed in 300 BC by the *lex Ogulnia* (Watson 1993, 8).

¹⁷³ (Watson 1993, 8)

claims of another city. It was the responsibility of the *fetiales* to conduct diplomatic demands for justice from the offending party and if, in spite of the demands of the *fetiales*, others persisted in unjust practices the *fetiales* could sanction and recommend war to the Roman Senate. The actual declaration of war "was made by the Senate, ratified by the Centurial Assembly and then communicated to the opposing state by having the fetials hurl a magical spear, dipped in blood or pointed with iron, into the enemy's territory" (Neff 2005, 27).

Dionysius of Halicarnassus, a Greek historian in the first century BC, provides the following account of the practice of the *fetiales*:

One of the *fetiales*, chosen by his colleagues, wearing his sacred robes and insignia to distinguish him from all others, proceeded towards the city whose inhabitants had done the injury; and, stopping at the border, he called upon Jupiter and the rest of the gods to witness that he was come to demand justice on behalf of the Roman State. Thereupon he took an oath that he was going to a city that had done an injury; and having uttered the most dreadful imprecations against himself and Rome, if what he averred was not true, he then entered their borders. Afterwards, he called to witness the first person he met, whether it was one of the countrymen or one of the townspeople, and having repeated the same imprecations, he advanced towards the city. And before he entered it he called to witness in the same manner the gate-keeper or the first person he met at the gates, after which he proceeded to the forum and taking his stand there, he discussed with the magistrates the reasons for his coming, adding everywhere the same oaths and imprecations. If, then, they were disposed to offer satisfaction by delivering up the guilty, he departed as a friend, taking leave of friends, carrying the prisoners with him. Or, if they desired time to deliberate, he allowed them ten days, after which returned and waited till they had made this request three times. But after the expiration of the thirty days, if the city still persisted in refusing to grant him justice, he called both the celestial and infernal gods to witness and went away, saying no more than this, that the Roman State would deliberate at its leisure concerning these people. Afterwards he, together with the other *fetiales*, appeared before the senate and declared that they had done everything that was ordained by the holy laws, and that, if the senators wished to vote for war, there

would be no obstacle on the part of the gods. But if any of these things was omitted, neither the senate nor the people had the power to vote for war. Such, then, is the account we have received concerning the *fetiales* (Watson 1993, 3).¹⁷⁴

Though the *ius fetiales* was one of the most ancient Roman priestly institutions it is unclear when exactly it was first adopted. "Ancient writers are unanimous that the fetiales were introduced in the regal period (which traditionally runs from 753 to 509 BC), though the sources disagree as to which king was responsible" (Watson 1993, 1). 175 Livy, as well as Servius¹⁷⁶ and Aurelius Victor¹⁷⁷ claim that the fourth Roman king, Ancus Marcius, "adopted from the ancient tribe of the Aequicolae the legal formalities by which a state demands redress for a hostile act" (Livy 2005, l. 1.32). Though the ritual itself is similar to other descriptions of the fetiales, Livy implies that the fetial priesthood may have developed some time after Ancus's adoption of the formalities, though he also describes a similar procedure under the third king Tullus Hostilius. Tullus is also the king to which Cicero, in *De re publica*, attributes the fetial institution. Plutarch and Dionysius attribute the Roman adoption of the fetiales to the second Roman king, Numa Pompilius, but Dionysius is unsure "whether he took his example from those called the Aequicoli, according to the opinion of some, or from the city of Ardea, as Gellius writes" (Watson 1993, 2).

¹⁷⁴ See also (Santangelo 2008, 85–86) for a detailed account of the fetial procedure.

¹⁷⁵ "Although almost all ancient authorities agree that the *ius fetiale* and its guarantors, the fetial priests, originated during the monarchy,' they put forth various views on which king was responsible for the institution" (Penella, p. 233). Cicero suggests the third Roman king while Livy, according to Penella is less clear.

¹⁷⁶ 4th century AD grammarian. teacher, and author of a commentary on Virgil, *Vergilii Aeneidon libirs*.

¹⁷⁷ 4th century AD "writer of history"; See (Watson 1993, 5) for comments on the origin of ius fetiales, and (Starr 1956) for more information on Aurelius Victor.

What is particularly interesting about these accounts of the "origins" of the fetial institution is the notable lack of an original instance. Each of these ancient authors, in attributing the Roman adoption of the practice to a particular king, points to earlier incarnations in other cities. Whether the Aequicoli, ¹⁷⁸ Ardeans, ¹⁷⁹ Albani, ¹⁸⁰ or the Faliscans ¹⁸¹ it appears that the *ius fetiales* had just always been there ¹⁸² and modern scholars argue that the *ius fetiales* in some form precedes the founding of Rome. Fetial rites as described by ancient authors contain suggestions of practices from as early as the Neolithic era including the use of a stone knife to sacrifice a pig and the casting of a spear with a "fire-hardened tip" (Watson 1993, 7). Specific discussions of the fetial "formalities" date at least as early as the late first millennium BC when the Albans and the Romans exchanged emissaries who made reciprocal demands for restitution for cattle-raids. ¹⁸³ Yet the notion that the *ius fetiales* was borrowed from earlier practices of

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¹⁷⁸ (Livy 2005, 1. 1.32), Servius and Dionysius, (Watson 1993, 2–5)

¹⁷⁹ Dionysius, (Watson 1993, 2)

¹⁸⁰ (Livy 2005, 1. 1.24) and (Watson 1993, 5)

¹⁸¹ Servius, (Santangelo 2008, 65) note 5.

¹⁸² "In the passage of Dionysius mentioned above, the fetials are said to have performed as guarantors for the settlement reached between patricians and plebeians, and this may be corroborated by what we know about the 'Latin' background of the priesthood. T. Wiedeniann suggested, with attractive arguments, that the fetials were the final outcome of a process that started when the Latin *gentes* started developing into communities and, eventually, into states. When there was a risk of conflict, the senior representatives of the *gentes* met to solve the crisis. In this reconstruction, the fetials derive from these groups of *patres* who discussed peace on behalf of their gentes. Indeed, the most senior fetial was called pater patratus, a sort of 'created father', who represented the collegium, and therefore the whole city. If the fetials are indeed a legacy of a gentilician organization and of relations within the Latin world, it is not entirely surprising that in Dionysius' account they settle a conflict between the orders, within the city" (Satangelo, pp. 89-90).

¹⁸³ See (Livy 2005, l. 1.20–1.22)

contemporaneous groups may suggest that the ritual was deemed to have some intrinsic higher value, that the Romans couldn't simply invent their own procedures for managing war and peace in pursuit of their own ends, but rather had to turn to other earlier groups who had in some sense gotten it right, or had the appropriate know-how to achieve the desired ends. This suggests that the ends in question were not limited to the particular aims of the Roman state which, presumably, would be in the best position to be the judge of its own ends and how best to achieve them.¹⁸⁴ Rather, some of the ritualistic details of fetial procedure suggest a traditional reverence for custom in the use of stone age materials and at times an overly formalistic approach.¹⁸⁵

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Whatever its particular inroads into Roman culture the *ius fetiales* seems to have become an important institution in the margins between Roman political and religious life. Dionysius records a conflict with the Aequi in 466BC when Roman fetials attempted to negotiate and, on failure of the negotiations, Rome declared war; this pattern with the Aequi was repeated eight years later. Livy states Rome employed *fetiales* in 428/437 (2005, l. 4.30) with the Nomentum and Fidenae and in 406 (2005, l. 4.57) with the Veii. In 362 the Roman people declared war on the Hernici after the efforts of the *fetiales* failed and again in 361 against Tibur, the Faliscans in 358/357, the Samnites in 339, Palaeopolis in 327, the Samnites again in 327 though there is some controversy about whether this date is anachronistic; see (Satangelo, p. 68); the Aequi in 304, the Samnites again in 298, and the Faliscans in 293 (Santangelo 2008, 67–70). *Fetiales* apparently had a role in the declaration of war against Pyrrhus in 280, in 201 peace negotiations with Cathiniginians, a declaration of war against Pyilip V of Macedon in 200 and the Aetolian League in 191 and in extraditions of Romans to offended cities in 188 and 137 BC (Broughton 1987, 60). As late as 32 BC Octavian, a fetial, performed the ritual to declare war on Cleopatra which, according to Dio, was "in full compliance with the usual procedure, inherited from the past" (Satangelo, p. 87).

For example the striking of a Roman fetial by a Roman who was only moments earlier extradited to the Samnites thereby losing his Roman citizenship and technically enabling him to, through his abuse of a Roman fetial, provide grounds for a just Roman resumption of hostilities; see aftermath of Caudine Forks disaster (Livy 1982, 1. 9.10). Later the 'legal fiction' employed to declare war on an overseas enemy by forcing a citizen of the enemy state to purchase a plot of land in Rome so that the fetial could throw a spear into it; "The Fetials are mentioned in a late source as the ones who made the declaration of war against Pyrrhus in 280, in an adapted ritual, by casting the blood-stained spear at a piece of land in Rome near the temple of Bellona which had been conveyed to the enemy and thus made enemy territory" (Broughton, p. 59-60) see also (Satangelo, p. 86, n. 84) and (Oost, p. 157).

The Battle of Caudine Forks in 321 BC is worth exploring in some detail. In 341 BC the Romans and the Samnites¹⁸⁶ concluded a truce which the Samnites apparently violated in 325 BC.¹⁸⁷ In 322 the Samnites sent fetials of their own to Rome; "the fetial priests were dispatched to Rome, in accordance with this resolution, taking with them the dead body of Papius Brutulus, who had escaped punishment and ignominy by voluntary suicide" (Livy 1982, 1. 8.39). The Romans rejected the Samnite appeal and in response the Samnite commander Gaius Pontius addressed his army:

War is just, Samnites, when it is necessary, and arms are righteous for those whose only hope remains in arms. Since, then, it is of the greatest importance in men's affairs whether what they do has the favour or the disfavour of the gods, rest assured that you fought your previous wars against gods rather than men, but you will fight this one now threatening you with the gods themselves for your leaders (Livy 1982, 1. 9.1).

With these words, which Livy described as "no less true than they were encouraging," (1982, l. 9.2) Pontius concedes that the violation of the previous treaty was not only a breach of faith with the Romans but was an actual breach of higher law. The violation of the treaty was an affront to the gods who are the witnesses and judges of this higher law. The Samnite attempts at restitution, in the form of surrendering seized Roman property and the bodies of those to blame for the violation, was not only with a view to reparations with the Romans but with the gods as well. In this case, then, when the Romans "contemptuously rejected" the Samnite attempts this represented a failure of only one aspect of the reparations. As far as Pontius was concerned the Samnite entreaty

¹⁸⁶ Samnites is the term that Livy and other Romans used to refer to the Sabine people of central Italy.

¹⁸⁷ (Livy 1982, 1. 8.23)

corrected the breach of a common law of justice and thus, at least in the eyes of the gods, if not the Romans, the Samnites could be held harmless. As a consequence Pontius could then argue that the continuation of the war represented an injustice on the part of the Romans, and thus the gods would now be with the Samnites against the Romans.

According to Livy Pontius was correct in this assessment and the Romans suffered the Caudine Forks disaster as a consequence of their unjust continuation of the war. At Caudine Forks the Samnites tricked a Roman army into a traveling into a gorge in which the Samnites trapped them. Surprised by the success of their stratagem, Pontius sent a letter to his father asking what to do with the trapped Romans. Herennius Pontius replied that they should let the Romans go, and when this advice was rejected, he advised that all the Romans be killed "down to the last man" (Livy 1982, 1. 9.3).

His first advice, he said, which he thought the best, would establish lasting peace with a very powerful people by conferring on them an immense benefit; the second would postpone war for many generations during which the Romans would not easily recover their strength after the loss of two armies; there was no third alternative. His son and the other leading men pressed him to tell them what would happen if they took a middle course and let the Romans go unhurt, but imposed terms on them as defeated men according to the laws of war (Livy 1982, 1.9.3).

Ultimately Pontius decided to offer terms to Roman envoys that would force them to surrender their arms, most of their clothing, walk "under the yoke," and evacuate both Roman armies and Roman colonies from Samnite territory. In exchange the Roman

¹⁸⁸ A symbolic gesture where two spears are stood upright and another is placed across their top. Walking "under the yoke" was a symbol of complete powerless and subjection before a stronger power. This episode has come to be used as a cautionary example of the "middle way" due to Rome's eventual victory over the Samnites.

armies would be released physically unharmed. In spite of the humiliation incurred by giving in to the Samnite demands, the Romans agreed. They could not, however, actually sign a treaty to these terms with the Samnites "without order from the Roman people, and also without the fetial priests and the other customary ceremonial" (Livy 1982, 1. 9.5). Consuls, legates, quaestors, military tribunes, as well as six hundred Roman cavalry were left with the Samnites as hostages to guarantee Roman adherence to the terms of the agreement. Upon returning to Rome in disgrace one of the men responsible for negotiating the Caudine Peace, Spurius Postumius, argued before the people that the pledge made to the Samnites was not made on behalf of the Roman people but on his and the other negotiator's honor alone. "Let the fetial priests hand us over, naked and bound; let us release the people form religious obligation, if we have laid any upon them, so that no obstacle, divine or human, shall prevent a renewal of a just and righteous war" (Livy 1982, l. 9.8). Eventually the Senate agreed and the fetial priests bound and delivered Postumius and others to the Samnites. When they came before the Samnite Pontius "the fetial priest Aulus Cornelius Arvina spoke these words: 'Whereas these men have acted as guarantors for a treaty when they had no orders from the Quirites, the people of Rome, and by so doing have inflicted an injury: so that the Roman people may be absolved from an impious crime, I surrender these men to you'" (Livy 1982, 1.9.10). Immediately after these words Postuminius, believing himself now to be a Samnite citizen, struck the Roman fetial in order to provide just pretense for renewed war by Rome on the Samnites. 189

¹⁸⁹ This narrative is also discussed in (Santangelo 2008, 69–70)

Though this pretense was "so blatant that not even the Roman envoys are said to have used it as a *casus belli*" (Santangelo 2008, 70) Livy's account of the Claudine Forks episode reveals the extent to which the Romans and the Samnites went to ensure that their actions were just or at least plausibly so. Even though they were more powerful than their adversary the Romans apparently had to address the issue of the guarantee provided by Postumious even though it was not legally made on behalf of the Roman people. Nonetheless, as is suggested by Livy's account, the Roman people may have acquired some degree of religious obligation to the Samnites even if the "treaty" made by the trapped army could not be legally binding on the people. In order to fulfill this obligation Postuminius, despite his popularity in Rome and status as a consul, was delivered bound to the Samnites. Though Pontius refused this attempt to repair the breach, as the Romans had before them, the Romans, according to Livy, redeemed themselves in the eyes of the gods. Though there are some troubling aspects of this narrative that render Livy less than factually reliable, ¹⁹⁰

The importance of the Caudine Forks episode is apparent, and the symbolic meaning that is attached to it must be stressed, notwithstanding the serious doubts about the authenticity of Livy's account. As soon as Rome wages war in breach of the fetial law and the customary ceremonies, it faces an epoch-making defeat. As soon as the individual directly responsible for such a violation chooses to face his responsibility and to liberate the Roman people from any guilt, the destiny of the war appears to be back on track. The rules, the *ius* that the fetials guarantee and act under are the very incarnation of the alliance between the gods and the Roman people. Rome can enjoy the protection of the gods only if the fetials are

¹⁹⁰ Both Santangelo (2008, 70–71) and Horsfall (1982, 46–47) discuss doubts about the details of Livy's account and the possibility that some of his account arises out of interceding events. Nonetheless Livy's account retains enough credibility to continue to lure topographical historians into the valley between Arienzo and Arpai based on little more than seven lines of his work; see (Horsfall 1982) for a review of these efforts to determine exactly where the Caudine Forks battle took place.

fulfilling their mission properly. To do so, they need an explicit mandate from the people. The personal decisions of isolated individuals, even if provided with *imperium*, cannot be deemed sufficient (Satangelo, p. 71).

Why did the Romans accept the *ius fetiales* if it sometimes required them to subordinate their immediate interests? Not only did the *fetiales* attempt to gain redress from adversaries without conflict, and ensure that Roman declarations of war were just, but they also held Romans accountable for their own unjust acts towards enemies even in times of war. The *fetiales* would investigate claims made by other cities and peoples and they would even turn notable Roman citizens over to their enemies to assuage an injustice against the other city. 191 Nonius Marcellus in the fifth century AD quoted Varro about this practice: "If the ambassadors of any people were assaulted they determined that those who had done it, even if they were outstanding by reason or rank, should be surrendered to the state; and the twenty fetials who investigated these matters so gave judgment, and determined, and decided" (Watson, p. 40). Dionysius of Halicarnassus wrote in Roman Antiquities that the fetiales "are also to take cognizance of the crimes committed against ambassadors, to take care that treaties are religiously observed, to make peace, and if they find that peace has been made otherwise than is prescribed by the holy laws, to set it aside; and to inquire into and expiate the transgressions of the generals in so far as they relate to oaths and treaties." From the *Digesta Justiniani*, which was a compilation of

¹⁹¹ Dionysius of Halicarnassus was a Greek historian in the first century BC; from *Roman Antiquities*, 2.72.5 as cited in (Watson 1993, 2–3); "They are also to take cognizance of the crimes committed against ambassadors, to take care that treaties are religiously observed, to make peace, and if they find that peace has been ,made otherwise than is prescribed by the holy laws, to set it aside; and to inquire into and expiate the transgressions of the generals in so far as they relate to oaths and treaties."

¹⁹² L. 2.72.5 as cited in (Watson 1993, 2–3).

Roman law completed under Justinian, "if anyone struck an ambassador of the enemy, he is thought to have so acted contrary to the law of all peoples (or of nations), because ambassadors are held to be sacred. And therefore if ambassadors of some people were with us and war was declared with them, the answer was that they remained free men: for this is proper for the law of nations. And therefore Quintus Mucius was accustomed to give the reply that he who struck an ambassador ought to be surrendered to the enemy whose ambassadors they were" (Watson, p. 41). There are numerous accounts of this practice occurring and several more where it was proposed or attempted, including a proposal by Cato to turn Julius Caesar over to the Gauls after he allegedly attacked a Gallic encampment during a truce. ¹⁹³

It is important to note that the mistreatment of envoys was not simply a crime against the state however; to mistreat an envoy was an act of injustice which could incite the judgment of the gods. Envoys were generally considered sacred by both the Greeks and the Romans, and the mistreatment of them was considered to be "sacrilegious and a source of pollution" (Broughton 1987, 50). In this sense envoys were protected by a kind of higher law than any law of a particular state, a "law of all peoples," or in some

¹⁹³ For Caesar see (Broughton 1987, 53–54); others actually turned over include ex-consuls Postumius and Titus Veturius were turned over to the Samnites after the Caudine Forks disaster (Livy 1982, 1. 9.8) and Vallerius Maximus, Cassius Dio, and Zonaras all give an account of a Senator named Q. Fabius and a Cn. Apronius being handed over to the Apolloniates in 266 BC for pushing or striking an envoy(Broughton 1987, 51). Livy 38.42.7, quoted in (Broughton 1987, 52) and (Santangelo 2008, 77–78), note 52 as well as Valerius Maximus (Broughton 1987, 52) provide an account of the *fetiales* delivering Lucius Mimicius Myrtilus and L. Manlius to Carthage in 188 for having abused Carthaginian envoys.

translations an "international law." 194 Cicero confirms that the extradition of those who abuse envoys was not simply a matter of prudent foreign policy but was intended to "free the state from a religious taint" (Broughton, p. 53). It seems that envoys, and the *ius* fetiales, existed in a marginal space where religion and politics overlapped, where state practices were, or should have been, guided by a transcendental law which is greater than the customary practices of states yet this is also a sphere that is in some ways distinct from traditional religious practices. Interestingly, the sacrifice of the immediate interests of Rome is not a sacrifice in the traditional sense at all; "the substantive content of the fetials' functions is entirely secular: the determination of a just war, the proper treatment of ambassadors, and offenses against a state for which the surrender of offenders may be granted or demanded. The role of the fetials does not extend to seeking the favor of the gods for the Roman people or to warding off their anger" (Watson, p. 42). When the fetial priests performed their rituals they did not call upon Mars. 195 the Roman god of war, but Jupiter, the king of the Roman gods, the chief deity, and the Roman's highest divine power. This would seem strange if the *ius fetiales* was simply about gaining additional help in warfare from the gods. It seems instead that the fetial appeal is made to Jupiter because the *fetiales* were not trying to enlist the help of the gods but rather their impartial judgment.

¹⁹⁴ See (Watson 1993, 41) note 12 for a skeptical account of this translation and argument for "law of all peoples."

¹⁹⁵ See (Watson 1993, 28)

Though the fetial appeal to the gods has often been translated as an appeal for the gods to act as "witness" Alan Watson (1993) has convincingly argued that the fetiales considered the role of the gods to be more like judges. 196 First, judges are "logically prior" to witnesses; if there is a law, and if there are witnesses, there must be a judge or else it is hard to understand the entire legalistic framework. If the gods are simply witnesses what is their specific role and function? What is the purpose of their witnessing if not to then render judgment, to weigh in on the side of the righteous, to abandon those who are in bad faith, and to serve as guarantors of the oath? If the gods do not serve as judges, but only witnesses, who then could judge? "No other possible candidates for the post are mentioned or can be imagined. Indeed, in an international dispute treated as a legal process, when there is not a body akin in authority to the International Court and no mutually appointed arbiter, the only possible judges are the gods" (Watson 1993, 12). 197 It seems that the role of the gods in the *ius fetiales* is to judge the practices of Rome and others in the context of a certain concept of a law that transcends particular communities, at least particular Latin communities, and that is characterized by a complex relationship between Latins, the gods, and a kind of natural

¹⁹⁶ Watson argues that the 'confusion' between "witness" and 'judge' may be due in part to a common etymological root.

¹⁹⁷ This argument sets aside for the moment that to a certain extent the people of Rome and the people of the adversarial force certainly fulfilled the role of judges. The appeals to the justness of a cause would certainly be a considerable factor in motivating people and resources to fight. However this appeal would only be persuasive to those who 'buy in' to this notion of an underlying law of justice that is somehow connected to a reality in balance. Otherwise the justice of the cause offers little in the way of incentive for the risk of blood or treasure.

law. It is towards this higher law of "all nations" that the fetial religious practice is oriented.

Though the fetial institution is intended to ensure that the Romans do not run afoul of the law of all peoples the *ius fetiales* as a reciprocal institutions must be understood to appreciate the role of the gods. As Watson and others have argued fetial practices were reciprocal in nature and not limited to Rome, but were shared among Latin people. This idea that the fetials appealed to a system of meaning that Latin people had in common is supported by the emphasis that Romans and others placed on convincing not only their own people of the rightness of their cause, but to craft their appeals in terms intended to convince others. If the gods are not called on to provide favors for the Romans but instead to simply act as judges, as neutral parties and to evaluate whose case is just, the Roman appeal must be to an unwritten law of justice that transcends Roman culture, and was understood to provide a transcendental source of

They are found also among Latin peoples, such as those from Ardea and Lavinium, and the Albans. They are also found among some non-Latin people of central Italy, such as the Falisci, from whom Servius in another text says the Romans took them. The Falisci, though not Etruscan and of uncertain origin, inhabited Etruria... There is no evidence of *fetiales* beyond central Italy or, indeed, among the Etruscans. The matter is important because the Roman law of war and treaties originally required reciprocal behavior by the *fetiales* of the other people. Thus, the Roman law of war and treaties was created for dealings with other central Italian, particularly Latin, peoples. Its history is the story of its disintegration as Rome expanded from its narrow beginnings" (Watson 1993, 6–7). In addition to the peoples listed above Livy specifically discusses fetials of the Samnites; "Livy makes clear that the fetials were an institution shared both by Romans and Samnites, and that the Samnite fetials went to Rome to fulfill the *reriirn reperitio* put forward by the Romans at the beginning of the war. Papius committed suicide before being surrendered, and yet his corpse was taken to Rome, along with his own patrimony: significantly however, the Romans refused this part of the compensation, and accepted only the prisoners and the part of the booty that 'was recognizable' (*cognitu expruedu*)" (Santangelo 2008, 69).

¹⁹⁹ "Polybitus in fact tells us explicitly that when they went to war the Romans were careful to find a pretext that would appeal to foreign, that is to say mainly Greek, opinion" (Harris 1971, 1372–1373)

truth, a binding reality which was plain not only to Romans but to all civilized peoples and to the gods as well. It would seem then that the Romans sought in the fetial practice a means to overcome irreconcilable differences through an appeal to a common source of meaning and truth which might ultimately reveal the justice of the Roman cause and also, importantly, provide an alternative means to resolve disagreements so that Rome and their neighbors would not have to rely on arms to settle every question. For this reason many observers have pointed out that in spite of their prominent role in religiously sanctioning declarations of war the *fetiales* were fundamentally oriented towards peace. Plutarch supports this perspective in his volume on Numa²⁰¹ and Both Dionysius and Varo stressed their role as peacemakers; Dionysius translated the world "fetials" into Greek as "arbiters, judges of peace."

After Livy's tenth book the fetials no longer hold a prominent role in his account of Roman history. The following eleven books spanning 74 years are lost but when Livy's extant work resumes the fetials are never again discussed in such detail or so regularly when it comes to Rome and war. There is considerable disagreement about whether, and in what form the fetial procedure continued after this period, but it seems clear that throughout the history of Rome the *ius fetiales* was characterized by both reverence for tradition and custom combined with a practical imperative to facilitate and

²⁰⁰ For brief discussion of Roman attitudes toward peace and esteem for 'just' warfare see (Wallace-Hadrill 1975, 157–158)

²⁰¹ (Plutarch 1941, 199)

²⁰² See (Santangelo 2008, 84)

legitimize the relations of Rome with its neighbors. By the middle of the 3rd century BC the specifics of the procedure had changed. At this time senatorial *legati* travelled to "enemy territory" already possessing a conditional declaration of war that could be activated if Rome's ultimatums were not accepted. It seems that this modified form of Roman declaration of war lasted at least until the end of the 2nd century BC ²⁰³ though others have argued that the *ius fetiales* completely died out by the end of the 3rd century BC and after that point, specifically with Macedon in 200 BC, war began with no formal declaration at all. Still others point to evidence of the existence of the fetial institution in some form much later than this. The *ius fetiales* was revived by Octavian in 32 BC per Cassisus Dio and used as late as 178 AD by Marcus Aurelius against the Marcomanni. The last mention is by Ammianus Marcellinus in 359 AD.

The Barbarian Outside

The notion that faith must be kept with "just and legitimate" enemies suggests an alternative category of enemy and, by implication, a corresponding alternative standard of behavior towards unjust and illegitimate enemies. Roman warfare in the legal, "just war" sense, *bellum iustum*, was not limited to peer competitors of the Romans who fought symmetrically, who shared certain institutions and practices, and with whom ritualized diplomacy was practiced. Legal warfare could also be conducted against

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²⁰³ See (Walbank 1949, 15) and (Oost 1954, 147).

²⁰⁴From Cicero: "Regulus was right not to overturn by perjury stipulations and agreements made with an enemy in war. For the enemy with whom the war was being waged was just and legitimate. The whole of our fetial code is about such an enemy and we have many other laws that are shared. If that were not so, the senate would never have delivered notable men in chains to the enemy" (1991, 142).

"inchoate, unstructured and socially inferior foes, in which case they were regarded as "bush" conflicts or irregular war"; "the enemy in such conflict was often unrecognizable (in both senses of the word) and hence could only be defined by some de facto response by the state or by the sheer magnitude of the threat he posed to the state's armed force." These irregular wars were usually referred to by some additional term that "modified the assumption of a genuine conflict" such as "slave war" or "Gallic war" (Shaw 1984, 6).

Asymmetrical conflicts account for some of the most notable instances of Roman savagery in warfare yet it does not seem to be the case that Romans recognized no laws of justice or nature as binding on their treatments of "barbarians." Those who were "cruel or savage in warfare," "treacherous," those who, like the Carthaginians, break truces, render themselves vulnerable to retribution. Cicero also suggests, however, that "certain duties must be observed even towards those at whose hands you may have received unjust treatment. There is a limit to revenge and punishment" (1991, l. I.33–38). Cicero, Antiphon, and many others, particularly Stoic philosophers, understood natural law to be common among all men, barbarian, Latin, and Roman alike. Consequently Cicero suggests that Roman conflict with asymmetrical adversaries is not "outside" the law, though often times Rome's adversaries may be in violation of natural law in which customs of warfare are rooted and thus expose themselves to retribution.

Caesar's *Commentaries on the Gallic War*, ²⁰⁵ which took place from 58 BC to 50 BC, provide an account of Caesar's campaign in Gaul against people inhabiting the margins of Roman civilization and constituting what the Romans called "barbarians." Caesar's account is particularly interesting because it is often considered one of the most egregious accounts of the barbarity, even "genocidal" nature of Roman warfare.

Though there are certainly multiple instances of atrocities recorded by both Caesar's armies and the various Gallic groups, there is also notable concern for norms of warfare and Caesar clearly places importance on justifying those instances in which his armies engage in practices that would normally be proscribed by Roman customs of warfare. A few instances from Caesar's account will illustrate the need for a more nuanced appreciation of Caesar's attitudes towards the Gauls.

The Veneti people lived in what is now Brittany in northwest France and faced some of worst consequences of Caesar's campaigns in Gaul. In 57 BC they had been subdued by Caesar and provided hostages to the Romans to ensure their compliance with the terms. The exchange of hostages functions as a kind of stand-in for the *ius fetiales* and was, according to Livy, only necessary outside the normal practices of those who shared a common understanding of *ius fetiales*; "for what need would there have been either of guarantors or hostages in the case of a treaty, where negotiations conclude with

Again, and particularly with Caesar's own account, the question of whether Caesar's narrative is accurate and to what extent it is fictionalized and self-serving. However I am interested in how Caesar explained and justified his actions. It is not particularly important if his motivations were exactly as stated but rather our emphasis is on the terms in which he constructed his explanations and justifications for the actions of his armies.

²⁰⁶ (Neff 2005, 25)

a prayer that the people for not keeping to the recited terms may be smitten by Jupiter just as the pig is smitten by the fetials?" (1982, l. 9.5). In the absence of common religiopolitical institutions such as the *fetiales* there is a lack of assurance that terms will be adhered to on both sides. The exchange of hostages provides an assurance that the adversary believes they will suffer a human instituted consequence for breach if not a divine one. This is not to say that the Romans did not believe that higher laws extended to barbarians but that barbarian people, if they did not understand the higher law, might still act contrary to it and consequently an institution such as hostage taking would be more reliably respected by barbarians.

Thinking Gaul was subdued one of Caesars's legions sent officers into several areas looking for grain. The Veneti captured several of these officers and convinced some groups in other regions to do likewise with the intention of using them to secure the release of the Veneti hostages Caesar then held. Rather than being inclined to negotiate, Caesar immediately set out for the area with his army. "The Veneti and likewise the other states learned of Caesar's coming and at the same time realized the gravity of their offence: they had arrested and thrown into chains ambassadors, a title which has always been sacred and inviolable among all peoples" (Caesar 1957, 62). After a series of battles Caesar decisively defeated the Veneti army. The Veneti survivors surrendered and "Caesar resolved to exact severe punishment, to make the natives more scrupulous in observing the rights of ambassadors in the future. Their senators were all put to death, and the others sold into slavery" (Caesar 1957, 66). Though Caesar executed some of the prisoners and enslaved the rest he is careful to justify this practice as punishment for the Veneti violation of ambassadors. It is not, according to Caesar's account, simply revenge

or even the right of conquest. Caesar justifies or at least explains this treatment of the Veneti in terms of a higher law of respect for ambassadors and the need to teach the "natives" to respect this particular custom.

