

**DEMONS, PHANTOMS, MONSTERS**

**LAW, BODIES, AND DETENTION IN THE WAR ON TERROR**

**BY**

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A thesis submitted to the  
Graduate School-New Brunswick  
Rutgers, The State University of New Jersey  
in partial fulfillment of the requirements

for the degree of

Master of Arts

Graduate Program in Geography

written under the direction of

Robert W. Lake

and approved by

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New Brunswick, New Jersey

October 2007

## ABSTRACT OF THE THESIS

Demons, Phantoms, Monsters:

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This thesis is a study of the political and legal geographies of detention and interrogation in the War on Terror. First, as individual bodies are increasingly singled out for control based not on a breach of law, but on behavior that might reveal one's destructive intentions, how are various security techniques being absorbed into the legal frameworks of liberalism and mobilized spatially in international war prisons? Next, how does this focus on bodily contingencies and destructive potentiality modify the legal organization of violence in the landscape of international conflict? Finally, how are new technologies of control and expertise being deployed to establish a fluid space for the exercise of State power, and what are the roles of agents of legal discourse—judges, lawyers, administrators—in securing this landscape? How do these spaces reflect a particularly neoliberal mode of detention? In approaching these questions, I address relationships between state spatiality, law, and the detention of the human body in the ongoing War on Terror. I concentrate on the discursive and material thresholds that are often understood to organize the landscape of war: freedom and social control, legal and illegal violence, body and state, self and other. Through close analyses, I intend to show that legal discourse in the War on Terror occupies a rather tenuous position—being called upon to legitimize acts of war and violence while simultaneously

revealing spaces that challenge the legitimacy of those very actions. Ultimately, this is a work interrogating the legal production of insides and outsides.

## ACKNOWLEDGEMENTS

This thesis would not have been possible without the continued support of my colleagues, friends, and family: Alex Hinton, David Hughes, and Jasbir Puar offered the seminars at Rutgers University that would form the skeletal framework for this thesis. Robin Leichenko and Kevin St. Martin who, on top of their own excellent seminars were kind enough to lend their insight and critical comments to this thesis. Bob Lake, in addition to being the model of the diverse and interested scholar, allowed me the room to play it by ear and figure out where my successes and failures were without conveying a modicum of impatience. Peter Vancura and Margo Andrews consistently offered their sympathetic ears, far-reaching intelligence, and good humor throughout the writing of this text. Conversations with Bradley Wilson, whose passion for things geographical is contagious, were always fruitful and uplifting. The Syracuse architecture misanthropes: Antonio Furgieuele, Joseph Godlewski, Tim Lock, and John May were invaluable not just as longtime friends who listened to my difficulties and doubts with regards to this thesis, but also for being intellectual role models that I have looked up to and respected in excess of a decade. My family (which over the last year has happily grown into an international apparatus) has exhibited extreme patience and understanding as I repeatedly disappear from the universe under piles of papers and pixels. Mom, Dad, Steen, Katie and Matt: Thank you. Lastly, and indeed overwhelmingly, this thesis would not have been possible without the daily love and support of Nicky Agate. Her ability to push me to my intellectual limits while making sure I don't take myself too seriously is unparalleled. She has shown me the value of so many things that lay beyond my field of vision—from the glories of nineteenth century France to the peculiarities of language to the relative merits of otters and owls.

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## INTRODUCTION

Remember as best you can, always, the first cut into this story is repeatedly performed in the dark, in a theater I want to call the social, by something you could call terror.

—Jackie Orr, *The Panic Diaries* (2006)

**PART I: THE NEW YORK TIMES, AUGUST 2006**

On Thursday, August 17, 2006, the *New York Times* ran an article focusing on a new security measure being undertaken at several major airports in the United States. The project, for which the Transportation Security Administration (TSA) hopes to have thousands of screeners trained by the end of 2007, aims at interpreting the movement, tension, and fear on a traveler's face and body-language, in the hopes of locating and detaining would-be suicide bombers. A number of legal issues have come to the fore as a result of this spatial practice—most prominently racial profiling—and the American Civil Liberties Union (ACLU) has become involved in negotiating these claims. As John Reinstein, an ACLU lawyer argues, “there is a significant prospect this security method is going to be applied in a discriminatory manner. It introduces into the screening system a number of highly subjective elements *left to the discretion of the individual officer*.” According to the paper, the task for these screeners is not to find bombs or other weapons; their assignment “is to find anyone with *evil intent*”(Lipton 2006, italics mine).

\* \* \*

Earlier in that same week, the paper ran an Op-Ed piece that was aimed at critiquing the desire of George W. Bush's Presidential administration to disallow legal amnesty for Iraqi insurgents and to prosecute as criminals those detained who have used violent means in this theater of war (Waters 2006). In concert with this desire to criminalize insurgents is the U.S. state's aim to provide amnesty for American military forces from international war crimes legislation and, through the workings of the legislative branch of government, to rearticulate the limits of its own War Crimes law. The author highlights an interpretive discrepancy resulting from the determination that a war is

being fought, but only one side is entitled to the legal protections that arise when violence is classified as an act of war. He argues that amnesty does not mean impunity, and that insurgents “who torture Americans should not receive amnesty, but that’s no reason to lump all Iraqis together. We wouldn’t want our warriors measured by Abu Ghraib” (Waters 2006).

\* \* \*

These vignettes, both taken from one week in the *New York Times*, draw attention to three of the key questions that I explore in this thesis, and highlight the relevance of the political and legal geographic issues in the United States-led War on Terror. First, as individual bodies are increasingly singled out for control based not on a breach of law but on behavior that might reveal one’s destructive intentions, how are security techniques being absorbed into the legal frameworks of liberalism and mobilized spatially in international warfare? Next, how does this focus on bodily contingencies and destructive potentiality modify the legal organization of violence in the landscape of international conflict? Finally, how are new technologies of control and expertise being deployed to establish a fluid space for the exercise of state power, and what are the roles of agents of legal discourse—judges, lawyers, administrators—in securing this landscape? How do these spaces reflect a particularly neoliberal mode of detention? In approaching these questions, I address relationships between State spatiality, law, and the detention of the human body in the ongoing War on Terror. I concentrate on the discursive and material thresholds that are often understood to organize the landscape



of war: freedom and social control, legal and illegal violence, body and state, self and other<sup>1</sup>.

In the first chapter, I discuss the contemporary legal geography of the War on Terror at a very broad spatio-temporal scale. To do this, I will first concentrate on the changing roles of the rule of law paradigm within liberalism. Here I take liberalism to be a certain rationality of power, within which the tension at the limit between freedom and social control is constantly being reworked and redefined by way of law and legal discourse. This section concludes with a study of legal and policy rhetoric claiming the War on Terror to be a ‘new war’. This language has been mobilized recently to extend law’s pre-emptive powers into the as-yet unknown future in the name of security. My goal in this section is to look at how law, when combined with the concept of security, flattens the distinction between freedom and social control into a contradictory field where each is coplanar with the other, and in which the flexible power over life itself is the primary aim of governance.

The second chapter is an investigation of the frontier between legal and illegal violence in international warfare. This is one of the most ghostly limits in war, formed deep in the discourses of modern geopolitical power. Yet it is also material—the laws that purport to organize warring populations are corporeal and affective—and their transgression leaves marks on the body and the earth, exposing very real biological matter to varying conditions of freedom or imprisonment, of life or death. In this chapter, I explore the legal discourse that both distinguishes and connects two classifications of violent bodies active in the War on Terror: Private Military

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<sup>1</sup> These borders all congeal at the frictional interfaces between what Foucault in *The Order of Things* posits as the three disciplines fundamental to the deployment of modern rationality: biology, philology, and political economy. Life. Language. Labor (Foucault 1973, 250; Rajan 2006, 13).

Contractors (PMCs) and unlawful or enemy combatants. Both of these groups, by nature of their political and biological lives, share a precarious position relative to the production of legality and legitimacy in international and U.S. state law. Next I trace this unstable legal geography into the contemporary war prison where the embodied manifestations of this discursive organization collide with one another—un-law against un-law—and individual bodies become diagrams for the interchange of geopolitical power. The primary objective of this chapter is to explore the production of state space and the possibility for justice at this aporetic frontier, where ghostly discourse and biological matter converge and lay claim to the legal organization of political violence.

In the third and final chapter, I continue to work through aspects of the problematic geographic conditions that are introduced in chapter 2. This chapter concentrates on the role that the collision of bodies of law and biological bodies plays in the production of state space and the distribution of a particular mode of power. My primary focus in this chapter is the landscape of detention. More specifically, here I concentrate on the prisoner body in contemporary war prisons, the geopolitical contexts for these spaces, and the legal and policy discourse that purports to legitimate the embodied practices that occur within them. These facilities make their appearances in ways that challenge many of the fixed categories that populate policy and law, and provoke numerous difficult questions about relationships between text, space, time and the body. I focus here on two specific legal issues: First, the fluid geography of war prison spaces and the detention of subjects—both American citizens as well as those of other countries, failed states, and stateless actors. This part of the chapter circulates around the detention and subsequent legal claims of Canadian Major Arar. In the second part of the chapter, I focus on how these suspects are treated and interrogated once they are in custody. This

section highlights the centrality of the body in the War on Terror. The aim of this chapter is to explore various modes of wartime detention and how these spaces are intentionally constructed to exist relative to an irreconcilable legal tension.

Though much of the scholarship on territory and borders in warfare has to do with land, my focus rests on transformations resulting from a movement *away* from land's centrality as a primary site in the War on Terror. I take law—specifically domestic and international law dealing with the conduct of war—as the archive for my empirical analysis, and use this legal geography to focus on the changing role of the material body in geopolitics. I am interested in exploring the ways in which agents—many (but certainly not all) acting on behalf of the U.S. state—use law as a governmental technique to reify the imagined limits of sovereign state power, while simultaneously using this very technique to blur, expand, or erase those same jurisdictional frontiers. As such, I am not approaching law as a fixed object of analysis, but rather as a process, as a socially produced technology of power that can be used to organize, distribute, and enable the production of a wide variety of oftentimes-contradictory spaces. Through close analyses, I intend to show that legal discourse in the War on Terror occupies a rather tenuous position—being called upon to legitimize acts of war and violence while concurrently revealing spaces that challenge the legitimacy of those very actions. Ultimately, this is a work interrogating the legal production of insides and outsides.

## **PART II: FRAMEWORK**

In March of 2006, I attended the annual meeting of the Association of American Geographers in Chicago. During a discussion on current directions in critical geopolitics, several scholars began to question the meaning of their collective use of the

word ‘critical’ to describe their project. They wondered why, in a time when foreign policy, resource distribution, and territorial power were at the fore of popular consciousness, critical geopolitical ideas were not reaching a wider readership within the geographic discourse or the public at large. The following day, I attended a similar panel titled Rethinking Legal Geography. This session too found scholars wondering about how to define their sub-field, how to distinguish it from other areas of geographic inquiry (such as Environmental Justice), and how to reach more readers. In addition to a shared lack of a clearly defined trajectory, I saw many of the same researchers in the audience both days, equally confused about the classifications and potentials of their scholarship in both sub-fields.

This thesis comes together at the connection-points of these two uneasy geographic frameworks: critical legal geography and critical geopolitics. As is so often the case, to approach either of these loose structures as a distinct or separate area of study is to both reify them as objects and to deny the relevance of the confusing or fleeting areas where their ideas overlap and often contradict one another. It also assumes that there is a cohesive or intentional nature to their intellectual formations in the first place. Below I outline how I am approaching my research in this overlapping and unstable geographic space.

Critical legal geographers have challenged understandings of law as a hermetic and autonomous field that is somehow sealed off from the “vagaries of social and political life” (Blomley 1994, 7). Such a focus brings to the fore the perspective of law as socially constructed and deeply implicated in and constitutive of political and cultural relations. Sociologist Ronen Shamir notes that law should not be considered as “an arm of the state, as an instrument at the service of interests external to it, or even as a mere echo of

the specific historical-cultural context in which it is embedded” (2001, 135). Instead, he argues that we must speak of law *as* culture. Law is thus recast as a relational field rather than as a highly rational and objective one. This “opening” of the law is coupled with a focus on law’s spatial and temporal characteristics, thrusting it into the purview of geographers and critical thinkers alike—scholars who investigate the role of law in the production of space and space’s role in framing legal discourse. Legal geographers in particular ask the provocative question: “Where is law?”(Delaney et al. 2001, xiii)

Addressing this question requires us to commit to two principles about law’s spatiality within liberal democracies. First, law is a powerful abstraction that projects a linguistic characterization over space and time. Through this complex relationship, textual descriptions and regulations leap off of the pages of law books and into the spaces of everyday life with the capacity to maintain public order and insure the broadest possible protections for those who inhabit these spaces. Second, law is implicated in the spatial distribution of power. It makes connections between actors possible and denies others. As such, law not only defines spaces, but it defines arrangements of bodies and spaces in relations of capacity, access, and agency. Under law, my body (a legally bounded entity with legally defined limits and property rights) and this space (a legally defined property, bounded within a territorial regime of law) collide and overlap.

To put this differently: bodies make nation-states by way of population, organization, and production. Nation-states make bodies by way of facilitating, protecting, and managing the growth of populations (Agamben 2005; Dean 1999; Foucault 2003). Law is the discourse of organization that textually describes limits of

the state and the recourse to which the population turns for protection from tyrannies of state and man alike.

Further, law takes work. It is involved in processes of negotiation, verification, and exchange between legislatures and populations. It requires the constant attention of lawyers, policy-makers, advocacy groups, and elected officials in order to maintain its appearance as detached, closed, and final. Similarly, it requires a population willing to accept its guiding principles and reinforce their stability and ethical framework. If law were to be seen as a socially constructed and contingent discourse, the very “blindness” of justice would immediately fall into question. However, by acknowledging that law is socially produced and always a work in process, one does not necessarily imply that breaking the law therefore becomes meaningless or has lesser ramifications. The very fact that a law disallows certain persons the right to perform an activity in a certain space and time does not make the law itself or breaking it any less meaningful. In fact, a breach might reveal *more* meaning (about the community, its repressive practices, its unspoken violences) in the law. Acknowledging that law and the rule of law paradigm are contingent and social does, however, open up the possibility for them to morph over time, changing space and modifying the distribution of power simultaneously.

Critical legal scholars have attempted to wrestle with the ramifications of this very issue, bringing into their purview legally constituted social relations and identities such as husband, owner, slave, neighbor, debtor, and judge. In addition, institutional spaces, practices and boundaries become objects of inquiry: nation-state, territory, sovereignty, rights, community, market, and family. Ultimately, these legal scholars take it as axiomatic that boundaries *mean*, and that what they mean is often established or reified

by law. Their work leaves neither conceptions of space nor law unchanged by their mutual analyses (Delaney et al. 2001).

Law and legal geography are about boundaries, order, power and space. What boundaries mean, how they are formed, and what practices are necessary to protect or reify them cannot be a question that is asked 'from within' and directed back 'to the inside'. A border must be an interface (real or imagined) between things, and as such, definitions produced on the 'outside' are just as necessary to understanding the limit as those produced 'inside'. Hence, at the inter- and intra-state level, legal geography very quickly becomes enmeshed in the landscape of geopolitics. A legal analysis of the present condition of perpetual war against a stateless enemy demands that one look at the overlapping areas of foreign policy, power, and law. Regimes of state jurisdiction and sovereign authority are tied intricately into one another, and are never as clearly demarcated as they would appear by looking at international law, a foreign policy brief, or a map. Law molds and guides the generation of a series of spatial effects and hierarchies. To look at law and policy as a spatial technology is to explore the ways that language and discourse can jump off of the page and into the objects and bodies that make up the landscapes of contemporary war.

Finally, much of the scholarly work focusing on distributions of power in modern liberal warfare deals with this connection between discourse and bodies by way of what is referred to as the state of sovereign exception (Agamben 2005)<sup>2</sup>: the dark underbelly

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<sup>2</sup> Agamben bases much of this exploration alternatively on the scholarship on the state of exception in the 1940s by Carl Schmitt and Walter Benjamin. Analyses of Schmitt's work forms the basis of Agamben's *Homo Sacer* (1998) and *The State of Exception* (2005). He writes:

"If the state of exception's characteristic property is a (total or partial) suspension of the juridical order, how can such a suspension still be contained within it? How can an anomie be inscribed within the juridical order? And if the state of exception is instead only a de facto situation, and is as such unrelated or contrary to law, how

of modern juridical order in which the sovereign stands outside (and above) the law while still belonging to it. It is the condition of deploying a decision with the force of law without law: the “legal form of what cannot have a legal form” (2005, 1). Agamben highlights the state of exception as the dominant form of contemporary politics, where law is not needed to create law, and certain lives do not fall within the protective discourses of the state. Ultimately, both law and the exception exist in force at the same time.

This thesis is situated in what I hope is a productive tension with the impressive body of scholarship which surrounds Agamben’s work. While I am sympathetic with, and frequently utilize the complex theoretical frame and thorough critiques offered by these works, this scholarship can easily become a distraction. First, in focusing on the sovereign exception in modern power, attention is—purposefully or not—drawn away from the poignant accuracy of Walter Benjamin’s comment that the exception is the rule of modern power (Benjamin 1996). Benjamin’s views point us to aporetic conditions within the very structure of modern sovereign power—the rules themselves, the forces that guide power, are where we should be looking—for they house the very possibility of the exception. In this regard, I echo Derek Gregory’s observation that the War on Terror is not a war on law, but *through* law (2006). The distinction between these two framings will be developed more fully in the first chapter, but briefly stated, there is a vast difference between turning one’s back on the law altogether and *using* law as a technique to achieve desired ends by investing new powers within it. This point leads to what I feel is the second distraction of literatures of the exception.

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is it possible for the order to contain a lacuna precisely where the decisive situation is concerned? And what is the meaning of this lacuna?” (2005, 23)



Agamben rightly notes that when President George W. Bush decreed that bodies detained in the War on Terror could be detained indefinitely without due process, this was indeed an exceptional moment. However, this seems to have led researchers and pundits alike to focus on particular agents of state power, who are seemingly separate from the everyday machinations of modern power and social space. These authors focus their attention on agents like George W Bush and his administration, state agents ‘out there’ and ‘in power’. I disagree strongly with this delineation. We are *all* agents in the exception that is the rule. While Weimar Germany was the legal landscape in question for Carl Schmitt (2004), and Vichy France for Benjamin (1996), the contemporary U.S.-dominated landscape is not a fascist regime, and analogies which label it as such significantly weaken the potential for what I see as the more necessary and deep critique. The goal of this study is not to search out violations of international or domestic law by the United States. In many cases, the legal maneuvers highlighted here point to tensions *within* the contemporary rule of law paradigm itself—not the workings of a singular “outlaw” regime. It is the legal isolation, control, and physical deformation of the human body and the resultant possibility that this landscape extends outside of the contexts of war and national security and into the domain of everyday public life that most interests me here. In other words, this thesis is not focused on breaking the law, but on the inadequacies of law as a normative ethic and its current utilization as an ends-focused instrumental technique for the projection and distribution of power in space.

Modern sovereign power is not about the abuses of Bush, Cheney, Rumsfeld, Ashcroft et al, but how all of us—the population, the structures of our decisionism, our institutions, and, most importantly for this thesis, our rules—are entwined with a vast

and fluid field of power. Thus, I will focus instead on the problematics of law, legal interpretation, and legal discourse in organizing and rationalizing the landscape of war. The shift, over the course of the twentieth century, from a rule of law to a rule of legal technique has resulted in a flattened landscape where bodies are no longer considered as separate from the battlefield, where war is synonymous with security, and accountability tied not to a normative rule, but to a constantly morphing narrative process of convenience. As Gregory notes, law is a site of political struggle “not only in its suspension, *but also in its formulation, interpretation, and application*” (2006, 207 italics in original).

Law is mobilized at each of these turns. This thesis will engage with the striking geographical consequences that these changes have on understandings of territory, violence, and power.

# ***1***

## **DEMONS** **On Liberty and Law in ‘The New War’**

Then we entered the Straits in great fear of mind, for on the one hand was Scylla, and on the other dread Charybdis kept sucking up the salt water.

—Homer, *The Odyssey* (c. 700 BCE)

...we create continuously before us the road we must journey upon...

—Thomas Pynchon, *Mason and Dixon* (1997)

Law and legal discourse have been thrust into the center of almost every debate regarding the conduct of the War on Terror. Be it critics from the left accusing the United States in general or the Bush Administration in particular of turning their backs on the law (Butler 2004; Sands 2005), or advocates on the right citing what they see as substantial legal space—and urgent social and geopolitical need—for the use of various exceptional techniques in the war’s conduct (Bolton 2004; Thomas 2004; Yoo 2000), law is consistently called forth to validate and legitimate action. In either case, law is *used*—it is methodically and instrumentally applied in order to achieve predetermined results. The mobilization of legal discourse at every turn for specific and often contradictory ends has revealed a demon law: a mischievous social organizer, a forceful discourse capable of possessing bodies, and a deeply affective framework for the governance of spatial practices and bodily action into the yet-unknown future. Law can quite literally appear out of nowhere.

This chapter is an examination of the instrumental role law and legal discourse play in structuring the spaces of the War on Terror. I explore the fluid and changing capacity of law to be mobilized to reframe the balance between liberty and security—between freedom and societal control. As law is repeatedly being called forth to justify or disqualify action, what are the geographic implications of the movement of this frontier? In order to address this question, first I explore the way that the twinned concepts of freedom and liberty have been produced within the liberal framework, and the ways in which the seemingly paradoxical idea of governing liberty appears as one of liberalism’s hallmarks. Next, I look at the ways in which language is mobilized in order to rationalize the redrawing of the line separating liberal freedom from liberal security.

In this rhetorical project, law appears as an instrumental tool lambasted for its limitations in dealing with a ‘new kind of war’, while at the same time it is deployed strategically to justify extremely broad ends. Through this use of popular discourses of security, law is described as inadequate for confronting the security challenges of global war in the late-modern era, while at the same time it paradoxically provides an open-ended framework through which the seemingly exceptional conduct deployed in that conflict is legitimated.

My goal in this chapter is to look at how law, when combined with the concept of security, flattens the distinctions between freedom and social control into a contradictory field where each is coplanar with the other, and in which the flexible power over life itself is the primary aim of governance.

### **PART I: GOVERNING LIBERTY, FREEING LAW**

The matrix of war operates in the name of humanity; however, it is ultimately this humanity as a whole that comes to be the subject of its operations of global control.

—Vivienne Jabri, *War, Security and the Liberal State* (2006)

Under liberalism<sup>3</sup>, there is constant tension between liberty and social control—between the so-called natural right of freedom and the palimpsest of codes and

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<sup>3</sup> There is a complex relationship between the idea of a liberal rule of law framework and a so-called neoliberal *use* of law. The latter relies greatly on the social and political persistence of the former. Throughout this thesis, I pay close attention to this distinction by addressing legal strategies and technologies of power as ‘liberal’, while the objectives and structures of legal action are frequently neoliberal. This is for two reasons: First, the modes of law and legal instrumentalism that are at work in the War on Terror have their origins in the 19th century—a period which greatly precedes the so-called Washington Consensus of the 1970s. Secondly, the foundational principles of liberalism that frame social and political life today remain largely unchanged in both the authoring and interpretation of contemporary law: rational individuals (states and corporations fit into this category) who possess freedom in some negotiable form are still the central agents of present-day legal discourse, as they were at liberalism’s theoretical and actual inception. While law largely remains a liberal disciplinary technology, the use of law, the geographies of decisionism, and the overall intent of legislation may be geared towards securing neoliberal formations of power and technologies of the self.

conventions that both enable and curtail this right. This dis-ease within the framework of liberal power has been a focus of scholarship beginning with the earliest theorists of liberalism as a political philosophy. From Mill to Hayek to Oakeshott to Rawls—scholars in the diverse literature on liberalism each present a distinct understanding of the roles that law plays in navigating the divide between freedom and social control. John Stuart Mill, in his book ‘On Liberty’, wrote that there “is a limit to the legitimate interference of collective opinion with individual independence...Where to place that limit—between independence and social control—is a subject on which nearly everything remains to be done” (Mill 1956, 7). Almost one hundred and fifty years later, the placement of this limit still “remains to be done”. Forces are continually pushing and pulling at it from all directions and by various means. In other words, this boundary is always *doing and being done to*. As a political interface, its contested position is how we come to understand regimes of power and modes of governance. Within the liberal state, law and legal discourse are primary techniques employed in determining its location, maintenance and meaning. Bound with law at this uneasy threshold, then, is where I begin this exploration.

## **WASHINGTON, D.C.**

In June of 2004, the U.S. Supreme Court handed down its ruling in a case involving Yaser Esam Hamdi, a U.S. citizen captured by American military forces during combat operations in Afghanistan (Hamdi v Rumsfeld. 542 U.S. 507, 2004). Deemed an unlawful enemy combatant<sup>4</sup>, Hamdi was thus denied the opportunity to go before a court and challenge the basis of his detention. His father initially filed his Due Process petition, and over the next two years, the case made its way through the U.S. courts.

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<sup>4</sup> Chapter 2 discusses in greater detail the process of deeming one an unlawful combatant.

The High Court Justices' pronouncements in the Hamdi decision were varied, but each focused to some degree on describing acceptable legal limits of individual liberty during wartime, and the extent to which the 2001 Authorization for the Use of Military Force (107-40, 18 Sept. 2001) allowed the President to impose restrictions on that freedom. Writing for the plurality<sup>5</sup>, Justice Sandra Day O'Connor stated that Hamdi's case resonated with one of liberalism's most elemental interests—to be “free from physical detention by one's own government”<sup>6</sup>. She wrote that liberty “is the norm, and detention without trial the carefully limited exception”, concluding that “We have always been careful not to ‘minimize the importance and fundamental nature’ of the individual's right to liberty, and we will not do so today” (O'Connor, 542 U.S. 507, 2004, 22).