In an incident in 55 BC Germans attacked Caesar during a truce. During Caesar's subsequent counterattack he targeted the German camp where many women and children were accompanying their armed force and apparently cut down Germans regardless of combatant status. A later account of indiscriminate slaughter at Bourges is justified by Caesar because Gauls, under Vercingetorix, had massacred Roman merchants and centurions at Cenabum during a truce. When Caesar's army finally overran Bourges "no one paid any attention to booty; they were so infuriated by the massacre at Cenabum and by the toil of the siege that they spared neither the aged nor women nor children. Actually out of the total number of some 40,000 scarcely 800, who had flung out of town at the first sound of shouting, got safely to Vercingetorix." (Caesar 1957, 168). With Cato in Rome calling for Caesar to be handed over to the Gauls for alleged treachery during a truce there is considerable reason to suspect that Caesar's account is intended to be exculpatory even at the expense of factual accuracy. While there is no ius fetiales and on occasion, even by Caesar's own presumably apologist account his armies gave no quarter, there is also a careful insistence on customs of warfare that were respected towards the barbarians and only temporarily abandoned in order to punish some perceived act of treachery on the part of the Gauls. Once a kind of balance is restored through retribution for violations, customs of warfare are again apparently observed until the next instance of violation. In Caesar's account informal customs of war are observed by the Romans towards Gallic people. Though Caesar's practices towards the Gauls are

not as formal or extensive as the *ius fetiales* most of the same practices in battle with respect to prisoners and non-combatants are observed towards the Gauls. In those instances where Caesar is able to argue that the adversary has shown disregard for customary laws and engaged in treachery, savage practices against them are apparently legitimized in the eyes of Caesar.

In this sense ancient customs of warfare not only proscribe certain kinds of practice but they also serve to legitimize Caesar's own transgressions if they are undertaken as punishment or revenge against a treacherous enemy. Cicero illustrates this duality of the law which both proscribes and authorizes unlimited warfare depending on the status of the adversary. In *On Duties* Cicero suggests that "wars, then, ought to be undertaken for this purpose, that we may live in peace, without injustice; and once victory has been secured, those who were not cruel or savage in warfare should be spared. Thus, our forefathers even received the Tusculani, the Aequi, the Volsci, the Sabini and the Hernici into citizenship. On the other hand they utterly destroyed Carthage and Numantia" (Cicero 1991, 15). It is important to note, however, that limitation or license provided by customs or laws of armed conflict depended not on archetypal identities such as Roman and barbarian, but rather on the behavior of the parties involved. Thus certain barbarian towns are spared while others are burned based on the conduct of the parties to the conflict. Once retribution for transgressions is achieved a kind of clean slate is restored and customs of armed conflict are again observed.

Latrocinium

Beyond these irregular wars and genuine wars there was *latrocinium*.²⁰⁷ It appears that the threat of banditry was pervasive and the Roman state had difficulty addressing it. Banditry was considered analogous to natural disasters and was included as such in a wide variety of legal contexts as a contingency that "could affect almost any legal act from the deposition of a will to the signing of building contracts, to sales agreements, marriages and the transfer of dowry" (Shaw 1984, 8). Common causes of death for Romans included "old age, sickness and attacks by bandit" (Shaw 1984, 9). The danger faced by travelers outside town walls at the hand of bandits is attested to by St. Paul in the first century in his parables of the Good Samaritan, and in the letters of Seneca who wrote "only the poor man is safe from bandit attacks" (Shaw, p. 9 n. 21). Pliny the Younger wrote a letter to a friend in which he lists people who have simply vanished while traveling through the countryside, and by the fourth century even Roman senators²⁰⁸ refused to travel beyond the city walls. Tombstones from across the empire are found with the inscription "killed by bandits" (Shaw 1984, 11).

There is an important distinction even between banditry and common criminals because with bandits a kind of permanent state of war seems to exist that was unlike

²⁰⁷ "The common term in Latin used to designate a bandit is *latro* (plural *latrones*) and for the phenomenon of banditry, *latrocinium*. Roman writers, from jurists to novelists, however, did not indulge in the sort of sociological analysis we do. Hence almost every kind of violent opposition to established authority short of war was subsumed under the catch-all rubric of *latrocinium*, with little or no conscious differentiation of the subcategories of violence beneath that umbrella term" (Shaw 1984, 6).

²⁰⁸ "In the late fourth century the senator Quintus Aurelius Symmachus wrote in a letter that although he was prefect of Rome he did not dare to venture beyond the walls of the city because the roads outside were infested with brigands" (Shaw 1984, 10).

normal law enforcement. Because there was no civic police force, and Roman governors did not have army units under their command, they had to rely on self-help to provide what security they could from banditry. Towns were empowered by Roman law to fight banditry by any means available to them. Apparently legal license to hunt bandits was delegated all the way to the level of the citizenry who were authorized to harm and even kill bandits without being subject to standard laws related to homicide, even in self-defense. The fight against *lactrociniae* is neither warfare in the common sense nor was it common law enforcement. One of the most significant differences from either case is that "military operations could be mounted against these enemies en masse, without any need for the scrupulous provision of proof of guilt in each individual case, as ordinary law enforcement required" (Neff 2005, 19).

In armed conflict Romans had to be careful to appear to keep faith with their adversaries because the charge of treachery could result in disaster for armies and peoples. The claim of treachery could be used as an argument for war and even for the denying of quarter. Again from Cicero "there are laws of warfare, and it often happens that faith given to an enemy must be kept. For if an oath has been sworn in such a way that the mind grasps that this ought to be done, it should be kept; if not, then there is no perjury if the thing is not done. For example, if an agreement is made with pirates in return for your life, and you do not pay the price, there is no deceit, not even if you swore to do so and did not. For a pirate is not counted as an enemy proper, but is the common

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²⁰⁹ See (Shaw 1984, 19)

foe of all" (Cicero 1991, I. III.107). Unlike other forms of Roman armed conflict, treachery was not only accepted against bandits but part of the standard approach used by governors and others by inducing the compatriots of bandits to betray them. Where with other groups warfare must always be oriented towards peace, it seems that with bandits Cicero holds that no peace is possible as they are the "common foe of mankind" and in this sense at odds with nature.

Unlike the wars against the Gauls and other barbarian groups, breaches of faith and unlimited violence against bandits was not conducted in order to correct transgression and produce the conditions in which peace was possible. The bandit standing against nature was in a position of endless war with the Roman state which took place outside the law because the bandit received no protection from the laws of the Roman state or of nature in the eyes of the Romans. Standing against nature the only remedy for the outlaw is eradication. There is difficulty, however, in determining which kinds of Roman outlaws fall into the category of *latrones*. As Shaw points out "everyone from a common thief to a rampant pillager is lumped under the label *latro* since all form part of a common threat to the same provincial order" (Shaw 1984, 14) and "once bandits had been defined as men who stood in a peculiar relation to the state, the label latro was available to be pasted on any "de-stated" person" (Shaw 1984, 23).

The Ascendance of Christianity

The extreme pacifism preached by Jesus of Nazareth, and embraced by many early Christian writers, was challenged in the fourth century AD when the Emperor Constantine attributed an important victory to the intervention of the Christian God. The

result was a dramatic reversal of the fortunes of Christians in the late Roman empire. The teachings of Jesus and the apostles proposed a kind of dual structure of kingship embodied in the teaching to "render therefore unto Caesar the things which are Caesar's, and unto God the things that are God's." While earthly authority should be obeyed due to its dominion over the body, the soul belongs to the kingdom of God. Prior to Constantine the teachings of Jesus and St. Paul were interpreted such that the kingdom of heaven is the proper concern for humans but worldly laws should also be obeyed. Since the ultimate reward for Christians was the grace of God the Roman state in effect lost a large degree of leverage over early Christians as they became more apolitical²¹¹ in their focus, not on earthly affairs, but those of God. Yet there were tensions even in these early currents of thought among Christians with regard to both secular and divine laws. 212 In 380 AD the Edict of Thessalonica effectively turned the tables and "heretics" now found themselves on the wrong end of Roman instruments of persecution. ²¹³ During the pagan periods of the empire some elements of Roman Christianity, reinforced by the material conditions of persecution, argued that warfare was impermissible under any

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²¹⁰ King James Bible, *Matthew* 22:19-22

²¹¹ See for example the early third century teaching of Turtullian who held that Christians should not perform military service (Neff 2005, 46) and who asked "what has Jerusalem to do with Athens?" (Klosko 1994, 200).

²¹² See (Klosko 1994, 188) for discussion of anti-nomian interpretations of Christian thought that, though varied, argued the faithful had no need for laws human or divine.

²¹³ From the Edict of Thessalonica 380 AD: "We require that those who follow this rule of faith should embrace the name of Catholic Christians, adjudging all others madmen and ordering them to be designated as heretics ... condemned as such, in the first instance to suffer divine punishment, and therewith, the vengeance of that power which we by celestial authority, have assumed"; see (Klosko 1994, 200)

circumstances. This understanding of Jesus' counsel to "turn the other cheek" was contested by many writers who pointed to passages elsewhere in the Bible that seemed to permit violence in defense of the faithful, the faith, or justice. After Constantine, Christian theologians generally accepted warfare as permissible in principle for Christians. As Christian writers grappled with the new relationship between political power and theology they had to come to terms with views on warfare. With the unification of Christianity and empire, and the assumption of political concerns by the church, warfare comes to be seen by some as an aberration in an otherwise peaceful system. Wars can be of two types; either they are a restorative force of divine order which addresses an imbalance on earth, or they are an action of men which itself creates a situation of imbalance. Those wars induced by God are necessarily defensive wars waged in defense of Christian peace and harmony and waged against injustice. Through the idea of defense of others many Christian writers escaped the corner of radical pacifism and war comes to be justified in terms of defense of others.

Augustine of Hippo, writing in the fourth and fifth centuries AD during the decline of the Roman empire in North Africa, "opened a middle road by firmly approving Christian participation in war and the military profession, but at the same time requiring

²¹⁴ See (Elbe 1939, 667); "when, after Constantine's conversion, state and army ceased to be instruments of persecution against the Christian subjects of the Roman Empire, the stigma which the originally pacific spirit of the Church had attached to war gradually disappeared." See also (Augustine 2001, xxiv): "No major Christian theologian since the time of Constantine had been a pacifist, and Christians had for a long time taken it for granted that war was permissible." Also Lactantius, Origen, Tetullian, Ambrose, and Isidore "had no doubt" about the waging of just war (Wallace-Hadrill 1975, 161–162).

²¹⁵ (Elbe 1939, 668)

that war be just" (Nussbaum 1943, 55). The writing of Augustine is particularly interesting because his work constitutes an engagement with the "pagan" thought still widespread in the fifth century. The fortunes of Rome had seemed to decline precipitously during the first century under Christianity. Augustine witnessed the siege of Roman Africa, a fight that Rome was slowly losing, and by the end of his life the "barbarian" Vandals were laying siege to Hippo, now northern Algeria, where he lay dying in 430 AD. Augustine witnessed the sack of Rome by the Visigoths in 410 and this event resulted in a resurgence of pagan thought and public blame of Christianity for the misfortunes of Rome. Augustine's *The City of God against the Pagans* was written not as a complete system of thought but rather an engagement with classical pagan thought and it was against these anti-Christian charges that Augustine conceived *The City of God.* Accordingly Augustine's work represents not the embodiment of an era but the record of a struggle.

In this context of Christian identity with the Roman Empire as it is faced by barbarians without and heretics within, Augustine articulates a version of Christian faith that is compatible with, and justifies the use of force in defense of the then tenuous ascendancy of Christianity. Augustine's writings indicate a kind of tragic perspective on the use of force and participation in warfare, and he "refuses to resolve the tension by giving simple precedence to either justice or mercy" (Augustine 2001, xxi). Augustine's consideration of punishment and armed conflict is based on the notion that all men are

²¹⁶ See (Klosko 1994, 232)

sinners and this common element ties humanity together. This is most clearly articulated in his Sermon 13 in which he takes up the issue of judgment. He considers the parable in which the Pharisees bring a woman who had been caught in an act of adultery before Jesus. The Pharisees attempt to trick Jesus into condemning the woman and "abandoning gentleness" or else sparing the woman and betraying the law. Jesus' fascinating response, as interpreted by Augustine, suggests that there is no discord between the law of men and the law of God but that fallen men are all equally guilty before the law; "'I do not forbid the stoning of whomever the Law orders', he said, 'I merely ask who will do it. I am not opposing the Law, but I am looking for someone to execute it" (2001, 122). Nonetheless Augustine sees human judges, though fallible, as a necessary element of human society. In *The City of God* he absolves human judges of guilt even though they sometimes condemn innocent men to torture and death; "the judge still does not know whether he has slain a guilty man or an innocent one, even after torturing him to avoid ignorantly slaying the innocent. In this case, he has tortured an innocent man in order to discover the truth, and has killed him while still not knowing it" (1998, bk. XIX.6). Though human judges occasionally torture and condemn innocent people "the philosopher does not consider that these many and grievous evils are sins; for he reflects that the wise judge does not act in this way through a wish to do harm. Rather, he does so because, on the one hand, ignorance is unavoidable, and, on the other, judgment is also unavoidable because human society compels it" (1998, bk. XIX.6). This is, for Augustine, representative of the "wretchedness of man's condition" that some must act as judges even though harm to the innocent will occasionally occur by their hand. It is, in other words, a necessary evil due to the fallen nature of man.

Judges, law enforcement, armies, and the state itself are artifacts of man's fallen nature that, though necessary, are also part of the punishment of mankind for original sin. In this way Augustine departs significantly from classical philosophy. Where the role of the *polis* and political participation was a positive one for many classical writers, offering a path to "the good life," the city is purely negative for Augustinian Catholics. In the best case the instruments of law provide a bulwark against unrepentant sinners so that the pious can get on with their service to god. The city and state simply have no positive role in facilitating greater faith or transcending man's fallen state. Harm, as in the case of judges above, attends not only the wicked but also the good due to the operations of the state. The only positive role for the state is through the punishment of the unrepentant. It must be understood though, that Augustine views punishment and coercion as acceptable and valuable only as means to a higher end which is the saving of individual souls. Even when Augustine accepts coercive measures and punishment he advocates the lowest amount of force possible. In his Sermon 13 Augustine advocates punishment as a means to help those who require it. "Punishments should be imposed; I don't deny it; I don't forbid it. But this must be done in the spirit of love, in the spirit of concern, in the spirit of reform" and judges should "avoid the death penalty, so that there's someone left to repent. Don't allow the human being to be killed; then someone will be left to learn the lesson" (2001, 124–125). In a sectarian conflict between African Catholics and Donatists, which became quite violent, Augustine argues against the use of force to return Donatists to the fold. Ultimately he changes his position as the conflict escalates and comes to accept coercive law as a tool to force the reconciliation of the Donatists. While he does not want individuals accepting a guise of Catholicism out of fear of the law, he

believes in the efficacy of coercion not only to remediate sinners but to actually produce ardent Catholics.

The aim of punishment is always forward looking for Augustine and must be undertaken in a way that is most likely to produce the greater good of an individual reconciled with Catholicism, and on a more righteous path. In *Letter 104* he advocates only fines instead of physical punishment for pagans, writing that "there are ways of punishing evil men that are not only gentle, but even for their benefit and well-being, and Christians too can make use of these. They have been given three benefits: a life of bodily health; the means of staying alive; and the means with which to live badly. Let them keep the first two safe: in that way there will still be some potential penitents" (2001, 13). For evil men there is a potential positive role for the state in depriving them of the "means with which to live badly" but the punishment itself is still a use of force which should be applied at the minimum.

For Augustine, judgment and punishment on earth are lesser evils²¹⁷ than allowing the unrepentant to carry on in their depraved condition and also threaten the security of the pious. This pragmatic approach is also seen in his writing on armed conflict. In *Letter 138* to Marcellinus, Augustine explains that in a Christian commonwealth "even wars will be waged in a spirit of benevolence; the aim will be to serve the defeated more easily by securing a peaceful society that is pious and just. For if defeat deprives the beaten side of the freedom to act wickedly, it benefits them. Nothing, in fact, is less

²¹⁷ See (Klosko 1994, 223)

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fortunate than the good fortune of sinners." He argues that "the good would even wage war with mercy, were it possible, with the aim of taming unrestrained passions and destroying vices that ought, under a just rule, to be uprooted or suppressed... If Christian teaching condemned all warfare, then the soldiers in the gospel who were seeking guidance about their security would have been told to throw away their weapons and withdraw entirely from the army" (2001, 38). Augustine suggests that just warfare is possible but far from the norm because most wars are waged out of greed.

In this way Augustine proposes a radical difference from the elements of classical pagan thought with which he was in conversation. He does not seem to draw a distinct line between Christian and pagan societies, but views all states as playing a role in providing security and the tenuous, unstable "peace of Babylon" (1998, bk. XIX.26) that, through fear of war, maintains a semblance of order. The sack of Rome had been particularly horrifying to pagan observers because Rome represented the embodiment of natural law and justice on earth. For Augustine, the only city which knows true peace and justice is the City of God. All earthly cities form a kind of constitutive outside to the City of God. All earthly cities are fallen and thus true justice is impossible in all cities on earth alike.²¹⁸ Pagan cities can produce an endurable semblance of justice in the same way that Christian cities do.²¹⁹ Justification for war is necessary not due to an "unnatural" disturbance of the peace, but rather because war is a threat to the fragile

²¹⁸ For this reason Augustine entertains the notion that the only difference between small criminal gangs and governments is one of scale; (1998, bk. IV.4).

²¹⁹ For discussion of this line of argument in Augustine's writing see R.W. Dyson's introduction to *The City of God* (Augustine 1998, xxiii–xxiv).

peace instituted by man. For this reason warfare is simply a kind of law enforcement on a large scale and must always be done with the highest earthly goal of man-made peace and order in mind. Like criminal punishment warfare is only acceptable when it constitutes a lesser evil and even then the evils of warfare themselves should everywhere be minimized for all peoples, and "let everyone, therefore, who reflects with pain upon such great evils, upon such horror and cruelty, acknowledge that this is misery. And if anyone either endures them or thinks of them without anguish of soul, his condition is still more miserable: for he thinks himself happy, only because he has lost all human feeling" (1998, bk. XIX.7).

Though he is often considered the father of just war doctrine, it is difficult to see an evolution of Augustinian thought in practice in the centuries after his life. Though Christian theology, broadly construed, continued to grow in influence throughout the first millennium its invocation by practitioners seems to present evidence of contending notions of justice and the appropriate use of force. Many of these ideas seem very different from those espoused by Augustine. The unity of the western empire gave way to a variety of local political communities, all of which employed their own particular versions of Christian theology only loosely affiliated with the Roman Church, and at times directly schismatic. One aspect of Augustine's thought that seems to be also identifiable in the centuries after his death is a pragmatic acceptance of certain violence that is deemed less evil than an alternative. The emergence of numerous communities that were independent politically, though sharing Christian faith, led to a certain flexibility of interpretation of just warfare. In the late sixth century Gregory of Tours "surveying the scene between the accession of Clovis and his own time (late sixth

century) has much to record of fighting, but most of it - bella civilia caused by fraternal disputes and feuds - falls outside any definition of warfare" (Wallace-Hadrill 1975, 163). Taking the warlike nature of the Merovingians as a given, Gregory and others advocated turning the martial energies of the Merovingian people against non-Christian enemies.²²⁰ Nonetheless "Merovingians saw themselves as defenders, not aggressors" (Wallace-Hadrill 1975, 164). Also, "righteous" peace could be won through battle that was aggressive in character and just warfare came to be viewed by some as not limited to defensive or preservative campaigns. ²²² In the fifth century Goth leaders were invoking a Christianized just war ethos within a still pagan belief systems, and more strikingly Pope Gregory I seems to have assumed some elements of pagan war ethos in his ardent support of "warfare to spread Christianity and convert the heathen" and to allow barbarians to "fight to their hearts content in causes blessed by the Church" (Wallace-Hadrill 1975, 168). In the ninth century Pope Nicholas I reminded emperor Louis II that ends justified means in dealings with pagan people, and that settlements with them were permissible in the interest of security "so long as one was clear that the right posture of Christians towards pagans was offensive; and so too towards heretics and all enemies to Christian society's peace" (Wallace-Hadrill 1975, 167). This is not to say that during the early

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[&]quot;The tragedy is, as Gregory sees it, that the Merovingians of his generation have fallen short of Clovis's ideal and turned their swords upon each other. In other words, Gregory stands at the beginning of that process whereby the church persuaded the Franks to extend their power by warfare associated with missionary objectives. There is nothing said of peace as a national objective but only of peace as the proper relationship of one Merovingian king with another" (Wallace-Hadrill 1975, 163)

²²¹ "True, defense could carry them fairly deep into Germany, as when Dagobert went for Samo's Wendish kingdom in Bohemia" (Wallace-Hadrill 1975, 164).

²²² (Wallace-Hadrill 1975, 165)

Middle Ages war under the banner of Christianity gave over completely to aggression against those labeled pagans, barbarians, and heretics. There were still plenty of defensive fights to be had, in particular by the Carolingians against the Arabs and then the Vikings.²²³ In the words of Wallace-Hadrill "The church has not exactly let Woden out of the bottle, but it had certainly not secured the stopper" (1975, 174).

Due to concern about the ferocity and frequency of armed conflict within

Christian European fiefdoms, a range of efforts were undertaken by elements of the
church to limit warfare within Christendom and channel unrestrained ferocity outwards
towards non-Christians. 224 In some cases it seems that ecclesiastical writers were
attempting to increase the vigor with which Christian forces attacked pagans 225 while in
others it seems that the direction of martial energies towards pagans was simply designed
to prevent those energies from being directed at Christians instead. A range of
measures were enacted to regulate the conduct of men at arms and bring consequences
for those who straddled the line between knight and marauder. Churches stripped knights
of their titles as punishment for crimes. The Peace of God and Truce of God movements
in the tenth and eleventh centuries attempted to provide protections to certain categories
of people and immunize them from harm. The Truce of God "decreed that all fighting

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²²³ (Wallace-Hadrill 1975, 170)

²²⁴ Robert Stacey has argued that during the late first millennium the church became more assertive in trying "to restrain and direct Christian warfare away from Christian targets. The First Crusade was in this respect a counsel of despair" (1994, 29).

²²⁵ (Stacey 1994, 28)

²²⁶ (Stacey 1994, 29)

was to cease between Wednesday evening and Monday morning and during all great Church feasts. It was only in effect in wars among Christians; the Truce of God did not need to be observed in wars against infidels and heretics" (Kinsella 2011, 38).

In the thirteenth century Thomas Aguinas attempted to reconcile the recently rediscovered writings of Aristotle with church doctrine. Though he drew heavily on Augustine, Aquinas has a very different view of human life on earth. For Aquinas the wellbeing of the soul is still the highest good but he does not share Augustine's "irreconcilable tension" between the city of man and the City of God. Where Augustine directs man's eyes only to God and characterizes the earthly world as corrupted at best by hopelessly fallen human beings, Aquinas sees a human world that is not inherently corrupt and which can be good and positive. While Augustine counsels that the only possible hope for man is a reward in the hereafter, Aguinas writes that humans can both seek advantage in their time on earth as well as in heaven. Echoing Aristotle, Aquinas argues that "man is by nature a social and political animal, who lives in a community" (2002, 5–6). As long as political and social lives do not negatively impact the spiritual life of man they are a legitimate part of his natural, divinely endorsed being as a human on earth. Aquinas's concept of government is not then the purely negative force envisioned by Augustine but rather a positive force that enables man's wellbeing while he is on earth in more ways than simply facilitating faith. Like Aristotle, Aquinas sees a virtuous aspect in human community that enables a higher order of human

²²⁷ See (Aquinas 2002, xxv)

existence than would be possible in isolation; "for men come together so that they may live well in a way that would not be possible for each of them living singly. For the good is life according to virtue, and so the end of human association is a virtuous life" (Aquinas 2002, 40).

Where many classical philosophers viewed earthly existence as the sole concern of mankind, and where Augustine viewed the City of God as the sole concern, Aquinas views the earthly realm of man and the realm of the divine as distinct, though overlapping spheres of human interest. There is no necessary reason why mankind can't have the best of both worlds, a virtuous and enjoyable life while on earth and an everlasting reward in heaven. It is then the concern of mankind, and the political arts, to ensure that this is the case. There are corresponding laws for both of these spheres; eternal law is identical with the mind of God and is responsible for everything in the universe. Natural law is that law which is particularly oriented towards earthly life and normatively governs the behaviors of all sentient beings, Christians and pagans alike. Human laws, to be worthy of the name, are derived from natural law 229 in those circumstances where natural law is not sufficiently clear to provide guidance for actual human behavior. In this sense human laws have a kind of Aristotelian potential to provide a positive force for the virtuous improvement of human behavior. 230

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²²⁸ (Aquinas 2002, xxxii–xxxiii)

²²⁹ (Aquinas 2002, 106)

²³⁰ (Aguinas 2002, xxxiii)

The need for specific guidelines in the form of human laws that can keep individuals on a righteous path takes on an interesting import in the Aquinas worldview. Since humans now want to maximize their enjoyment of both their time on earth and their life after death there is less tolerance for ambiguity in higher law. Mankind has license to embrace their earthly existence and seize every advantage from it that is not expressly prohibited by eternal law or natural law. The new question now faced by more people than in the past is just how far the limits can be pushed to enjoy earthly delights without suffering divine consequences. The focus becomes this ambiguous margin between human practices that are allowed and those that are disallowed by both God and man. Renewed focus on earthly delights leads to an increased desire to reduce the ambiguity of this marginal space.

With regard to war Aquinas, quoting Augustine, provided a model for just war in which Christians might participate without hazarding their souls. For Aquinas a just war requires three things. First, a just war can only be waged on the authority of a prince²³¹ because individuals can look to the prince for justice. However the prince can look to no higher power for earthly help and therefore the prince is the sole entity that is empowered to act on behalf of the political community. Second, a just cause is required in the form of a wrong that was committed by the adversary that results in their "deserving" to have war waged against them.²³² Finally the intent of those who wage war must be righteous

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²³¹ See also (Keen 1965, 68–69)

²³² "While to Augustine the injury itself provides the just cause for war, Thomas Aquinas demands some fault on the part of the wrongdoer: his culpability which deserves punishment is the justifying reason for

and aimed to "promote a good cause or avert an evil ... For it can happen that even if war is declared by a legitimate authority and for a just cause, that way may be rendered unlawful by wicked intent. For Augustine says in the book *Contra Faustum*: 'The desire to do harm, the cruelty of vengeance, an unpeaceable and implacable spirit, the fever of rebellion, the list to dominate, and similar things: these are rightly condemned in war'" (Aquinas 2002, 241).

For Aquinas the individual is always responsible to eternal divine law. In many cases the individual can obey even unjust rulers insofar as they are not required to personally act in contravention to their faith and divine law. However, at a certain point an individual has a duty to God that trumps duties to man. Individuals can participate in just warfare but always remain bound to the higher requirements of Christian morality which require them not only to avoid actions in war that are not directed to the higher good or the aversion of evil but to even disobey and potentially resist²³³ earthly authorities who command evil. An individual can only kill sinners in the interest of the whole community and only the prince can determine the interest of the whole community. In a just war an individual can kill those who the prince has directed him against though "it is in no way lawful to slay the innocent" (Aquinas 2002, 261) unless commanded by no less authority than God. If an innocent man has been condemned by the prince via the legal system the judge has an individual responsibility to vacate the

going to war. The just war is primarily in the nature of a punitive action against the wrongdoer for his subjective guilt rather than his objectively wrongful act" (Elbe 1939, 669).

²³³ (Aquinas 2002, xxix)

judgment, and if he cannot do so, the executioner has an individual responsibility to refuse to carry out the execution.

On War and The Tree of Battles

The writing of Aquinas and others on "just war" did little to provide a kind of handbook for individuals concerned with the line between lawful and unlawful conduct with regard to both human and divine law. There was a widespread consensus at this time that a law of nations (*jus gentium*) founded in natural law and observed by almost all nations was in fact a form of positive human law; "the trouble arose over defining these conclusions from principles. The *jus gentium* was said to be a positive law, but no one was quite sure where to look for its positive rules" (Keen 1965, 11). Two attempts to provide just such a practical guide to "laws of arms" were made in the mid-fourteenth century by Italian jurist John of Legnano in *De Bello*²³⁴ and French prior Honore Bouvet in *Arbre des Batailles*. Legnano and Bouvet argue that war is justified by both divine and natural law²³⁵ and the evil consequences of war are not due to an inherent aspect of warfare itself but rather the imperfect execution of it. War in its perfect form is identical

Like almost every other writer throughout history who has mentioned law and war in the same work Legnano has been identified as the first to develop a coherent work on the laws of war. For this argument see (Elbe 1939, 672; Legnano 1917, ix); Legnano is identified as basic source for Bouvet's *Tree of Battles* and Christine de Pisan's *Livre des Fays d'Armess et de Chevalerie*. According to Keen (1965), Bouvet and Pisan were simply translating the works of John of Legnano and other lawyers into French and making it accessible "to a wider public, and in a more popular and digestible form" (1965, 21). Wright (1976) points out that Legnano's work has been either portrayed as a original point of modern law or the terminal point of classical law (1976, 13–14).

²³⁵ To the question, posed by these and other writers, "from what law does war come," "the answer given buy the two most famous amongst then, John of Legnano and Honore Bonet, is unfortunately at first sight rather unhelpful; 'war', they declared, 'is justified by all laws'" (Keen 1965, 7–8). See also the Second Lantern Council (1139) which ruled that certain classes of people would not be molested in war as well as outlawing the crossbow and archer in the Christian world (Neff 2005, 65).

with both natural and divine reason and does not constitute a deviation from natural or divine order. Instead, war is a kind of restorative force for natural order and harmony which arises from natural impulses that take form in human institutions and practices of warfare. Where others considered warfare a dangerous deviation from natural or divine order, Legnano and Bouvet hold that war *par excellence* is an aspect of the natural *and* the divine.²³⁶

John of Legnano invokes a "genus" of warfare that can be traced to a pure archetype in what he calls "Celestial Spiritual War." The struggle between good and evil, manifest in the casting out of Lucifer from paradise, constitutes war in pure archetypal form. From this archetype human warfare is derived according to Legnano:

This, then, was the Spiritual War whereby Lucifer was cast out from the paradise of the Most High, and perhaps from it Human Spiritual War had its origin. For in every genus it is possible to arrive at one thing which is the first and the measure of all things within the common genus. So in the genus of the conflict of good against evil we may arrive at the first thing. The first thing is the beginning; but the beginning of virtue is the Most High, and the beginning and the prince of vices is the Devil. Their conflict, then, is the first thing and the measure of any lower human spiritual conflict (Legnano 1917, 219).

Prior to the casting out of Lucifer there was only paradise, but with this first moment of divine warfare an unevenness was introduced into the spiritual realm which is manifest in the ongoing struggle between divine good and evil, and in which mankind is

²³⁶ This attitude towards war is repeated by others of the same period. Writing in the fifteenth century Christine de Pisan wrote "As touching the harms that be done above the right and *droit* of war... that cometh not of the right of war, but by the evilness of the people who use it evilly" (Keen 1965, 9) and "knights who take part in a war without just cause", wrote Nicholas of Tudeschi, 'should rather be

called robbers than knights" (Keen 1965, 65).

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caught. Like the ripples on a pond, this original moment of warfare continues to animate the spiritual realm. This tumultuous animation of the divine order is mirrored in the natural world. Legnano's approach is to compare, side by side, divine and natural orders which both form the unalterable environment in which humans exist. In *De Bello* he moves immediately from the theological origination of pure warfare to a consideration of this archetype of warfare manifest in natural law:

For according to the teaching of natural philosophers it is impossible for the heaven to stand still ... on the contrary its motion is perpetual, and the celestial bodies by their own nature work opposing effects upon these lower bodies, and this opposition of effects arises here below by reason of the variety of the aspects of the celestial bodies and their motions, as our sensations show us. For, to deduce the proposition strictly, by reason of the varied correspondence of the celestial bodies at the time of the construction of states, some states are found hating one another naturally, others are friendly or akin; and so too there are men who hate one another naturally, not because of preceding deserts on one side or the other, and others who love one another naturally. Since, therefore, wars arise by reason of hatreds and discordances of desires, and these are necessarily produced by the motions of the celestial bodies, which are always and necessarily active, we infer that there will necessarily be wars, having regard to the necessity of material and corporeal nature (Legnano 1917, 220).