Filing his dissenting opinion, and upholding the position of the government and the decision of the Fourth Circuit Court of Appeals, Justice Clarence Thomas made a distinct counter-argument, using a passage from Alexander Hamilton's Federalist Paper No. 23:

“The power to protect the Nation ‘ought to exist without limitation ... [b]ecause it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent & variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed” (Thomas, 542 U.S. 507, 2004, 2).

The rulings present two different diagrams for understanding freedom in the liberal state, each utilizing the imagery of incarceration. While the plurality decision stresses

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<sup>5</sup> The case had no true majority decision: While eight of the nine justices concurred with the plurality that Hamdi be allowed to access the protections of due process, the Justices varied widely on what they considered to be the scope and applicability of the President's war powers, and the role of the judiciary in deciding matters of national security.

<sup>6</sup> Here she cites Foucha v. Louisiana (1992) “Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action”.

the foundational liberal right of the individual to be protected from detention without trial (a protection of the conditions of individual freedom *through* law), Thomas' dissent highlights another core principle of liberal governance: the need for power to secure and protect the nation from harm (the protection of the population's freedom *in spite* of law). The dilemma of freedom in the liberal state is rendered through the image of a prison, with law being called forth to legitimate the individual's liberty, and derided for the walls it builds around the freedom of the sovereign. We are presented with two conflicting notions of the conditions of liberty: the freedom from social control and the necessary social control of freedom.

But just what is freedom?

\* \* \*

To govern, one could say, is to be condemned to seek an authority for one's authority.  
—Nikolas Rose, *Powers of Freedom* (2004)

In his lectures collected under the title *Society Must be Defended*, Michel Foucault states that it is part of his project to look for the “blood that has dried in the codes,” the violence and war that forms the basis for much of the implied peace of his contemporary political space (2003, 56). In his analysis, what organizes the practices and conventions of liberal power are not natural rights—freedom, tolerance, equality—but rather a precarious historical project built upon layers of conflict and disorder. Foucault's view is that justice, freedom and order are in no way built around equilibrium or balance: they are instead supported by a framework of dissymmetry. Further, he saw an erosion of the twentieth century notion that society was progressing towards a future of peace through the teleological advance of technology and good governance, giving way to an era dominated by the ever-present condition of war. Vivienne Jabri notes that this



analysis renders war not as a historically isolated rupture in a peaceful continuum of human societies, but rather “this peaceful order is imbricated with the elements of war, present as continuities in social and political life, elements that are deeply rooted and enabling of the actuality of war in its traditional battlefield sense. This implies a continuity of sorts between the disciplinary, the carceral and the violent manifestations of government (Jabri 2006, 55). Not only is war a ubiquitous condition, but traces of war’s violence exist in the institutions and conventions that organize social and political landscapes including, notably, the discourses of law and human rights.

Foucault goes so far as to argue that freedom is actually a condition that can only be enjoyed due to the persistence of domination and war. Through this lens, freedom and liberty are positioned in opposition to equality, in opposition to balance, and in opposition to peace. For Foucault, the primary expression of freedom is the ability to trample on someone else’s freedom—for if freedom is only the prevention of or protection from being trampled, then what, if anything, does it mean (2003)? This form of ‘weak’ freedom is precisely the type that exists under liberalism. The classical liberal argument for this restraint of freedom may be justified, as John Gray notes, “only where harm to others’ interests is at stake” (Gray 1989, 133). However, using Foucault’s analysis, each rational actor’s ability to exercise his or her own freedom is *always* balanced and conditioned by the ability of all others to do the same. Further, as alluded to in the Thomas dissent above, the power to exist as a free subject is further limited by the liberal State’s responsibility to assure the maximization of individual liberties. This is specifically the type of freedom that Mill struggles with as he attempts to balance out a ‘strong’ *freedom to* with the liberal state’s *freedom from another’s freedom to*. It is under liberalism that the idea of freedom and the idea of governance become entwined.

Nikolas Rose argues that liberal freedom is in fact a form of unfreedom. It is the result of imbuing subjects with the capacity for self-reliance, self-government, and self-control. This type of freedom is in actuality a form of rule, of control. This mode of governance works to gain purchase on the forces that traverse the multitudes of spatial encounters where conduct is the subject of government: sexuality, family structures, belief systems. These assemblages, once under the authority of the sovereign, now became subject “only to the limits of the law” (Rose 1992, 69). The power of the sovereign to determine for all the best disposition of things has been joined by an art of government diffused across the population: governmentality (Foucault 1991). The role of the state thus appears as only one element in a diverse and varied matrix of social organization. Here, governance is not only the actions taking place in the halls of the Capitol building, not only lawmaking and policy pronouncements. It is also the diffuse landscape of control embodied by judges, lawyers, citizens and populations, guards, prisoners, and space. The mentality of government is a concert in which the conductor, the music, the instruments, the performing bodies, and the listening audience all guide and exert pressure and force at the molecular level: coming together with a certain rationality and a certain performative clarity.

This mode of liberal governmentality appears to reign in the powers of the sovereign in favor of a vast assemblage of forces. War (a constant condition) in this regime is not carried out in the name of expanding the breadth of the sovereign’s authority, but as a diverse policing operation—taking as its target the ever-present threat of the enemy, and the perpetual possibility for disorder (Hardt & Negri 2004; Jabri 2006). Risk and the constant presence of an enemy place the emphasis of governance on security, and on maintaining global order and control through various

institutionalized regimes: human rights, welfare practices, conventions against the use of torture and genocide (Jabri 2006). Law enters into the fold here as a material field through which these conventions are codified. It becomes a tool used to frame the conditions of possibility for this perpetual police operation. As Foucault writes, "with government it is a question not of imposing law on men, but of disposing things: that is to say, of employing tactics rather than laws, and even using laws themselves as tactics – to arrange things in such a way that, through a certain number of means, such and such ends may be achieved" (1991, 95).

Law and juridical systems are typically seen as tools of a disciplinary society, and as such, they are a form of power that works through docile bodies to limit the field of bodily and political action. This management of time and space has as its diagram Foucault's famous rendition of the ultimate architectural expression of discipline, Jeremy Bentham's panoptic prison.<sup>7</sup> The spatial arrangement of this "machine" can be integrated into many institutional enclosures<sup>8</sup> for the precise and minute control of the processes contained therein. The panoptic arrangement manages to increase the efficacy and economy of power because it "is not invested from the outside, like a rigid, heavy constraint to the functions it invests, but is so subtly present in them as to increase their efficiency by increasing its own points of contact" (Foucault 1977, 206). He adds, that the panopticon is not merely a space where discipline interacts with its subjects, but rather is more finely tuned; it is a "way of making power relations function in a function, and of making a function function through these power relations" (1977, 207). The architecture and geometry of the panopticon assure the maximum disciplinary

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<sup>7</sup> Once again, the prison is used as a diagram for liberal power.

<sup>8</sup> Foucault uses education, medical treatment, production, and punishment as examples (1977, 206)

efficiency with minimal effort. Its power is centralized within the limits of a discrete, finite space.

Italian philosopher Giorgio Agamben notes that this localization of power within the confines of an institution is a key function of how disciplinary power works, and indeed, how this framework differs from the expansive (and yet still minute) reach of the governmentalities of security and control. He writes that while “disciplinary power isolates and closes off territories, measures of security lead to an opening and globalisation; while the law wants to prevent and prescribe, security wants to intervene in ongoing processes to direct them” (2004, NP). Agamben places law firmly within the confines of disciplinary power. But law too has moved beyond the confines of the disciplinary diagram. Through the spatial diffusion that typifies liberal governmentality, legal discourse and decisionism expand beyond the walls of the juridical institutions and out into the landscape of self-governance, self-regulation, and unfreedom. Instead of power being enclosed in prisons, hospitals, and barracks, in the spaces framed by liberal governmentality, power is diffused and encompasses a new and total geography<sup>9</sup>. The geometries of power that were key functions of the panopticon have now turned outwards through constant reference to risk and fear—to a total space dominated by imagined future threats.

Thus, the limit between liberty and security is eradicated, and law is seen as a strategy for the management of risk, for securing positive ends for the population, and for opening up space for action. Prevention and prescription via normative law are no longer dominant as State functions recede and policing becomes the “basic principle of state activity” (Agamben 2004, NP). However, law remains in force, and particularly

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<sup>9</sup> The changes in the spaces of enclosure and incarceration are discussed in more detail in Chapter 3.

law as a structure that organizes liberal freedom, as an anachronistic reminder of older regimes of power that still coat the surface of political interaction. In other words, law as a rule bound discipline is still touted as one of the defining characteristics of liberal societies. But agents appeal to law not only to prevent and prescribe, as Agamben notes, but they also *use* it to open, guide, and facilitate the achievement of specific ends. This approach to law is no longer primarily rule bound; here law is seen as purpose-oriented.

To state that law has become a means to an end, a tool or strategy, is, concretely, nothing new. Legal scholar Brian Tamanaha traces the history of this instrumental law back to the 19th and early 20th centuries<sup>10</sup>, when a considerable debate was taking place amongst legal scholars in the United States and Europe over the role of law and legal power. The two sides in this debate were structured around whether law represented a set of given rules that were not subject to the whims of individual or political fancy, or whether it was indeed an instrument of power that could be used to advance personal (or other) interest. The former understanding typifies how law was approached before the debate, guided by such concepts as natural and divine law, and an empirical structure that would lead the former Justice of the Wisconsin Supreme Court to claim that “law is a science” (Tamanaha 2006, 15). Proponents of this model of legal reasoning saw in law a set of “unchangeable principles...which underlie and permeate its whole structure, and which control all its details, its consequences, its application to human affairs” (2006, 16).

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<sup>10</sup> Though neither Foucault nor his work are ever mentioned in this legal study—Tamanaha’s text focuses on the contestation over the role of law in the 19th century: the same historical juncture that Foucault identifies as a period when the West was transitioning from a disciplinary regime of power to a governmental one.

Early advocates of instrumental law, such as John Dewey, saw law as a social strategy. In a passage that echoes Foucault's notion of the war operating under the surface of freedom, Dewey writes in 1916: "Is not all law coercion?...Are our effective legislative enactments anything more than registrations of results of battles previously fought out on the field of human endurance?" He later concludes, "since the attainment of ends requires the use of means, law is essentially a formulation for the use of force" (quoted in Tamanaha 2006, 3). While Tamanaha acknowledges that law was always used to some degree instrumentally, he is quick to note that before this change in structure, law had a degree of autonomy and internal integrity. Law was an enclosed and empirical institutional space. Today, however, the instrumental version of law is taken for granted and law is a site of struggle for advocacy groups, politicians, and judges alike. This understanding of law is now so prevalent that it is accepted as what law *is*. An instrumental judge "manipulates the applicable legal rules to arrive at a preferred end," an instrumental legislator will "promote whatever law will help secure" his or her personal, political, and social ends (2006, 7). In the most general sense, at the scale of liberal tenets and foundational principles, the rule of law is still understood as that which universally orders and organizes, protects and sequesters. At a more particularized scale of legislation, legal interpretation and policy, law is seen as an instrumental tool that enables, that can be used to achieve particular results.

Through this instrumental understanding of law, the "supply of possible ends is limitless and open" (2006, 6). This is the focus of the research explored in detail throughout this thesis, in the context of the War on Terror. Instrumental law is not normative. It can be aimed and utilized to mark populations, to organize space, and to offer the image of a spatial and temporal order that is anything but general. The

instrumental use of law can guide the generalities of legal texts to dislodge the classification of bodies who otherwise would be firmly classified, as is the case with the illegal enemy combatant (Chapter 2). It can be used to locate new spaces for activity within law based not on what is specifically allowed, but through the vast expanse of spatial and performative possibilities that are not specifically disallowed, as in the case with the location of war prisons and the interrogation of subjects detained therein (Chapter 3). The generalities of legalese make available a wide range of possibly illiberal ends. The rule of law framework, which to so many has buttressed and is buttressed by liberalism's freedom, has been mobilized and directed to enable a specific, and not universal, disposition of power. The use of legal discourse now focuses attention on the very core of liberal freedom, while rendering visible the extents of liberal unfreedom.

Importantly, the rule of law remains unchallenged as a normative concept. But, rather, its scope and capacity are problematized and an argument is proffered about law's inadequacy in contemporary conflict. Law as a form of limitation of State power is not acceptable when the security of the population is at stake. Therefore, law's capacities must be redrafted. These changes are not necessarily in the laws themselves but in their mode of interpretation, their jurisdiction, and the populations that they target. This activated and directed legal discourse can find legal room to challenge the Great Writ of habeas corpus, can demand that Supreme Court justices restate the conditions that constitute freedom in the liberal state, and can facilitate the momentary and selective suspensions of law. This is no longer a power that delimits and closes—this is a power that guides and makes available. The laws and legal discourses that ensure a particular form of freedom are the very same ones that can selectively and

tactically remove these liberties. The Geneva Conventions can therefore be seen as both the contracts by which human rights are assured and the contracts by which, through close attention to the voids and spaces in the black letter of the law, their required coverage can be selectively and strategically withheld. The very same legal framework critiqued for potentially limiting the power of the State to protect its populations may, at the same time, enable such diverse practices as waterboarding, indefinite detention, and rendition, all in the name of that protection.

These processes of legal instrumentalism may have begun in the nineteenth century but have in the recent past come into their own as strategies for action. These powers do not revolve around the sovereign's unique and isolated authority. Instead, they are enabled by a tactical employment of law and legal discourse to arrange the landscape in order to achieve "such and such ends" (Foucault 1991, 95). The idea of a maximization of individual freedom becomes entwined with the drive towards security and the limit between liberty and control is flattened, and these two concepts are no longer positioned in opposition, but as parallel tools in the assemblage of liberal government.

## **PART II:** **THE PROBLEMATIC GEOGRAPHIES OF THE 'NEW WAR', LEGALLY SPEAKING**

Having described the capacity for instrumental law to secure near-unlimited ends, I move in the following section to an analysis of the various ways that instrumental law is mobilized through discourse to break down geographical boundaries between freedom and control, between friend and enemy, and between war and peace. Law and legal discourse form a contested field in the landscape of the War on Terror, with the refining of the limit between freedom and social control being their aim. In what follows, I look



at the ways in which legal discourse frames the conditions of possibility for this frontier—the barrier that separates a universalized rule of law from a conditional and selective instrumental law. I focus on the operations at this border by concentrating on the rhetoric surrounding the place of law in a “new type of war”—this unprecedented battle against a new kind of enemy, so vicious and barbaric that the old methods of social and disciplinary organization, detention, and state territorial jurisdiction are no longer effective and must be changed. This discourse is pervasive, and yet there exists the distinct possibility that what classifies this as a new war is not the nature of the enemy or its violence, but the nature of the power used to locate and address that enemy.

#### ANDREWS AIR FORCE BASE, MARYLAND

On December 5, 2005, immediately before departing the United States for a diplomatic trip to Europe, then-National Security Advisor Condoleeza Rice had the following to say about the role of law in dealing with the threat of terrorism:

“One of the difficult issues *in this new kind of conflict* is what to do with captured individuals who we know or believe to be terrorists. The individuals come from many countries and are often captured *far from their original homes*. Among them are those who are effectively stateless, owing allegiance only to the extremist cause of transnational terrorism. Many are extremely dangerous. *And some have information* that may save lives, perhaps even thousands of lives. *The captured terrorists of the 21st century do not fit easily into traditional systems of criminal or military justice, which were designed for different needs. We have to adapt.* Other governments are now also facing this challenge” (Rice 2005, italics mine).

The Secretary’s comments were issued amid increasing national and international discontent with the United States’ suspected rendition of terrorist suspects to recently disclosed secret prisons in Europe, Africa and the Middle East. Rice’s comments were

meant to mollify criticism by restating the Administration's willful adherence to international law and its associated regime of human rights<sup>11</sup>.

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The rhetoric surrounding law in the War on Terror focuses primarily on one paradoxical narrative: law must be mobilized to secure an unknowable future, a function that it is not capable of performing. Embedded within this untenable landscape are three intertwined issues that are central to understanding the problematic legal geography of the ongoing War on Terror. These are: positioning the War on Terror as a *new war* against an enemy population representing a *new kind of target*, and taking place in an interconnected global landscape—a *new war theater*. Each of these issues brings about a complex maze through which law and legal discourse must be marshaled. These premises, central to the war rhetoric and clearly running through Dr. Rice's comments, cannot be separated from one another. Nor can they be distinguished from the discourse intended to reframe the limits and powers of the law. The first and primary drive of this rhetorical push is to position law as an inadequate system for addressing both the 'new kind of conflict' and the globalized network of individuals who are carrying it out. By placing both the conflict itself and the bodies and territories that are at its center in a new, antagonistic position relative to law, a significant space is opened up for the active remaking of law's capacities. The implications of Rice's comments are that society must move beyond traditional understandings of law in an international context, but not too far as to have law seen as something that we should do away with entirely. The problem becomes labeling and isolating certain populations using the very same laws that must stand in for everyone. Here, instrumental legal

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<sup>11</sup> The legal geography of rendition is discussed in greater detail in Chapter 3.

interpretation acts as a demon discourse—a universal law with the capacity to single out specific individuals in the present for violences that *may* occur in the unknowable future. Law must facilitate new security measures in the War on Terror, not impede their progress. It is seen as a strategic political tool for the management of populations and for securing the space of the state, and as a mode of ensuring a specific formation of liberal freedom.

Consider the words of Dr. John Yoo, the infamous former Deputy Attorney General in the Office of Legal Council of the Justice Department, from a debate with international legal scholar Phillippe Sands:

“(...) The world has changed. These rules were written in 1945. (...) Our great enemies are not nation states. The great problems affecting the United States are...international terrorist organizations like Al Qaeda...rogue states and failed states, states that commit massive human rights violations against their own citizens, and...weapons of mass destruction proliferation. So if you agree that those are the pressing security problems that we face in the world today, should we maintain a system that is designed to prevent military intervention to solve those kinds of problems?” (Yoo and Sands 2005)

It is clear from Yoo’s comments that in the eyes of the U.S. nation-state and its legal apparatus, one of the main challenges it faces is that its enemies are no longer states with clearly defined legal and territorial limits, but individuals and network organizations which are elusive, transient, and impermanent. This break from the past is key: a new approach to the limit between freedom and control through law is only justifiable if the present conditions cannot be covered by existing legislation. As Tamanaha points out, existing legislation is often obsolete or inconsistent with the current political landscape. Terms and limits set forth today “cannot anticipate or account for every eventuality that might arise” (2006, 229).

The problems with a pre-emptive law within the liberal framework become clear through this rhetorical drive. Liberalism cannot predict the future, and neither can

law—so how might a state react legitimately with law-preserving violence? Perhaps more to the point, how does a state legitimately and legally pre-act? The logic of pre-emption is intensified by this tension between security and liberty and leads to the obliteration of the “difference between law and fact, by making the will of the state and not the ambiguity of the word immanent” (Basu 2003, 20). The deeming of a body as a terrorist has the potential to activate the extraordinary regimes of detention and interrogation that this category enables. The activities that might qualify one as a terrorist and the legal classification terrorist become flattened—synonymous. After all, terror is only terror if it has already happened, and the structures of law in the present cannot secure the state from what is yet unknown.

Is the existing law incapable of dealing with the War on Terror? Clearly, Drs. Yoo and Rice argue that the law cannot accommodate the new geographies of global terrorism. However, there has been significant debate over what security activities are available within the space of existing law, and whether or not the events of 9/11 represent a change so radical as to necessitate a shift in those legal limits. Many have argued that existing domestic and international laws are in fact capable of handling these shifts (Jinks 2004; Paust 2004; Sheppard 2003). These scholars point to widely varying interpretations of existing legislation, of precedent (both legally as well as geopolitically), and of geography. Nonetheless, the framework for legal interpretation enabled by an instrumental use of law has room for both—even those that seem opposed to the principles espoused by a liberal rule of law. By locating spaces within the “black

letter” of the law, both critics and boosters of policies can be absorbed into a convincing legal interpretation.<sup>12</sup>

This instrumental interpretation of law mobilizes a series of other security measures. Dr. Rice’s words are aimed at mobilizing not only a new legal regime, but also the related military-industrial technologies (surveillance equipment, interrogation strategies, weapons). In articulating these new military needs, the language used seams together the body of the perpetrators of “illegitimate” violence with their methods (suicide bombing, acts of violence directed at public targets), their resources (human information: HUMINT), and their socio-political structure: militant theological sleeper cells. These bodies, organized in such and such a way and believing such and such a thing, pose a threat to us and our order by nature of their lives alone. We are confident that we must defeat terrorists, but we don’t ultimately know who this target is (Sheppard 2003, 752) or where they are or when they will act. This poses a significant challenge for law and legal capacity.

The threat of terror, and the legal necessity to deal with that threat, were similarly projected forward during the period of ‘mutual assured destruction’ of the Cold War, when the buildup of arms was the tangible product of this virtuality. However, the Cold War was ultimately a “state on state” conflict, in which the actions of bodies were traceable back to sovereign governments, which in turn would assume responsibility for corporeal action. The War on Terror is rendered as something different—not solely as an inter-state war (although it certainly has that capacity), not as a civil war (though it has these elements too), but as a war to *secure* the landscape of control. Within a matrix of global power, the mobility of bodies and the shifting positions of subject identities

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<sup>12</sup> As will be shown in the following chapters, many legal interpretations hinge upon unstable and even contradictory bodily and territorial classifications.

yield a condition in which “today’s friends may indeed be tomorrow’s enemies” (Jabri 2006, 61). This movement and overlap is encouraged and enabled by the circuits connecting the local and the global in a complex symbiotic relationship. The idea of the enemy target is not territorially or temporally fixed. It “comes into form not just at the boundaries of the state, but on the streets, in the cities, in schools, in tenement blocs, in other countries and in detention camps in the midst of what otherwise are known as liberal democratic spaces” (2006, 61). With territory being tied into global networks of capital and power, a state of security must allow bodies and data to flow smoothly—to secure the future order of space. This drive towards security produces a paradoxical landscape for the state: a geography in which the flow of all things is assured and smooth is a geography in which illicit arms money, biological and chemical weapons, and the bodies of potential terrorists themselves are all given room to move. Law in the security state must somehow allow for one without conceding space to the other.

A central issue for law in the War on Terror is that the desired target is frequently immaterial: information. It is not land or even bodies that are the ultimate goals of state security measures, but what is *in* bodies and the strands of intelligence that connect bodies. Above, both Dr. Rice and Dr. Yoo focus on what they have deemed the inadequacy of existing legal (and geopolitical) discourse in dealing with what they see as a new target: decentralized, networked, bodies of knowledge. These are not bodies in the traditional military sense of casualties or quantifiable enemy populations (as knowledge of the scale of insurgent populations is unknowable) but bodies as conduits of information, bodies as potentially violent entities, and bodies that have a particular knowledge, such as knowing of the location of potential violence. The paradox is that anyone can “possess” information, but the law must seek out and address only those that

have or have had access to a particular type of information. It is this furtive and fluid nature of the ‘elastic concept’ of the enemy (Jabri 2006) that in turn instigates the critique of law’s capacity. Here, again, we see that the law is being asked to do two things: apply to all and to each, consistent with understandings of the rule of law framework, and to target specific bodies into the unknown future—to selectively apply, in ways that often appear unlawful or illiberal, to this new type of enemy.

In turning to the body, the problem of legally defining or classifying life gets fore-fronted<sup>13</sup>. A series of seemingly unanswerable questions begins to appear at the lines of distinction between legitimate and illegitimate violence (Benjamin 1996) or between legitimate or illegitimate incarceration. The questions in this thought experiment fall easily from the tongue: What makes a terrorist? When does a person become more than a criminal and enter into the legal framework that defines an illegal or enemy combatant? When, with reference to militant political Islam specifically, does the transgression of law’s borders occur? Is it the plot against a political foe? The thoughts themselves? The acquisition of material arms? The push of the button, throttle, or yoke? How, in any of these instances is law to penetrate the minds and bodies of individuals who under the ostensible protections of liberal freedom, should be shielded from such infiltration? Ulrich Beck (2005, 24) points to the legal geographic problems associated with the fluid nature of globalized non-state actors. He notes that:

“The ungraspable nature of terrorism forces and enables enemy-image constructions that are no longer limited by the physically graspable nature of state enemies. The fusion of the concepts ‘enemy’ and ‘terrorism’ has opened new strategic options. Terrorist enemies are at once civil and military, state and non-state, territorial and non-territorial ubiquitous enemies, both internally and externally.”<sup>14</sup>

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<sup>13</sup> The complexity of legally classifying bodies is further discussed in Chapter 2.

<sup>14</sup> Disagreement over how to effectively deal with this collapsing of the distinction between civilian and military persons played out publicly in the U.S. during the early days of the War on

The difficulty in addressing this issue from the perspective of both civil liberties and state security is not to be understated. This challenge is apparent when one looks at the legal rulings coming out of Guantánamo Bay. In one instance, Judge Joyce Hens Green writes, “(I)t would appear that the government is indefinitely holding the detainee — possibly for life — solely because of his contacts with individuals or organizations tied to terrorism and not because of any terrorist activities that the detainee aided, abetted or undertook himself.” (Glaberson 2007) This is an activation of law (and indefinite detention) based on the potential for wrongdoing, not on the wrongdoing itself. Thus language must be deployed that reframes the capacity of law to govern individuals in the present and into the potential future, a hypothetical landscape of probable cause with the ability to detain individuals indefinitely—to suspend their lives with a law that can appear selectively and target specific individuals at specific times in specific places. In the past, law was a disciplinary frame justifying liberal power. As Rose states, “to govern ... is to be condemned to seek authority for your authority” (2004, 27), and the rule of law provided such authority. Now, law becomes a tool for power to use. While it retains its original function as a disciplinary power, in the framework of liberal governmentality, it acquires the power to guide the actions of soldiers and statesmen alike.