Like Aquinas, Legnano treats the spiritual and secular worlds as somehow separate but overlapping. Throughout his work he provides this kind of bifurcated archetype of warfare that exists in both spiritual and natural pure forms; one "of the Creator against Lucifer himself" and the second an "opposition of the motions and aspects of celestial bodies, which introduces formal opposition in these lower bodies" (1917, 220). War is inherent in divine and natural order, "introduced not only with the permission, but by the positive allowance, of the Lord," and the evil persons and acts which are punished by divine will via warfare are a "theologically necessary" (1917, 224)

condition of existence. Switching again to natural law, Legnano compares the world to the human body which is always in a balance of fighting off disease:

Sometimes, in a territory and region of the world, there is no excess of rebellious persons, and then there is no conflict, or rather the guiding hand of Nature tends uniformly to its conservation. Sometimes there is excess of rebellious persons, tending to the destruction of government and of conservation, and then sometimes Nature corrects it of itself, by monitions, exhortations, and other soothing processes, and then there is no need of war, or poisonous medicament. Sometimes the disease has advanced so far that a poisonous medicament is needed, extirpating the matter of the disease entirely, and such a medicament is a war to eradicate and exterminate the bad (1917, 225).

The laws of particular political communities and the law of nations serve to give form to the natural inclination towards warfare among those who are naturally opposed to each other. Legnano is very clear that though the laws of nations, civil law, and canonical law give political form to its expression, war itself arises from natural law and divine will:

We may infer, therefore, that this contention which arises for the sake of destroying what is discordant and opposed to one's own conservation has its origin fundamentally in natural first principles, and so in the law of nature, as distinguished from the law of nations. But you will say at once that this conflicts with the texts which say that it arises from the law of nations; but as to that, we must observe that, although this natural inclination is introduced by natural law, our natural intelligence being limited, yet the inclination is regulated by the dictates of reason and natural intelligence; just as we say of particular acts which are proper to men by nature, their intellect being limited, such as the inclination to food and drink and sexual intercourse, that these acts are natural to men, and yet in a man they are regulated by the dictates of reason, which is not the case with the brutes, for they lack that dictation. So, then, I believe that the meaning of those texts was that the regulation of that inclination, introduced by natural first principles, arises from the law of nations, that is, from the general equity of natural intelligence, but the inclination itself is from natural law (1917, 230).

Legnano divides the world into two broad communities of insiders and outsiders with respect to both spiritual and secular divisions. The Christian world headed by the

Pope is set against the world of the infidels and barbarians, yet the Pope retains ultimate jurisdiction everywhere by virtue of natural and divine law.²³⁷ Quoting Augustine, Legnano acknowledges that infidels should not be forcibly converted, yet all people are nonetheless subject to the law of nature, and the Pope is empowered to remediate transgressions of that law. The Roman Empire forms a secular component of the community of the church and thus the Pope's ultimate power to engage in just warfare is also delegated to the emperor. ²³⁸ The political community that Legnano invokes as the "Roman people" on behalf of which the Pope and the emperor engage in just war is a bit amorphous. It includes the entirety of the Holy Roman Empire as it existed in the fourteenth century when Legnano was writing, as well as certain communities and regions that maintained some degree of political independence from the empire. Ultimately for Legnano "almost all nations which obey the Holy Mother Church belong to the Roman people" (1917, 233) and the Pope and emperor are empowered to wage "public warfare" not only on their behalf, but against rebellious elements of the empire itself.

²³⁷ "Hence it is that if a barbarian, who has only the law of nature, sins against the law of nature, he may be punished by the Pope. For it is written in Genesis, ch. xix, that the Sodomites were punished by God; therefore the Vicar of God also has this power. The same, too, if they worship idols; for it is natural to worship the Creator and not His creatures. So, too, he may punish Jews, if they act contrary to their own law in matters of morality, and are not punished by their governors. There is no doubt that he may punish Christians, if they act contrary to the law of the Gospel. From all this we infer that the Pope, like a true prince, may declare war against infidels, and grant indulgences for the recovery of the Holy Land, and especially of the land consecrated by the birth of Christ, by His habitation, and death, where Christ is not worshipped, but Mahomet" (Legnano 1917, 232).

²³⁸ See (Legnano 1917, 232–234) for repeated references to the subordination of the emperor to the Pope. Also, Chapter XV directly asserts the Popes ability to punish and depose the emperor if the emperor does not support and defend the Pope. The Pope, on the other hand, may declare war on the emperor if he is "schismatic, heretic, or otherwise usurping the rights and liberties of churches" (1917, 235).

The Ascendance of Man

Legnano articulates a vision of spiritual and political community under the command of the Pope and the emperor respectively, empowered to sit in judgment of natural and divine law and use warfare to enforce those laws. In Legnano's account there is now a new role for God who is no longer a judge, as the gods were in classical times, nor a dispassionate observer as God was characterized by Augustine and others. Legnano invokes a God who has taken the place of man as the "author" of war and at whose behest mankind employs warfare "as the minister of God" (1917, 226). This change has dramatic implications. For Legnano warfare is associated with nature and the will of god rather than a disruption or dangerous deviation of the natural order. In this sense warfare moves from the realm of convention to the realm of nature and there is a corresponding reversal in the priority given to nature and convention. In the classical period natural order was considered to be the highest order of purity and perfection which man strived to approach and, failing that, corrupt as little as possible through imperfect conventions and political activities. The good life achievable through the *polis* is nonetheless good to the extent that it participates in and enjoys natural balance and harmony. With Legnano the divine that is, moment by moment, a tumultuous play of forces and ongoing reverberations of the first pure instant of warfare in which Lucifer was cast out and who now wages a war on mankind.²³⁹ Nature is likewise experienced as anything but orderly at any given moment due to the natural hatreds and passions that set groups of people against each other and like celestial bodies are characterized by never ending collision

²³⁹ (Legnano 1917, 218)

and tumult. In both realms forces are constantly in flux as they threaten their ordering principles and are ceaselessly brought back into balance by opposing forces. In this figuration nature becomes associated with chaos, unpredictability, and warfare and the conventions of mankind begin to be associated with the hope of control and order.

This change has significant implications for the way that Legnano and others approach laws of armed conflict. Manmade conventions begin to be seen differently than they were in the past. As nature begins to lose its association with order and harmony an opening is created for man-made conventions to take on a role equilibrium force that can provide a kind of Pareto improvement in the balance of nature. In these terms Legnano frames his concept of the "law of nations"; the law of nations is founded on natural law and natural law is a force that "tends to the conservation and increase of the universe"; "an act which tends to the destruction of the universe is forbidden by the law of nations" (1917, 338). The law of nations is an element of this conservative force that ensures equilibrium and harmony if not perfectly, eventually. Since certain practices, such as dueling, ²⁴⁰ tend to increase discord and disequilibrium they are against the law of nations and the natural equity which underlies and founds it. Put most simply manmade conventions start to be seen as institutions that can actually improve upon the natural order.

Much of Legnano's concern in *De Bello* is legal particulars regarding the implications of oaths and loyalties for military service, the details of compensation,

²⁴⁰ (1917, 338)

mediation of property loses, ²⁴¹ and exploration of virtues that may be had in battle. There is some extended consideration of providing quarter to the enemy and of different rules for wars between two states that are part of the Roman people and between a Roman state and a rebellious or barbarian one. He advocates warfare which is limited proportionally and must be "equal" "in quality of arms, and in length of time" and must be "defensive, not vindictive" (1917, 302–304). Legnano counsels that mercy and quarter must be given to those who are captured in war provided that this will not result in some further danger. ²⁴² Certain immunities are provided to attendants in war who cannot fight. These themes are made more explicit in Bouvet's *Arbre des Batailles* where he attributes the protection of children, women, and the elderly to ancient laws and customs, that they should neither be imprisoned nor ransomed, and "whoever does the contrary deserves the name of villain" (Green 1999, 58).

For Legnano and others, war and peace are not characterized by presence or absence but rather by degree. War "was the endemic condition of West European society. The distinction which the medieval lawyer had to draw was not therefore between war and peace but between one condition of war and another" (Keen 1965, 64). The chaotic play of forces at work in the natural and spiritual worlds constantly produces and exacerbates the forces of disequilibrium which give rise to conditions that threaten to develop into open warfare. Warfare is simply an intensification of human practices of

See for example ch. xlv: "Whether, if one man summons another to a war, and the other is robbed on his way to the war, the summoner can sue the robber by the "actio vi bonorum raptorum" (Legnano 1917, 260)

²⁴² See ch. xxx (1917, 253) and ch. lxix (1917, 274)

negotiation and mediation which, through its heightened intensity, serves as a kind of pressure relief valve of last resort by which "war tends finally to destroy the displeasure which introduced it" (Legnano 1917, 217). In this sense the potential for, and tendency toward, recurring war is ever bubbling and building under the surface of political interaction. Mankind works to restore balance short of combat through negotiation and politics. Politics comes to be seen in the light of Foucault's inversion of Clausewitz as the continuation of war by other means (Foucault 2003, 15). Political negotiations are always backstopped by the warfare that they can only hope to temporarily defer. Even when armed hostilities occur both parties are subject to the same natural and divine law which, in its objectivity, renders one party just and lawful and the other criminal. Even this notion of warfare is not one of a state of war but something more akin to a law enforcement action of the just against the criminal.²⁴³ One of the most illuminating passages considers whether "outlaws" who, like homo sacer, have been exposed by the laws to being killed by anyone, may then defend themselves. Legnano replies in the negative in those cases where the law specifically sanctions the killing of the outlaw because their killing is lawful and the citizen who carries it out acts as a public official. This illustrates the notion arising from Legnano's theoretical and theological grounding in an underlying natural and divine reality that holds true for all time and all places. There can only be one just and lawful side in any conflict: the side that is in accordance with nature and with the divine. Those who fight on the side of the just will be in good

²⁴³ "Medieval just-war theory, in other words, knew no state of war but only acts of war – either wrongful acts by the unjust side or lawful ones by the just party – that occasionally punctured the general state of peace, but without ever displacing it" (Neff 2005, 58).

standing with the divine even if they are killed in such a just war and those who fight on the unlawful side will "perish." ²⁴⁴

Legnano identifies seven types of war recognized by law.²⁴⁵ Generally speaking those waged on behalf of, and at the command of, the emperor and the rule of law are lawful. Of particular note is "Roman" war and which is conducted by Roman people against infidels. It is called Roman because it is fought on behalf of the entire community of Roman peoples against outside infidel enemies, such as the Saracens, who are repeatedly invoked as being in a perpetual state of war with the Romans.²⁴⁶ Those wars without the sanction of the emperor or the Pope are unlawful with the exception of "necessary" war which is waged in self-defense and is authorized by both natural and divine law.²⁴⁷ "Wars" of self-defense,²⁴⁸ what Legnano calls "particular wars," are a kind of war that can be waged without the express consent of spiritual or secular authorities.

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²⁴⁴ See Ch. lxv, (Legnano 1917, 273)

²⁴⁵ "The Middle Ages saw other customs developing that have ceased to be of topical importance, although in some instances they have been responsible for current practices. During the Hundred Years War it was possible to distinguish between *guerre mortelle*, war to the death, *bellum hostile*, a war between Christian princes in which prisoners could ransom themselves, *guerre guerriable*, fought in accordance with the feudal rules of chivalry, and the truce, which indicated a temporary cessation of hostilities when the wounded and dead might be collected, with any resumption of actual fighting considered a continuation of an ongoing conflict rather than commencement of a new one" (Green 1999, 15).

²⁴⁶ Though Legnano also points out that this state of war is the result of anti-Christian practices on the part of the Saracens and "it would not be necessary to declare war even against the Saracens, if they did not persecute Christians" (Legnano 1917, 274).

²⁴⁷ See Ch. lxxx, (1917, 278)

²⁴⁸ "It Is lawful for every man to move war in defense of himself and his goods', wrote Innocent IV, and Raymond was of the same view; 'it is always lawful to meet force with force'. Other lawyers agreed; Johannes Andreas, Baldus de Ubaldis, Henry of Gorinchen, and others all discuss just wars which are waged without authority and are just 'ex sola causa'" (Keen 1965, 67–68).

Legnano spends more than twenty pages meticulously considering a wide variety of scenarios in which "wars" of self-defense are either lawful or unlawful.

The extent to which Legnano covers this topic can be seen as indicative of a desire to strictly limit the occasions on which the authority to use violence is delegated from the prince or emperor to those of subordinate political status. The care with which Legnano attends to this question illustrates the extent that this was a wider problem and concern for jurists of the period. Not only mercenary forces but "knights errant" and feuding nobles posed a substantial challenge to the aspirations of secular and ecclesiastical authorities and "one of the most serious problems of the 'civil authority' in fourteenth-century Italy was that of controlling the mercenary soldiers in its employ: of subordinating the private interests of the condottieri to the public interests of the state" (Wright 1976, 25). The work of Legnano and others can be seen to perform more functions than the violence-limiting aspiration that is traditionally attributed to them. Legnano and others also assert an increased and consolidated authority in the Pope and the prince with regard to the employment of organized violence. At a time when there was significant concern that Christian soldiers were doing more harm than good²⁴⁹ the concept of a "Roman" community can be seen to be an attempt to gain a greater degree of control over the forces of violence by political and ecclesiastical authorities. In this case a non-Christian adversary would have been almost indispensable for those who could not realistically hope to gain complete mastery over Christian martial energies but might

²⁴⁹ For example Saint Peter Damian "grumbled that the swords wielded by knights errant had created more widows and orphans than they had protected" (Neff 2005, 74).

hope to provide a greater degree of direction for them towards the outside, and in so doing consolidate a more powerful political community inside.²⁵⁰

Interestingly, there is also at this time the invocation of a past in which warfare was unrestrained and barbaric.²⁵¹ Medieval writers invoked a notion of warfare, *guerre mortelle* or *bellum Romanum*, supposedly practiced by the Roman empire that was wholly unrestrained and which provided no quarter to combatants and non-combatants alike, allowed genocidal violence, and enslavement, pillage, plunder, immolation, the nailing of skulls to trees,²⁵² and other barbarities.²⁵³ Interestingly, unrestrained warfare is invoked at the temporal and spatial margins of these secular and ecclesiastical accounts of Christian order in the fourteenth century. Unrestrained warfare is something that happened in the barbarous past and at the barbarous borders of contemporary society but not within the would-be political community of Roman Christendom. In the accounts of

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²⁵⁰ "The Italians were concerned with directing the aggressive energies of the *condottieri* against the enemies of the state rather than against its own subjects in the *contado*. The French crown had similar problems, especially with its garrison troops on the frontiers of the kingdom who often compensated themselves for insufficient and irregular pay at the expense of 'friendly' non-combatants" (Wright 1976, 26).

For more on this medieval characterization of Roman warfare see (Stacey 1994, 27–33) and (Keen 1965, 104)

²⁵² See (Green 1999, 10).

²⁵³ This 'memory' of Roman warfare has persisted and is found in many modern accounts of Roman warfare as well; "the rule and principles of war were considered by both Hellas and Rome to be applicable only to civilized sovereign States properly organized, and enjoying a regular constitution; and not conglomerations of individuals living together in an irregular and precarious association. Rome did not regard as being within the comity of nations such fortuitous gatherings of people, but only those who were organized on a civilized basis, and governed with a view to the general good, but a properly constructed system of law... Hence barbarians, savage tribes, bands of robbers and pirates, and the like were debarred from the benefits and relaxations established by international law and custom" C. Phillipson as cited in (Green 1999, 9).

certain medieval Christian jurists the primordial past and the infidel frontier constitute zones of barbarity which the Christian community is defined against. In those times and places Christian law did not function to produce an optimal natural balance and chaotic forces obtained a kind of free play. This account seems to contain a normative figuration of Christian political community that, if realized, might mitigate chaotic forces of violence that were then threatening to undo the efforts of political consolidation and community creation underway in order to increase the control of the Pope and prince over the violent and potentially destabilizing forces within the community. The assertion of external times and places of chaos and barbarity is at the same time a normative articulation of an idealized community that might bring to heel those very same forces at work contemporaneously. In this way the works of Legnano, Bouvet, Pisan, and others are not only a codification of what the laws of war were as actually practiced, not only a statement of law then *in effect*, but also an attempt to consolidate the authority and control of particular figurations of political and spiritual power. ²⁵⁴

This notion of unrestrained warfare at the temporal and spatial margins of Christianity was not confined to the imaginations and writing of medieval theorists. Customs were developed for the employment of *guerre mortelle* including the development of certain red banners that indicated no quarter was to be given to the

²⁵⁴ "If we look to the *Tree* for information concerning the actual conduct of war during the first half of the Hundred Years War, we are as likely to find it in the breach as in the observance of the *Tree*'s rules… To regard the Tree, as many have done, as an authority for the law of arms is likely to be an unfruitful exercise unless we appreciate the conception of war which the *Tree* proposes 'was moving in a direction favourable to modern kingship'" (Wright 1976, 30)

enemy.²⁵⁵ It seems that this unrestrained "war to the death" was almost exclusively limited to battles with infidels but there are some notable exceptions. The battles of Lewes and Evesham in 1264-1265 between King Henry III and Simon de Montfort, earl of Leicester were conducted as *guerre mortelle* and the earl of Leicester was ultimately killed and mutilated as a consequence. Thus the notion of unrestrained warfare was actually enshrined, regularized, and legitimized as part of this increasing legal specification of warfare. This permissibility of unrestrained warfare against infidels would be taken up by Vitoria in the sixteenth century. In his work there is a continuation of these modes of justification where the authority of Christian secular and ecclesiastical rulers is further consolidated over organized violence within their own communities, the flip side of which is a permissibility of absolutely unrestrained violence towards those on the outside.

One of the most striking differences between Legnano and Vitoria is that by the sixteenth century Vitoria is no longer talking about the Christian empire but rather

See Green (1999, 15) and Stacey (1994, 33) who both rely on Keen (1965); "The usual sign of war to the death was the carrying of a red flag or banner. Thus in 1293 English sailors, who had been involved in a clash at sea with the French, reported that the enemy had been flying *bausons* or streamers of red sandal 'which everywhere among mariners means war to the death without quarter'. Le Baker declares that at Crecy the French displayed a fiery banner alongside the King's standard, which meant that no one was to take any man alive, on pain of death. This was the Oriflamme, which in the fourteenth and fifteenth centuries seems only to have been unfurled at moments of dire necessity and when no quarter was to be given. It was displayed again at Poitiers, when Knighton calls it 'the red banner which is the sign of death'. It was unfurled also as Roosebeque, according to Froissart after much deliberation and because the Flemings were considered to be no better than enemies of the faith. With obvious anger, Lefevre de St. Remy tells us that it was again carried, 'as if against the Saracens', by the Armagnacs when they invaded Artois in 1414, but on this occasion it was not unfurled. Nicholas Upton says that in heraldry red was the colour signifying cruelty and ferocity, as of a prince against his enemies; no doubt this is why it was the colour which signified that no mercy would be shown to men in arms' (1965, 105–106)

prescribing rules for independent states. In On the Law of War (1991, 326–327) he produces three general rules for warfare. First, "since princes have the authority to wage war, they should strive above all to avoid all provocations and causes of war." Vitoria's justification is quite different from that of Legnano, however. Warfare should be avoided among Christian states because of the horrors associated with warfare and the fact that all men have to stand before God in judgment. The prince is no longer subordinate to the Pope and, with his eyes now firmly on the world of men, Vitoria counsels that warfare should be avoided primarily for practical reasons. Second, "once war has been declared for just causes, the prince should press his campaign not for the destruction of his opponents, but for the pursuit of the justice for which he fights and the defense of his homeland, so that by fighting he may eventually establish peace and security" (1991, 327). Finally, "once the war has been fought and victory won, he must use his victory with moderation and Christian humility. The victor must think of himself as a judge sitting in judgment between two commonwealths, one the injured party and the other the offender; he must not pass sentence as the prosecutor, but as the judge. He must give satisfaction to the injured, but as far as possible without causing the utter ruination of the guilty commonwealth" (1991, 327). The aim of warfare for Vitoria, in addition to correcting a wrong, punishment, or self-defense, should be above all to the reestablishment of peace. For this reason enslavement, the execution of prisoners, the sacking and burning of cities, and the mistreatment of non-combatants is prohibited among Christian nations.²⁵⁶

²⁵⁶ See Vitoria (1991, 323)

This is not the case with infidel nations because there can be no peace between Christians and infidels. Warfare against "the pagans" is "permanent because they can never sufficiently pay for the injuries and losses inflicted" and in consequence "it is not to be doubted that we may lawfully enslave the women and children of the Saracens" and "plunder the enemy indiscriminately, both innocent and guilty, since the enemy rely upon the resources of its people to sustain an unjust war, and their strength is therefore weakened if their subjects are plundered" (1991, 317–318). Saracen prisoners may be executed without limit, including entire populations; "the proof runs as follows: war is waged to produce peace, but sometimes security cannot be obtained without the wholesale destruction of the enemy. This is particularly the case in wars against the infidel, from whom peace can never be hoped for on any terms; therefore the only remedy is to eliminate all of them who are capable of bearing arms against us, given that they are already guilty" (Vitoria 1991, 321).

Conclusion

If the question, in the context of the War on Terrorism, is what the laws of war are, and whether there is such a thing as "outside the law," additional questions immediately arise. How can the essence of the law be known, how can a boundary be imposed, what entity could impose it, and how could a satisfactory answer be provided to these questions? These are the question over which lawyers, activists, scholars and others have long been explicitly and implicitly arguing. Some argue that the boundary is here, others argue the boundary is there, others argue there is no such boundary. In lieu of a final authority for questions international, contending interpretations are submitted as politically normative claims about what war law *should* be interpreted to be. The

politically normative elements of these claims are not acknowledged, however, lest they lose whatever authority their argument might be supposed to have. Rather than acknowledging particular normativity, most arguments seek to establish an authority to speak which is often done through the situating of their arguments as the logical standard bearer of legal history. Throughout the material surveyed normative arguments about the nature of laws of armed conflict, founded in particular accounts of the nature of human reality, appear not to be normative at all but rather authoritative. Though this survey cannot hope to trace the actual limits of meaning that can be attributed to periodic accounts of war law, there is in particular instances a suggestion of the heterogeneity of human practice with regard to armed conflict and law. Any particular period is characterized by contending, disharmonious, divergent voices that, in their multiplicity, can be read by observers in a further multitude of ways.

If the past is not actually static, if in the words of William Faulkner "the past is never dead. It's not even past" (2011, 73) then questions of change become profoundly more complex. If the notion of a definitive, unitary meaning of the past is relinquished, and the undecidability of history and practice is instead embraced, the question of what exactly the nature of the past *was* gives way to questions of how today certain interpretations of the past are suggested, articulated, imposed, and overturned. How is the appearance of *truth* produced through textual practices? Any particular interpretation of the past that claims to be the *truth* must also conceal or obscure the practices, the work and text of politics, by which it founds its aspiration to objectivity and authority. This concealment need not be conscious or intentional and may not really be concealed at all. It could be better thought of as a kind of camouflage that is due to the fact that these

efforts simply draw on and reproduce wider social and political practices, and they tap into dominant paradigms or narratives that already take the terms and means of narrative production for granted, such that the so-called concealment is really no concealment at all but just a reproduction of certain grammars of intelligibility in play in particular contexts.²⁵⁷

Rejecting a mode of historical inquiry that assumes universals, that assumes concepts are associated with an essence, a form outside of time and place that manifests its unchanging nature throughout the ages, the particular meanings of words and ideas for those who employ them can be explored. Furthermore questions regarding how these meanings are created or asserted are raised. Words, concepts, and ideas are not metaphysically endowed with a fixed meaning across time and place but function differently here and there. Perhaps the continuity of this idea of war is only the word itself, the letters and the sounds, and it is handed, leapfrogged, from language to language, across stepping stones in time from one context to the next, malleable not without limit but without essence. An idea of war appears through the ages, but the clearest continuity that can be traced is in the word itself, and even this continuity is limited to each of its epochal leaps from language to language. What is left is a hollow shell of a concept that is only content rich from moment to moment via the seduction of

²⁵⁷ This notion is evocative of David Foster Wallace's commencement speech at Kenyon College in 2005. Wallace suggests that people become habituated to daily life to an extent gain a kind of tunnel vision that blinds them to even the most significant aspects of their daily life. This blinds results from the sheer ubiquity of these elements that become unnoticed. He uses an analogy of fish that have to ask "what is water?" For the fish the water is their context which becomes so ubiquitous and transparent that it is not noticed in spite of how definitive it is of daily life and how possible it is that it could be otherwise.

this or that argument. To this extent the discourse of the laws of war is a political field of practice like many others. In this field political claims are made in order to create and consolidate certain figurations of political community.

The Greeks and the Romans make a variety of claims that invoke a Latin community that is legally governed and organized against a barbarian outside. These claims display contending articulations of how Greeks and Romans should understand Latin community and the barbarians beyond. "Hellenic law" and Roman laws of war are depicted as a legal structure that regulates this community of nations and which should restrain organized violence within, while legitimizing and channeling it without. The figure of the bandit in Roman law, which occupies a legal non-place as a domestic enemy, is in a certain sense outside the law. Looking beyond the Romans and the Greeks, there are different figurations and justifications during the Middle Ages with a familiar invocation of political community that transcends "sovereign" princes, and which articulates again certain restraint in its use of violence within, while directing and releasing it towards pagans on the outside. Throughout the Middle Ages there are a variety of attempts made by ecclesiastical and secular authorities to consolidate control over organized violence. Violence is restrained and regulated among those within the political community and direct toward those outside. Just as the sole authority of the prince to employ violence domestically is consolidated in the ideology of the nation state, the sole authority for the employment of unrestrained violence becomes this larger political community. As "sovereignty" in this larger community of Christian nations becomes dispersed among modern states the border between inside and outside remains a

matter of political practice. The idea of this border is also a powerful political tool upon which always hinges the dual imperatives of restraint within and release without.

To the extent that aspirations to sovereignty characterize this greater community there are analogous aspirations to a sovereign voice in the very claims that invoke such a community. The "regulative ideal" of this sovereign voice is one that is able to reveal objective truth through transparent representations of bare reality. This is accomplished in part by the marking off normative aspects of particular claims in such a way that the claim can itself be taken to be an objective rendering of truth. Those elements of the claim, principles of interpretation, grids of intelligibility, regimes of truth that are normatively, or even arbitrarily assumed, are placed outside the bounds of the particular claim. In order to explore the politics of the laws of war these boundaries must be questioned and transgressed in order to explore how articulations of political community and invocations of sovereignty work.

Most modern narratives of the laws of war function on a simple implicit distinction between *true* laws of war and *false* laws of war. This distinction is established and maintained by a cursory survey of the long ages prior to the modern period. The story of these long ages is told in negative terms; those deficient half efforts directed towards restraining the barbaric passions of primitive man are met everywhere with failure and the recurrence of chaos. Only with the advent of *true* modern laws of war was man finally able to overcome primitive origins and gain mastery of previously wild nature. However this historical narrative of the laws of war employed by many modern observers is dependent on a metaphysical model of war and law that does not change

over time. Without such model it is not possible to search the centuries for laws of war as they are understood today. Nonetheless this search is routinely conducted and valued because it is a well-rehearsed form of modern narrative history. Much modern history assumes this form of a narrative monologue²⁵⁸ that is "disposed to uncover and refer to some coherent, continuous, and sovereign presence that at once generates meaning and imposes the limits of meaning - an essential and originary presence whose knowing makes possible an adequate rendition of the content of the historical text" (Ashley 1981, 263). The perspective assumed by this modern narrative is one that locates its subject position at one with the modern sovereign state. From this subject position the modern observer is able to gaze back on the history of the laws of war and attribute meaning and locate particular instances within the long arc of evolution which ultimately delivers man, at one with the modern state, to a present position at the culmination of history.

What is the subject position in this modern historical narrative? It is a subject position that is at the center of the evolution of the laws of war, one who is at one with the laws themselves, who the laws work on behalf of, and at whose behest the laws attempt to tame the uncontrollable and chaotic forces at the borders of civilization. The voice of the narrative is one with the law and its guardian the modern state. In this case the subject position that is assumed by those telling the modern historical narrative of the laws of war is that of a definitively modern subject at the center of the sovereign state. The principle of interpretation, which is beyond question, is the element that allows this

²⁵⁸ See (Ashley 1989, 262–264)

procedure because it provides the solid ground from which the terms in the opposition can be situated. When faced with a diversity of possible interpretations logocentric discourse resorts to some particular standard of interpretation in order to produce a single narrative. The particular narrative of history told by this voice happens to be a narrative of history whose telling delivers this particular voice to a position on the throne of history, the only possible position from which such a voice could be so privileged.

5 THE LAWS OF WAR AND THE WORK OF VIOLENCE

And once sent out a word takes wing beyond recall.

Horace 65 BC, Roman Poet

In this chapter I will return to the concept of the "unlawful combatant" as it has been employed in the context of the Global War on Terrorism. I will conduct a reading of three texts: Barack Obama's 2009 Nobel Peace Prize acceptance speech, John Brennan's "The Ethics and Efficacy of the President's Counterterrorism Strategy," and Medea Benjamin's interruption of John Brennan. The purpose of these readings will be to explore how modern narratives of the laws of war function as a discursive field of political play, a contested "intertext" where subjects are incorporated, political boundaries are inscribed, and violent practices are deployed. I will argue that acts of violence and practices of warfare always overflow practices of signification, and attempts to impose boundaries on what they can and do mean. My contention is that narrative accounts of modern laws are employed to write and discipline the range of meanings attributable to particular acts of political violence. These "textual" practices seek to promote particular "monological" narrative accounts of the employment of violence by state versus non-state actors. I will propose a fundamental inability of any particular "author" to finally control or precisely employ textual elements of political violence, and then look for ways that modern narratives of the laws of war attempt to do exactly that. Ultimately I will argue that modern laws of war often represent a desire to employ and control political violence and even provide license for war *outside the law*. In consequence modern laws of war are a fundamentally flawed tool for any kind of truly universal approach to minimizing actual casualties in war. Though modern laws of war

may function to limit violence, they also function as powerful discursive tool for the modern state's desire to competently and precisely employ unlimited violence.

The Myth of Perfectible Violence

In the first two texts there is a central claim that the modern sovereign state can "ethically and effectively" employ violence. This violence is employed on behalf of a universalized subject position implicitly defined as modern "humanity," against dangerous forces that threaten to deprive individuals of their physical security and mankind of its agency over history. There is also a certain anxiety associated with the state's desire to employ and control violence, to use violence as a tool, and a repeated insistence on metaphors of technology, legality, and expertise with regard to the state's use of political violence. This "surgical precision" is described in sharp contrast to the chaotic violence of non-state actors, horrifyingly manifest in the image of the suicide bomber. In the following section I will argue that narratives of state control of violence employ a particular account of the "work" of violence in which the meaning of an act is wholly reducible to the intent of its author. This notion is crucial to the argument for the "ethics and efficacy" of targeted strikes, and the organized employment of state violence. This perspective depends on maintaining a certain blindness toward the intertextual nature of acts of violence and the "signifying overflow," (Barthes 1982, 41) or difference, (Derrida 1982a) that always allows the meaning of violence to escape the control and intent of the author. I will explore this aspect through a reading the above narrative constructions of state violence through the lens of Roland Barthes's (1982) Theory of the Text and Jacques Derrida's (1982b) Signature Event Context.

The Work and Text of Violence

In any act of political violence there are at least two elements: a kinetic element and a communicative element. The kinetic element of armed force is oriented to the reduction of an opponent's material capability. This kinetic effect focuses on destroying tools used by the opponent and is most evident in the idealized form of conventional symmetrical conflicts. In this case the targets of violence are war *materiel* such as tanks, bridges, leadership figures, munitions factories, infantry forces, and so on. In this idealized image of warfare the actual human beings who operate the war machinery are only incidentally targeted. The combat capable soldier is the target, not the human being who occupies his or her body, and it is in these terms that modern laws of war function. Since the desired target in idealized form is limited to material capability those who are *hors de combat* are simply irrelevant to military objectives and can be spared, even cared for, when able.

Violence as political act also always has a communicative element insofar as it functions as a political act. There is always in any act of political violence a threat of further violence, an assertion of power, a demonstration of intent, an assertion of validity, or a work of "justice." The non-kinetic or messaging aspect of political violence is more evident in less idealized conceptions of warfare. In asymmetrical conflict the killing of individual adversaries is overtly both kinetic and communicative insofar as it is meant to "send a message" of deterrence to prospective agents. The overt kinetic element is almost wholly absent in instances of "terrorism" where the physical effects of violence serve as little more than punctuation for the desired political messaging.

The employment of violence as communication by the United States, al-Qaeda, and others participates in a long tradition of "sending messages" through the use of violence or the threat of violence. Even in idealized form all episodes of political violence, a missile strike, a suicide bombing, the movement of gasses and metal, the military art of "killing people and breaking things" can be thought of as "a type of brutal communication" (Booth and Dunne 2011, 19) like speech, writing, and other forms of communicative acts. Political violence functions as political violence through its non-kinetic message whether that message is intended as a warning, a threat of further violence, an assertion of power, a demonstration of the opponent's weakness, or the imposition of fear. The communicative element is what separates a missile strike from a meteor strike, an intentional act from a natural disaster. This communicative aspect of political violence was famously illustrated in George W. Bush's "bullhorn moment" (Walsh 2013) when, standing amid the rubble of the World Trade Center, he declared that "the people who knocked these buildings down will hear all of us soon."

The material form a message takes, whether spoken word, written statement, or bomb blast comprises what Roland Barthes calls a "work." The messaging or meaningful component associated with a work is "text." A work is a physical shell and a medium for text which is the subjective, non-physical, meaningful component of the work. If text is created through works of political violence that enemies can "hear" what, exactly, do they "hear"? How does a work of violence, or a speech act for that matter, transmit a specific message from the sender to the receiver? The "classical" or traditional model holds that messages are inhabited "by one, and one only, meaning, a true meaning, a definitive meaning" (Barthes 1978, 33). This one meaning is wholly reducible to the

intent of the author of the communicative act and what the author *really means* is the true meaning of the message. The text of the message is "that incontrovertible and indelible trace, supposedly, of the meaning which the author has intentionally placed in his work; the text is a weapon against time, oblivion and the trickery of speech which is so easily taken back, altered, denied" (Barthes 1982, 32). This classical notion of the text is of text as vessel which carries the determinate meaning of the work, the message that the author imposed on the work, the difference between literature and pulp, high art and pop art, or between acts of self-defense and acts of terrorism.

The classical model of communicative acts as autonomous vessels harboring authorial intent gives rise to traditional modes of meaning seeking. Operations of "restoration and interpretation" (Barthes 1982, 33) seek to reveal, establish, and maintain the one true meaning of any particular work. As Barthes and Derrida point out, this operation depends critically on metaphysics of truth (Barthes) or presence (Derrida). This notion of meaning is one that is independent of context and somehow metaphysically persistent in any piece of work. This "classical model" of communication is evident throughout the narratives of warfare that have been considered where the authorial intent combined with a work of violence produces a closed system, where "closure arrests meaning, prevents it from trembling or becoming double, or wandering" (Barthes 1982, 33). The intent of the author of violence, whether state or non-state actor, is treated as fully determinate and exhaustive of the meaning of the act of violence.

In *Signature Event Context* Derrida (1982b) explores this metaphysical grounding of the meaning of communicative acts through the element of absence at play in

communication. The absence of the addressee is the postulated driving force behind the development of communication, specifically writing, and the same can be said for works of violence. The need to *send* a message already contains the notion that the addressee is not present. This lack of presence is not necessarily linked to a spatial relationship but rather to the idea that if communication is necessary there must already be some division, separation, and hence absence of the addressee $vis-\dot{a}-vis$ the sender. If this was not the case, no communication would be necessary because the idea or the signified would already also be present in the mind of the addressee. The absence of the addressee is not the only absence involved in the sending of a message, however. The author is also absent from the marks he or she makes, from the written letter or the bomb blast, and thus communication must operate according to certain rules or codes. The possibility condition of writing, given the possible absence of both author and addressee, is the possibility that a message can be deciphered and understood according to the rules by which it was constructed. In this sense every act of communication depends on a set of rules, or grammar, for the encoding and decoding of messages. Seen this way the constituent elements of the message whether spoken, written, pictured, or in this case exchanges of physical force have no inherent meaning in themselves but attain their meaning through their arrangement and their relationships which are specified by the contextual grammars of their composition. The ability of a particular mark, word, or sign to function differently in different contexts is the very possibility condition of writing per se and the codes by which signifiers are arranged, their contextual grammars, are themselves only ever relatable through the very languages they would structure. This interchangeability and repeatability in an infinite number of contexts, which Derrida

refers to as "iterability," "structures the mark of writing itself, and does so moreover for no matter what type of writing (pictographic, hieroglyphic, ideographic, phonetic, alphabetic, to use the old categories)" (1982b, 315).

Were it not for this polysemous capability the form itself would not be communicative. In this sense "iterability" is the possibility condition for symbolic language. The written mark "will constitute a kind of machine that is in turn productive" (Derrida 1982b, 316) and "for the writing to be written, it must continue to "act" and to be legible even if what is called the author of the writing no longer answers for what he has written, for what he seems to have signed, whether he is provisionally absent, or if he is dead, or if in general he does not support, with his absolutely current and present intention or attention, the plenitude of his meaning, of that very thing which seems to be written 'in his name'" (Derrida 1982b, 316). As communication, applications of armed force are "structurally legible" even in the absence of the addressee. Works of violence, like writing, are employed based on a contextual grammar and can be repeated in other contexts, and thus even if the only addressee on earth dies such that there is a "radical absence of every empirically determined addressee in general," (Derrida 1982b, 315– 316) the "writing" can still function to transmit meanings. In order for an act of violence to function as an act of communication, for it to send a message, its very possibility condition is its repeatability in different contexts. Like writing, a missile strike inscribes marks on the material landscape, on bodies, and in the minds of those on the receiving end of the message. Targeted strikes share this characteristic of communication; the same "tool" can be used in different contexts with different meanings. A strike against a tank in a conventional conflict versus a "targeted strike" against a "high value target"

versus a "signature strike" against unknown "militants" to a strike on a United States citizen all share a particular signifier but are productive of a variety of different meanings based on the particular context.

Iterability is the possibility condition of signifiers, of the building blocks of the work, the word, picture, or the bomb blast, and this iterability produces what Barthes calls "signifying overflow" (1982, 41). Any particular signifier always potentially signifies more than any particular signified, always overflows any particular meaning or intention. In any given employment a signifier can always mean more than the meaning to which it has been put to use by its author. The text is, according to Barthes, not something to be interpreted but rather "an explosion, a dissemination. The plural of the text depends, that is, not on the ambiguity of its contents but on what might be called the stereographic plurality of its weave of signifiers" (1978, 159). The text, in Barthes's words, is production rather than product. It is in this sense that the text is never finished producing even when the ink is dry and the author is "finished"; though the author may finish the text never does because "the signifier belongs to everybody; it is the text which, in fact, works tirelessly, not the artist or the consumer" (Barthes 1982, 37). For this reason the text can produce meanings that were not even historically possible for the author to have intended because authorial intent is neither the measure, nor master, of the productive activity of the text.

The classical conception was interested in the "person of the author, or in the rules of manufacture of the work" (Barthes 1982, 42). Textual analysis in this sense calls into question the "exteriority" of the reader from the text, which undermines the ability of

any authorial source to pronounce the meaning of either their own works of violence, the textual component of instances of armed force, or the meaning of the works of others. The author is always absent "from the marks that he abandons, which are cut off from him and continue to produce effects beyond his presence and beyond the present actuality of his meaning, that is, beyond his life itself" (Derrida 1982b, 313). Both the violent act and the written work have a human being that set them in motion, that is somehow responsible for them, yet who does not control their meaning. Derrida argues that there is an "irreducible absence of intention or assistance from the performative statement, from the most "event-like" statement possible" (1982, 327).

If the meaning of the work is not reducible to the intent of the author how can the author be responsible at all if they do not control the meaning that is attributed to their work? Though violence always overflows the intentionality of its author, always communicates more than is intended, this is not to say that authorial intent is completely absent. A particular work does not erase its author but rather has a certain distance from the author with no direct linkage or access; "the intention which animates utterance will never be completely present in itself and its content" (Derrida 1982b, 326). The point is not that the statement in whatever form is absolutely cut off from intentionality, from the "effect of presence and of speech acts" (1982b, 327) but that "these effects do not exclude what is generally opposed to them term by term, but on the contrary presuppose it in dissymmetrical fashion, as the general space of their possibility" (1982b, 327).

Authorial intent is one aspect of one of the contextual landscapes in which an act of communication takes places. Just as the author's intent is never fully present nor finally determinative of the meaning of an act, the author's intent is also never fully absent. An

act of communication always has an inherent notion of source and suggestion that it was created by someone for something.

The proliferation of meaning attributed to acts of violence is also illustrated by Michel Foucault (1995) in *Discipline and Punish*. Foucault considers the dying out of the "gloomy festival of punishment" (1995, 8) as it existed prior to mid-nineteenth century when punishment was exhibited as a spectacle. The sovereign, through the executioner, exercised violence directly upon the body of the condemned in full view of the public. The gallows, the gibbet, and all other manner of torture and execution took place in public as a means of communication between the sovereign and the subject. Rather than the condemned individual, "the main character was the people" (1995, 57) in public displays of sovereign power and violence. The condemned would soon be dead but the people would live on and function as an audience for the message of power sent by the sovereign. Barthes' problem of "signifying overflow" is suggested by Foucault's exploration of the move away from public spectacles of punishment. This move began in the eighteenth century as sovereigns began to realize that they could never finally control how the audience reacted to the spectacle of punishment. The public, "drawn to the spectacle intended to terrorize it, could express its rejection of the punitive power and sometimes revolt" (1995, 59). The public was always found to be an unpredictable reader of the spectacle and the ever greater precision applied to the practice of torture and execution never extended to the meanings that would be read by the public. Foucault's focus is specifically on power effects and on the ways that the sovereign, recognizing this limitation, shifted away from violence publicly applied. The "shame" attributed to "modern justice" which seeks to "no longer touch the body, or at least as little as

possible" (1995, 11) is the reflection of a preference for abstraction in punishment which potentially allows for greater state control over the meaning of practices of discipline by minimizing and hiding physically violent aspects of punishment. In other words, the *work* of punishment becomes hidden and the public becomes dependent on narration provided by the state.

Foucault's account further illustrates that the voice of the author is neither wholly present nor wholly absent in any act of political violence. Not only does this ambiguity not absolve the author of any responsibility for violent work, but it also complicates the ability to limit the meanings attributed to violence. Rather than a surgical employment a work of violence might be better thought of as a release. Its meaning is always partially vacuous, waiting to be filled in, always other and on its way, in transformation, and on the loose. Violent acts are released in an ongoing proliferation of meaning which could never finally be isolated from that which the author would disavow or from that which the author holds at absolute odds from his or her express intent. Seen in this way, no author nor reader can ever pronounce the true or final meaning of acts of violence, not their own nor the works of others. The assertion that one violent act is an act of terrorism while another is not is little more than a political statement and an assertion of a true meaning which relies on a particular metaphysical faith. This political act is a work of "authority and force of a certain historic discourse" (Derrida 1982b, 315) which aspires to impose closure on a multitude of possible meanings.

In the following section I will read three texts through the lens of this irreducible ambiguity of meaning. I will examine how these texts display an anxiety about state

violence and a desire to impose boundaries between the violence exhibited by the modern state system and the violence exhibited by excluded outsiders. I will further explore how this irreducible ambiguity is experienced not only attending the meanings associated with acts of violence but the very identities of the modern state, state system, and excluded "terrorist" others. Consequently these texts exhibit not only practices attempting to found a certain attitude toward the use of violence, but also practices that attempt to found stable identities of self and other. ²⁵⁹

Text 1: Barack Obama, 2009 Nobel Peace Prize Acceptance Speech

On the one hand Barack Obama's 2009 acceptance speech for the Nobel Peace prize has an overt, explicit association with the expansion of peace and with the minimization and avoidance of war. The speech appeals to hope for progress away from the barbarity of the past and toward a transcendental future. Certainly there is an explicit tone of melancholia at the prospect of continued warfare and a simultaneous suggestion that at least incremental progress may be made toward a more peaceful and rational future. On the other this speech is also oriented toward the justification, legitimation, and legalization of warfare, of warfare outside the limits and outside the law, of an *expansion* of unlimited warfare. A universalized subject position is constructed, a collective political identity that is empowered to employ warfare against the fear of its own undoing. Warfare occupies an ambiguous, supplemental position in this narrative that is at once the very essence of pre-modernity yet also the means by which modern mankind

²⁵⁹ Though I have not reproduced the entirety of either of these speeches here the sections I have included are presented in order they are found in the original provide an overview of the general argument.

may transcend that impotent pre-modern condition that continues to pull at mankind's coattails (Foucault 1984, 79).

I receive this honor with deep gratitude and great humility. It is an award that speaks to our highest aspirations -- that for all the cruelty and hardship of our world, we are not mere prisoners of fate. Our actions matter, and can bend history in the direction of justice.

The speech begins with an allusion to a phrase, "the arc of the moral universe is long but it bends towards justice," that is most famously linked in recent memory to Martin Luther King Jr. This phrase has made numerous appearances since at least as early as an 1857 sermon delivered by a Unitarian minister named Theodore Parker and later by Rabbi Jacob John in 1940. These early uses, including King's, share a tone of consolation for those suffering in the "tragic present" that injustice tends to be corrected over the course of the (very) long term. Those who suffer should not focus on their suffering but direct their eyes "to the beyond, wherein the arc of history will be found bending toward justice, victory, and freedom."²⁶⁰ King used the phrase in a 1958 article written for "The Gospel Messenger" where he argues that though this long arc tolerates Caesar and crucifies Christ the tendency towards justice is evidenced by the eventual celebration of Christ such that even the dates of Caesar's life are measured relative to the life of Christ. 261 The version of the phrase that appears in the Nobel Peace Prize remarks, however, articulates a tendency towards justice that is not an attribute of the moral universe but rather a potential inherent in human history. As human potential rather than

²⁶⁰ ("Jews Usher in New Year: Services Conducted at Scores of Synagogues and Temples in City" 1940)

²⁶¹ Martin Luther King, Jr., *Out of the Long Night*, February 8, 1958, in (Morse 1958)

a natural tendency history is bent only through human will and agency. This emphasis is on action rather than patience and the speaker is assuming a pose of exhortation rather than consolation. On this reading it seems that only an active subject is able to escape the prison of fate to become the master of history, while beset on all sides by "cruelty and hardship." This aspiration of man to actively bend history towards justice rather than passively accepting a barbarous fate is the "highest aspiration" of mankind and the most basic end of collective human existence.

But perhaps the most profound issue surrounding my receipt of this prize is the fact that I am the Commander-in-Chief of the military of a nation in the midst of two wars. One of these wars is winding down. The other is a conflict that America did not seek; one in which we are joined by 42 other countries -- including Norway -- in an effort to defend ourselves and all nations from further attacks.

An apparent problem immediately arises, though, because the figure who has just articulated the highest aspirations of mankind also acknowledges a question of his authority to speak on this subject. An apparent contradiction, or confrontation, between two particular figures inhabiting the same body already haunts this narrative from the outset. It might seem that there is a significant division between a Nobel Peace Prize recipient and a wartime president and this division threatens to render the narrative voice fundamentally fractured. Acknowledging this problem, the narrative voice immediately sets to work resolving this apparent fracture and establishing an authority to speak as a unified subject in a voice that can deliver truth and meaning rather than

²⁶² It is interesting to note that Woodrow Wilson, Henry Kissinger, Yasser Arafat, Yitzhak Rabin, Shimon Peres, and George Marshall are all Nobel laureates who were instrumental in the conduct of a variety of instances of 20th century warfare including both world wars.

contradiction and ambiguity. The unification of the narrative voice is conducted through several textual moves.

The striking first move is not to associate the US president with peace but rather to associate the Nobel Peace Prize with the waging of war. A wide array of organized violence employed by the United States military, law enforcement agencies, intelligence services, and hired contractors in diverse locales throughout the spatiotemporal "global battlefield," the very persistence of which threatens to fracture this voice, is encapsulated and quarantined through the employment of the image of two discrete, distinct wars. This encapsulation of state violence in the image of two discrete wars suggests that there are clear boundaries in place within which the state can safely, legally, ethically, and morally employ violence. These boundaries at the same time protect those who are not on the battlefield from the violence that takes place therein. This encapsulation of violence actually replicates a tactical battlefield device known as a "kill box" which is a four dimensional set of coordinates within which weapons can be employed much more liberally than they can outside. In both cases a zone of space-time is marked off in order to separate zones of relative violence. The battlefield "kill box" does not imply a clear distinction between war on the inside and peace on the outside. In Afghanistan, Iraq, and around the world the violence differentials between inside and outside "kill boxes" are a matter of degree rather than a matter of kind. Battlefield commanders occupy a position of authority that can set forth the boundaries of "kill boxes" by defining coordinates, establishing rules of engagement, and deploying forces. In these remarks a subject positions is invoked that, like the battlefield commander, has authority to institute boundaries and identities, fix the underlying meaning of history's narrative arc, and speak the truth of human destiny. The assumption of this authority to speak can be read in terms of Richard Ashley's "paradigm of sovereignty" which enables the speaker to speak from an authority position with this "specific, historically fabricated, widely circulated, and practically effective interpretation of man as sovereign being" (Ashley 1989 269-270). By this first move, then, this narrative voice suggests the ability of the state to competently employ well bounded, disciplined warfare on behalf of this modern subject.

The first conflict mentioned, presumably the war in Iraq, is dismissed as "winding down," a phrase that would stow safely in the past a vast range of difficult questions about the legal, ethical, and moral implications of US involvement in Iraq. ²⁶³ The more important point is the specific mentioning of Norway as part of the forty three nation community which authored this "forced" second war. This mentioning implicates the very body that is now awarding the Peace Prize, and the Peace Prize itself in the authorship of this second ongoing war. In so doing it attempts to break down the apparent opposition between a wartime president and the Norwegian Parliament which appoints the Nobel Committee which awards the Nobel Prize. Not only does this mentioning of Norway serve to resolve the apparent opposition between the President and the Peace Prize, but it would also subsume both figures to a single authorial presence, a unified community of "all nations" which is able to employ this well-disciplined figure of warfare in the pursuit of just ends. In this one statement, then, any apparent fracturing of

²⁶³ In a partial undoing of this stowage the second war is described, by contrast, as one that was forced upon the United States thereby implying that the first war, though no longer dangerously present, was a war of choice.

the narrative voice is resolved as is any division between the figures of the Nobel Peace Prize, the wartime president, and the community of "all nations." Instead, a central figure is invoked consisting of a unified collectivity that embodies mankind's highest aspirations on Earth. With these three subjects now safely unified and empowered in service of the highest aspirations of mankind this narrative voice of "suprahistorical truth" (Ashley 1984, 264) can direct attention to the most pressing matter at hand: the waging of war.

War, in one form or another, appeared with the first man. At the dawn of history, its morality was not questioned; it was simply a fact, like drought or disease -- the manner in which tribes and then civilizations sought power and settled their differences.

And over time, as codes of law sought to control violence within groups, so did philosophers and clerics and statesmen seek to regulate the destructive power of war. The concept of a "just war" emerged, suggesting that war is justified only when certain conditions were met: if it is waged as a last resort or in self-defense; if the force used is proportional; and if, whenever possible, civilians are spared from violence.

This invocation of the modern narrative of the laws of war is precisely the modern narrative discussed in the previous chapter. "War" is as old as the "first man" yet premodern man undertook no efforts to bend the arc of history in a supreme abdication of historical possibility, of the unique responsibility of mankind as a potentially cogent collectivity that could author a rational history. Warfare, though it has appeared in "one form or another," is nonetheless a coherent and ever-present menace that was allowed free reign to realize itself, to work its own particular will, and to write its own story on the all too often scorched earth. The "morality" of warfare seems to have been unquestioned by pre-modern man though it is not clear which questions, exactly, went unasked. Are these questions about the morality of certain practices in warfare, about

torture, the abuse of prisoners, and the killing of non-combatants? Or, do these unasked questions pertain to the morality of engaging in any particular war, as if pre-modern man lacked even the agency to decide whether to embark on this or that particular war and how to behave when so engaged? Or, do these unasked questions pertain to this figuration of war itself, to the morality of engaging in this notion of ritualized warfare in general, of supposing that a zone of space-time can be distinctly created in which violence is contained and employed precisely, in the service of a transcendental history-making effort? It's hard to know which questions exactly went unasked by pre-modern man because they remain unasked here.

What is more clear is that the repetition of this modern narrative of the laws of war aspires to incorporate and stabilize this central presence of a modern subject within this narrative, and to further authorize this particular narrative voice to speak on its behalf. This stability is sought through now familiar means. Pre-modern man is presented as a unified figure drawn in simply negative terms that simultaneously establish the grounds for asserting a similarly unified mirror image in a modern subject. This image of pre-modernity is not supported or justified because it is taken for granted and obvious. It functions as a kind of token foundational truth. The repetition of this image of pre-modernity is here a kind of ritualized price of entry, a possibility condition that enables the speaker to, like *The Lord of the Flies* (Golding 1954), hold the conch and an authority to speak within the terms of this modern discourse. The participation here of the ritualized inscription of pre-modern mankind will provide the foil for the invocation of the central re-inscription of the modern subject and what R.B.J. Walker (2006) calls

the "regulative ideal" of the modern sovereign state, or what Meyer et al (1997) refer to as world cultural models of modern statehood.

In the wake of such destruction, and with the advent of the nuclear age, it became clear to victor and vanquished alike that the world needed institutions to prevent another world war. And so, a quarter century after the United States Senate rejected the League of Nations -- an idea for which Woodrow Wilson received this prize -- America led the world in constructing an architecture to keep the peace: a Marshall Plan and a United Nations, mechanisms to govern the waging of war, treaties to protect human rights, prevent genocide, restrict the most dangerous weapons.

In the transition from the impotence of pre-modernity to the agency of modernity a central subject position is sketched. This figure of a modern subject is the embodiment of humanity, civilization, and is the guardian of the highest aspirations of mankind. Defined against the impotence of pre-modern man this subject position is one that aspires to bend the arc of history. For pre-modern man war happened to him, like "drought or disease," rendering pre-modern man a helpless object of its destructive activity. This modern subject, on the other hand, has subdued warfare, learned to control it through mechanisms and treaties, and has learned to make war a tool that can be directed as he chooses. But, this figure of the modern subject always faces the danger that war can escape from its legal bonds and once again make of moderns its helpless objects. Nuclear proliferators, failed states, and technologically enhanced terrorists all threaten to undo the long domestication of warfare. This is the fear that characterizes this modern subjectivity: a regression to pre-modernity, the loss of historic agency, and a generalized fear of impotence. These are the dangers that the modern subject has been defined against and which can threaten undoing.

What was lacking all along in pre-modernity was the intervention of mankind in the form of law against those natural forces that had for so long run roughshod through history. This collective subject, now legally instituted, is finally on its way toward the justice at the end of the arc of history, the justice that Mandela, King, and others vouchsafed through the moral arc of the universe. The collective subjectivity invoked at the center of this narrative is one with the conventions and interventions of mankind and which is set against the chaos and danger of nature. Only through the development of the Marshall Plan, the United Nations, and the conventions and treaties that underlie them has mankind begun to subdue the forces of chaos that inhabit the margins of human civilization. Modern international law has contained the most destructive impulses of nature, righted mankind's ideological missteps into tyranny, and removed barriers to a single, collective, commercial identity modeled on the ideals exemplified by the United States. The picture is clear: modern international law has enabled an expansion of the figurative borders of modernity, and the inclusion within these borders of refugees from the poverty, tyranny, determinism, inequality, and chaos outside the figurative walls, walls that are now "buckling under the weight of new threats."

The world may no longer shudder at the prospect of war between two nuclear superpowers, but proliferation may increase the risk of catastrophe. Terrorism has long been a tactic, but modern technology allows a few small men with outsized rage to murder innocents on a horrific scale.

This modern subjectivity confronts forces in the world which it divides into manmade conventions and natural forces. As seen above, warfare and danger are associated with the natural, elemental forces that dominated mankind for ages. Set against these natural forces are the conventions of modern international law. This legal

architecture has contained natural dangers in the past but now threatens to "buckle" and enable a resurgence of natural chaos. Here apparitions of empowered others, who are excluded from the nuclear community, threaten to gain nuclear weapons. This danger is not of inclusion or the dilution of the self; the concern is not of another joining the nuclear community but rather of an outsider gaining the power of a nuclear weapon yet remaining an outsider. Likewise "terrorism," which has long existed outside the self-same community invoked at the center of this narrative, threatens to become more powerful while remaining excluded and dangerous. Technological developments have empowered those who are in complicity with natural chaos and thus legal conventions must likewise be empowered in order to maintain a kind of figurative balance of forces.

Moreover, wars between nations have increasingly given way to wars within nations. The resurgence of ethnic or sectarian conflicts; the growth of secessionist movements, insurgencies, and failed states -- all these things have increasingly trapped civilians in unending chaos. In today's wars, many more civilians are killed than soldiers; the seeds of future conflict are sown, economies are wrecked, civil societies torn asunder, refugees amassed, children scarred.

The threats posed to this collective subject do not only come from the outside, however. Threats are also present within the community in the form of the breakdown of the basic building block of that community which is the sovereign state. When breakdown of the community looms the physical security of *us* is threatened; not only are "civilians" exposed to the dangers beyond the borders but even economies, civil societies, and children lose the safety provided by the sovereign state. In short the precious cargo of the sovereign state, the modern subject, is imperiled. What is made clear is that the modern sovereign state provides the unique vehicle for man's transcendental destiny and the sole hope for security from the violence of others. This takes the dual form of

security from external threats such as nuclear proliferators and terrorists as well as security from internal threats such as secessionist movements, insurgencies, and state failures. The modern subject is protected from all these dangers so long as the sovereign state remains sovereign and strong.

The modern state is defined in this narrative as the unique entity competent to employ "war" in a responsible manner that is safely encapsulated by law. This is often considered to be the core criteria for modern statehood. As a consequence "responsible nations" must be ready and willing to use their "clearly mandated" militaries not only for individual self-defense and individual security but also to intervene "on humanitarian grounds" where other states fail to live up to their solemn responsibility to be the guardians of this figure of the modern subject at the center of the narrative. Of particular concern are "failed states" which here are the origins of those "diffuse" pre-modern horrors of terrorism, piracy, famine, human suffering, and instability.

I do not bring with me today a definitive solution to the problems of war. What I do know is that meeting these challenges will require the same vision, hard work, and persistence of those men and women who acted so boldly decades ago. And it will require us to think in new ways about the notions of just war and the imperatives of a just peace.

We must begin by acknowledging the hard truth: We will not eradicate violent conflict in our lifetimes. There will be times when nations -- acting individually or in concert -- will find the use of force not only necessary but morally justified.

The birth of the modern subject is a kind of anti-Eden myth where, rather than a fall from paradise, the modern subject emerged from natural chaos through man's own agency and the development of laws regulating armed conflict. The agency that marked this origin "decades ago" must be renewed today if the modern subject is to live up to the

subject position invoked here. The laws of war have become deficient and lacking in the face of contemporary challenges and must be reinvigorated, perfected, and solidified in their opposition to the natural forces of chaos, war, and disaster. Failure to do so threatens to once again release the kraken of war upon mankind. How is this collective subject to maintain its security and strengthen its conventions? Through the carefully, conventionally managed employment of those very same forces against which legally incorporated the modern subject is defined. In order to maintain the conventional architecture that provides for a well-defined and orderly collective subject, in order to protect this subject from dangers both external and internal, the waging of war is "sometimes necessary." In spite of the fact that the subject position at the center of this narrative is at one with the progressive destiny of mankind to continue to bring natural forces of chaos under control, in spite of the self-evident presence of humanity in this subjectivity, this subjectivity nonetheless lacks the ability to realize itself without the addition of something external to itself. For all its promise this international community is forced to *supplement* its identity with the careful application of those very same forces it is defined against. ²⁶⁴ Convention, then, cannot realize itself without simultaneously contaminating itself with the forces of nature. Law, which is the embodiment of human triumph over war, cannot realize itself with recourse to war.

So part of our challenge is reconciling these two seemingly irreconcilable truths - that war is sometimes necessary, and war at some level is an expression of human folly. Concretely, we must direct our effort to the task that President Kennedy called for long ago. "Let us focus," he said, "on a more practical, more

²⁶⁴ For exploration of the concept of supplement see (Derrida 1980, 289–292, 1998, 144–145).

attainable peace, based not on a sudden revolution in human nature but on a gradual evolution in human institutions.

War as primitive "human folly" is the very opposite of the true identity of this collective subjectivity yet war is nonetheless the tool that this collectivity employs in order to maintain its coherence and self-identity. War is the tool that is employed by modern states in aspiration to actually be the embodiment of modernity here invoked, to actually be man's unique transcendental vehicle for the highest aspirations, to be the only way that man can ever finally arrive, and to be able to employ violence in a way that is made safe for the state's passenger. The living up to this regulative ideal is analogous to Hart's secondary rules because the state that conforms to this regulative ideal should, ought to be, included in that international community even without having to force others to provide that recognition. The regulative ideal of the sovereign state also functions to delimit this political community of "all nations" which has its own boundaries and prices of entry, prices which are manifest in the makeup of the state that is its member, the regulative ideal of the state to which any particular state strives to live up, such that it can be considered part of, a legitimate member of this political community.

How does this regulative ideal function? Through a kind of international consensus where the elements are not actually the state because the state is an aspiration, an ambition, not something that can actually be an effective and unitary agent. The elements are a variety of collectivities and identities none of which is ever finished or stable, among which there are power and voice differentials, a flux of human political practice whose Brownian motion here swells and there ebbs over time. The structure of the international system is nonetheless only which its elements ever make of it through

the reading/writing of political practice, yet the elements are nonetheless constrained, "paradoxically" (Ashley 1989 273) influenced, and empowered by these very relationships they are ever in the process of scripting. Like any political identity, this practice respects neither the horizontal, nor vertical boundaries of the state system, nor those boundaries of the sovereign state itself. Both state and state system function instead as ambitions of this collective ordering mind. Respect for this regulative ideal, or enactment of world cultural models, comes with significant benefits for the modern state and disregarding them can come with significant costs. These costs associated with failing to live up to the regulative ideal can be felt both laterally and vertically in that members of one's own state can criticize the state for not actually living up to the ideal of modern statehood, not to mention the possibility of intervention by other states. This is the way the dispersal of sovereignty is experienced in the state system.

Yet as soon as this supplemental tension is acknowledged its resolution is proposed through a re-prioritization of law, a "gradual evolution of human institutions," those very same institutions that must then be supplemented with warfare. Just when this is beginning to seem hopelessly circular, law which is supplemented by war which is constrained by law which is supplemented by war, a limit condition to this Jacob's ladder appears: the exception.

To begin with, I believe that all nations -- strong and weak alike -- must adhere to standards that govern the use of force. I -- like any head of state -- reserve the

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²⁶⁵ For analysis of this agent-structure problem in international relations see (Doty 1997) and (Ashley 1984, 1989)

right to act unilaterally if necessary to defend my nation. Nevertheless, I am convinced that adhering to standards, international standards, strengthens those who do, and isolates and weakens those who don't.