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Modes of legal interpretation have enabled the liberal production of distinctly illiberal ends. In this landscape, rhetoric must be deployed to conjure the impossibility of dealing with the current crisis through existing law while retaining the image that

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Terror, when some considered counter-terrorist operations to be police actions, and others advocated for a military solution.



the rule of law is still capable of effectively organizing everyday social life “outside” the theater of war. Instrumental legal work is used to retain the image of law’s capacity as a universalized framework while it is simultaneously critiqued for its inadequacy in the present crisis *and* used as a tool to achieve ends that are specific, targeted, and preconceived. This law is a demon law, a haunting force that may be mobilized at select times in select spaces to produce and manage enemy targets out of the matrix of global populations.

The following chapters present a mining of the known—of the landscape of law, the foundational nature of the rule of law, and the exceptional authority of sovereign right—not to establish the Truth or Justice but to point towards and potentially activate the differences and contradictions that lie behind every universal, behind every law. Herein lies the paradox of instrumental law: while certain ends are *given* in and by the law, these are not the only ends *enabled* by it. Legal discourses of Right and just law can facilitate illiberal and unjust ends. This is not a deconstructive reading, but one that, as will be shown in the following chapters, is based on an empiricism of the most classical kind.

# 2

## PHANTOMS On The Legal Organization of Violent Bodies in International Conflict

What is the difference between a barroom brawl and a boxing match? Nothing, save that one is recognized as legitimate based on certain fictions.

—Justin Wylie, quoted in Carolyn Nordstrom, *Shadows of War* (2004)

...legitimacy is always a matter of judgment rather than of fact ... In nearly all the major nation states of the world, recent history provides some striking examples of the fact that legitimate actions of the ruler become the criminal acts of the ex-ruler.

—Edmund Leach, *Custom, Law, and Terrorist Violence* (1977)

Borders are phantoms. They are fleeting, mobile, and discursive—conjured and negotiated through time and social relations. The frontier between legal and illegal violence in international warfare is one of the most ghostly limits, formed deep in the discourses of modern geopolitical power. Yet borders are also material—the laws that purport to organize warring populations are corporeal and affective—their transgression leaves marks on the body and the earth, exposing very real biological matter to varying conditions of freedom or imprisonment, of life or death. In this chapter, I concentrate on the dynamic landscape that occurs at the frontiers of legal order, spatial production, and state control of non-state violence. First, I explore the legal discourse that both distinguishes and connects two classifications of violent bodies active in the so-called War on Terror: Private Military Contractors (PMCs) and unlawful enemy combatants. Both of these groups, by nature of their political and biological lives, share a precarious position relative to the production of legality and legitimacy in international and U.S. state law. Next I trace this unstable legal geography into the contemporary war prison, where the embodied manifestations of discursive organization collide with one another—un-law against un-law—and individual bodies become diagrams for the interchange of geopolitical power. The primary objective of this study is to explore the production of state space and the possibility for justice at this aporetic frontier, where ghostly discourse and biological matter converge and lay claim to the legal organization of political violence.

## **PART I: LEGAL BLACK HOLES AND OTHER JURIDICAL ANOMIES**

The urgent consideration of the public safety may undoubtedly authorize the violation of every possible law. How far that or any other consideration may operate to dissolve the natural obligations of humanity and justice, is a doctrine of which I still desire to remain ignorant.

—Edward Gibbon, 1776, quoted by W. Vollmann, *Rising Up, Rising Down* (2004)

There are multiple ways to read the legal framing of the current use of military force in the War on Terror. For instance, counter to U.S. Administration arguments that this is a war of law-abiding states against terrorist formations for global security, Janell Watson makes an argument that the new *nomos* of the earth is one of capital flows and market mechanisms, in which the “great powers” of dominant states, such as those that make up the G-8, engage in extra-territorial conflicts in order to appropriate labor and resources (2005). I argue that in concert with and inseparable from each of these perspectives, the War on Terror represents a remapping of the body—of the very limits of legitimate biopolitical control—and that one of the primary means of enacting these re-articulations is through the administration of law.

As I began this research, I had a series of neat oppositions laid out around which I planned to investigate the landscape of the War on Terror: legal/illegal, war/peace, legitimate/illegitimate, licit/illicit, public/private, civilian/combatant. These are the images of the order of war. I was convinced that, with diligent research I would be able to conclude in my final analysis that aspects of this conflict were empirically on one side of the slash or the other. Theorists of legal order often rely on this mode of understanding of events as spatially isolated, temporally limited, and territorially bounded. With reference to international humanitarian law, scholar Derek Jinks notes that these classifications, set down in ink on paper, ultimately establish the parameters governing corporeal violence: who may be attacked, what techniques of violence may be

legally used, and what happens to a body once it is captured on the battlefield (2004). By way of these categories, populations can make the case that an act of violence is or is not justified, that a mobilization of economies and artilleries is or is not done in accordance with some understanding of the rule of law. Acts are either legal or illegal and, thus, one is either guilty or not.

As time went on, however, I began to realize that these divisions were not only inaccurate—that drawing a distinction between the spatio-temporal materialization of these concepts was problematic—but also that the myth of an orderly war was counterproductive. I say counterproductive because, as various authors have shown, establishing definitive links between a body's status and concepts of justice, law, and legitimacy often stands in the way of fulfilling the quest for any of them (Arendt 1963; Hayner 1994; Minow 1998; Nordstrom 2004). For example, Carolyn Nordstrom (2004) addresses these supposed separations between the legal practices of day-to-day life and what she calls the shadows. In her analysis, certain formations in the rigidly codified world are rendered invisible—cast out of the light or below the ground. Yet these shadowy populations are enmeshed with all others in the economies of warfare. At the frontlines of war, discreet characterizations break down, and the image that there is a legal world distinct from the non-legal sub-world is troubled. She writes that the “state and the extra-state, the legal and the illicit, the violent and the peaceful intertwine along the streets and the cafés, the offices and the shops, the politics and the profits shaping the world as it unfolds into the third millennium” (2004, 39). One's status as legal may actually serve to inhibit the envisioning of that very same person's participation in illegitimate or unjust violences.

Therefore, if I were going to understand how agents of political violence are legally organized, and the implications of that legal geography, I had to accept that law might exist in force while it is simultaneously suspended or subjugated. Perhaps *de jure* legal organization facilitates *de facto* illegal ends, that spaces opened within the letter of the law might expose certain bodies to unjust deadly violence: discourse leaping off of the page and strangling biological life. Indeed, what was rendered by close analysis of the law was, quoting Giorgio Agamben, the “logic of a field...where it is impossible to draw a line clearly and separate two different substances” (2004, np). In this field, then, is where I situate myself. In what follows, I look outward from “moments” of violence, when one fires a gun and another dies, from where one body dresses as a civilian and explodes at a public market, out into the hazy topographies of law.

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One of the most difficult effects of violence is that it projects itself into the future (Nordstrom 2004). It never becomes lost to history because it always retains the potential to shade tomorrow’s actions—for the past to bubble to the surface and encode the as-yet knowable. These codes are passed down through the centuries and help define what war and violence are in the present, and shape our collective theories about justice. Administrators of law—executives, legislators, judges—seize onto these projections and attempt to render invisible the spatio-temporal interweaving of violence’s contradictions. Thus, the past is codified and used to legitimate the violences of the future: through memory, embodied practices, and significantly, law. The resultant categories wield considerable power in shaping the present-day landscape.

Thus, as stated in the previous chapter, law retains its position as one of liberalism’s central organizing principles: a norm that is rendered and delimited through the

administration of government. However, these legal classifications do not materialize solely through legislating the limit between the lawful and the unlawful, but also by way of what Judith Butler calls *deeming* (2004, 59). Deeming is an exercise of managerial prerogative power with no clear claim to legitimacy or a normative ethic. These managers, whom she calls “petty sovereigns”, and their actions are not determined by the rule of law, but by the drive towards security. This law-less position is one of extraordinary power over life and death: the limit between legally established freedom and governmental control is pulverized, and the two are united in the action of the petty sovereign. Unilaterally deeming someone dangerous *makes* them dangerous. Deeming one a terrorist *makes* their virtual destruction something other than criminal.

Deeming is enabled by what Agamben—echoing German jurist Carl Schmitt—refers to as the “state of exception”: a condition of modern juridical order in which the sovereign stands outside (and above) the law while still belonging to it. It is the condition of deploying a decision with the force of law *without* law: the “legal form of what cannot have a legal form” (2005, 1). Ultimately, Agamben highlights the state of exception as the dominant form of contemporary politics, where crises yield the suspension of existing constitutional order and the implementation of law that is not law. This act of sovereign administration retains law’s organizational power in what he terms the *Force-of-Law* (2005). The process of deeming has been noted by legal scholars who conclude that the current administration of George W. Bush is a lawless one, a rogue presidency that has turned its back on the rule of law and liberalism’s established governing frameworks. The number of signing statements the President has issued when approving legislation regarding the conduct of war supports this reading<sup>15</sup>.

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<sup>15</sup> Cooper (2005, cited in Gregory 2006) notes the exponential rise in the use of signing

However, these critics fail to note that, while there are most certainly exceptional performances by the U.S. state, each step of the way is intensely intertwined with very strategic readings of the so-called ‘black letter’ of domestic and international law. The administration has not abandoned law in favor of what Philippe Sands (2005) calls a lawless world. Law remains in force, as an anachronistic reminder of older regimes of power that still coat the surface of political space, and is employed as a strategic technique with the aim of facilitating specific ends. Both elements of this framework of power—law and the deeming power of the sovereign exception—coexist and “both are driven to the extreme, so much so, that they seem at the end to fall apart. Today we see how a maximum of anomy and disorder can perfectly coexist with a maximum of legislation.” (Agamben 2005, 11). We are not seeing a war on law but, rather, and perhaps more devastatingly so, a war *through* law (Gregory 2006). Law becomes a governmental technique by which, and not in contradistinction to, presumably exceptional practices like indefinite detention, extraordinary rendition, and “coercive interrogation” become available within the spaces of black letter law. As one passes through a legal black hole, one finds an excess of law and legal power on the other side.

In the following section, I move away from broad theoretical analyses of political philosophy and focus on two organizations of political violence: the private military contractor and the unlawful enemy combatant. These two groups change the way

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statements in the current Bush administration. Specifically, 322 signing statements had been issued since 1817, but in his first term alone, George Bush issued them 435 times (Gregory 2006, 43). However, it is important to note that signing statements, and their excessive use, are also justified by a particular reading of the Constitutional authority of the ‘unitary executive’ vested in a U.S. President, particularly at wartime. Current Supreme Court Justice Samuel Alito, then working in the Office of Legal Council in the Reagan administration, puts the importance of signing statements thusly: “From the perspective of the Executive Branch, the issuance of interpretive signing statements would have two chief advantages. First, it would increase the power of the Executive to shape the law. Second, by forcing some rethinking by courts, scholars, and litigants, it may help to curb some of the prevalent abuses of legislative history” (1986, 2).



political violence is formed and organized, and thus represent a significant redistribution of power and influence both inside and outside of the state (Avant 2004). The literature that surrounds these legal categories remains distinct, and does not pair these two groupings together in any substantive way. As they are joined here, I do not intend to draw a dishonest equivalence between their violences: each body has its own potential to do harm to the state and its civilian public—whether by overt war or covert terror. Further, I do not stand in judgment of the crimes of which either party is accused: PMC personnel have been implicated in robberies, rapes, and murders of civilians, unlawful combatants have been accused of killing civilians en masse and, in the case of al Qaeda, waging covert war on the United States and its allies. Agents in both of these “legal” entities employ violent and occasionally criminal means. However, it is important to note the zone of legal indistinction that links these two categories together, yielding an unsettling shared space where friend and enemy, legal and illegal, civilian and combatant become fused. Paraphrasing Walter Benjamin, if the state of exception is the rule of modern power, I focus on the exceptional geographies of the rule (1996).

## **PART II: THE LEGAL ORGANIZATION OF VIOLENT BODIES**

The myth of an orderly war is more bearable.

—Carolyn Nordstrom, *Shadows of War* (2004)

If I am classified as an enemy combatant, it is possible that the United States will deem my witnesses are enemy combatants and judicial or administration action may be taken against them. It is my opinion the detainee is in a lose-lose situation.

—Guantánamo detainee Abu Faraj al-Libbi (in Liptak), *New York Times* (2007)

In what follows, I sketch two vignettes that illustrate the instability of these frontier spaces. Each of these vignettes is connected by a number of threads to the legal

topography of the War on Terror. As I move forward, I will trace the vectors that weave each of these spatial sketches together, and the tensions that pull them apart. My aim is to highlight the difficult, sometimes contradictory task of legally organizing bodies in international war. This legal organization is not the limit or end of a discourse on legitimacy, but a beginning. By moving out from two separate examples, I will show that law, the force of law, legitimacy and illegitimacy can all coexist in an uneven relational field. This field is anything but fixed.