This supplemental use of exceptional force seems to open to a complete undoing of the distinction between modernity and pre-modernity. Here two aspects of the "regulative ideal" of the modern state are articulated. First, all modern states will "adhere to standards that govern the use of force" in their normal conduct. This ideal strengthens those who live up to it and weakens those who do not. The community of nations has a variety of tools illustrated throughout the Peace Prize remarks, from sanctions to armed conflict, to enforce the regulative aspect of the ideal. The second aspect of this regulative ideal is the ever present possibility of exceptions to the regulative ideal itself, and the abandonment of those very same standards that serve to bound the identity of the modern state. In cases of "necessity" heads of state may pursue "self-defense" even at the expense of strict adherence to the standards that govern the use of force. The dual imperatives of self-defense and necessity, which delimit the permissibility of exceptions to the norm, likewise guarantee that the force that is being resisted is one that emerges from outside this collective subjectivity. In so far as an entity engages in armed aggression and a state of exception is permissibly created this aggressor cannot simultaneously be living up to the regulative ideal of modern statehood. Exceptional transgressions of standards regulating the use of force by the state, tragic as they are, are made necessary by these external dangers and in consequence the state itself cannot be held to blame for the damage thereby incurred. The possibility of an exception to the regulative ideal is thereby included in the ideal itself so long as these exceptions can be justified in terms of the community, the collective subject of the modern subject, and

thereby preserve the unity of this particular political community here referred to as the system of sovereign states.

Nonetheless the modern state employs as part of its construction of its own identity that very force, *warfare outside the law*, that it defines itself against. This inclusion of exceptional warfare in the identity of the modern state contaminates any notion of purity implied in this construction of modernity as it is defined against premodernity. At the limit this figure of the modern subject has not excluded that which is absolutely other, the natural chaos of warfare outside the law, but has actually built into this very identity that which it is simultaneously defined against. This "supplemental" status of exceptional warfare renders the gates of the modern subject's identity *already breached*, and the "barbarians" are already inside!

Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct. And even as we confront a vicious adversary that abides by no rules, I believe the United States of America must remain a standard bearer in the conduct of war. That is what makes us different from those whom we fight. That is a source of our strength. That is why I prohibited torture. That is why I ordered the prison at Guantanamo Bay closed. And that is why I have reaffirmed America's commitment to abide by the Geneva Conventions. We lose ourselves when we compromise the very ideals that we fight to defend. (Applause.) And we honor -- we honor those ideals by upholding them not when it's easy, but when it is hard.

As has been argued above, the principle of necessity always contains an element of decision. The necessity invoked here appears to simply and spontaneously emerge from the outside to imperil the inside. The terrorist's bomb simply appears, ticking away, and the modern state has no reasonable choice but to torture the terrorist, discover the

location, and protect the lives of innocents. 266 If, however, the moment of necessity always arrives through the decision of the head of state then the necessity, the motive for exceptional practices, the exception itself arises from within the community as much as outside. Of course this decision can't actually be neatly localized in the figure of the head of state. Despite the modern aspiration to sovereignty, which is often celebrated as a core element of the regulative ideal of the state, the range of permissibility for exceptional practices is itself dependent on the regulative ideal of statehood, which is a collective ideal and constrains heads of state in their ability to violate international norms even as they simultaneously participate in the creation of those very norms. The decision with regard to necessity and the exception is an ongoing process and practice of that community and of convention rather than nature.

Let us live by their example. We can acknowledge that oppression will always be with us, and still strive for justice. We can admit the intractability of depravation, and still strive for dignity. Clear-eyed, we can understand that there will be war, and still strive for peace. We can do that -- for that is the story of human progress; that's the hope of all the world; and at this moment of challenge, that must be our work here on Earth.

Thank you very much. (Applause.)

²⁶⁶ For contemporary arguments explicitly advocating the torturing of suspected terrorists see *Time to Think* About Torture (Alter 2001) as well as There is a Need to Bring an Unfortunate Practice Within the Bounds of the Law in Debating Terrorism and Counterterrorism, (Dershowitz 2009). ²⁶⁶For discussion of the torture debate in America see also The Torture Debate in America, (Greenberg 2006), Are We in a War? Do We Have an Enemy? (Zizek 2002, 4), "Like a Dog!": Humiliation and Shame in the War on Terror, (Danchev 2006), Torture in the Public Mind, (Nincic and Ramos 2011), Power, Violence, and Torture, (Barder 2009), Torturefest and the passage to pedagogy of tortured pasts, (Thorsten 2009). For arguments against the use of torture by the United States see Torture Violates U.S. and International Law and Should Never Be Allowed (Posner 2009, 308–309), and Torture, Terrorism and the State: a Refutation of the Ticking-Bomb Argument, (Bufacchi and Arrigo 2006),

To summarize Barack Obama's acceptance speech of the Nobel Peace Prize contains a number of textual moves that enable us to further understand how political communities are invoked and how violence is marshaled as a tool for the stabilization of this idea of community, this identity, and the corresponding stabilization of a particular enemy against which the community is defined. First there is an attempt to stabilize the narrative voice, President Barack Obama, who is authorized to speak not only on behalf of the American people but on behalf of the highest aspirations of mankind. This stabilization is accomplished through the textual subsuming of President Obama, the highest aspirations of mankind, and modernity in this single collective subjectivity which takes its place at the center of the subsequent narrative arrangement of human political, social, and spiritual life. This arrangement is then presented as one where mankind is confronted by nature for control of history. Mankind must therefore make a choice: an existence dominated, as pre-modern mankind was, by natural, chaotic forces, impotent and even castrated before the will of nature, drought, disease, and warfare. Or, mankind may conquer nature and submit these forces to man's will through the development of law and institutions and the progressive imposition of justice on nature through law. The matter is one of control and agency. This political community invoked at the center of the narrative has as its highest aspiration the ability to control and the agency needed to bend history according to its will. This identity of mankind as master of fate is set against an image of pre-modern mankind lacking agency, lacking control, and lacking the will to determine its own destiny. This is, in the words of Richard Ashley, an aspiration to submit history to "man's sovereign will" (1989, 269). From this subject position priority is accorded to conventions over nature and to law over diplomacy.

Nature here represents the loss of everything, absolutely everything that defines mankind, an existence devoid of meaning with no progressive trajectory and instead an endless experience of subjection and a brute animal existence, lacking the essential characteristic of humankind: the rational imposition of the will. Framed in these terms man's choice is really no choice at all. Law, institutions, and their steward the sovereign state are synonymous with modern humanity. They are the possibility conditions of true human life, of rationality, and of transcendence. Yet transcendence remains out of reach because juridical mankind has not yet perfected its institutional form. Nature still bedevils mankind, subjecting mankind here and there to war, drought, and pestilence. These dangers lurk in the margins of modernity as do the shadowy figures in complicity with them, ever threatening to derail or waylay man's steady progress. In this sense the juridical incorporation of mankind, the term privileged with a transcendental purity over nature, is still lacking, has not yet arrived at its potential, and must, lamentably, and only for the time being, supplement itself with those very natural forces its seeks to overcome. War takes on this supplemental, unstable position in this narrative, always threatening to undo the purity of either element of the opposition. The modern subject so defined employs a juridical form of warfare, ever more effectively, precisely, humanely, and accurately to combat those natural dangers that threaten this agency. Yes, "we shall overcome" but in the end it is warfare that will save us.

Text 2: John O. Brennan, "The Ethics and Efficacy of the President's Counterterrorism Strategy"

In April of 2012 John O. Brennan spoke at the Wilson Center on the "ethics and efficacy" of the Obama administration's counterterrorism strategy. Remotely piloted

vehicles, or drones, have been in use as part of a targeted killing program since the early days of the War on Terrorism under the George W. Bush administration. This program was officially denied until Brennan's 2012 speech where it was confirmed and described "openly" for the first time.

[President Obama] said that we would carry on this fight while upholding the laws and our values, and that we would work with allies and partners whenever possible. But he also made it clear that he would not hesitate to use military force against terrorists who pose a direct threat to America. And he said that if he had actionable intelligence about high-value terrorist targets, including in Pakistan, he would act to protect the American people.

In Brennan's speech there is a repetition of the broad outlines of the universalized figure of the modern subject as enshrined in the modern sovereign state. This modern subject exercises agency over history and destiny and this agency sometimes requires the use of warfare to combat entities that threaten regression and insecurity. This figure of the modern subject preserves a sense of agency through a certain domestication of warfare by convention and law. In this way warfare becomes subject to, and an instrument of, the modern subject's desire to control its place in history. At the same time this implies that the modern subject is lacking in a certain sense. This lack is man's inability to already be the absolute embodiment of mankind as the master of history. The fact that man has to resort to warfare at all suggests the danger or possibility that mankind could fall from this evolutionary arc, could be waylaid, or even prevented from ultimate transcendence. Thus warfare generally supplements this modern identity and provides the tool that can enable the modern subject to further approach an idealized form. Nonetheless even this modern legalized form of warfare is not quite sufficient to complete this central identity. When confronted by a Schmittian contingency, here taking the form of "terrorists," exceptional practices of warfare may be employed above and beyond legal norms of state behavior. The promise to uphold laws, values, and multilateralism is contingent on normal circumstances. "Terrorists" constitute an exceptional threat inhabiting the far side of the "but" clause in this statement. In consequence "we" must sometimes meet "terrorists" on their own terms and utilize warfare that is not restrained by law.

The key distinction between "us" and the terrorists is that "we" desire to "uphold the laws and our values" and to respect the core ideals of the international community even when we choose not to. "We" only depart from law when forced to by the exceptional threat posed by terrorists. Thus even in those instances when "we" make exceptions to "laws and our values" it is still in defense of those very laws and values in the face of exceptional threats. When conditions of necessity arise violence will be employed by the United States to defeat threats even if this requires setting aside laws, values, and partners. In the very first lines of this speech on ethics and efficacy Brennan inverts this ordering and makes clear that so long as it is in service of this universalized figure of the modern subject, efficacy trumps ethics.

As a matter of international law, the United States is in an armed conflict with al-Qaida, the Taliban, and associated forces, in response to the 9/11 attacks, and we may also use force consistent with our inherent right of national self-defense. There is nothing in international law that bans the use of remotely piloted aircraft for this purpose or that prohibits us from using lethal force against our enemies outside of an active battlefield, at least when the country involved consents or is unable or unwilling to take action against the threat.

The suggestion that targeted strikes would be undertaken against "terrorists" even in Pakistan illustrates the exceptional nature of this conflict, but also suggests an anxiety

inducing permeability of revered and ritualized political boundary functions.

Consequently there is a re-inscription and stabilization of boundaries on new terms. The enemy and potential object of violence is defined as al-Qaida, the Taliban, and also "associated forces" yet this definition is also fundamentally ambiguous and undefined. The battlefield is also re-inscribed by creating a distinction between an "active" battlefield and "outside" an active battlefield. The potential for concern for what, exactly, "outside" an active battlefield might mean is assuaged by the suggestion that this is limited to "at least," though potentially in addition to, states that are unable or unwilling to combat terrorists. This effectively establishes that the "outside" which is subject to these strikes is also the outside of the international community. Any state unable or unwilling to combat terrorists on their own soil is simply not a modern state at all.

Targeted strikes conform to the principle of necessity, the requirement that the target have definite military value. In this armed conflict, individuals who are part of al-Qaida or its associated forces are legitimate military targets. We have the authority to target them with lethal force just as we target enemy leaders in past conflicts, such as Germans and Japanese commanders during World War II.

Extralegal lethal force is potentially problematic, however, because as I have argued above this central modern subject is defined against pre-modernity precisely through the legalization of armed conflict. The identity of this modern subject is predicated on, and defined by, obedience to modern laws of war. Remaining within the law enables the modern subject to employ warfare without being dominated by it, without losing control, and without abandoning a definitive historical agency. As warfare had to be domesticated in order to support rather than undermine the construction of the figure of the modern subject, exceptional armed force must likewise be domesticated such that

the modern subject can make use of extralegal violence without imperiling the constitutive distinction between the modern subject and pre-modern "terrorists."

Where normal warfare was domesticated by the modern subject through the laws of war the exceptional use of armed force is domesticated through appeals to mythologies of technology and a boundless faith in a metaphysical persistence of authorial intent. In order to found this notion of domesticated warfare there is an explication of the legal boundaries which serve to quarantine the effects of war waged by the state. Even through exceptional military force is employed it is distinct from barbarism because "targeted strikes" are *intended* to distinguish between military and non-military targets. Targets are selected because they are legitimate military targets and more importantly because "they" are "our" enemies. Al-Qaida and associated forces are here marked off as distinct entities that are endowed with particular meanings. These are groups to which individuals either belong or do not belong. They are groups which are homogeneously distinct from their surroundings. In so far as these groups are actual discrete entities that can be referenced and grouped under a single name they are also targetable in isolation from that which surrounds them. Individuals either are, or are not, members of these groups and membership produces a "military target." The question of what actually constitutes one of these groups and how membership is determined is not taken up here and in fact remains "veiled" (Barthes 1982, 39) behind secrecy and classification. Secrecy functions according to the classical model of the text which conceals a single true meaning that can be accessed only through a correct reading. The secrecy surrounding "sources and methods" suggests that modern intelligence services are capable of these correct readings

but must keep the details secret lest our adversaries attempt to mislead these intelligence readers.

Targeted strikes conform to the principles of distinction, the idea that only military objectives may be intentionally targeted and that civilians are protected from being intentionally targeted. With the unprecedented ability of remotely piloted aircraft to precisely target a military objective while minimizing collateral damage, one could argue that never before has there been a weapon that allows us to distinguish more effectively between an al-Qaida terrorist and innocent civilians.

Now that a discrete "military target" or "military objective" has been produced by this voice with access to the meanings and identities behind the veil of secrecy, the claim can be made that technology allows the precise application of lethal force to just these entities. There is a recurrence of the familiar opposition between terrorist and civilian where both are closed categories that are clearly bounded. The principle of distinction is thereby not only preserved but enacted more effectively than ever before through the use of technologically advanced weaponry to strike military targets precisely with very little "collateral damage."

The principle of distinction seems to be applied inconsistently, however. The use of the label "terrorist" is predicated on the lack of exactly this kind of distinction between civilian and militant. The state engages in "military strikes" while terrorists commit "murder" and "unlawful combat" precisely because terrorists are essentially indistinct from civilians. "Terrorists" do not sufficiently protect civilians and "terrorists" do not sufficiently distinguish themselves from civilians. The lack of this very distinction is the essential difference between armed forces and terrorist groups; it is the foundation of the identity and figure that is constructed as the adversary in this conflict. This difficulty is

not simply due to their clothing or attempts to blend in with the populace but actually because in many cases those who are deemed to be terrorists are deemed so because they do not have legal authority to employ force due to their civilian status. In other words in this narrative to be a "terrorist" one must first be a "civilian." When the context is targeting and the application of force, however, there is an invocation of a clear boundary between "terrorists" and "civilians" such that, with the help of new technology, modern militaries are better able to distinguish between military and civilian objectives than ever before. The phrasing at the end of this section which repeats the terrorist versus the civilian motif creates an impression that there is a clearly discernible distinction and that given the right technology correct targeting is little more than processing algorithms quickly enough. In addition a clear trajectory of progress is indicated by the idea that "never before," not even in World War II was the principle of distinction between combatants and civilians more solidly instituted.

Targeted strikes conform to the principle of proportionality, the notion that the anticipated collateral damage of an action cannot be excessive in relation to the anticipated military advantage. By targeting an individual terrorist or small numbers of terrorists with ordnance that can be adapted to avoid harming others in the immediate vicinity, it is hard to imagine a tool that can better minimize the risk to civilians than remotely piloted aircraft.

In order to further illustrate the high level of control exercised by the United States in the application of lethal force a kind of programmatic, technical language is employed. "Targeted strikes," "anticipated military advantage," the targeting of "individuals" and "small numbers" with "adaptable ordinance" via this technologically advanced "tool" create a context of scientific precision in which the application of force is conducted as a kind of surgical procedure.

For the same reason, targeted strikes conform to the principle of humanity which requires us to use weapons that will not inflict unnecessary suffering.

In fact even the act of detonating an explosive in the immediate proximity of human beings is sanitized in a way that suggests an instance of euthanasia rather than battlefield violence, of surgery rather than paroxysm.

In addition, compared against other options, a pilot operating this aircraft remotely, with the benefit of technology and with the safety of distance, might actually have a clearer picture of the target and its surroundings, including the presence of innocent civilians. It's this surgical precision, the ability, with laser-like focus, to eliminate the cancerous tumor called an al-Qaida terrorist while limiting damage to the tissue around it, that makes this counterterrorism tool so essential.

The surgical metaphor becomes more explicit as al-Qaida is compared to a cancerous tumor. On the one hand the modern war-fighter is drawn as a technically competent surgeon with heroic powers to precisely employ life-giving tools and craft. The surgeon is defined against the cancerous tumor with its attendant implications of uncontrollable violence and destructive power. The cancer metaphor invokes an opponent that is well defined and encapsulated in a tumor that is distinct from surrounding tissue. The cancerous tumor is a non-sentient being and an aberration that has no rationality. Its only animation is a tendency to expand and destroy life. The laser-like elimination of tumors is not even an act of killing but is rather an act of salvation; it is a gift of life. Tumors are simply, like the Cthulhu cultists, a thing that should not be.²⁶⁷

As the president and others have acknowledged, there have indeed been instances when, despite the extraordinary precautions we take, civilians have been

²⁶⁷ See note 79.

accidently killed or worse -- have been accidentally injured, or worse, killed in these strikes. It is exceedingly rare, but it has happened. When it does, it pains us, and we regret it deeply, as we do any time innocents are killed in war. And when it happens we take it very, very seriously. We go back and we review our actions. We examine our practices. And we constantly work to improve and refine our efforts so that we are doing everything in our power to prevent the loss of innocent life. This too is a reflection of our values as Americans.

The acknowledgement of the "exceedingly rare" occurrences where "civilians" have been killed continues to invoke a stable notion of "terrorist" and "innocent civilian" and relegates the deaths of "civilians" to little more than calculation error, an inevitable occurrence akin to a workplace accident or the surgical excision of some infinitesimally small portion of healthy tissue surrounding a tumor. The important point is that "we" are doing "everything in our power" to prevent the deaths of "innocents." This renders those innocent deaths effectively beyond our power, unintentional, and attributable to the fact of war itself, to the final uncontrollability of warfare which of course is the reason that mankind recoils from war in the first place and seeks to bend history away from it. The fact of these innocent deaths, though, cannot actually call into question the enterprise itself because the deaths of civilians are unintentional. "Collateral damage" does not detract from the enterprise of war because collateral damage is an aberration, an accident, or deficiency that is not an act of war *per se* but rather a side effect or chance occurrence. Because the state didn't *mean* to inflict collateral damage then the deaths of these civilians are categorically different and the state, "pained" as it is, can review its actions and improve its processes thereby offering the promise that collateral damage will be that much less in the future as the state becomes better and better at waging war. The deaths of innocents are then a kind of acceptable price paid for the good provided by the surgeon. The fact of these horrors is explained by the promise of a positive historical

trajectory. Through ever better processes and improvements to technology fewer and fewer civilians can be killed and warfare can be ever improved, disciplined, and controlled.

But I am certain about one thing. We are at war. We are at war against a terrorist organization called al-Qaida that has brutally murdered thousands of Americans, men, women and children, as well as thousands of other innocent people around the world. In recent years, with the help of targeted strikes, we have turned al-Qaida into a shadow of what it once was. They are on the road to destruction.

The narrative of a desperate struggle against terror, murder, and brutality suggests that the authorial intent of targeted strikes, the "one thing" that is certain, is their fundamental justification. This subject position is aligned with innocent men, women, and children against murderous terrorists. The meaning most fundamentally attributed to these actions is a resistance to evil. This suggests the sense of necessity that permits the modern state and modern state system to employ exceptional violence. It suggests that this campaign of targeted strikes has been an effective, helpful tool against these enemies. It associates the author of exceptional lethal force with innocence and the targets of this lethal force with terror.

Yes, war is hell. It is awful. It involves human beings killing other human beings, sometimes innocent civilians. That is why we despise war. That is why we want this war against al-Qaida to be over as soon as possible, and not a moment longer. And over time, as al-Qaida fades into history and as our partners grow stronger, I'd hope that the United States would have to rely less on lethal force to keep our country safe.

This is the clearest illustration yet of the ambiguous, supplemental, undecidable aspect of modern warfare. In this general narrative warfare is a natural force that brings tragedy and destruction to human beings and it is imposed from outside by "al-Qaida," an

awful intrusion of chaos and danger that kills beyond the control of human beings. Yet it is also an instrument that "we" use in order to force "al-Qaida" to recede into history where it can longer impose disaster upon "us." Escape from the "hell" of war is an imperative that provides license for efficacious measures whatever their ethical implications. This is a war that must be waged and won at any cost in order to safeguard a future in which the United States can rely less on lethal force.

Again there is a distinction between violence as employed by the international community and violence employed by others. When civilian deaths are mentioned they are attributed to the nature of war. These civilian deaths are regrettable but are understandable because they are unintentional byproducts of a necessary war. This distinction suggests that modern war par excellence, waged only by the modern state does not engage in any of the chaos involved in barbarity, murder, and so on because these are not the *intend* effects of state violence. Certainly mistakes, the killing of innocents, and occasional violations of standards occur, such is the reality of war, but these instances are a corruption of war per se, they are impurities, and are not actually indicative of modern warfare, but rather the failure of any particular act of war to live up to the ideal form. The "war by standards" employed by the modern international subject tightly regulates and determines the intentions by which it is put to use and the truth of these intentions shields the author from moral or ethical culpability for "collateral damage." As has been indicated above, however, war within the law cannot account for every situation and even the pure form of warfare must, in extreme cases of necessity, draw on a lack of restraint to get the job done. This is evident in the instances above where the possibility of necessity and exception are invoked; the exception provides the

supplement for normalized, idealized warfare, the ever-present possibility, installed in the regulative ideal of the modern state, that warfare may have to be *let off its leash*.

In a question and answer session that followed these remarks a State Department employee asked how those involved in "targeting" "are held to appropriate standards, and processes as we ask them to act as prosecutors, judges, and juries, and how we can ensure that intelligence is held to the same standards and processes that evidence is?" The response provides insight into how exactly the category the enemy is portrayed in this narrative:

Okay, well as I tried to say in my remarks, we're not carrying out these actions to retaliate for past transgressions. We are not a court, we're not trying to determine guilt or innocence, and then carry out a strike in retaliation. What we're trying to do is prevent the loss of lives through terrorist attacks, so it's not as though we're, you know, sort of judge and jury on, again, their involvement in past activities. We see a threat developing, we follow it very carefully, we identify the individuals who are responsible for allowing that plot and that plan to go forward, and then we make a determination about whether or not we have the solid intelligence base, and that's why I tried to say in my remarks, we have standards ... We only decide to take that action if there is no other option available, if there is not the option of capture, if the local government will not take action, if we cannot do something that will prevent that attack from taking place, and the only available option is taking that individual off of the battlefield, and we're going to do it in a way that gives us the confidence that we are not going to, in fact, inflict collateral damage. So again, it really is a very rigorous system of standards and processes that we go through.

Here again distinct identities and categories are invoked. Individuals are not targeted because of what they have done but instead because of what they intrinsically are, what archetypal identity they are marked by, and because of the things they will do in the future. "Unlawful combatants," "terrorists," and others do not join these categories because of what they have done in the past but because they *are* these identities the determination of which continues to take place behind the veil of secrecy. Continuing the

metaphor of warfare these individuals are "taken off of the battlefield" based on the fact that they are engaged in warfare on behalf of a hostile force, because they are actively engaged in an attack on the United States and the international community of which it is a part.

You make reference to signature strikes that are frequently reported in the press. I was speaking here specifically about targeted strikes against individuals who are involved. Everything we do, though, that is carried out against al-Qaida is carried out consistent with the rule of law, the authorization on the use of military force, and domestic law. And we do it with a similar rigor, and there are various ways that we can make sure that we are taking the actions that we need to prevent a terrorist attack. That's the whole purpose of whatever action we use, the tool we use, it's to prevent attack, and to save lives. And so I spoke today, for the first time openly, about, again, what's commonly referred to in the press as drones, remotely piloted aircraft, that can give you that type of laser-like precision that can excise that terrorist or that threat in a manner that, again, with the medical metaphor, that will not damage the surrounding tissue, and so what we're really trying to do -- al-Qaida's a cancer throughout the world, it has metastasized in so many different places, and when that metastasized tumor becomes lethal and malignant, that's when we're going to take the action that we need to.

Here a question about "signature strikes" is acknowledged but not engaged as if John Brennan is not ready to speak "openly" about the targeting of anonymous individuals. Instead the narrative of "ethical and effective" use of targeted killings is repeated and the control that the United States exercises over these applications of violence is reasserted. The "tool" of "remotely piloted aircraft" enables "laser-like precision" in order to "excise" the "lethal and malignant" "metastasized tumor" without "damage to the surrounding tissue." The extent to which the use of force is framed in

Most discussion of 'signature strikes' has taken place off the record and their use is generally not acknowledged by the Obama administration. Nonetheless a ban on their use was recently unsuccessfully advocated by three members of the United States House Intelligence Committee (Gerstein 2013). See also (Greenfield 2013; G. Miller 2012; Rosenthal 2013; Shane 2012)

terms of technological precision and control suggests an anxiety about the level of control exercised over violence. Repeated use of the word tool, medical analogies, lasers, and legality all suggest a level of absolute control. The only indication that this control is not complete is the acknowledgement of the occasional killing of civilians, a fact that cannot be absolutely denied due to the proof provided by dead and damaged bodies, and which is still acknowledged in a way to minimize its impact on the narrative. This imagery is used to imply and express that even in the exception, even when supplementing law with nature, the modern subject still has perfectible control. Brennan argues that targeted killings are legal and that not only does the United States have both national and international legal authority to undertake these strikes but the United States also goes above and beyond by making sure that the individuals are a credible threat and that they are targeted in a way that ensure that innocent people are not killed.

To summarize, this speech contains an overarching claim that the United States' use of lethal force and exceptional warfare is "ethical and efficacious" and can be used in a manner that simultaneously provides control over mankind's destiny yet maintains a distinction between the modern subject and it's others. First modern narratives of the laws of war are put to work to produce an image of modern warfare that is conducted within the law such that violence is tightly controlled in idealized form and directed only at war *materiel* and never at modern humans themselves. In idealized form human beings are injured and killed only incidentally, as collateral damage in the targeting of war making capacity. Even when soldiers are targeted they are not targeted as human beings but as instruments of state power and for this reason the goal is to render them *hors de combat* rather than individually *morte*. As such modern warfare in its *true* form

is as safe as possible for modern humans and causes no more damage, death, and destruction to this central figure of the modern subject than is absolutely necessary. If modern human beings are called on to "give their lives" in war it is because there was simply no alternative. In modern narratives of the laws of war there is an idealized image of warfare which is made as safe as possible for modern humans when practiced only by the modern state.

Modern warfare must sometimes be supplemented with exceptional use of force. The modern form of legally domesticated warfare is not sufficient to address all threats. Thus exceptional measures must sometimes be taken in order to address "direct threats" such as terrorism. This kind of warfare *outside the law* threatens to dissolve the very domestication of warfare that the identity of the modern subject is predicated upon. This anxiety is allayed through a second strategy for the instrumentalization of political violence which depends on conceptualizing acts of violence through technological imagery and an unbounded faith in the metaphysical persistence of authorial intent. This shift provides a kind of rationalized structure that constrains and domesticates acts of violence, and offers the promise that warfare is progressively more controlled and disciplined even when it takes place outside the law. Through technology, man's prosecution of warfare can be linked to a material force of endless progress. If war is now employed through technological processes, and modern technology is increasing at an ever more rapid rate, the controlled employment of political violence is likewise ever more perfected. This increasing technological mastery of the instruments of organized violence enables the modern state to suggest that even if the practice of war results in

occasional instances of "collateral damage" these instances are increasingly, even "exceedingly rare" as violence is applied ever more "surgically."

The most fundamental distinction between the violence employed by the United States and the "international community" versus the violence employed by "terrorists" is one of intent. Even in those instances where the United States or others employ exceptional lethal force outside the law, when a modern state engages in violence in a manner inconsistent with the normal practices of "regulative ideals" or "world cultural models" of modern statehood, when this figure of the modern subject undertakes practices that result in "collateral damage," even then these actions are wholly determined and justified based on the intentions of their authors. The remotely piloted vehicle operating against "terrorists" undertakes acts of "justice" in order to provide "safety" to "innocents" from those dedicated to a "murderous cause." The War on Terrorism is conducted on behalf of the rule of law if not always in accordance with it. John Brennan discussed one by one the principles of distinction, proportionality, and humanity and argued that even exceptional violence is in service of these principles while perhaps discarding those laws which modern reality has rendered obsolete. The fundamental element that "makes us different from those whom we fight" is that "we" "remain a standard bearer in the conduct of war" while "they" are "a vicious adversary that abides by no rules." "Our" conduct of war is well intentioned and in service of mankind's highest ideals while "their" violence is in service only of chaos and danger. When "we" abandon the rules and laws of war it is justified by our good intentions; when "they" abandon the rules and laws of war it is unjustified due to their ill intentions.

Text 3: Medea Benjamin's Interruption of John Brennan

At a certain moment during John Brennan's speech he is interrupted by Medea Benjamin who stands up from the audience and makes a statement as she is forcibly taken from the room. Medea Benjamin's interruption of John Brennan illustrates the role of imposed silence in political practices oriented toward controlling the meaning of state violence. First, Medea's interruption is cleanly excised from the transcript of Brennan's speech. When reading the transcript there is no indication of the interruption at all except for an odd discontinuity and an unusually placed "thank you." Here is how the interruption appears in the Wilson Center transcript of the speech:

More broadly, al-Qaida's killing of innocents, mostly Muslim men, women and children, has badly tarnished its image and appeal in the eyes of Muslims around the world.

John Brennan:

Thank you. More broadly, al-Qaida's killing of innocents, mostly men women and children, has badly tarnished its appeal and image in the eyes of Muslims around the world.

In order to explain this discontinuity one must look to the video of the speech which reveals the excised interruption. An unabridged transcript would read:

More broadly, al-Qaida's killing of innocents, mostly Muslim men, women and children, has badly tarnished its image and appeal in the eyes of Muslims around the world.

Medea Benjamin:

Excuse me, Mr. Brennan, will you speak out about the innocents killed by the United States in our drone strikes? What about the hundreds of innocent people we are killing with drone strikes in the Philippines, in Yemen, in Somalia? I speak out on behalf of those innocent victims. They deserve an apology from you, Mr.

Brennan. How many people are you willing to sacrifice? Why are you lying to the American people and not saying how many innocents have been killed?

I speak out on behalf of Tariq Aziz, a 16-year-old in Pakistan who was killed simply because he wanted to document the drone strikes. I speak out on behalf of Abdulrahman Al-Awlaki, a 16-year-old born in Denver, killed in Yemen just because his father was someone we don't like. I speak out on behalf of the Constitution and the rule of law. I love the rule of law and I love my country. You are making us less safe by killing so many innocent people. Shame on you, John Brennan.

John Brennan:

Thank you. More broadly, al-Qaida's killing of innocents, mostly men women and children, has badly tarnished its appeal and image in the eyes of Muslims around the world.

The published transcript silences this particular voice that is trying to speak an alternative interpretation of these targeted killings. Medea Benjamin was not on the speaking agenda and she did not wait until the question and answer session to speak and so her voice was partly silenced out of certain decorum as any radical voice of protest would have been regardless of message. Nonetheless her interruption represents a threatened proliferation of meaning that is directly at odds with the performative aspects of John Brennan's speech. The excised transcript represents not a record of reality, a record of what actually happened, but a record of the intended reality, of the performance that John Brennan and the Wilson Center intended to take place. Suggesting comparisons to the refusal to listen to or negotiate with "terrorists," Benjamin's voice is here disappeared from the work of the speech and consequently the text is also altered by the addition of an (almost) unnoticed silence.