### PEORIA, ILLINOIS

Ali Saleh Kahlah al-Marri is a Qatari citizen who, after finishing his undergraduate degree at Bradley University in Peoria, Illinois, had in the fall of 2001 begun work towards a graduate degree there. In December of 2001, al-Marri was indicted for credit card fraud and accused of lying to the FBI. Following sixteen months of criminal proceedings and months before he was to stand trial, the U.S. Administration declared al-Marri an “enemy combatant”. On June 23, 2003 the government—citing supposed ties to an al-Qaeda sleeper cell—took al-Marri into military custody and shipped him to a military brig in South Carolina, where he remains, in solitary confinement, today. He is the only enemy combatant being held in the United States. His detention there is potentially indefinite, and he has yet to be accused of a crime that would warrant his change in status from criminal to combatant. In July of 2005, a South Carolina federal judge ruled that the administration was justified in detaining al-Marri indefinitely, because he is not a U.S. citizen<sup>16</sup> (Liptak 2005b). In a recent appeals court hearing, government attorneys cited the Authorization of the Use of Military Force (107-40. 18

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<sup>16</sup> The same judge ruled, in a very similar case four months earlier (this case would eventually reach the Supreme Court as Rumsfeld v Padilla), that Jose Padilla could not be denied a trial, because Padilla *was* a U.S. citizen.

Sept. 2001) to justify his indefinite detention, and challenged the court's jurisdiction to even hear the case based on the more recent Military Commissions Act (109-366, 120 Stat. 2600, 17 Oct. 2006).

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Protective schemes in the laws of war are tightly bound to what Derek Jinks calls status categories (2004, 1493). These "rigid" distinctions provide protection along various axes including combatant status, nationality, territory, and the character of the conflict. The frontier between civilians and combatants forms one of the most basic legal classifications of wartime bodies. Bound in text, these status categories either expose or protect corporeal matter, and make the legitimacy or illegitimacy of one's politics a matter of life or death.

Under the framework provided by international law, where a person falls with relation to these categories significantly changes the way they are entitled to be treated once detained. In the context of the War on Terror, legal status legitimates the violence of war and mobilizes spatial practices such as indefinite detention and extraordinary rendition. Clearly, these definitions matter. At first glance, the terminology seems based on clear material realities: one is an armed belligerent or not. One is directly involved in a conflict or not. But closer inspection of these two terms reveals difficult ambiguities that states and lawmakers have been attempting to reconcile for most of the twentieth century.

In al-Marri's case, his seemingly arbitrary change in status, while already in the midst of a federal investigation in the U.S. court system (within U.S. territorial jurisdiction), meant that he was no longer entitled to the legal protections granted to civilians or lawful combatants in international warfare. Just how was this man deemed

an unlawful combatant? In order to address this question, it must first be made clear what qualifies a person as a lawful combatant, as there was no *de jure* or *de facto* legal definition of an unlawful warrior until the U.S. Congress hastily passed The Military Commissions Act of 2006.<sup>17</sup> In the sphere of international law, it is still unclear as to what, if anything, qualifies one as an unlawful enemy combatant.<sup>18</sup>

The Geneva Convention III<sup>19</sup> sets down six criteria that must be filled in order to qualify as a lawful combatant and, thus, for prisoner of war status and the resultant protections. They are: being organized, under responsible command, belonging to a Party to the conflict, wearing a fixed distinctive sign, carrying weapons openly, and acting in compliance with the customs and law of war. In a paper on the combatant struggles for legitimacy, Kenneth Watkin (2005) highlights the lack of precision that

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<sup>17</sup> The definitions included in this Act will be discussed in greater detail below.

<sup>18</sup> Derek Jinks argues that, when taken in concert, The Hague Conventions, the Geneva Conventions, and the 1977 Protocols establish a framework that abandons no life beyond the protections offered by status categories. He notes that, even if taken alone, the Geneva Conventions provide similar protections “in substance” to both the combatant and the civilian, implying, ultimately that there are baseline human protections. Further, he states that their provisions apply to all enemy nationals, including ‘unlawful combatants’ (Jinks 2004, 1504)

<sup>19</sup> The Geneva Conventions are the prevailing legal documents framing the rules of international war and the treatment of bodies in cases of international conflict. For the purposes of this paper, Geneva III *Relative to the Treatment of Prisoners of War*, and Geneva IV *Relative to the Protection of Civilian Persons in Time of War* are the most relevant. Both of these documents were last revised in 1949. Some of the issues relating to more contemporary modes of war—such as guerilla war and wars for ‘national liberation’ were addressed in the Additional Protocols I, and II from 1977. However, the Reagan Administration rejected Protocol I on the basis of what it saw were fundamental flaws that would endanger civilians. The provisions to which the Administration was most adamantly opposed were those that “would automatically treat as an international conflict any so-called ‘war of national liberation.’ Whether such wars are international or non-international should turn exclusively on objective reality, not on one’s view of the moral qualities of each conflict. To rest on such subjective distinctions based on a war’s alleged purposes would politicize humanitarian law and eliminate the distinction between international and non-international conflicts. It would give special status to ‘wars of national liberation,’ an ill-defined concept expressed in vague, subjective, politicized terminology. Another provision would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves” (Reagan, 1987) Further, he concluded, “the repudiation of Protocol I is one additional step, at the ideological level so important to terrorist organizations, to deny these groups legitimacy as international actors” (Reagan, 1987)

one is confronted with when viewing these criteria through a contemporary lens. One of the major contentions is that these qualifications are typically left in the hands of the capturing Party, and thus one's status as a lawful combatant remains distinctly outside of one's own power to define. Below, I briefly outline some of the specific difficulties associated with these provisions.

1) *Organization and Responsible Command*: These provisions are meant to establish a clear hierarchy so as to ensure discipline that would ideally stand as an obstacle to the commission of war crimes. This view of a command structure seems to automatically disqualify the lawfulness of guerilla warriors or those engaged in *levée en masse* movements—those belligerents with a much less transparent internal hierarchy and chain of responsibility.

2) *Compliance with the laws and customs of war*: This too appears to disqualify all guerilla forces from being able to achieve lawful combatant status, as some of the requirements of humanitarian laws of war would be materially impossible for an informal, indirect military organization to achieve. However, while this ambiguity with regards to legal compliance seems potentially unattainable, there is likewise a danger in establishing a different standard for 'irregular forces,' as this could have an overall deleterious effect on the prosecution of war and the equal application of humanitarian law<sup>20</sup>.

3) *Fixed Signs and the Open Carrying of Weapons*: These provisions have, according to Watkin, been the most problematic of the lawful combatant qualifications. Due to a vagueness of terms, and the lack of a requirement for mutual notification, the capturing state has a significant degree of latitude in determining compliance with

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<sup>20</sup> Such was the case during World War II, when *quasi-combatant* status was used to pave the way for the bombing of urban factories.

these statutes. Further, this language also allows for a condition where different clothes could mean the difference between life and death. Carrying a weapon openly is also a significantly vague and problematic qualification. As Watkin notes, engaging in hostile action in modern war does not require the carrying of arms. “For example, the operation of a laser designator or even the delivery of ammunition to fighting positions can constitute direct participation in hostilities” (2005, 32). He concludes that relying too heavily on this qualification “may lead to a very narrow and unrealistic view of what actually constitutes taking an active part in hostilities”(32).

In all, these provisions are modeled on the type of symmetrical, state-on-state warfare that was dominant in the mid-twentieth-century, and as modes of conducting warfare have changed, these standards become less and less relevant. Yet, states continue to apply them, with widely varying interpretations, and with vastly different consequences for their populations.

As previously stated, the lawful combatant exists in contradistinction to two other wartime categories: the unlawful combatant and the civilian. As modes of warfare have changed, the line between civilian and combatant has also been drawn into question. First, visibly distinguishing a civilian from a belligerent is no longer the simple task of looking for a uniform and a weapon. As mentioned above, guerilla war, night and urban warfare, and special operations all work to conceal the differences between these status categories. Next, determining ‘how far up the chain’ one goes when assessing combatant status is a particularly challenging exercise (Guillory 2001). Does the person hired to maintain weapons systems qualify as a civilian? What about the person hired to provide security for a government official Party to the war? Many of the new

high-tech weapons deployed in Iraq were aimed and released from a location within the United States—does this qualify these locations as the battlefield (Roth 2004a, 2004b)? In the case of al-Marri, can an unarmed student with alleged ties to a Party to the conflict, yet already detained for another crime, retroactively assume the status of combatant—and unlawful combatant at that? In this case, the field of battle appears to be limitless and, as with each of these distinctions, the consequences for life dire.

What happens to a person deemed an unlawful combatant? Most significantly, such persons are denied prisoner of war status and the protections that derive from the Geneva Conventions relative to this status. Further, the state detaining them may hold them, without charge and without trial, for the duration of the conflict. In the War on Terror, this is often stated as an indefinite span. As these detainees are not seen as being protected by Geneva, there is the possibility that they will be exposed to coercive interrogations, extended periods of isolation, and other measures that the Conventions prohibit.

Significant questions as to where U.S. domestic law fits into the structure of international human rights treaties remain. From the U.S. perspective, the Geneva Conventions are a guiding framework and the enforcement of their edicts is the responsibility of the individual state governments who have signed the documents. To that end, the U.S. has expended considerable energy to produce these international legal agreements and an infrastructure based on the international rule of law. Further, the United States has embedded the protections of the Geneva Conventions within its domestic law. In the final analysis, however, it is well within the justifiable bounds of any state to accept or reject international agreements as it sees fit. Much of the work that has gone into mobilizing law in the War on Terror has thus centered on

negotiating between international and domestic law to establish the boundaries of and resultant legal protections for different status categories.

Two Supreme Court rulings were important in articulating the U.S. position on the status and the conduct of detention and interrogation in international conflict. 1) The decision in Hamdi et al. v Rumsfeld (2004) returned, in a limited capacity, due process protections to U.S. citizens detained as enemy combatants in the War on Terror<sup>21</sup> and, 2) the ruling in Hamdan v Rumsfeld (2006), which challenged the domestic legality of military tribunals held at the Guantánamo detention facility. Forming a counterpoint to the Hamdi ruling, the 2005 Detainee Treatment Act (also known as the McCain Amendment) was passed as an addition to the 2006 Department of Defense Appropriations Bill. This provision, intended to eliminate any flexibility in legal interpretations of cruel or inhumane interrogation techniques, relied on the Army Field Manual to establish the lawful conduct of detainee interrogations. Coincident with the signing of the Appropriations Bill, President George W. Bush issued a signing statement outlining his interpretation of the legislation. In this statement, the President notes that he will interpret the law consistent with his Constitutional mandate to protect the population, and thus opened the legal possibility that he could move beyond the restrictions of the legislation (Savage 2006).

The most recent piece of domestic legislation to be passed regarding detainee status and its accompanying protections is the Military Commissions Act of 2006 (MCA). This law, hastily pushed through the Congress with minimal debate, was a clear

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<sup>21</sup> Justice O'Connor, in a plurality decision for a *habeas* claim by a U.S. citizen noted the then lack of public law defining an unlawful combatant thusly: "The threshold question before us is whether the Executive has the authority to detain citizens who qualify as "enemy combatants." There is some debate as to the proper scope of this term, and the Government has never provided any court with the full criteria that it uses in classifying individuals as such" (Hamdi et al. v. Rumsfeld, 542 U.S. 507 (2004)).



response to the ruling in Hamdan v Rumsfeld and was aimed at articulating and finalizing the U.S. framework for justice within its military prisons. The Act describes not only lawful combatants, but enemy combatants as well<sup>22</sup>. Importantly, it also explicitly denies the protections of the Geneva Conventions to those deemed as unlawful enemy combatants, stating in Section 948b: “No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights” (Public Law No. 109-366).

When Hamdan later tried to challenge his denial of due process (as Hamdi had), District Court Judge James Robertson who had originally supported Hamdan’s claims in the Hamdan v. Rumsfeld case *before* the passage of the MCA now ruled against

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<sup>22</sup> The Military Commissions Act of 2006 (Public Law No. 109-366) refers to legal categories thusly:

(1) UNLAWFUL ENEMY COMBATANT

(A) The term ‘unlawful enemy combatant’ means--

- (i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or
- (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

(B) CO-BELLIGERENT- In this paragraph, the term ‘co-belligerent’, with respect to the United States, means any State or armed force joining and directly engaged with the United States in hostilities or directly supporting hostilities against a common enemy.

(2) LAWFUL ENEMY COMBATANT- The term ‘lawful enemy combatant’ means a person who is--

- (A) a member of the regular forces of a State party engaged in hostilities against the United States;
- (B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or
- (C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.

(3) ALIEN- The term ‘alien’ means a person who is not a citizen of the United States.

Hamdan, claiming: "Hamdan's lengthy detention beyond American borders but within the jurisdictional authority of the United States is historically unique. Nevertheless . . . his connection to the United States lacks the geographical and volitional predicates necessary to claim a constitutional right to habeas corpus" (Barnes 2006). Despite the clear articulations of what does and does not qualify as an unlawful combatant, law was used to maintain the legal zone of indistinction that accompanies this status category.