It is also important to note that Medea Benjamin is not attempting to impose a silence on John Brennan. Though she does interrupt him, the text of her speech is an

exhortation for Brennan to speak, an exhortation to speak the voice of the other and to allow this voice to be heard. Questions are posed and demands are made for an apology that do not silence John Brennan per se but attempt to force him to discontinue some of the practices of silencing that are already at work in his very speech. What Medea Benjamin's interruption illustrates is that in the very act of speaking John Brennan is not only enunciating certain ideas but he is actively working to silence others. Benjamin's interruption is a momentary hearing of a multitude of silenced voices, the voices of "innocents" in the Philippines, Yemen, and Somalia, the voices of children who have been killed, and the voices of Americans and members of the "international community" in whose name these actions are taking place. Yet as quickly as they are heard by those in the audience they are again silenced by John Brennan's refusal to acknowledge, the security personnel's removal of Medea from the room, and the Wilson Center's excision of her voice from the written record. As has been argued above the Obama administration has no privileged metaphysical ground from which to argue that these voices are illegitimate or irrelevant. The possibility of their perceived legitimacy and the chance that today's public might still share some of those same stirrings of sympathy that forced the cloistering of the spectacle of punishment cause the Obama administration qua modern state to continuously silence and marginalize such voices that insist on the ambiguity of state violence.

Most fundamentally Medea Benjamin's interruption of John Brennan illustrates that the modern narrative of which Brennan's speech is a productive part is not fully universal. Claims to universality are revealed to be a part of the intended *effect* of the narrative rather than the ground upon which it stands. To speak the *truth* of modern

civilization, of modern humanity, of a universalized international modern subject involves a necessary silencing of alternative voices that would speak alternative truths. Medea is silenced because the voices for which she aspires to speak cannot be part of a conversation that takes for granted their "collateral" status. This modern narrative and universalized modern subjectivity at its center are defined by the controlled employment of violence. To hear the voice of those who would argue otherwise is to call into question the entire modern project of identity creation of which John Brennan's speech was a celebrated part. In consequence Medea Benjamin's interruption is simply irrelevant and outside the scope of the violent work to which John Brennan and the Wilson Center were dedicated.

Reading Signatures, Releasing Violence

The idea of the "signature strike" has haunted the whispered periphery of debates on the conduct of the War on Terrorism "off the record" and in the shadows. The "signature strike" is apparently a kind of targeted strike in which targeting is based on a "pre-identified 'signature' of behavior that the US links to militant activity" (Greenfield 2013). The signature in this case functions as a distinctive mark of identity determinative enough that the United States undertakes applications of lethal forced based on this signature alone. Patterns of behavior have apparently been identified that can only have a particular meaning and associated hostile identity and thus the identity of an individual can be determined even in the absence of his or her proper name or background. This kind of targeting has not been openly acknowledged by the Obama administration. However it can be argued that the "signature strike" is not so different from the practices of targeted killing that have been acknowledged and explained by John Brennan and

others. If, as I have argued, the identities of "unlawful combatant," "terrorist," "modern mankind," and "international community" are ongoing practices of articulation and construction that are never finished or finally determined, if identity is a kind of textual effect of behavior and practice which always overflows any particular signifier, then all targeted killings undertaken by the Obama administration are "signature strikes" because a single, determinate identity of any individual does not hinge on a proper name or historical narrative. Instead all "terrorists" are targeted based on certain markers of identity that are fundamentally ambiguous and inconclusive.

The presence invoked by a signature, whether it is a celebrity autograph, a presidential signature on a kill order, or the "signature" of militant activity is presumed to transmit a message that is actually present in the transmission. This understanding of a signature depends on a metaphysical persistence of meaning inherent in all of these instances of signatures. The signature in the case of targeted killings is the mark of the idealized form of the "unlawful combatant." This signature has a pattern, a repeatable form, which is understood to represent the presence of the abstracted identity here and now. By whatever patterns of movement or behavior that constitute this signature the observer can identify the hand of the abstract enemy writing its name on the discrete bodies under surveillance. Like a literal written signature marks a page in order to indicate authorial presence, at one time and thus for all time, the signature behavior of the "terrorist" marks particular bodies with the presence of the abstract enemy manifest here in these bodies through this signature. Yet these bodies are not the author itself, not the abstract enemy form, but merely the marks that the author makes on the human landscape.

The signature, like all writing, has as its possibility condition the idea of iterability or différance discussed by Derrida (1982b) in Signature, Event, Context. As has been argued above, this polysemous capacity is the possibility condition of language including the signature function. In order to be recognized as a signature a mark or pattern must be able to be used in multiple contexts. Again, as Derrida has argued, the written mark "will constitute a kind of machine that is in turn productive" (1982b, 316) and "for the writing to be written, it must continue to 'act' and to be legible even if what is called the author of the writing no longer answers for what he has written, for what he seems to have signed, whether he is provisionally absent, or if he is dead, or if in general he does not support, with his absolutely current and present intention or attention, the plenitude of his meaning, of that very thing which seems to be written 'in his name'" (1982b, 316). If the signature, in whatever form, can function when transplanted from one context to the next without restriction based on intended audience or intended meaning then the signature in any context must acquire its meaning through the process of reading rather than from the original instance. There is simply no chain of custody that could account for the transmission of meaning from one context to the next via an iterable code.

Seen in this way the determinate meaning of the signature of a "terrorist" identity is not due to an underlying reality that is transmitted in its purity through this signature but is rather due to the processes of reading that determines what this signature here and now means. Put more simply this signature is not necessarily the faithful transmission of the intentions, identity, motives, and essence of the individual under surveillance which are the very criteria, according to John Brennan, upon which individuals are targeted.

The signature as marker of identity is always associated with alterity or the possibility of otherness. In this sense there is little difference between targeted killings in which the name of the target is known and so-called "signature strikes" in which it isn't. In both cases targeting is based on the signature of an identity that cannot actually be simply transmitted by an iterable code whether that is a particular pattern of behavior or a proper name.

The more startling implication of this line of thought is that the authorial signature on the strike itself, the intent of the author of violence is likewise not fully determinate of the meaning of the work. The message or meaning of the signature strike is not actually present in the transmission, in the employment of the iterable form of political violence. The meaning of a signature strike is created in the reading of the work and the production of the text which takes place, not in the precision of the laser guided weapon or the press conference, but at dispersed sites across the globe and even in dark corners into which modern surveillance has yet to penetrate. No matter the increase in technology or the ever greater precision of weapons placement, the text of the signature strike and thus its meaning is in production well outside the control of its authors. Like writing, political violence is this semantic drift and iterability. A single, pure meaning is never simply transmitted by an act of violence; violence is always released and let loose, given over to others to read and re-write, endlessly open to meanings that the author "does not support, with his absolutely current and present intention or attention, the plenitude of his meaning, of that very thing which seems to be written 'in his name'" (Derrida 1982b, 316). The author of political violence can never ensure what the work of violence doesn't mean, the author can never prohibit this signature strike from being read as

terrorism, murder, chaos, horror, barbarity, savagery, and all those other attributes that the modern author of violence defines itself against. This is not to say that the author cannot prohibit a *misreading* of his work. There simply is no ground on which to claim that such readings of targeted killings are misreadings, otherwise defective, or incomplete. It is only possible to make such an argument from the very subject position at the center of the modern narratives that employ violence and widespread textual mechanisms of justification for that violence. By these narratives participants in this modern subjectivity-producing discourse seek to impose limits on the possible meanings of political violence and to determine once and for all the meanings attributed to the violence employed by outside adversaries. These limits and determinate meanings are only ever stable and effective for those who adopt the modern narratives that have been discussed thus far. In spite of these widespread efforts to control meaning this control cannot extend to those who do not accept such narratives. The message that others "hear" is beyond the ultimate control of the author and thus violence always ultimately slips from the author's grasp. The author can't even finally determine who the people are that have been killed because their identity isn't fixed, the entirety of the message is not under the author's control, and the control of meaning is always surrendered to others with every act of violence. This makes any distinction between "our" violence and "their" violence that is based on the intent of the author fundamentally unstable and out of control.

This inability to finally control the meaningful content of acts of violence gives rise to a certain experience of anxiety displayed by the modern state. Unlike the disciplining of criminals the state is not simply able to hide away these acts of violence

directed at those outside their borders or who escape their control. Nonetheless this inability to finally exercise control leads to ever greater efforts by the modern state to do just that, to conceal the ambiguous work of violence, to pretend control, and to attempt to impose boundaries on the proliferation of meanings attributable to acts of state violence. Through a variety of textual practices the modern state attempts to invoke certain boundaries and attribute certain meanings to works of violence that are inherently political, that are the effects of desire rather than truth, and that involve political practices of empowering certain speech and silencing others. The discourse of the laws of war can be seen in this context as a field of practice on which the modern state and modern state system attempt to impose certain readings of the meaning of acts of violence, to legitimize those acts of violence undertaken by the state and the state system and delegitimize those acts undertaken by non-state outsiders. Modern laws of war and their attendant historical narratives aspire to mitigate the proliferation of meaning and to impose closure and limits on how violence can be interpreted. The laws of war are not only a limitation of violent practices but also a symptom of state violence, a practice of legitimation and extension of state violence, and a framework for arresting the proliferation of meaning unleashed in each act of violence. Modern laws of war reflect a desire on the part of the modern state for violence to be an effective tool, a tool that can be controlled and a tool that can do only that work that the state desires. Yet the meaning of the work of violence always slips through the grasp of the state as author and thus there is a corresponding anxiety and deep desire to control the meaning of violence. Of course the state is confronted by a secret insecurity that violence is not actually controlled even by the state no matter how much it tries and that it is never actually able to live up to its idealized form. The supposed core value, the essence and identity of the modern states, is often said to be the exercise of a monopoly on violence yet it is this mastery and monopoly over even its own precisely applied violence that always slips from its control. Once released, violence simply does its own work that no one finally controls and the power and impotence of the state are always revealed in this final moment. In consequence the final moments must be hidden as much as possible from the public eye and constructed instead in the public imagination through narration provided by the modern state in order that the meaning attributed to violent acts can be better controlled.

Multi-Dimensional Global Exceptionalism

In these texts associated with the Global War on Terrorism, read through the lens of an anxiety about the work of violence, the laws of war are seen to function as a discursive foundation for an alignment of both state and state system exception making. A subject position is invoked that is at one with humanity, civilization, the modern state system, and is the guardian of the highest aspirations of mankind. This modern subject position is defined against pre-modern man who was unable to take control of history, who did not exercise a potential for agency, and who was in this regard not fully human. For pre-modern man war happened to him whereas the modern subject has made even extralegal warfare an "ethical and efficacious tool." Rather than being the object of warfare the modern subject aspires to make war happen only to excluded others according to the rules of a modern "universalized" political community. As has been argued above, this figure of the modern subject is rooted in metaphysical accounts of truth, or presence, and relies on these accounts for its "reality." If these metaphysical grounds are questioned the figure of the modern subject and its "international

community" appear to be ongoing constructions and idealized figures that reside in language and thought rather than objective reality. The archetypal modern subject and international community are little more than regulative ideals, that are not unitary but rather amorphous, and are always in flux, never finished, and never finally realized. On this account individual practice may live up to this model to a greater or lesser degree over time but can never actually become a pure example of the model. Furthermore the ideal itself is always under construction and subject to contending articulations and interpretations, ceaseless struggle and re-imagination, and is never finished, never final. The resulting picture is one where identity is always a project or production that is carried out through political (con)textual practice and is never simply there.

This ongoing practice of identity fixing is not limited to the figure of the modern subject. The regulative ideals of the modern sovereign state and the modern state system are characterized by dispersed practices of articulation as well. The aspiration of modern states to actually be that which Barack Obama is invoking, to be man's transcendental vehicle for its highest aspirations, to be the only way that modern mankind can finally arrive, and to be able to employ violence in a way that is made "safe" for the state's passenger is evident in a wide range of textual practices, only a few of which have been considered here. This invoked subject position is then subject to three overlapping regulative ideals: the modern subject, the modern sovereign state, and the modern

²⁶⁹ For a consideration of the diffusion of a "global rationalism" that structures and permeates such regulative ideals see (Thomas 2007, 46–47). Policies "immersed in scientific knowledge and technical practice, and marked by professional imprimatur" provide a powerful legitimating function. Most importantly: "They are attributed a quality of necessity, threatening chaos if they are not implemented" (Thomas 2007, 47).

sovereign state system all of which are mutually implicating. As regulative ideals and processes of identity production a constitutive outside is produced by each ideal. Thus each regulative ideal makes demands on the others: the modern subject can only realize himself in a state that institutionally protects its individuality, the modern state can only realize itself in a system that protects its aspiration to sovereignty. At the same time the modern state system can only realize itself by disciplining its members with regard institutional form and principles of modernity. The modern state must live up to these "rules" imposed by the modern state system and likewise modern individuals must live up to certain rules established by the modern state. The consequence of this permeation of regulative ideals is not only a complication and dispersal of the classical notion of sovereignty, but also a challenge for practices of exceptionalism. On the one hand an exception to any particular regulative ideal is cause for running afoul of another. The lunatic transgress the ideal of the modern subject and is locked away by the modern state that tortures political prisoners and is sanctioned by the international community in whose name armed intervention is undertaken to secure economic gains which is protested by marginalized "third world" states whose flawed elections deprive the modern subject of one of the essential conditions of its realization. On the other hand exceptions undertaken against those who are excluded from all three levels of regulative ideals can potentially harness the political power of man, state, and system. ²⁷⁰

This line of thought is suggested by R.B.J. Walker (2006) in *Lines of Insecurity: International, Imperial, Exceptional.* See also *Simulating Sovereignty: Intervention, the State and Symbolic Exchange* (C. Weber 1994, 5)

Exceptions can be made to regulative ideals so long as these exceptions can be justified in terms of the international political community and thereby not actually challenge regulative ideal of the state nor introduce a fracture into the dispersed sovereignty of the state system. This extends even to those instances when violence is employed exceptionally because even then it is employed, though tragically, only to that extent that it is made necessary by the dangers then faced, and in consequence the state itself cannot be held to blame for the damage thereby incurred. The discourse of the modern laws of war is a kind of key site for this very aligning of exceptional practices, a regulative ideal of international political community that functions to discipline members and impose a boundary between self and other. In one sense this is an uncontroversial claim. Most would agree that respect for the laws of war is what separates "us" from "them." The laws of war are quite obviously a set of minimum rules that civilized states should obey and those who do not should be sanctioned. As should be clear by now, this account is predicated on a certain metaphysical faith or "paradigm of sovereignty" that "can be said to "work" only to the extent that the logocentric procedures that pivot upon it succeed in disciplining the indeterminacy of local sites – incorporating those interpretations that can be assimilated to a heroic narrative centering upon a paradigmatic interpretation of "reasoning man" and excluding those "dangerous" interpretations that resist" (Ashley 1989 271). This "heroic" narrative universalizes particular practices of identity construction such that a certain privileged inside community is able to draw lines between us and them, human and monster, modern and pre-modern according to their own particular desires and their own particular attributions of meaning to these identities. The "civilian" who is killed by the "terrorists" bomb is a victim of "murder" rather than

"lawful combat" yet ongoing "collateral damage" at the expense of other people in other places is not murder because the authors of "collateral damage" attribute a different intention and different meaning to their work. Never mind the fact that other people in other places associate alternate content to these same signifiers: "murder," "innocent," "civilian," and "self-defense." These words function like the terms of an equation: (lethal force) + (civilian) = (terrorism) and (lethal force) + (terrorism) = (self-defense) and the truth of the equations is self-evident and obvious. Yet the content of the variables, the meaning associated with the identities, is constructed rather than given, multiple rather than discrete, and always, even at the same moment, *different*. Insofar as a metaphysical persistence of meaning is attributed to the terms, however, these boundaries are understood not as particular and normative but universal and *true*. Based on such identities that are located beyond the pale of human community, extraordinary violence is mobilized, textual articulations of violence are employed, and "collateral damage" is accepted as a price that must be paid.

6 CONCLUSION

The Abandonment of "Unlawful Combatants"

When the "origin of modern laws of war," the Lieber Code, was issued as an order to Union armies, Lincoln also had it delivered to the Confederacy with the expectation that it would be followed by Confederate troops as well. What was most notable about the Lieber Code for Confederate leaders was the subordination of restraint in war to military necessity. Jefferson Davis condemned the code not because it attempted to apply restraints to Confederate armies but because it provided codified legal license to the Union to employ "barbaric" practices if they were deemed to be a militarily "necessity." The code was issued at exactly the time when Lincoln was moving away from a limited "rose-water" approach to the Civil War and employing a more aggressive "hard hand of war" (Witt 2012, 3). The Lieber Code was seen by many as "a weapon for the achievement of Union war aims, like the Springfield rifle, the minié ball, and the ironclad ship" (Witt 2012, 4). Though it is most often remembered as the origin of an effort to limit the barbarity of warfare the Liber code codified a right to almost any barbarity undertaken in the name of "military necessity." While the code represented an unprecedented codification of some restraints it was also an unprecedented license for

²⁷¹ See (Witt 2012, 4); also (Carnahan 1998, 213); "The Lieber Code's greatest theoretical contribution to the modern law of war was its identification of military necessity as a general legal principle to limit violence, in the absence of any other rule."

armies to deny quarter to their enemies and abandon, in cases of "necessity," those customary laws of war that had influenced military practice for thousands of years.²⁷²

As I have argued above codification is often considered the essential difference between modern laws of war and pre-modern law. Codification is the attribute that lends modern laws of war their distinctly legal character. Yet codification also seems to cloak what Jacques Derrida (1992) calls the "mystical foundation of authority." The codification of the laws of war seems to have legitimized both restrained and unrestrained practices in war. The fact of codification itself does not seem to have imparted a discernible element of justice to the laws of war or necessarily protected individual humans from fates they would have otherwise suffered. Codification instead seems to be a distinctly modern characterization of an ancient field of political practice that includes not only works of violence but also narrative explanations and justifications for a diverse set of political practices. Codification seems to simply be the way that long standing customs related to practices of armed conflict and the narratives that surround them are experienced and reproduced in modernity.

Seen in this light codification seems to be a mode of justification for the observance or non-observance of certain practices of war much, like the different modes

John Fabian Witt explains that the Lieber code "is not just a humanitarian shield, though it was that. It was also a sword of justice, a way of advancing the Emancipation proclamation and or arming the 200,000 black soldiers who would help to end slavery once and for all. As such, the code Lincoln sent into the world was the written embodiment of tensions that have been internal to the law of war in American history from the Revolution to present. For many Americans, the law of war has been more than merely a set of constraints on the means available to armies in combat. It has been a tool for vindicating the destiny of the nation" (Witt 2012, 4).

of justification encountered in the exploration of pre-modern laws of war. The idea of codification functions to conceal the "mystical" foundations of the laws of war and the particular political motives driving any observance or non-observance of them. The sanctity of codified modern international law and corresponding narratives of universal human rights are invoked by a particular subject position on behalf of an archetypal figure of a universalized "international community." Mythologies of the past are employed to produce a legitimating narrative of the present. Throughout the history of the laws of war there is frequently an aspiration to control and coordinate violence and to marshal violence on behalf of a particular political community against an exterior threat. Certain images of the past have been used to produce certain images of heterogeneous presents. The laws of war have often functioned to make an idea of peace possible and to limit the carnage among those on the inside of a certain idealized community. This imperative for internal peace has often been justified or explained in terms of an external enemy against which the community must be mobilized.

In the face of a fundamental ambiguity of archetypal identities, political practices of identity stabilization that have been explored in this work are more apparent. In order to mobilize and sustain broad campaigns of lethal force clear identities and explanatory narratives are needed. Yet these archetypal identities against which violence is mobilized exist in discourse rather than material reality, while lethal force ultimately does its work on discrete, materially real human bodies. For this reason it is imperative to continuously examine the role that archetypal identities play in the mobilization of violence and how this violence is experience by actual human beings.

Many advocate humanitarian laws based on a notion of this kind of law establishes a certain baseline of human practice which may prevent a degree of human suffering. The problem for this humanitarian project as universally applicable is that the political community defined by narratives of modern laws of war is articulated as synonymous with humanity itself. Modern laws of war are justified on universal humanitarian grounds because the "international community" is discursively aligned with a particular image of modern humanity which is roughly coterminous with the idealized form of the modern sovereign state. The promise now, the reason for the laws of war, is to allow the state to continue doing its work carrying the modern human subject forward towards a transcendental destiny, and to enable and maintain an international community of sovereign states. Those who are depicted as waging war on this community must also be waging war on modern humanity itself and for this reason they are described as "monsters," "murderers," "evil," and somehow other than human. In this sense modern laws of war are always already on the side of the modern state against whatever non-state actor is articulated as its collective enemy and, by implication, falls somewhere outside modern humanity.

How, then, are certain discrete human individuals cast beyond the pale of humanity itself? Previous chapters considered accounts of the "unlawful combatant" in the context of the politics of exception and their relation to the laws of war. Much of the work surveyed a tendency to essentialize "unlawful combatants" and assume that individuals actually are ambiguous in reality and actually are essentially *new* when exposed to the light of international law. The debate then focuses on how these individuals who have this innate ambiguity, who are a new kind of adversary, should be

treated with reference to international law. This account assumes that such individuals are originally encountered by the sovereign gaze of history, intact in their nature, essence, and identity, as ambiguous others who must be appropriately categorized according to this nature. This idea is repeated in the texts considered that suggest that "terrorists" are targeted not because what they may have done in the past but because of what they *are*. But from where does identity arise if not past behavior? Is not past behavior the very work by which the text of identity is produced? How can a discrete body be removed from any context and simply *be* an "unlawful combatant"? What mystical signature makes such identification possible?

The arrival of an essentially new kind of adversary calls for a corresponding anthropological process in order to determine which category any particular discrete body belongs to. This call for examination, or in Barthes's (Barthes 1982, 33) terms, "restoration and interpretation," is intended to get to the bottom of this ambiguity. This ambiguity is not a recognition of the irreducible alterity of any identity, however. It is instead an ambiguity regarding how this concrete unified identity, the "unlawful combatant," can be accommodated by the dominant paradigms of the international community. It is also the question of which concrete identity any discrete individual actually *is*. Both archetypal identities themselves are understood to be stable; one of them is simply *new*. The discrete human bodies that are marked by the archetypal "unlawful combatant" can either be accommodated by some existing legal category, as many human rights advocates propose, or rather remain outside the law as suggested by the Bush and Obama administrations and other likeminded regimes around the world. In either case a furious legal/anthropological endeavor is underway to determine the

essential nature of discrete human bodies and categorize them, either "unlawful combatant," "lawful combatant," or "civilian" appropriately. The fundamental question that the surveillance, interrogation, and targeting processes are pursuing around the world is "to which identity does this discrete body belong?"

In this narrative the "unlawful combatant" is simply a label that corresponds to a particular novel essence that no longer fits into our old systems of laws, based in the old world that did not include these new entities. However this narrative depends on a fixed and unitary identity associated with certain individuals that renders them "unlawful combatants." It remains unclear how an individual becomes or acquires the signature of an "unlawful combatant." The details of this process are of course a closely guarded secret. What seems clear is that those who are suspected of being an "unlawful combatant" are not entitled to the legal processes that would normally constitute the only means to ever decide a legal identity in the first place. Those who are suspected of being an "unlawful combatant" are subjected to a process for determining that status that is predicated on already being an "unlawful combatant." If one is suspected of being an "unlawful combatant" one is subjected to targeted killing, indefinite detention, or military tribunals in order to determine whether one is in fact an "unlawful combatant." So it is reasonable to say that when it comes to "unlawful combatants" one is guilty until proven innocent and to be suspected of being an "unlawful combatant" is to already be one.

This narrative takes for granted that this new, ambiguous identity has simply appeared from the wilds out of thin air and the modern subject must now figure out how to take control of it. In this sense the "unlawful combatant" and the interrogator have no

history; one is the embodiment of evil and the other the search for justice. If metaphysically grounded, essentialized identities are rejected, the question becomes how the "unlawful combatant" and the "international community" as archetypal identities are produced. This inquiry can begin from the assertion that no discrete human body is intrinsically an "unlawful combatant" and that there is no privileged subject position at the center of the "international community" that is able to finally pronounce such an identity authoritatively. The question then of whether these particular individuals are inside or outside the law should instead be oriented to ask how these particular individuals are characterized as inside or outside the law. The group identity "unlawful combatant" is textually constructed and does not, strictly speaking, exist. The legal/anthropological process described above only masquerades as a restoration of true identity but is at the same time constructing and inscribing the very identities it claims to reveal. This is the project taking place on the far end of video feeds from remotely piloted vehicles, in the interrogation centers at Guantánamo Bay and elsewhere, and in the dispersed textual practices in which Barack Obama and John O. Brennan's speeches participate.

This, then, is one aspect of a wider politics of exception that disintegrates the reification of the sovereign state so common in accounts of the politics of exception. To the question whether this body is inside or outside international law the answer is very much neither. For the figure of the abstract outsider, *the outlaw*, is already there within the law, a constitutive limit condition, and thus the silhouette of the enemy is already inside the law, an animating force of the law itself, the negative image of the self, the driving force behind community, and the ever present threat. The enemy in the broadest

sense has never been absent and is always within the law as an element that is outside the law, that is actively *abandoned*, and maintained in that condition of exteriority through law and language. If the "unlawful combatant" bears the marks of exclusion such as an unashamed disregard for those celebrated elements of modernity s/he also bears the marks of inclusion; s/he is a hostile force at war with humanity, the embodiment of evil, and inhumanity itself disguised as a mortal individual.

In this case an individual can never be found that is actually this thing that the international community is fighting. As Zizek argues "enemy recognition is always a performative procedure which brings to light/constructs the enemy's 'true face'" (Zizek 2002, 5). The interrogator will always capture more individuals and demand that they speak the only language the interrogator can understand: intelligence. Intelligence is eagerly needed so that the interrogator can continue to look for the figure that is the object of this war. But if this figure can never finally be found then it is the fact of being at war itself that produces the very enemy that is fought. I do not simply mean that others may take up arms in response to acts of violence but rather in the sense of a textual "production" as discussed by Barthes (1982). The idea of the enemy that is unconnected to discrete individuals drives this vast effort to find this nonexistent enemy among individuals across the world. This is a search that can never end but not because they haven't been found yet but because the figure is not there to find. In the meantime it is regrettably necessary to deny terrorists the Achilles heel of outdated humanitarianism, due process, and rule of law. So long as a modern state believes that there is an "unlawful combatant" or "terrorist" signature on every Dilawar it will remain determined to "break" them to get to it. As repugnant as it may be "rough men," always ready to do

violence,²⁷³ will defeat these threats so long as civilized people are willing to look the other way.

Given this grim narrative one might be tempted to again ask what, precisely, makes modern laws of war so much more effective than pre-modern law. If the mystical foundations of modern laws of war are appreciated the negative narrative caricature of pre-modern law can also be reevaluated. In so doing alternative understandings of how violence is employed and limited can be "un-foreclosed." This opening to the thought of ancient writer suggests some interesting avenues for rethinking modern efforts to minimize some effects of war without simultaneously empowering those who would advocate unlimited violence. Surprisingly, one of these avenues is suggested by those paragons of barbarity in warfare, the Romans. As I have argued above Roman and Greek narratives of laws of war were generally oriented toward maintaining the possibility of peace among Latins in order to better direct martial energies toward outsiders. Despite the misappropriations of medieval writers, however, even warfare against barbarians was not simply unrestrained. Instead, it seems that customs and rules for combat were negotiated on an ongoing basis with barbarian groups in a kind of quid pro quo without regard to archetypal identity. Caesar's Gallic War, for all its brutality, maintained a crude sense of balance where transgressions were sanctioned according to the judgment of commanders and, when vengeance had been satisfied, a kind of clean slate was

²⁷³ Taken from a 1993 article by Richard Grenier in which he attributed a statement to George Orwell: "When the country is in danger, the military's mission is to wreak destruction upon the enemy. It's a harsh and bloody business, but that's what the military's for. As George Orwell pointed out, people sleep peacefully in their beds at night only because rough men stand ready to do violence on their behalf."

restored until the next transgression. This un-codified approach did not always prevent barbarity but it also did not provide an open-ended legitimization of "exceptional" warfare against outsiders. Instead, there was a kind of openness to each barbarian other, and customs and standards of practice were established based on the behaviors of each group toward the other.

This is certainly not to say that a return to the past offers the promise of salvation for the future. It is rather to illustrate an idea of openness that is critical for a compassionate humanitarian project. A humanitarian project oriented toward protecting discrete individuals from brutality would have to maintain openness to the ambiguity of identity. This kind of project would have to aspire to reach out towards the other, to engage in a kind of ongoing diplomacy, and an ever present hospitality to alterity. Laws of war, to fulfill a humanitarian mission, must always be open to the other; must always show hospitality to inassimilable difference or the humanitarian project perpetually fails in its mission. This is not to say that a truly universal community can be constructed or that all potentially fatal animosities can be resolved. It is rather to say that the ambiguity of identity, and yet the need to decide, is the experience of politics. The subordination of experience of politics to procedure is exactly the danger that Carl Schmitt saw in liberalism in the desire to distance itself from the raw experience of the political. Politics "cannot be made safe" and the substitution of "procedure for struggle" (Schmitt 2007, xv) does not eliminate politics but merely hides it. Modern narratives of laws of war simply allow participants in modern warfare to hide politics behind procedure, and to create a kind of mystical darkness from which inhuman archetypal identities ever threaten to emerge.

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APPENDIX I

REMARKS BY BARACK OBAMA

http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize

Oslo City Hall Oslo, Norway

1:44 P.M. CET

THE PRESIDENT: Your Majesties, Your Royal Highnesses, distinguished members of the Norwegian Nobel Committee, citizens of America, and citizens of the world:

I receive this honor with deep gratitude and great humility. It is an award that speaks to our highest aspirations -- that for all the cruelty and hardship of our world, we are not mere prisoners of fate. Our actions matter, and can bend history in the direction of justice.

And yet I would be remiss if I did not acknowledge the considerable controversy that your generous decision has generated. (Laughter.) In part, this is because I am at the beginning, and not the end, of my labors on the world stage. Compared to some of the giants of history who've received this prize -- Schweitzer and King; Marshall and Mandela -- my accomplishments are slight. And then there are the men and women around the world who have been jailed and beaten in the pursuit of justice; those who toil in humanitarian organizations to relieve suffering; the unrecognized millions whose quiet acts of courage and compassion inspire even the most hardened cynics. I cannot argue with those who find these men and women -- some known, some obscure to all but those they help -- to be far more deserving of this honor than I.

But perhaps the most profound issue surrounding my receipt of this prize is the fact that I am the Commander-in-Chief of the military of a nation in the midst of two wars. One of these wars is winding down. The other is a conflict that America did not seek; one in which we are joined by 42 other countries -- including Norway -- in an effort to defend ourselves and all nations from further attacks.

Still, we are at war, and I'm responsible for the deployment of thousands of young Americans to battle in a distant land. Some will kill, and some will be killed. And so I come here with an acute sense of the costs of armed conflict -- filled with difficult questions about the relationship between war and peace, and our effort to replace one with the other.

Now these questions are not new. War, in one form or another, appeared with the first man. At the dawn of history, its morality was not questioned; it was simply a fact, like drought or disease -- the manner in which tribes and then civilizations sought power and settled their differences.

And over time, as codes of law sought to control violence within groups, so did philosophers and clerics and statesmen seek to regulate the destructive power of war. The concept of a "just war" emerged, suggesting that war is justified only when certain conditions were met: if it is waged as a last resort or in self-defense; if the force used is proportional; and if, whenever possible, civilians are spared from violence.