In the War on Terror, the designation of unlawful combatant is a reality for an ever-growing population. President Bush issued a group designation on November 13, 2001 stating that all Taliban and al-Qaeda fighters would be treated as unlawful combatants. Such is the administration's case against al-Marri. Additionally, non-Iraqi militants captured in Iraq are given this status (Jehl and Lewis 2005).

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Classifying life with fixed legal codes of distinction has the ability to politicize cultural identities. As Mahmood Mamdani notes, when the French drew a line between "Berber" and "Arab" in their North African colonies, they turned these cultural identities into mutually exclusive categories. This was at first a legal description but soon became a political one, so much so that to "acknowledge any distinction between Arabs and Berbers was to risk associating oneself with the French colonial attempt to divide the nation into ethnic enclaves" (2004:33). He further notes that while political identities are singular, cultural ones often morph through time, achieving an often-contradictory history and ideology. The same might be said for the fixed legal classifications discussed above. One's body is immediately propelled from the diverse spatio-temporal realities of the day-to-day cultural milieu into a political characterization (combatant, unlawful combatant, civilian) whose legitimacy,

protections, and acceptable violence is for all intents and purposes determined. Yet, these determinations of legal status no longer seem transparent or based on the actions of those being characterized by legal discourse. In fact, the legal claims rest, with perhaps the exception of U.S. citizens at Guantánamo, on a determination not by law, but by sovereign decree. One is *deemed* an unlawful combatant. Further, the legitimacy of this decree cannot be challenged: as the sovereign deems, so the classification changes. And yet law is called upon and interpreted at every turn in this narrative. As Watkin notes, “(w)hat the present controversy does establish is the lack of clarity in the ‘black letter’ law”(2005, 70). By looking at the law itself, the very line that separates the legal civilian from the unlawful combatant blurs, and the force of law is revealed as a force of ~~law~~. This legal power that Agamben terms “the force of law without law” (2005, 39) occupies spaces governed by sovereign exception, but also the spaces governed by the gaps and vagaries within the laws themselves. Those potentialities of legal power that are not explicitly disallowed (or allowed) by the language of the law (indefinite detention, coercive interrogation) can be initiated by instrumental readings of the law. These readings have the power to enable actions or classifications that are *non-lawful*, not by turning away from law, but by turning towards its spaces. The force of ~~law~~ is the activation of the powers of law and legal authority at work beyond, beneath, and between the letters of the law—the anomic spaces where language, space, and power collide.

The dangerous irony of this scenario is that one might be a lawful target while at the same time being deemed an unlawful combatant, as if to say, be mindful of the friends you keep, your life could depend on it.

## NAJAF, IRAQ

On April 6, 2004, the *Washington Post* reported an attack on a U.S. government headquarters in Najaf, Iraq by hundreds of Shiite militia forces. For hours they pulsed the compound with rocket-propelled grenades and AK-47s. However, it was not solely Marines but also eight Private Military Contractors (PMCs) who fended off this insurgent violence. These armed security personnel were employees of the firm Blackwater Security Consulting, and during the course of this barrage, they sent in their “own helicopters amid an intense firefight to resupply [their] commandos with ammunition and to ferry out a wounded Marine” before the U.S. military could send in reinforcements. According to the article, the PMCs fired thousands of rounds and hundreds of grenades were deployed. An unknown number of Iraqis were killed in the battle (Preist 2004).

In April of 2006, the firm announced that it could “deploy a small rapid-response force to conflicts like the one in Sudan” (Weiner 2006). Citing their will to engage only in defensive missions, and the expense of NATO troops, Blackwater’s vice chairman Cofer Black added, “We’re low cost and fast, the question is, who’s going to let us play on their team” (Weiner 2006)?

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The use of private forces in war goes back to well before the appearance of the Westphalian system of states. Indeed, as Peter Singer notes, the “state monopoly over violence is an exception in history rather than the rule”(2001, 190). Pirates, mercenaries, religious warriors, and the contract forces of various empires from Egypt forward attest to the veracity of that statement. Historically, corporate entities like the Dutch East India Company had enough money and power to employ their own standing

armies. With the rise of the nation-state, terms like mercenary took on a particularly negative connotation—especially in light of post-colonial violence (Singer 2004)—and their activity was gradually minimized or regulated by international legislation. Regardless of this stigma, the use of contract military personnel by nation-states has been steadily increasing for the past fifteen years. Most scholars of the industry place the rise in use of PMCs back to military budget cuts following the Cold War (Leander 2004; Singer 2001, 2006; Spearin 2004). As the reduced threat from that war's enemies was coupled with new high-tech weapons, the need for a massive standing army decreased. Through the 1990s, many ex-military personnel were left without work. Out of this pool of specialized labor developed the early landscape of the modern day PMC (Spearin 2004).

Iraq is currently the world's largest market for private military contractors. According to industry estimates<sup>23</sup>, there are over 20,000 “private, non-Iraqi personnel” performing military functions in Iraq (Singer 2006, 15). This number is second among coalition members only to U.S. Military forces. Further, the number of PMCs in Iraq is greater than the quantity of all non-U.S. coalition forces combined. These firms provide a diverse array of services including the design and construction of barracks, prisons, and dining facilities, laundering services, food preparation, and supply transportation. In addition, PMCs oversee the maintenance of high-tech weapons, provide armed public security, and, as with the Blackwater case above, form a low cost military regime. It need not be stressed that PMCs have been essential to the coalition war effort. The

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<sup>23</sup> These are the figures that the Pentagon and Congress use as well. There have been several claims that this number is both too high and far too low. This lack of transparency will be discussed below in reference to responsibility and accountability.

*Economist* has even gone so far as to call the recent war in Iraq the “first privatized war” (Singer 2004, 523).

However, virtually no assessment of the privatization of the military leaves out the potential problems associated with their growing presence in international armed conflict. A number of concerns come to the surface with the rise of this industry—ranging from questions of market regulations to issues of accountability to issues of labor exploitation. For my purposes in this chapter, I will focus on the structures of PMC legal accountability, and the ways that this precarious legal situation maintains its degree of legitimacy.

Most of the international legislation that guides PMC activity comes from the Geneva Conventions regulation of mercenaries<sup>24</sup>. One commenter has noted that, even using the more updated Geneva Protocol I<sup>25</sup>, the regulation of mercenaries is directed at the actor, not the activity, leaving ample room for modifications in corporate structure to validate new modes of mercenarism (Singer 2004). As Singer notes, “unlike the intent requirement of felony offenses in the U.S., such as the intent to kill or the intent to distribute narcotics, the intent aspect in the case of mercenaries is focused on identifying a person’s criminal status, not their act” (2004, 529). Article 47 of the Protocol articulates that a mercenary does not have the protections granted to a lawful combatant and, by default, would be considered an unlawful combatant.

In addition to PMC’s legal proximity to mercenaries, what remains troubling is that international law in its current form does not have the capacity to handle these new organizations of violence that have emerged in the last decade (Singer 2004). For

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<sup>24</sup> This proximity to mercenaries has caused many critics of military privatization to argue that PMCs should be *de facto* banned (Faite 2004). One key distinction between a mercenary and a PMC is that mercenaries are typically individual fighters, whereas PMCs are corporate entities.

<sup>25</sup> This provision was not adopted by the United States

instance, the UN established the International Convention against the Recruitment, Use, Financing and Training of Mercenaries in 1989 in order to smooth over the problematic oversights of existing legislation. This extensive Convention appeared just as private military activity was turning towards a more corporate structure and, thus, appears relatively obsolete. Additionally, it has only recently (2001) achieved the mandatory 22 signatures required to become effective, and has not been signed by most of the major state powers (Singer 2004). Thus, at the international scale, there remains a significant legal void around the activities of PMCs.

National governments have had to step up their regulation of these combatants in order to maintain some degree of control. The United States, to its credit, has been at the forefront of establishing these regulations. In 2000, the U.S. Congress passed the Military Extraterritorial Jurisdiction Act (MEJA), which allows for American civilians to be prosecuted for their activities overseas (Public Law 106-778). Further, beginning in 2005, the Pentagon required that its contractors ascribe to the Defense Federal Acquisition Regulation Supplement (DFARS), which establishes a code of conduct for contractors working abroad (Frontline 2005).

However, in June of 2003, head of the Coalition Provisional Authority (CPA) Paul Bremer established Memorandum 17, which required all foreign contractors working in Iraq to be held accountable to the regulations of their home country. While the memorandum requires all American-based contractors to register with the government, to date just over half of those operating in Iraq have done so<sup>26</sup>. Additionally, most other

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<sup>26</sup> 37 security contractors have registered with the Iraqi Ministry of the Interior. One is awaiting approval, and at least 18 additional security companies are in the process of registering. (Isenberg 2006) This out of 80 firms (Singer 2006). Significantly, once licensed, there are no follow-up requirements to see how contracts are performed in reality (Singer, 2004)

countries do not have legislation in place to deal with PMC combatants fighting extraterritorially, and significant populations of PMC personnel represent third party nationals—who remain unaccountable. In June of 2004, as the CPA was handing over control to the Iraqi interim government, Bremer signed a revised version of Memorandum 17 “which stipulates that the rule remain in effect until multinational forces are withdrawn from Iraq or until it is amended by Iraqi lawmakers” (Frontline 2005). Lastly, U.S. contractors can work abroad with or without notifying Congress if their contract is below \$50 million. As Singer notes “[m]any contracts naturally fall under this amount, while larger ones are easily broken up to do so” (2004, 539).

It is clear that despite some legal maneuvering by the U.S., national and international oversight of privatized combatants remains significantly exposed to the very same non-law that enshrouds the unlawful combatant—most commonly associated with non-state terrorist groups. How, then, do these largely self-regulatory military regimes maintain legitimacy in the eyes of the nation-state while living a violent life “outside of the law,” financially benefiting from the perpetuation of conflict?

### **PART III: LEGITIMACY AND JUSTICE, OR, THE ORDER OF SHADOWS**

...it is striking that detainees in Guantánamo were denied both prisoner of war status and the protection of the Fourth Geneva Convention on the basis of what could be a daily bread-and-butter for private contractors in Iraq: direct participation in the hostilities of individuals that are not members of the armed forces of a party to the conflict.

—Alexandre Faite,  
“Involvement of Private Contractors in Armed Conflict” (2004)

To approach the issues of legitimacy and justice, in the final section of this paper, I will turn to the space shared by unlawful combatants and PMCs: the war prison. As I have noted, PMCs not only aid in the design, construction, and maintenance of these



facilities, but also have been hired to perform and translate highly classified interrogations within them. These spaces of detention represent an environment where these two organizations of political violence become entwined, where the legal black hole encounters its mirror image, and bodies become diagrams of the interchange of geopolitical power.

### **BAGHDAD, IRAQ**

More than three years after the abuses at Abu Ghraib were made public, and four years since the events there took place, none of the nineteen suspected contractors that Army investigators have implicated as potentially involved have had any legal action taken against them. One of the contractors, CACI employee Daniel Johnson, together with a female translator in the employ of the firm Titan, have been shown in a photograph depicting the interrogation of a prisoner. The prisoner is shown, according to Maj. Gen. George R. Fay's investigative report, "squatting on a chair which is an unauthorized stress position. Having the detainee on a chair which is a potentially unsafe situation, and photographing the detainee are violations of the ICRP" (Fay 2004, 82). According to one recent article, the U.S. Justice Department's prosecution of Johnson remains in a state of suspended animation (Benjamin 2006).

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There is a common language that connects the legal voids of unlawful combatants and PMCs. Their collisions as bodies within the prison space draws out important contradictions and instabilities latent in the legal organization of violence. The unlawful combatants—accused but not publicly taken before a judge—remain detained indefinitely and subject to the myriad violent performances of state power based ultimately on suspected somatic associations. They, like Agamben's *homo sacer*, have

been expelled from public life and abandoned by law (1998). The corporate interrogator—privy to state secrets, funded by federal monies—also stands in a position “outside of the law,” but as an agent capable of deploying the very same deadly violences. PMCs are the beneficiaries of the non-legal spaces of the force of ~~law~~: they occupy the spaces beyond, beneath, and between the letters of the law. In these spaces where law and non-law collide, the evaluation of just ends and just means ceases to become a legal proposition. Here, the question of *legitimacy* replaces the question of legality.

Falk argues that after September 11, 2001, law lost much of its legitimacy as a source for guiding the activity of liberal democracies (2004). Law came to be seen by many within the government’s foreign policy sector as too cumbersome and an impediment to swift action. Either it needed to be changed, or it needed to be overlooked in favor of a stance that eased activity. What ultimately became clear, based not on any decisions made within the administration, but rather on a half-century lineage of legal reasoning, was that this does not actually have to be a choice. Administering *both* legal ends by way of an instrumental approach to law *and* the prerogative power embodied in deeming, an exceptional legitimacy is produced: Law that is law enmeshed with law that is not law yields the troubling space of legitimacy.