Of course, we know that for most of history, this concept of "just war" was rarely observed. The capacity of human beings to think up new ways to kill one another proved inexhaustible, as did our capacity to exempt from mercy those who look different or pray to a different God. Wars between armies gave way to wars between nations -- total wars in which the distinction between combatant and civilian became blurred. In the span of 30 years, such carnage would twice engulf this continent. And while it's hard to conceive of a cause more just than the defeat of the Third Reich and the Axis powers, World War II was a conflict in which the total number of civilians who died exceeded the number of soldiers who perished.

In the wake of such destruction, and with the advent of the nuclear age, it became clear to victor and vanquished alike that the world needed institutions to prevent another world war. And so, a quarter century after the United States Senate rejected the League of Nations -- an idea for which Woodrow Wilson received this prize -- America led the world in constructing an architecture to keep the peace: a Marshall Plan and a United Nations, mechanisms to govern the waging of war, treaties to protect human rights, prevent genocide, restrict the most dangerous weapons.

In many ways, these efforts succeeded. Yes, terrible wars have been fought, and atrocities committed. But there has been no Third World War. The Cold War ended with jubilant crowds dismantling a wall. Commerce has stitched much of the world together. Billions have been lifted from poverty. The ideals of liberty and self-determination, equality and the rule of law have haltingly advanced. We are the heirs of the fortitude and foresight of generations past, and it is a legacy for which my own country is rightfully proud.

And yet, a decade into a new century, this old architecture is buckling under the weight of new threats. The world may no longer shudder at the prospect of war between two nuclear superpowers, but proliferation may increase the risk of catastrophe. Terrorism has long been a tactic, but modern technology allows a few small men with outsized rage to murder innocents on a horrific scale.

Moreover, wars between nations have increasingly given way to wars within nations. The resurgence of ethnic or sectarian conflicts; the growth of secessionist movements, insurgencies, and failed states -- all these things have increasingly trapped civilians in unending chaos. In today's wars, many more civilians are killed than soldiers; the seeds of future conflict are sown, economies are wrecked, civil societies torn asunder, refugees amassed, children scarred.

I do not bring with me today a definitive solution to the problems of war. What I do know is that meeting these challenges will require the same vision, hard work, and persistence of those men and women who acted so boldly decades ago. And it will require us to think in new ways about the notions of just war and the imperatives of a just peace.

We must begin by acknowledging the hard truth: We will not eradicate violent conflict in our lifetimes. There will be times when nations -- acting individually or in concert -- will find the use of force not only necessary but morally justified.

I make this statement mindful of what Martin Luther King Jr. said in this same ceremony years ago: "Violence never brings permanent peace. It solves no social problem: it merely creates new and more complicated ones." As someone who stands here as a direct consequence of Dr. King's life work, I am living testimony to the moral force of non-violence. I know there's nothing weak -- nothing passive -- nothing naïve -- in the creed and lives of Gandhi and King.

But as a head of state sworn to protect and defend my nation, I cannot be guided by their examples alone. I face the world as it is, and cannot stand idle in the face of threats to the American people. For make no mistake: Evil does exist in the world. A non-violent movement could not have halted Hitler's armies. Negotiations cannot convince al Qaeda's leaders to lay down their arms. To say that force may sometimes be necessary is not a call to cynicism -- it is a recognition of history; the imperfections of man and the limits of reason.

I raise this point, I begin with this point because in many countries there is a deep ambivalence about military action today, no matter what the cause. And at times, this is joined by a reflexive suspicion of America, the world's sole military superpower.

But the world must remember that it was not simply international institutions -- not just treaties and declarations -- that brought stability to a post-World War II world. Whatever mistakes we have made, the plain fact is this: The United States of America has helped underwrite global security for more than six decades with the blood of our citizens and the strength of our arms. The service and sacrifice of our men and women in uniform has promoted peace and prosperity from Germany to Korea, and enabled democracy to take hold in places like the Balkans. We have borne this burden not because we seek to impose our will. We have done so out of enlightened self-interest -- because we seek a better future for our children and grandchildren, and we believe that their lives will be better if others' children and grandchildren can live in freedom and prosperity.

So yes, the instruments of war do have a role to play in preserving the peace. And yet this truth must coexist with another -- that no matter how justified, war promises human tragedy. The soldier's courage and sacrifice is full of glory, expressing devotion to country, to cause, to comrades in arms. But war itself is never glorious, and we must never trumpet it as such.

So part of our challenge is reconciling these two seemingly inreconcilable truths -- that war is sometimes necessary, and war at some level is an expression of human folly. Concretely, we must direct our effort to the task that President Kennedy called for long ago. "Let us focus," he said, "on a more practical, more attainable peace, based not on a sudden revolution in human nature but on a gradual evolution in human institutions." A gradual evolution of human institutions.

What might this evolution look like? What might these practical steps be?

To begin with, I believe that all nations -- strong and weak alike -- must adhere to standards that govern the use of force. I -- like any head of state -- reserve the right to act unilaterally if necessary to defend my nation. Nevertheless, I am convinced that adhering to standards, international standards, strengthens those who do, and isolates and weakens those who don't.

The world rallied around America after the 9/11 attacks, and continues to support our efforts in Afghanistan, because of the horror of those senseless attacks and the recognized principle of self-defense. Likewise, the world recognized the need to confront Saddam Hussein when he invaded Kuwait -- a consensus that sent a clear message to all about the cost of aggression.

Furthermore, America -- in fact, no nation -- can insist that others follow the rules of the road if we refuse to follow them ourselves. For when we don't, our actions appear arbitrary and undercut the legitimacy of future interventions, no matter how justified.

And this becomes particularly important when the purpose of military action extends beyond self-defense or the defense of one nation against an aggressor. More and more, we all confront difficult questions about how to prevent the slaughter of civilians by their own government, or to stop a civil war whose violence and suffering can engulf an entire region.

I believe that force can be justified on humanitarian grounds, as it was in the Balkans, or in other places that have been scarred by war. Inaction tears at our conscience and can lead to more costly intervention later. That's why all responsible nations must embrace the role that militaries with a clear mandate can play to keep the peace.

America's commitment to global security will never waver. But in a world in which threats are more diffuse, and missions more complex, America cannot act alone. America alone cannot secure the peace. This is true in Afghanistan. This is true in failed states like Somalia, where terrorism and piracy is joined by famine and human suffering. And sadly, it will continue to be true in unstable regions for years to come.

The leaders and soldiers of NATO countries, and other friends and allies, demonstrate this truth through the capacity and courage they've shown in Afghanistan. But in many

countries, there is a disconnect between the efforts of those who serve and the ambivalence of the broader public. I understand why war is not popular, but I also know this: The belief that peace is desirable is rarely enough to achieve it. Peace requires responsibility. Peace entails sacrifice. That's why NATO continues to be indispensable. That's why we must strengthen U.N. and regional peacekeeping, and not leave the task to a few countries. That's why we honor those who return home from peacekeeping and training abroad to Oslo and Rome; to Ottawa and Sydney; to Dhaka and Kigali -- we honor them not as makers of war, but of wagers -- but as wagers of peace.

Let me make one final point about the use of force. Even as we make difficult decisions about going to war, we must also think clearly about how we fight it. The Nobel Committee recognized this truth in awarding its first prize for peace to Henry Dunant -- the founder of the Red Cross, and a driving force behind the Geneva Conventions.

Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct. And even as we confront a vicious adversary that abides by no rules, I believe the United States of America must remain a standard bearer in the conduct of war. That is what makes us different from those whom we fight. That is a source of our strength. That is why I prohibited torture. That is why I ordered the prison at Guantanamo Bay closed. And that is why I have reaffirmed America's commitment to abide by the Geneva Conventions. We lose ourselves when we compromise the very ideals that we fight to defend. (Applause.) And we honor -- we honor those ideals by upholding them not when it's easy, but when it is hard.

I have spoken at some length to the question that must weigh on our minds and our hearts as we choose to wage war. But let me now turn to our effort to avoid such tragic choices, and speak of three ways that we can build a just and lasting peace.

First, in dealing with those nations that break rules and laws, I believe that we must develop alternatives to violence that are tough enough to actually change behavior -- for if we want a lasting peace, then the words of the international community must mean something. Those regimes that break the rules must be held accountable. Sanctions must exact a real price. Intransigence must be met with increased pressure -- and such pressure exists only when the world stands together as one.

One urgent example is the effort to prevent the spread of nuclear weapons, and to seek a world without them. In the middle of the last century, nations agreed to be bound by a treaty whose bargain is clear: All will have access to peaceful nuclear power; those without nuclear weapons will forsake them; and those with nuclear weapons will work towards disarmament. I am committed to upholding this treaty. It is a centerpiece of my foreign policy. And I'm working with President Medvedev to reduce America and Russia's nuclear stockpiles.

But it is also incumbent upon all of us to insist that nations like Iran and North Korea do

not game the system. Those who claim to respect international law cannot avert their eyes when those laws are flouted. Those who care for their own security cannot ignore the danger of an arms race in the Middle East or East Asia. Those who seek peace cannot stand idly by as nations arm themselves for nuclear war.

The same principle applies to those who violate international laws by brutalizing their own people. When there is genocide in Darfur, systematic rape in Congo, repression in Burma -- there must be consequences. Yes, there will be engagement; yes, there will be diplomacy -- but there must be consequences when those things fail. And the closer we stand together, the less likely we will be faced with the choice between armed intervention and complicity in oppression.

This brings me to a second point -- the nature of the peace that we seek. For peace is not merely the absence of visible conflict. Only a just peace based on the inherent rights and dignity of every individual can truly be lasting.

It was this insight that drove drafters of the Universal Declaration of Human Rights after the Second World War. In the wake of devastation, they recognized that if human rights are not protected, peace is a hollow promise.

And yet too often, these words are ignored. For some countries, the failure to uphold human rights is excused by the false suggestion that these are somehow Western principles, foreign to local cultures or stages of a nation's development. And within America, there has long been a tension between those who describe themselves as realists or idealists -- a tension that suggests a stark choice between the narrow pursuit of interests or an endless campaign to impose our values around the world.

I reject these choices. I believe that peace is unstable where citizens are denied the right to speak freely or worship as they please; choose their own leaders or assemble without fear. Pent-up grievances fester, and the suppression of tribal and religious identity can lead to violence. We also know that the opposite is true. Only when Europe became free did it finally find peace. America has never fought a war against a democracy, and our closest friends are governments that protect the rights of their citizens. No matter how callously defined, neither America's interests -- nor the world's -- are served by the denial of human aspirations.

So even as we respect the unique culture and traditions of different countries, America will always be a voice for those aspirations that are universal. We will bear witness to the quiet dignity of reformers like Aung Sang Suu Kyi; to the bravery of Zimbabweans who cast their ballots in the face of beatings; to the hundreds of thousands who have marched silently through the streets of Iran. It is telling that the leaders of these governments fear the aspirations of their own people more than the power of any other nation. And it is the responsibility of all free people and free nations to make clear that these movements -- these movements of hope and history -- they have us on their side.

Let me also say this: The promotion of human rights cannot be about exhortation alone. At times, it must be coupled with painstaking diplomacy. I know that engagement with repressive regimes lacks the satisfying purity of indignation. But I also know that sanctions without outreach -- condemnation without discussion -- can carry forward only a crippling status quo. No repressive regime can move down a new path unless it has the choice of an open door.

In light of the Cultural Revolution's horrors, Nixon's meeting with Mao appeared inexcusable -- and yet it surely helped set China on a path where millions of its citizens have been lifted from poverty and connected to open societies. Pope John Paul's engagement with Poland created space not just for the Catholic Church, but for labor leaders like Lech Walesa. Ronald Reagan's efforts on arms control and embrace of perestroika not only improved relations with the Soviet Union, but empowered dissidents throughout Eastern Europe. There's no simple formula here. But we must try as best we can to balance isolation and engagement, pressure and incentives, so that human rights and dignity are advanced over time.

Third, a just peace includes not only civil and political rights -- it must encompass economic security and opportunity. For true peace is not just freedom from fear, but freedom from want.

It is undoubtedly true that development rarely takes root without security; it is also true that security does not exist where human beings do not have access to enough food, or clean water, or the medicine and shelter they need to survive. It does not exist where children can't aspire to a decent education or a job that supports a family. The absence of hope can rot a society from within.

And that's why helping farmers feed their own people -- or nations educate their children and care for the sick -- is not mere charity. It's also why the world must come together to confront climate change. There is little scientific dispute that if we do nothing, we will face more drought, more famine, more mass displacement -- all of which will fuel more conflict for decades. For this reason, it is not merely scientists and environmental activists who call for swift and forceful action -- it's military leaders in my own country and others who understand our common security hangs in the balance.

Agreements among nations. Strong institutions. Support for human rights. Investments in development. All these are vital ingredients in bringing about the evolution that President Kennedy spoke about. And yet, I do not believe that we will have the will, the determination, the staying power, to complete this work without something more -- and that's the continued expansion of our moral imagination; an insistence that there's something irreducible that we all share.

As the world grows smaller, you might think it would be easier for human beings to recognize how similar we are; to understand that we're all basically seeking the same things; that we all hope for the chance to live out our lives with some measure of

happiness and fulfillment for ourselves and our families.

And yet somehow, given the dizzying pace of globalization, the cultural leveling of modernity, it perhaps comes as no surprise that people fear the loss of what they cherish in their particular identities -- their race, their tribe, and perhaps most powerfully their religion. In some places, this fear has led to conflict. At times, it even feels like we're moving backwards. We see it in the Middle East, as the conflict between Arabs and Jews seems to harden. We see it in nations that are torn asunder by tribal lines.

And most dangerously, we see it in the way that religion is used to justify the murder of innocents by those who have distorted and defiled the great religion of Islam, and who attacked my country from Afghanistan. These extremists are not the first to kill in the name of God; the cruelties of the Crusades are amply recorded. But they remind us that no Holy War can ever be a just war. For if you truly believe that you are carrying out divine will, then there is no need for restraint -- no need to spare the pregnant mother, or the medic, or the Red Cross worker, or even a person of one's own faith. Such a warped view of religion is not just incompatible with the concept of peace, but I believe it's incompatible with the very purpose of faith -- for the one rule that lies at the heart of every major religion is that we do unto others as we would have them do unto us.

Adhering to this law of love has always been the core struggle of human nature. For we are fallible. We make mistakes, and fall victim to the temptations of pride, and power, and sometimes evil. Even those of us with the best of intentions will at times fail to right the wrongs before us.

But we do not have to think that human nature is perfect for us to still believe that the human condition can be perfected. We do not have to live in an idealized world to still reach for those ideals that will make it a better place. The non-violence practiced by men like Gandhi and King may not have been practical or possible in every circumstance, but the love that they preached -- their fundamental faith in human progress -- that must always be the North Star that guides us on our journey.

For if we lose that faith -- if we dismiss it as silly or naïve; if we divorce it from the decisions that we make on issues of war and peace -- then we lose what's best about humanity. We lose our sense of possibility. We lose our moral compass.

Like generations have before us, we must reject that future. As Dr. King said at this occasion so many years ago, "I refuse to accept despair as the final response to the ambiguities of history. I refuse to accept the idea that the 'isness' of man's present condition makes him morally incapable of reaching up for the eternal 'oughtness' that forever confronts him."

Let us reach for the world that ought to be -- that spark of the divine that still stirs within each of our souls. (Applause.)

Somewhere today, in the here and now, in the world as it is, a soldier sees he's outgunned, but stands firm to keep the peace. Somewhere today, in this world, a young protestor awaits the brutality of her government, but has the courage to march on. Somewhere today, a mother facing punishing poverty still takes the time to teach her child, scrapes together what few coins she has to send that child to school -- because she believes that a cruel world still has a place for that child's dreams.

Let us live by their example. We can acknowledge that oppression will always be with us, and still strive for justice. We can admit the intractability of depravation, and still strive for dignity. Clear-eyed, we can understand that there will be war, and still strive for peace. We can do that -- for that is the story of human progress; that's the hope of all the world; and at this moment of challenge, that must be our work here on Earth.

Thank you very much. (Applause.)

APPENDIX II

REMARKS BY JOHN O. BRENNAN

Transcript of Remarks by John O. Brennan; Assistant to the President for Homeland Security and Counterterrorism; given at the Wilson Center on April 30th, 2012

Jane Harman:

Good afternoon, everyone. Welcome to the Wilson Center, and a special welcome to our chairman of the board Joe Gildenhorn and his wife Alma, who are very active on the Wilson -- who is very active on the Wilson council. This afternoon's conversation is, as I see it, a great tribute to the kind of work we do here. We care intensely about having our most important policymakers here, and in getting objective accounts of what the United States government and other governments around the world are doing. On September 10th, 2001, I had lunch with L. Paul Bremer. Jerry Bremer, as he is known, had chaired the congressionally chartered Commission on Terrorism on which I served.

It was one of three task forces to predict a major terror attack on US soil. At that lunch, we lamented that no one was taking our report seriously. The next day, the world changed. In my capacity as a senior Democrat on the House intelligence committee, I was headed to the US Capitol at 9:00 a.m. on 9/11 when an urgent call from my staff turned me around. To remind, most think that the Capitol, in which the intelligence committee offices were then located was the intended target of the fourth hijacked plane. Congress shut down. A terrible move, I thought, and 250 or so members mingled on the Capitol lawn, obvious targets if that plane had arrived. I frantically tried to reach my youngest child, then at a D.C. high school, but the cell towers were down.

I don't know where John Brennan was that day, but I do know that the arch of our lives came together after that when he served as deputy executive director of the CIA, when I became the ranking member on the House intelligence committee, when he became the first director of the Terrorist Threat Integration Center, an organization that was set up by then-President Bush 43, when I was the principle author of legislation which became the Intelligence Reform and Terrorism Prevention Act, a statute which we organized our intelligence community for the first time since 1947, and renamed TTIC, the organization that John had headed, the National Counter Terrorism Center, when he served as the first director of the NCTC, when I chaired the intelligence subcommittee of the homeland security committee, when he moved into the White House as deputy national security advisor for homeland security and counterterrorism, and assistant to the president, and when I succeeded Lee Hamilton here at the Wilson Center last year.

Finally, when he became President Obama's point person on counterterrorism strategy, and when the Wilson Center commenced a series of programs which as still ongoing, the first of which we held on 9/12/2011 to ask what the next 10 years should look like, and whether this country needs a clearer legal framework around domestic intelligence.

Clearly, the success story of the past decade is last May's takedown of Osama bin Laden. At the center of that effort were the senior security leadership of our country. I

noticed Denis McDonough in the audience, right here in the front row, and certainly it included President Obama and John Brennan. They made the tough calls.

But I also know, and we all know, how selfless and extraordinary were the actions of unnamed intelligence officials and Navy SEALs. The operation depended on their remarkable skills and personal courage. They performed the mission. The Wilson Center is honored to welcome John Brennan here today on the eve of this first anniversary of the bin Laden raid. President Obama will headline events tomorrow, but today we get an advance peek from the insider's insider, one of President Obama's most influential aides with a broad portfolio to manage counterterrorism strategy in far-flung places like Pakistan, Yemen, and Somalia. Activities in this space, as I mentioned, at the Wilson Center are ongoing, as are terror threats against our country.

I often say we won't defeat those threats by military might alone, we must win the argument. No doubt our speaker today agrees that security and liberty are not a zero sum game. We either get more of both, or less. As Ben Franklin said, "Those who would give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety." So, as we welcome John Brennan, I also want to congratulate him and President Obama for nominating the full complement of members to the Privacy and Civil Liberties Board, another part of the 2004 intelligence reform law, and a key part of assuring that America's counterterrorism efforts also protect our constitution and our values. At the end of today's event, we would appreciate it if everyone would please remain seated, while Mr. Brennan departs the building. Thank you for coming, please welcome John Brennan.

[applause]

John Brennan:

Thank you so much Jane for the very kind introduction, and that very nice and memorable walk down memory lane as our paths did cross so many times over the years, but thank you also for your leadership of the Wilson Center. It is a privilege for me to be here today, and to speak at this group. And you have spent many years in public service, and it continues here at the Wilson Center today, and there are few individuals in this country who can match the range of Jane's expertise from the armed services to intelligence to homeland security, and anyone who has appeared before her committee knew firsthand just how extensive and deep that expertise was. So Jane, I'll just say that I'm finally glad to be sharing the stage with you instead of testifying before you. It's a privilege to be next to you. So to you and everyone here at the Woodrow Wilson Center, thank you for your invaluable contributions, your research, your scholarship, which help further our national security every day.

I very much appreciate the opportunity to discuss President Obama's counterterrorism strategy, in particular its ethics and its efficacy.

It is fitting that we have this discussion here today at the Woodrow Wilson Center. It was here in August of 2007 that then-Senator Obama described how he would bring the war in Iraq to a responsible end and refocus our efforts on "the war that has to be won," the war against al-Qaeda, particularly in the tribal regions of Afghanistan and Pakistan.

He said that we would carry on this fight while upholding the laws and our values, and that we would work with allies and partners whenever possible. But he also made it clear that he would not hesitate to use military force against terrorists who pose a direct threat to America. And he said that if he had actionable intelligence about high-value terrorist targets, including in Pakistan, he would act to protect the American people.

So it is especially fitting that we have this discussion here today. One year ago today, President Obama was then facing the scenario that he discussed here at the Woodrow Wilson Center five years ago, and he did not hesitate to act. Soon thereafter, our special operations forces were moving toward the compound in Pakistan where we believed Osama bin Laden might be hiding. By the end of the next day, President Obama could confirm that justice had finally been delivered to the terrorist responsible for the attacks of September 11th, 2001, and for so many other deaths around the world.

The death of bin Laden was our most strategic blow yet against al-Qaeda. Credit for that success belongs to the courageous forces who carried out that mission, at extraordinary risk to their lives; to the many intelligence professionals who pieced together the clues that led to bin Laden's hideout; and to President Obama, who gave the order to go in.

Now one year later, it's appropriate to assess where we stand in this fight. We've always been clear that the end of bin Laden would neither mark the end of al-Qaida, nor our resolve to destroy it. So along with allies and partners, we have been unrelenting. And when we assess that al-Qaida of 2012, I think it is fair to say that, as a result of our efforts, the United States is more secure and the American people are safer. Here's why.

In Pakistan, al-Qaida's leadership ranks have continued to suffer heavy losses. This includes Ilyas Kashmiri, one of al-Qaida's top operational planners, killed a month after bin Laden. It includes Atiyah Abd al-Rahman, killed when he succeeded Ayman al-Zawahiri, al-Qaida's deputy leader. It includes Younis al-Mauritani, a planner of attacks against the United States and Europe, until he was captured by Pakistani forces.

With its most skilled and experienced commanders being lost so quickly, al-Qaida has had trouble replacing them. This is one of the many conclusions we have been able to draw from documents seized at bin Laden's compound, some of which will be published online, for the first time, this week by West Point's Combating Terrorism Center. For example, bin Laden worried about, and I quote, "The rise of lower leaders who are not as experienced and this would lead to the repeat of mistakes."

Al-Qaida leaders continue to struggle to communicate with subordinates and affiliates. Under intense pressure in the tribal regions of Pakistan, they have fewer places to train and groom the next generation of operatives. They're struggling to attract new recruits. Morale is low, with intelligence indicating that some members are giving up and returning home, no doubt aware that this is a fight they will never win. In short, al-Qaida is losing badly. And bin Laden knew it at the time of his death. In documents we seized, he confessed to "disaster after disaster." He even urged his leaders to flee the tribal regions, and go to places, "away from aircraft photography and bombardment."

For all these reasons, it is harder than ever for al-Qaida core in Pakistan to plan and execute large-scale, potentially catastrophic attacks against our homeland. Today, it is increasingly clear that compared to 9/11, the core al-Qaida leadership is a shadow of its former self. Al-Qaida has been left with just a handful of capable leaders and operatives, and with continued pressure is on the path to its destruction. And for the first time since this fight began, we can look ahead and envision a world in which the al-Qaida core is simply no longer relevant.

Nevertheless, the dangerous threat from al-Qaida has not disappeared. As the al-Qaida core falters, it continues to look to affiliates and adherents to carry on its murderous cause. Yet these affiliates continue to lose key commanders and capabilities as well. In Somalia, it is indeed worrying to witness al-Qaida's merger with al-Shabaab, whose ranks include foreign fighters, some with US passports. At the same time, al-Shabaab continues to focus primarily on launching regional attacks, and ultimately, this is a merger between two organizations in decline.

In Yemen, al-Qaida in the Arabian Peninsula, or AQAP, continues to feel the effects of the death last year of Anwar al-Awlaki, its leader of external operations who was responsible for planning and directing terrorist attacks against the United States. Nevertheless, AQAP continues to be al-Qaida's most active affiliate, and it continues to seek the opportunity to strike our homeland. We therefore continue to support the government of Yemen in its efforts against AQAP, which is being forced to fight for the territory it needs to plan attacks beyond Yemen. In north and west Africa, another al-Qaida affiliate, al-Qaida in the Islamic Maghreb, or AQIM, continues its efforts to destabilize regional governments and engages in kidnapping of Western citizens for ransom activities designed to fund its terrorist agenda. And in Nigeria, we are monitoring closely the emergence of Boko Haram, a group that appears to be aligning itself with al-Qaida's violent agenda and is increasingly looking to attack Western interests in Nigeria, in addition to Nigerian government targets.

More broadly, al-Qaida's killing of innocents, mostly Muslim men, women and children, has badly tarnished its image and appeal in the eyes of Muslims around the world.

John Brennan:

Thank you. More broadly, al-Qaida's killing of innocents, mostly men women and children, has badly tarnished its appeal and image in the eyes of Muslims around the world. Even bin Laden and his lieutenants knew this. His propagandist, Adam Gadahn, admitted that they were now seen "as a group that does not hesitate to take people's money by falsehood, detonating mosques, and spilling the blood of scores of people." Bin Laden agreed that "a large portion" of Muslims around the world "have lost their trust" in al-Qaida.

So damaged is al-Qaida's image that bin Laden even considered changing its name. And one of the reasons? As bin Laden said himself, US officials "have largely stopped using the phrase 'the war on terror' in the context of not wanting to provoke Muslims." Simply calling them al-Qaida, bin Laden said, "reduces the feeling of Muslims that we belong to them."

To which I would add, that is because al-Qaida does not belong to Muslims. Al-Qaida is the antithesis of the peace, tolerance, and humanity that is the hallmark of Islam.

Despite the great progress we've made against al-Qaida, it would be a mistake to believe this threat has passed. Al-Qaida and its associated forces still have the intent to attack the United States. And we have seen lone individuals, including American citizens, often inspired by al-Qaida's murderous ideology, kill innocent Americans and seek to do us harm.

Still, the damage that has been inflicted on the leadership core in Pakistan, combined with how al-Qaida has alienated itself from so much of the world, allows us to look forward. Indeed, if the decade before 9/11 was the time of al-Qaida's rise, and the decade after 9/11 was the time of its decline, then I believe this decade will be the one that sees its demise. This progress is no accident.

It is a direct result of intense efforts made over more than a decade, across two administrations, across the US government and in concert with allies and partners. This includes the comprehensive counterterrorism strategy being directed by President Obama, a strategy guided by the President's highest responsibility, to protect the safety and the security of the American people. In this fight, we are harnessing every element of American power: intelligence, military, diplomatic, development, economic, financial, law enforcement, homeland security, and the power of our values, including our commitment to the rule of law. That's why, for instance, in his first days in office, President Obama banned the use of enhanced interrogation techniques, which are not needed to keep our country safe. Staying true to our values as a nation also includes upholding the transparency upon which our democracy depends.

A few months after taking office, the president travelled to the National Archives where he discussed how national security requires a delicate balance between secrecy and transparency. He pledged to share as much information as possible with the American people "so that they can make informed judgments and hold us accountable."

He has consistently encouraged those of us on his national security team to be as open and candid as possible as well.

Earlier this year, Attorney General Holder discussed how our counterterrorism efforts are rooted in, and are strengthened by, adherence to the law, including the legal authorities that allow us to pursue members of al-Qaida, including US citizens, and to do so using technologically advanced weapons.

In addition, Jeh Johnson, the general counsel at the Department of Defense, has addressed the legal basis for our military efforts against al-Qaida. Stephen Preston, the general counsel at the CIA, has discussed how the agency operates under US law.

These speeches build on a lecture two years ago by Harold Koh, the State Department legal adviser, who noted that "US targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war."

Given these efforts, I venture to say that the United States government has never been so open regarding its counterterrorism policies and their legal justification. Still, there continues to be considerable public and legal debate surrounding these technologies and how they are sometimes used in the fight against al-Qaida.

Now, I want to be very clear. In the course of the war in Afghanistan and the fight against al-Qaida, I think the American people expect us to use advanced technologies, for example, to prevent attacks on US forces and to remove terrorists from the battlefield. We do, and it has saved the lives of our men and women in uniform. What has clearly captured the attention of many, however, is a different practice, beyond hot battlefields like Afghanistan, identifying specific members of al-Qaida and then targeting them with lethal force, often using aircraft remotely operated by pilots who can be hundreds, if not thousands, of miles away. And this is what I want to focus on today.

Jack Goldsmith, a former assistant attorney general in the administration of George W. Bush and now a professor at Harvard Law School, captured the situation well. He wrote:

"The government needs a way to credibly convey to the public that its decisions about who is being targeted, especially when the target is a US citizen, are sound. First, the government can and should tell us more about the process by which it reaches its high-value targeting decisions. The more the government tells us about the eyeballs on the issue and the robustness of the process, the more credible will be its claims about the accuracy of its factual determinations and the soundness of its legal ones. All of this information can be disclosed in some form without endangering critical intelligence."

Well, President Obama agrees. And that is why I am here today.

I stand here as someone who has been involved with our nation's security for more than 30 years. I have a profound appreciation for the truly remarkable capabilities

of our counterterrorism professionals, and our relationships with other nations, and we must never compromise them. I will not discuss the sensitive details of any specific operation today. I will not, nor will I ever, publicly divulge sensitive intelligence sources and methods. For when that happens, our national security is endangered and lives can be lost. At the same time, we reject the notion that any discussion of these matters is to step onto a slippery slope that inevitably endangers our national security. Too often, that fear can become an excuse for saying nothing at all, which creates a void that is then filled with myths and falsehoods. That, in turn, can erode our credibility with the American people and with foreign partners, and it can undermine the public's understanding and support for our efforts. In contrast, President Obama believes that done carefully, deliberately and responsibly we can be more transparent and still ensure our nation's security.

So let me say it as simply as I can. Yes, in full accordance with the law, and in order to prevent terrorist attacks on the United States and to save American lives, the United States Government conducts targeted strikes against specific al-Qaida terrorists, sometimes using remotely piloted aircraft, often referred to publicly as drones. And I'm here today because President Obama has instructed us to be more open with the American people about these efforts.

Broadly speaking, the debate over strikes targeted at individual members of al-Qaida has centered on their legality, their ethics, the wisdom of using them, and the standards by which they are approved. With the remainder of my time today, I would like to address each of these in turn.

First, these targeted strikes are legal. Attorney General Holder, Harold Koh, and Jeh Johnson have all addressed this question at length. To briefly recap, as a matter of domestic law, the Constitution empowers the president to protect the nation from any imminent threat of attack. The Authorization for Use of Military Force, the AUMF, passed by Congress after the September 11th attacks authorized the president "to use all necessary and appropriate forces" against those nations, organizations, and individuals responsible for 9/11. There is nothing in the AUMF that restricts the use of military force against al-Qaida to Afghanistan.

As a matter of international law, the United States is in an armed conflict with al-Qaida, the Taliban, and associated forces, in response to the 9/11 attacks, and we may also use force consistent with our inherent right of national self-defense. There is nothing in international law that bans the use of remotely piloted aircraft for this purpose or that prohibits us from using lethal force against our enemies outside of an active battlefield, at least when the country involved consents or is unable or unwilling to take action against the threat.

Second, targeted strikes are ethical. Without question, the ability to target a specific individual, from hundreds or thousands of miles away, raises profound questions. Here, I think it's useful to consider such strikes against the basic principles of the law of war that govern the use of force.

Targeted strikes conform to the principle of necessity, the requirement that the target have definite military value. In this armed conflict, individuals who are part of al-Qaida or its associated forces are legitimate military targets. We have the authority to target them with lethal force just as we target enemy leaders in past conflicts, such as Germans and Japanese commanders during World War II.

Targeted strikes conform to the principles of distinction, the idea that only military objectives may be intentionally targeted and that civilians are protected from being intentionally targeted. With the unprecedented ability of remotely piloted aircraft to precisely target a military objective while minimizing collateral damage, one could argue that never before has there been a weapon that allows us to distinguish more effectively between an al-Qaida terrorist and innocent civilians.

Targeted strikes conform to the principle of proportionality, the notion that the anticipated collateral damage of an action cannot be excessive in relation to the anticipated military advantage. By targeting an individual terrorist or small numbers of terrorists with ordnance that can be adapted to avoid harming others in the immediate vicinity, it is hard to imagine a tool that can better minimize the risk to civilians than remotely piloted aircraft.

For the same reason, targeted strikes conform to the principle of humanity which requires us to use weapons that will not inflict unnecessary suffering. For all these reasons, I suggest to you that these targeted strikes against al-Qaida terrorists are indeed ethical and just.

Of course, even if a tool is legal and ethical, that doesn't necessarily make it appropriate or advisable in a given circumstance. This brings me to my next point.

Targeted strikes are wise. Remotely piloted aircraft in particular can be a wise choice because of geography, with their ability to fly hundreds of miles over the most treacherous terrain, strike their targets with astonishing precision, and then return to base. They can be a wise choice because of time, when windows of opportunity can close quickly and there just may be only minutes to act.

They can be a wise choice because they dramatically reduce the danger to US personnel, even eliminating the danger altogether. Yet they are also a wise choice because they dramatically reduce the danger to innocent civilians, especially considered against massive ordnance that can cause injury and death far beyond their intended target.

In addition, compared against other options, a pilot operating this aircraft remotely, with the benefit of technology and with the safety of distance, might actually have a clearer picture of the target and its surroundings, including the presence of innocent civilians. It's this surgical precision, the ability, with laser-like focus, to eliminate the cancerous tumor called an al-Qaida terrorist while limiting damage to the tissue around it, that makes this counterterrorism tool so essential.

There's another reason that targeted strikes can be a wise choice, the strategic consequences that inevitably come with the use of force. As we've seen, deploying large armies abroad won't always be our best offense.

Countries typically don't want foreign soldiers in their cities and towns. In fact, large, intrusive military deployments risk playing into al-Qaida's strategy of trying to draw us into long, costly wars that drain us financially, inflame anti-American resentment, and inspire the next generation of terrorists. In comparison, there is the precision of targeted strikes.

I acknowledge that we, as a government, along with our foreign partners, can and must do a better job of addressing the mistaken belief among some foreign publics that we engage in these strikes casually, as if we are simply unwilling to expose U.S forces to the dangers faced every day by people in those regions. For, as I'll describe today, there is absolutely nothing casual about the extraordinary care we take in making the decision to pursue an al-Qaida terrorist, and the lengths to which we go to ensure precision and avoid the loss of innocent life.

Still, there is no more consequential a decision than deciding whether to use lethal force against another human being, even a terrorist dedicated to killing American citizens. So in order to ensure that our counterterrorism operations involving the use of lethal force are legal, ethical, and wise, President Obama has demanded that we hold ourselves to the highest possible standards and processes.

This reflects his approach to broader questions regarding the use of force. In his speech in Oslo accepting the Nobel Peace Prize, the president said that "all nations, strong and weak alike, must adhere to standards that govern the use of force." And he added:

"Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct. And even as we confront a vicious adversary that abides by no rules, I believe the United States of America must remain a standard bearer in the conduct of war. That is what makes us different from those whom we fight. That is a source of our strength."

The United States is the first nation to regularly conduct strikes using remotely piloted aircraft in an armed conflict. Other nations also possess this technology, and any more nations are seeking it, and more will succeed in acquiring it. President Obama and those of us on his national security team are very mindful that as our nation uses this technology, we are establishing precedents that other nations may follow, and not all of those nations may -- and not all of them will be nations that share our interests or the premium we put on protecting human life, including innocent civilians.

If we want other nations to use these technologies responsibly, we must use them responsibly. If we want other nations to adhere to high and rigorous standards for their use, then we must do so as well. We cannot expect of others what we will not do

ourselves. President Obama has therefore demanded that we hold ourselves to the highest possible standards, that, at every step, we be as thorough and as deliberate as possible.

This leads me to the final point I want to discuss today, the rigorous standards and process of review to which we hold ourselves today when considering and authorizing strikes against a specific member of al-Qaida outside the hot battlefield of Afghanistan. What I hope to do is to give you a general sense, in broad terms, of the high bar we require ourselves to meet when making these profound decisions today. That includes not only whether a specific member of al-Qaida can legally be pursued with lethal force, but also whether he should be.

Over time, we've worked to refine, clarify, and strengthen this process and our standards, and we continue to do so. If our counterterrorism professionals assess, for example, that a suspected member of al-Qaida poses such a threat to the United States to warrant lethal action, they may raise that individual's name for consideration. The proposal will go through a careful review and, as appropriate, will be evaluated by the very most senior officials in our government for a decision.

First and foremost, the individual must be a legitimate target under the law. Earlier, I described how the use of force against members of al-Qaida is authorized under both international and US law, including both the inherent right of national self-defense and the 2001 Authorization for Use of Military Force, which courts have held extends to those who are part of al-Qaida, the Taliban, and associated forces. If, after a legal review, we determine that the individual is not a lawful target, end of discussion. We are a nation of laws, and we will always act within the bounds of the law.

Of course, the law only establishes the outer limits of the authority in which counterterrorism professionals can operate. Even if we determine that it is lawful to pursue the terrorist in question with lethal force, it doesn't necessarily mean we should. There are, after all, literally thousands of individuals who are part of al-Qaida, the Taliban, or associated forces, thousands upon thousands. Even if it were possible, going after every single one of these individuals with lethal force would neither be wise nor an effective use of our intelligence and counterterrorism resources.

As a result, we have to be strategic. Even if it is lawful to pursue a specific member of al-Qaida, we ask ourselves whether that individual's activities rise to a certain threshold for action, and whether taking action will, in fact, enhance our security.

For example, when considering lethal force we ask ourselves whether the individual poses a significant threat to US interests. This is absolutely critical, and it goes to the very essence of why we take this kind of exceptional action. We do not engage in legal action -- in lethal action in order to eliminate every single member of al-Qaida in the world. Most times, and as we have done for more than a decade, we rely on cooperation with other countries that are also interested in removing these terrorists with their own capabilities and within their own laws. Nor is lethal action about punishing

terrorists for past crimes; we are not seeking vengeance. Rather, we conduct targeted strikes because they are necessary to mitigate an actual ongoing threat, to stop plots, prevent future attacks, and to save American lives.

And what do we mean when we say significant threat? I am not referring to some hypothetical threat, the mere possibility that a member of al-Qaida might try to attack us at some point in the future. A significant threat might be posed by an individual who is an operational leader of al-Qaida or one of its associated forces. Or perhaps the individual is himself an operative, in the midst of actually training for or planning to carry out attacks against US persons and interests. Or perhaps the individual possesses unique operational skills that are being leveraged in a planned attack. The purpose of a strike against a particular individual is to stop him before he can carry out his attack and kill innocents. The purpose is to disrupt his plans and his plots before they come to fruition.

In addition, our unqualified preference is to only undertake lethal force when we believe that capturing the individual is not feasible. I have heard it suggested that the Obama Administration somehow prefers killing al-Qaida members rather than capturing them. Nothing could be further from the truth. It is our preference to capture suspected terrorists whenever and wherever feasible.

For one reason, this allows us to gather valuable intelligence that we might not be able to obtain any other way. In fact, the members of al-Qaida that we or other nations have captured have been one of our greatest sources of information about al-Qaida, its plans, and its intentions. And once in US custody, we often can prosecute them in our federal courts or reformed military commissions, both of which are used for gathering intelligence and preventing future terrorist attacks.

You see our preference for capture in the case of Ahmed Warsame, a member of al-Shabaab who had significant ties to al-Qaida in the Arabian Peninsula. Last year, when we learned that he would be traveling from Yemen to Somalia, US forces captured him in route and we subsequently charged him in federal court.

The reality, however, is that since 2001 such unilateral captures by US forces outside of hot battlefields, like Afghanistan, have been exceedingly rare. This is due in part to the fact that in many parts of the world our counterterrorism partners have been able to capture or kill dangerous individuals themselves.

Moreover, after being subjected to more than a decade of relentless pressure, al-Qaida's ranks have dwindled and scattered. These terrorists are skilled at seeking remote, inhospitable terrain, places where the United States and our partners simply do not have the ability to arrest or capture them. At other times, our forces might have the ability to attempt capture, but only by putting the lives of our personnel at too great a risk. Oftentimes, attempting capture could subject civilians to unacceptable risks. There are many reasons why capture might not be feasible, in which case lethal force might be the only remaining option to address the threat, prevent an attack, and save lives.

Finally, when considering lethal force we are of course mindful that there are important checks on our ability to act unilaterally in foreign territories. We do not use force whenever we want, wherever we want. International legal principles, including respect for a state's sovereignty and the laws of war, impose constraints. The United States of America respects national sovereignty and international law.

Those are some of the questions we consider; the high standards we strive to meet. And in the end, we make a decision, we decide whether a particular member of al-Qaida warrants being pursued in this manner. Given the stakes involved and the consequences of our decision, we consider all the information available to us, carefully and responsibly.

We review the most up-to-date intelligence, drawing on the full range of our intelligence capabilities. And we do what sound intelligence demands, we challenge it, we question it, including any assumptions on which it might be based. If we want to know more, we may ask the intelligence community to go back and collect additional intelligence or refine its analysis so that a more informed decision can be made.

We listen to departments and agencies across our national security team. We don't just hear out differing views, we ask for them and encourage them. We discuss. We debate. We disagree. We consider the advantages and disadvantages of taking action. We also carefully consider the costs of inaction and whether a decision not to carry out a strike could allow a terrorist attack to proceed and potentially kill scores of innocents.

Nor do we limit ourselves narrowly to counterterrorism considerations. We consider the broader strategic implications of any action, including what effect, if any, an action might have on our relationships with other countries. And we don't simply make a decision and never revisit it again. Quite the opposite. Over time, we refresh the intelligence and continue to consider whether lethal force is still warranted.

In some cases, such as senior al-Qaida leaders who are directing and planning attacks against the United States, the individual clearly meets our standards for taking action. In other cases, individuals have not met our standards. Indeed, there have been numerous occasions where, after careful review, we have, working on a consensus basis, concluded that lethal force was not justified in a given case.

As President Obama's counterterrorism advisor, I feel that it is important for the American people to know that these efforts are overseen with extraordinary care and thoughtfulness. The president expects us to address all of the tough questions I have discussed today. Is capture really not feasible? Is this individual a significant threat to US interests? Is this really the best option? Have we thought through the consequences, especially any unintended ones? Is this really going to help protect our country from further attacks? Is this going to save lives?

Our commitment to upholding the ethics and efficacy of this counterterrorism tool continues even after we decide to pursue a specific terrorist in this way. For example, we

only authorize a particular operation against a specific individual if we have a high degree of confidence that the individual being targeted is indeed the terrorist we are pursuing. This is a very high bar. Of course, how we identify an individual naturally involves intelligence sources and methods, which I will not discuss. Suffice it to say, our intelligence community has multiple ways to determine, with a high degree of confidence, that the individual being targeted is indeed the al-Qaida terrorist we are seeking.

In addition, we only authorize a strike if we have a high degree of confidence that innocent civilians will not be injured or killed, except in the rarest of circumstances. The unprecedented advances we have made in technology provide us greater proximity to target for a longer period of time, and as a result allow us to better understand what is happening in real time on the ground in ways that were previously impossible. We can be much more discriminating and we can make more informed judgments about factors that might contribute to collateral damage.

I can tell you today that there have indeed been occasions when we decided against conducting a strike in order to avoid the injury or death of innocent civilians. This reflects our commitment to doing everything in our power to avoid civilian casualties, even if it means having to come back another day to take out that terrorist, as we have done previously. And I would note that these standards, for identifying a target and avoiding the loss of innocent -- the loss of lives of innocent civilians, exceed what is required as a matter of international law on a typical battlefield. That's another example of the high standards to which we hold ourselves.

Our commitment to ensuring accuracy and effectiveness continues even after a strike. In the wake of a strike, we harness the full range of our intelligence capabilities to assess whether the mission in fact achieved its objective. We try to determine whether there was any collateral damage, including civilian deaths. There is, of course, no such thing as a perfect weapon, and remotely piloted aircraft are no exception.

As the president and others have acknowledged, there have indeed been instances when, despite the extraordinary precautions we take, civilians have been accidently killed or worse -- have been accidentally injured, or worse, killed in these strikes. It is exceedingly rare, but it has happened. When it does, it pains us, and we regret it deeply, as we do any time innocents are killed in war. And when it happens we take it very, very seriously. We go back and we review our actions. We examine our practices. And we constantly work to improve and refine our efforts so that we are doing everything in our power to prevent the loss of innocent life. This too is a reflection of our values as Americans.

Ensuring the ethics and efficacy of these strikes also includes regularly informing appropriate members of Congress and the committees who have oversight of our counterterrorism programs. Indeed, our counterterrorism programs, including the use of lethal force, have grown more effective over time because of congressional oversight and our ongoing dialogue with members and staff.

This is the seriousness, the extraordinary care, that President Obama and those of us on his national security team bring to this weightiest of questions: Whether to pursue lethal force against a terrorist who is plotting to attack our country.

When that person is a US citizen, we ask ourselves additional questions. Attorney General Holder has already described the legal authorities that clearly allow us to use lethal force against an American citizen who is a senior operational leader of al-Qaida. He has discussed the thorough and careful review, including all relevant constitutional considerations, that is to be undertaken by the US government when determining whether the individual poses an imminent threat of violent attack against the United States.

To recap, the standards and processes I've described today, which we have refined and strengthened over time, reflect our commitment to: ensuring the individual is a legitimate target under the law; determining whether the individual poses a significant threat to US interests; determining that capture is not feasible; being mindful of the important checks on our ability to act unilaterally in foreign territories; having that high degree of confidence, both in the identity of the target and that innocent civilians will not be harmed; and, of course, engaging in additional review if the al-Qaida terrorist is a US citizen.

Going forward, we'll continue to strengthen and refine these standards and processes. As we do, we'll look to institutionalize our approach more formally so that the high standards we set for ourselves endure over time, including as an example for other nations that pursue these capabilities. As the president said in Oslo, in the conduct of war, America must be the standard bearer.

This includes our continuing commitment to greater transparency. With that in mind, I have made a sincere effort today to address some of the main questions that citizens and scholars have raised regarding the use of targeted lethal force against al-Qaida. I suspect there are those, perhaps some in this audience, who feel we have not been transparent enough. I suspect there are those, both inside and outside our government, who feel I have been perhaps too open. If both groups feel a little bit unsatisfied, then I probably struck the right balance today.

Again, there are some lines we simply will not and cannot cross because, at times, our national security demands secrecy. But we are a democracy. The people are sovereign. And our counterterrorism tools do not exist in a vacuum. They are stronger and more sustainable when the American people understand and support them. They are weaker and less sustainable when the American people do not. As a result of my remarks today, I hope the American people have a better understanding of this critical tool, why we use it, what we do, how carefully we use it, and why it is absolutely essential to protecting our country and our citizens.

I would just like to close on a personal note. I know that for many people in our government and across the country the issue of targeted strikes raised profound moral questions. It forces us to confront deeply held personal beliefs and our values as a

nation. If anyone in government who works in this area tells you they haven't struggled with this, then they haven't spent much time thinking about it. I know I have, and I will continue to struggle with it as long as I remain in counterterrorism.

But I am certain about one thing. We are at war. We are at war against a terrorist organization called al-Qaida that has brutally murdered thousands of Americans, men, women and children, as well as thousands of other innocent people around the world. In recent years, with the help of targeted strikes, we have turned al-Qaida into a shadow of what it once was. They are on the road to destruction.

Until that finally happens, however, there are still terrorists in hard-to-reach places who are actively planning attacks against us. If given the chance, they will gladly strike again and kill more of our citizens. And the president has a Constitutional and solemn obligation to do everything in his power to protect the safety and security of the American people.

Yes, war is hell. It is awful. It involves human beings killing other human beings, sometimes innocent civilians. That is why we despise war. That is why we want this war against al-Qaida to be over as soon as possible, and not a moment longer. And over time, as al-Qaida fades into history and as our partners grow stronger, I'd hope that the United States would have to rely less on lethal force to keep our country safe.

Until that happens, as President Obama said here five years ago, if another nation cannot or will not take action, we will. And it is an unfortunate fact that to save many innocent lives we are sometimes obliged to take lives, the lives of terrorists who seek to murder our fellow citizens.

On behalf of President Obama and his administration, I am here to say to the American people that we will continue to work to safeguard this nations -- this nation and its citizens responsibly, adhering to the laws of this land and staying true to the values that define us as Americans, and thank you very much.

Jane Harman:

Thank you, Mr. Brennan. As it is almost 1:00, I hope you can stay a few extra minutes to take questions, and I would just like to make a comment, ask you one question, and then turn over to our -- turn it over to our audience for questions. Please no statements. Ask questions. First your call for greater transparency is certainly appreciated by me. I think that the clearer we can make our policies, and the better we can explain them, and the more debate we can have in the public square about them, the more: one, they will be understood; and two, they will persuade the would-be suicide bomber about to strap on a vest that there is a better answer. We do have to win the argument in the end with the next generation, not just take out those who can't be rehabilitated in this generation, and I see you nodding, so I know you agree and I'm not going to ask you a question about that. I also want to say how honored we are that you would make this important speech at the Wilson Center. There is new material here, for

those who may have missed it. The fact that the US conducts targeted strikes using drones has always been something that I, as a public official, danced around because I knew it had not been officially acknowledged by our government. I was one of those members of Congress briefed on this program, I have seen the feed that shows how we do these things, I'm not going to comment on specific operations or areas of the world, but I do think it is important that our government has acknowledged this, and set out, as carefully as possible, the reasons why we do it, and I want to commend you personally as well as Eric Holder, Jeh Johnson, and Harold Koh for carefully laying out the legal framework, and also add that at the Wilson Center, we will continue to debate these issues, and see what value we can add free from spin on a non-partisan basis to helping to articulate even more clearly the reasons why, as you said, war is hell, and why, as you said, there is no decision more consequential than deciding to use legal force, so thank you very much for making those remarks here.

My question is this: One thing I don't think you mentioned in that enormously important address was the rise of Islamist parties, which have been elected in Tunisia, Egypt, and probably will be elected, and exist in Turkey and other countries. Do you think that having Islamist inside the tent, in a political sphere, also helps diminish the threat of outside groups like al-Qaida?

John Brennan:

Well, hopefully political pluralism is breaking out in the Middle East, and we're going to find in many countries the ability of various constituencies to find expression through political parties. And certainly, we are very strong advocates of using the political system, the laws, to be able to express the views of individual groups within different countries, and so rather than finding expression through violent extremism, these groups have the opportunity now, and since they've never had before in countries like Tunisia, and in Egypt, Yemen, other places, where they can in fact participate meaningfully in the political system. This is going to take some time for these systems to be able to mature sufficiently so that there can be a very robust and democratic system there, but certainly those individuals who are parties -- who are associated with parties that have a religious basis to them, they can find now the opportunity now to be able to participate in that political system.

Jane Harman:

My second and final question, and I see all of you with your hands about to be raised, and again, please just state a question as I'm about to do. You just mentioned Yemen, that has been part of your broader portfolio, I know you made many trips there, and you were a key architect of the deal to get Saleh to agree to -- the 40 year autocrat ruler -- to agree to accept immunity, leave the country, and then to be replaced by an elected leader, in this case, his vice president in a restructured government. Do you think a Yemen-type solution could work in Syria? Do you think there's any possibility of getting the Bashar family out of Syria and structuring a new government there, and

perhaps in having the -- Russia lead the effort to do that, because of its close ties to Syria, and the fact that it is still unfortunately arming and supporting the Syrian regime?

John Brennan:

Well, each of these countries in the Middle East are facing different types of circumstances, and they have unique histories. Yemen was fortunate that they do -- did have a degree of political pluralism there, Ali Abdullah Saleh in fact allowed certain political institutions to develop, and we were very fortunate to have a peaceful transition from the previous regime to the government of President Hadi now. Certainly, there needs to be some way found for progress in Syria. It's outrageous what's happening in that country, the continued death of Syrian citizens at the hands of a brutal authoritarian government. This is something that needs to stop, and the international community has come together on it, so I'd like to be able to see something that would be able to transition peacefully, but the sooner it can be done, obviously, the more lives we've saved.

Jane Harman:

Thank you very much. Please identify yourselves, and ask a question only. The woman straight ahead of me, yes. Just wait for the mic.

Tara McKelvy:

Hi, my name is Tara McKelvy, I'm a scholar here, and I'm a correspondent for Newsweek and The Daily Beast, and you talked a little bit about the struggle that you have in this process of the targeted strikes, and General Cartwright talked to me about the question of surrender, that's not really an option when you use a Predator drone, for instance. I'm wondering if you can talk about which kinds of issues that you found most troubling when you think about these strikes.

John Brennan:

Well, as I said, one of the considerations that we go through is the feasibility of capture. We would prefer to get these individuals so that they can be captured. Working with local governments, what we like to be able to do is provide them the intelligence that they can get the individuals, so it doesn't have to be US forces that are going on the ground in certain areas. But if it's not feasible, either because it's too risky from the standpoint of forces or the government doesn't have the will or the ability to do it, then we make a determination whether or not the significance of the threat that the person poses requires us to take action, so that we're able to mitigate the threat that they pose. I mean, these are individuals that could be involved in a very active plot, and if it is allowed to continue, you know, it could result in attacks either in Yemen against the US embassy, or here in the homeland that could kill, you know, dozens if not hundreds of people. So what we always want to do, though, is look at whether or not there is an

option to get this person and bring them to justice somehow for intelligence collection purposes, as well as to try them for their crimes.

Jane Harman:

Thank you, man in the green shirt right here.

Robert Baum:

Robert Baum from the Wilson Center and the University of Missouri. Thank you for your comments. I did want to ask about one area where we seem to be less successful, the events in Mali and Nigeria seem to suggest that we've been less successful in containing al-Qaida, and I was wondering if you could talk a little bit about your efforts in West Africa and also urge you to emphasize the importance of economic development as a way of -- the strategic development of economic development in combating the terrorism. Thank you.

John Brennan:

You raised two important points. One is what are we doing in terms of confronting the terrorist threat that emanates in places like Mali and Nigeria, and other areas, and then what we need to do further upstream as far as the type of development assistance, and assistance to these countries, so they can build the institutions that are going to be able to address the needs of the people. Nigeria's a particularly dangerous situation right now with Boko Haram that has the links with al-Qaida, but also has links with al-Shabaab, as well AQIM. It has this radical offshoot, Ansaru, that really is focused on US or Western interests, and so there is a domestic challenge that Boko Haram poses to Nigeria, and as we well know, there's the north-south struggle within Nigeria, and tensions between the Christian-Muslim communities. So we are trying to work with the Nigerian government as well as other governments are, as well, to try to give them the capabilities they need to confront the terrorist threat, but then also the issue is the building up those political institutions within Nigeria so that they can deal with this, not just from a law enforcement or internal security perspective, but also to address those needs that are fueling some of these fires of violent extremism.

Mali, you know, because of the recent coup, we've been trying to work across the Sahel with Mali, and Niger, and Mauritania, and other countries to address the growing phenomenon and threat of al-Qaida Islamic Maghreb that is a unique organization because it has a criminal aspect to it. You know, it kidnaps these individuals for large ransoms. We're outraged whenever, you know, countries or organizations pay these huge sums to al-Qaida, whether it be in the Sahel or in Yemen because it just is able to feed their activities, but Mali right now, with the coup, and then you have the Tuareg rebellion up in the north, and then that area that basically is such a large expansive territory, that also, you know, requires both a balancing of addressing the near-term threats that are posed by al-Qaida, but also trying to give the government in Mali, in Bamako, the ability to build up those institutions, address the development needs, they

have the different sort of ethnic and tribal rivalries that are there, so it's a complicated area. I've worked very closely with the -- talking with my French and British colleagues as well as with others in the region, about how there might be some way to address some of these broader African issues that manifest themselves, unfortunately, in the kidnappings, and the piracy, and the criminal activities, and terrorist attacks, so there's an operational cadence in Africa now that is concerning in a number of parts of the continent.

Jane Harman:

Back there, middle, yeah.

John Brennan:

I can take another 10 minutes [inaudible].

Leanne Erdberg:

Hi there, Leanne Erdberg [spelled phonetically] from the State Department. How can we ensure that executive interagency actors, when they are undertaking counterterrorism actions, are held to appropriate standards, and processes as we ask them to act as prosecutors, judges, and juries, and how we can ensure that intelligence is held to the same standards and processes that evidence is?

John Brennan:

Okay, well as I tried to say in my remarks, we're not carrying out these actions to retaliate for past transgressions. We are not a court, we're not trying to determine guilt or innocence, and then carry out a strike in retaliation. What we're trying to do is prevent the loss of lives through terrorist attacks, so it's not as though we're, you know, sort of judge and jury on, again, their involvement in past activities. We see a threat developing, we follow it very carefully, we identify the individuals who are responsible for allowing that plot and that plan to go forward, and then we make a determination about whether or not we have the solid intelligence base, and that's why I tried to say in my remarks, we have standards. You know, the intelligence is brought forward, we evaluate that, there's interagency meetings that a number of us are involved in on a ongoing basis, scrutinizing that intelligence, determining whether or not we have a degree of confidence that that person is indeed involved in carrying out this plan to kill Americans. If it reaches that level, then what we do is we look at it according to the other standards that I talked about in terms of infeasibility of capture, determination that we are able to have the intelligence that will give us, you know, a high degree of confidence that, you know, we can track an individual and find them, and be confident that we're taking action against an individual who really is involved in carrying out an attack. You know, if we -- if we didn't have to take these actions, and we still had -- and we had confidence that there wasn't going to be a terrorist attack, I think everybody would be very, very pleased. We only decide to take that action if there is no other option available, if there is not the option of capture, if the local government will not take action, if we cannot do something that will prevent that attack from taking place, and the only available option is taking that individual off of the battlefield, and we're going to do it in a way that gives us the confidence that we are not going to, in fact, inflict collateral damage. So again, it really is a very rigorous system of standards and processes that we go through.

Jane Harman:

Thank you. In the far back. Yes, you.

Jon Harper:

Sir, I was wondering if you could tell us --

Jane Harman:

Identify yourself, please.

Jon Harper:

Oh, sorry, Jon Harper with the Asahi Shimbun. It's a Japanese paper. I was wondering if you could tell me how many times or what percentage of the time have proposals to target a specific individual been denied, and also if you could address the issue of signature strikes, which I guess aren't necessarily targeted against specific individuals, but people who are engaging in suspicious activities. Could you comment on what the criteria is for targeting them? Thank you.

John Brennan:

Well, I'm not going to go into sort of how many times, what proportion of instances there have been sort of either approvals or declinations of these recommendations that come forward, but I can just tell you that there have been a -numerous times where individuals that were put forward for consideration for this type of action was declined. You make reference to signature strikes that are frequently reported in the press. I was speaking here specifically about targeted strikes against individuals who are involved. Everything we do, though, that is carried out against al-Qaida is carried out consistent with the rule of law, the authorization on the use of military force, and domestic law. And we do it with a similar rigor, and there are various ways that we can make sure that we are taking the actions that we need to prevent a terrorist attack. That's the whole purpose of whatever action we use, the tool we use, it's to prevent attack, and to save lives. And so I spoke today, for the first time openly, about, again, what's commonly referred to in the press as drones, remotely piloted aircraft, that can give you that type of laser-like precision that can excise that terrorist or that threat in a manner that, again, with the medical metaphor, that will not damage the surrounding tissue, and so what we're really trying to do -- al-Qaida's a cancer throughout the world,

it has metastasized in so many different places, and when that metastasized tumor becomes lethal and malignant, that's when we're going to take the action that we need to.

Jane Harman:

Last question will be the woman in the back at the edge.

Homai Emdah:

Sorry. What about in a country like Pakistan --

Jane Harman:

Could you identify yourself please.

Homai Emdah:

Homai Emdah [spelled phonetically], Express News. Mr. Brennan, what about in a country like Pakistan where drone strikes are frequently carried out, and the Pakistani government has, over the last few months, repeatedly protested to the US government about an end to drone strikes, which is also the subject of discussion between Ambassador Grossman when he was in Islamabad. You mentioned that countries can be incapable or unwilling to carry out -- to arrest militants, so how do you deal with a country like Pakistan which doesn't accept drone strikes officially?

John Brennan:

We have an ongoing dialogue with many countries throughout the world on counterterrorism programs, and some of those countries we are involved in very detailed discussions about the appropriate tools to bring to bear. In the case of Pakistan, as you pointed out, Ambassador Grossman was there just very recently. There are ongoing discussions with the government of Pakistan about how best to address the terrorist threat that emanates from that area, and I will point out, that, you know, so many Pakistanis have been killed by that malignant tumor that is within the sovereign borders of Pakistan. It's -- and many, many brave Pakistanis have given their lives against these terrorist and militant organizations. And so, as the parliament recently said in its resolution, that Pakistan needs to rid itself of this -- these foreign militants and these foreign terrorists that have taken root inside of Pakistan. So we are committed to working very closely on an ongoing basis with the Pakistani government which includes, you know, the various components, intelligence, security, and various civilian departments and agencies in order to help them address the terrorist threat, but also so that they can help us make sure that Pakistan and that area near Afghanistan is never, ever again used as a launching pad for attacks here in the United States.

Jane Harman:

Thank you. Let me just conclude by saying that former CIA director Mike Hayden used to use the analogy of a football field, the lines on the football field, and he talked about our intelligence operatives and others as the players on the field, and he said, "We need them to get chalk on their cleats." Go up right up to the line in carrying out what are approved policies of the United States, and if you think about it that way, it is really important to have policies that are transparent, so that those who are carrying out the mission and those in the United States, and those around the world who are trying to understand the mission, know where the lines are. If we don't know where the lines are, some people will be risk-averse, other will commit excesses, and we've certainly seen a few of those, Abu Ghraib comes to mind, over recent years which are black eyes on our country. And so I just want to applaud the fact that John Brennan has come over here from the White House, spent over an hour with us laying out in great detail what the rules are for something that has been revealed today, which is the use of drones in certain operations, targeted operations. The debate will continue, no question, people in this audience and listening in have different points of view, we certainly know that one young woman did during his remarks, but that's why the Wilson Center's here. To offer a platform free of spin and partisan rhetoric to debate these issues thoroughly, and you honored us by coming here today, Mr. Brennan, thank you very much.

John Brennan:
Thank you very much Jane, thank you.

[applause]

[end of transcription]

APPENDIX III REMARKS OF MEDEA BENJAMIN

Excuse me, Mr. Brennan, will you speak out about the innocents killed by the United States in our drone strikes? What about the hundreds of innocent people we are killing with drone strikes in the Philippines, in Yemen, in Somalia? I speak out on behalf of those innocent victims. They deserve an apology from you, Mr. Brennan. How many people are you willing to sacrifice? Why are you lying to the American people and not saying how many innocents have been killed?

I speak out on behalf of Tariq Aziz, a 16-year-old in Pakistan who was killed simply because he wanted to document the drone strikes. I speak out on behalf of Abdulrahman Al-Awlaki, a 16-year-old born in Denver, killed in Yemen just because his father was someone we don't like. I speak out on behalf of the Constitution and the rule of law." My parting words as they dragged me out the door were, "I love the rule of law and I love my country. You are making us less safe by killing so many innocent people. Shame on you, John Brennan.