In 1998, when NATO felt it needed to intervene in Kosovo for humanitarian reasons, the UN Security Council (the legal entity that approves wars of aggression) was poised to reject intervention based on vetoes by Russia and China. NATO allies flew the bombing runs anyway in clear violation of international law (Falk 2004). From the position of U.S. geopolitical power, and that of much of the international community, the Kosovo bombings are often *deemed* as legitimate. However, closer

inspection reveals that many nations—most of Latin America, Africa, and Asia, not to mention many Americans—opposed (and still oppose) the intervention on the grounds that authorization had not been established through legal means. With this precedent set, when the United States attempted to argue its case for war in Iraq in 2003 using the same means—a coalition of willing nations determined to act in pursuance of what they *deemed* a legitimate cause—but the Iraq war frequently gets represented as illegitimate (Kagan 2004). It begins to be clear that without a normative framework that establishes acceptable codes of action, the idea of legitimacy is indeed quite a hazy and subjective classification.

A series of geographical questions arise when one attempts to structure action on legitimacy. What is the scale of international legitimacy? How does one structure and validate a consensus? Other issues of rights and justice also come to the fore. How might one who has been deemed an illegitimate seek recourse? What is a crime if there are only illegitimacies? What are legitimate rights? Legitimate justice? Legitimacy is not a normative framework, it is a justification for predetermined ends. Legitimacy is storytelling. It is a tactical projection of cause and effect scenarios into the future. Legality and legitimacy, terms which on their faces seem mutually supportive, become disconnected. An illegal war is legitimate while another similarly illegal war is not. Though legal categories may be problematic based on language or its voids, law does not conveniently serve to guide action, but rather, is a malleable and fluid means of approaching a just international space. When law is turned into a governmental technique to be exploited to achieve ends, the possibilities for rendering justice become much more difficult.

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Legality at first glance appears a straightforward concept. There is a line dividing what is legal and what is illegal; rules define those lines, judicial codes institutionalize these rules, and enforcement agencies guard justice. Yet there is no biological imperative marking crime from legitimacy.

—Carolyn Nordstrom, *Shadows of War* (2004)

Returning finally to the space of Abu Ghraib, the avenues open for the meting of justice and the assignment of responsibility seem quite clear. There exists ample evidence documenting clear violations of state and international law to make a just and final legal decision. Entwined with this ostensibly clear legal situation is a complicated legal geography, one in which issues of status categories, territorial jurisdiction, and the relationship between state and international law serve to destabilize what would initially seem to be an instance of international criminal violence and a violation of human rights. Instead, through highly technical instrumental use of the laws of international conflict, a zone of indistinction has been opened in which, it would seem, certain populations can act and be acted upon with impunity. Analyzing the legal organization of violent bodies into such categories as lawful and unlawful combatant reveals that much of the landscape of war hinges on the subjective and problematic field of legitimacy. However, judging acts and agents based solely on the legitimacy of the force of law runs the risk of opening a social space where action takes precedence over justice, and law's validation is preemptively and permanently foreclosed. The unsatisfactory lack of prosecution of those responsible for clear violations of rights in Abu Ghraib stands as a glaring testament to this anomic condition.

# 3

## MONSTERS On Rendering Justice in the Contemporary War Prison

As he thinketh in his heart, so is he.

—proverbs xxiii

The frame of reference of the human monster is, of course, law.

—Michel Foucault, *Abnormal* (2003)

The end of man is knowledge, but there's one thing he can't know. He can't know whether knowledge will save him or kill him. He will be killed, all right, but he can't know whether he is killed because of the knowledge which he has got or because of the knowledge which he hasn't got and which if he had it would save him. There's the cold in your stomach, but you open the envelope, you have to open the envelope, for the end of man is to know.

—Robert Penn Warren, *All the King's Men* (1974)

This chapter concentrates on the role that the collision of bodies of law and biological bodies plays in the production of state space and the distribution of a particular mode of power. As in earlier chapters, I am here concerned with exploring frontier spaces in the War on Terror and the precarious legal geography that constitutes them. My primary focus in this chapter is the landscape of detention. More specifically, here I will concentrate on the prisoner body in contemporary war prisons, the geopolitical contexts for these spaces, and the legal and policy discourse that purports to legitimate the practices that occur within them. These facilities make their appearances in ways that challenge many of the fixed categories that populate policy and law, and provoke numerous difficult questions about relationships between text, space, time and the body. The aim of this chapter is to explore various modes of wartime detention and how these spaces are intentionally constructed to exist relative to an irreconcilable legal tension. In these spaces, the individual material bodies of the detainees are entwined with an unstable legal discourse that renders them as monsters, outside of the law and legal protections based on conditions over which they may or may not have any control. I concentrate on the legal work being done at several levels of governance that has arisen out of the increased importance of the body relative to territory in this war. I focus here on two specific legal issues. First is the fluid geography of war prison spaces and the detention of subjects—both American citizens as well as those of other countries, failed states, and stateless actors. This part of the chapter circulates around the detention and subsequent legal claims of Canadian Majer Arar. In the second section of the chapter, I focus on how these suspects are treated and interrogated once they are in custody. This section highlights the centrality of the body in the War on Terror.

Administrators of modern state power have long sought to manipulate their legal margins in order to establish or maintain spatial dominance. Within the context of the War on Terror, these manipulations have shaped the limits of law in terms of territorial jurisdiction, bodily classification, and temporal reach. The use of law as a governmental technique is premised on the need for legal discourse to achieve certain ends: to open legitimate spaces for the control of individual bodies. This instrumental view of law has led to the production of a common discourse of newness surrounding the conflict. It is a new war, against a new type of enemy, and necessitating new modes of governance. In contrast to eighteenth and nineteenth-century imperialism, and to major twentieth-century wars, these transformations generate from the fact that there is no bounded territory in the War on Terror that can be located as the primary or exclusive front in the battle<sup>27</sup>.

What can be seen presently is a war materializing on two similarly important fronts. First, the U.S. state grounds its actions in traditional theaters of war—those being (to date) Afghanistan and Iraq. Hence we see the overthrow of the Taliban regime, the fighting in Baghdad, and the insurgency in Iraqi cities and villages. Deaths in this theater are the public casualties of the war. Such actions are supported by the state using rhetoric of freedom and liberation, democracy and ethics. The War on Terror also has a second front: the battle over bodies that have already been incarcerated and removed from the territorial theater. Those detainees, hidden from view, are thought to have knowledge key to the security of the territorial theater, the U.S. national space,

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<sup>27</sup> As was discussed in Chapter 2 with the case of Ali al-Maari, the territory to which the wartime powers of the United States apply is at times within its own ostensibly peaceful borders, and at other times the streets and alleys of Baghdad and Kabul. The legal texts utilized for such territorial liberalization were not only domestic law, but international humanitarian law as well.

and the populations it supports. This particular war is taking place in detention facilities all over the globe as well as in the halls of government, where legal administrators must develop measures to deal with the placeless-ness of terror. Indeed, terrorists can *be* anywhere, and it is only the embodiment of their ideologies in their actions that may someday violently convey their status as enemies of the state. In territory's lack, what remains are bodies. Transient and mobile, these bodies are potentially dangerous challengers to the image of a rule of law. The prisoner body is rendered as monstrous, and become subject to a diverse array of powers: the will of the sovereign, strategies of discipline, and the art of government. How these various formations come together in the body of the prisoner is the focus of this study.

Thus, land has been joined, and perhaps superseded, by *information* that is contained 'in' the terrain of active bodies<sup>28</sup>. Supporters and critics of the war effort acknowledge this as a given. Winning this war, the story goes, requires not only the power to eliminate bodies from the battlefield until the war's conclusion<sup>29</sup>, but more importantly, the ability to extract information and to indefinitely remove monstrous bodies from all future public life. So, then, how has this change—this *embodiment* of the war—altered and been altered by the landscape of law, of detention, and of territory, and in what ways are all three of these regimes intertwined?

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<sup>28</sup> The prolific strategy of suicide bombing may amplify the urgency and danger associated with the bodies of those in the more traditional, territorial theater of war. While apprehension over the volatility of certain bodies may indeed extend to the administrators of detention centers, detainee life and potential for violence are markedly different once incarcerated. I will discuss this in greater detail in the second section of the paper.

<sup>29</sup> The concept of an end to the "War on Terror" is becoming increasingly more indeterminate and hard to imagine. This is one of the more consistent accusations by lawyers involved in the representation of detainees.



## **PART I: THE WAR PRISON: OF ISLANDS, ARCHIPELAGOS, AND BODIES**

The United States is pursuing aggressive new methods at the international scale to house and interrogate suspected terrorists in the War on Terror. After the attacks of 11 September 2001, President George W. Bush signed into effect a “finding” authorizing Central Intelligence Agency (CIA) covert action. While still subject to U.S. law and Justice Department review, this finding gave the CIA “broad authorization to disrupt terrorist activity, including permission to kill, capture and detain members of al Qaeda *anywhere in the world*” (Priest 2005, italics mine). The CIA has long conducted international intelligence gathering missions—with or without the approval of other sovereign governments. This finding, however, gave the agency the legal authority to establish detention facilities—‘islands’ for spaces of punishment—globally and without the need for the President to approve each one. As Paglen and Thompson write of the finding:

Age-old complaints about covert actions getting “lawyered” to death would be gone. New, secret wars would begin across the world. Old ones would expand. Strict rules about congressional and executive oversight of covert operations would be a thing of the past. The agency would no longer have to get individual covert actions approved by the President. The CIA would have tremendous new powers and tremendous autonomy (2006, 22).

By establishing this authority to act independently in other states, the finding places a primacy on U.S. safety, security, and sovereignty while usurping the territorial and legal dominion of others, including its allies in the War on Terror. U.S. security agencies would be at liberty to work with other state’s security agencies: autonomous islands would open up worldwide for the interrogation of terror suspects worldwide. As Redfield points out, when looking for a site to develop a space of punishment, islands have definite spatial benefits. “[W]hether landmass or metaphorical field of expertise,” he writes, “an island has clear borders and a horizon on all sides.” (2000, 2). The space

surrounding an island provides a buffer which helps to conceal the practices and facilities from external review. Indeed, islands were initially the preferred sites for contemporary CIA facilities, as they:

... searched for a setting like Alcatraz Island. They considered the virtually unvisited islands in Lake Kariba in Zambia, which were edged with craggy cliffs and covered in woods. But poor sanitary conditions could easily lead to fatal diseases, they decided, and besides, they wondered, could the Zambians be trusted with such a secret? (Priest 2005)

For a number of reasons, the U.S. administration was looking internationally for these islands. Their reasons have little to do with a lack of acceptable locations within the bounded territory or existing legal jurisdiction of the United States or the militarized war zone. Rather, it is precisely the limits of its jurisdiction that were being reconfigured. The United States and CIA were looking for sites that possessed the physical requirements of detention centers: characteristics that have remained virtually unchanged since the colonial era referred to by Redfield. Yet they were looking for something more—sites where the legal restrictions and the oversight of interrogation techniques were not as explicit as in the United States. This desire to avoid oversight and escape the confines of judicial review is demonstrated by the shift in policy after the Supreme Court in June 2004<sup>30</sup> granted Guantánamo prisoners the right to challenge their incarceration in court. Subsequent to this decision, detainees in the War on Terror were sent to a prison 40 miles north of Kabul in Afghanistan, at Bagram Air Base. This facility bars visitors (excepting the Red Cross, which is only allowed to go in certain areas) and photography and, due to it being detached from any U.S. territorial jurisdiction, is free from the oversight that the Supreme Court now requires at

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<sup>30</sup> Rasul v Bush 542 U.S. 466 (2004)

Guantánamo Bay<sup>31</sup>. Guantánamo and Bagram have evolved from makeshift war prisons, the likes of which have been in use since the Second World War, into more substantial prisons in the mold of the super-max prisons of the United States.

With the opening of these new facilities, the image of the terrorist monster is produced and persists on the outside—these are the worst of the worst<sup>32</sup>—while on the inside, fewer than twelve individuals have been charged with committing a crime, and approximately 25% of detainees have been cleared of any wrongdoing and await safe release (Melia 2006). It is important to stress that these performances at the limits of the state do not represent a turning away from law; rather they use an instrumental approach to taking action *within*, though not necessarily consistent with, the law. Derek Gregory points to the paradoxical approach to governing and justifying these islands as places where the “legalized and the extra-legal cross over into one another” (2006, 213). Referring specifically to Guantánamo Bay, he dissects the way in which the land there has been determined part of U.S. territorial jurisdiction (in order to establish military bases) while the rules governing the disciplining of bodies there can remain simultaneously outside. As has been discussed in previous chapters, so-called “black letter” law contains exceptional spaces that can at times be mined to achieve specific ends by way of executive discretion: the law is being called into question at every turn.<sup>33</sup>

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<sup>31</sup> Regarding this oversight, the U.S. has set up Combatant Status Review Tribunals (CSRT) which allow the detainee to seek an explanation for his detention. No one involved with these tribunals is given access to any classified information relevant to the case at hand, which has resulted in an absurd legal review situation where the accused, his lawyer, and the presiding jurist are not aware of information they are meant to be discussing.

<sup>32</sup> The classification ‘worst of the worst’ was often used by administration officials—from Secretary of Defense Donald Rumsfeld to Attorney General John Ashcroft—most frequently between 2002-2004, in reference to detainees held at Guantánamo Bay.

<sup>33</sup> The U.S. Justice Department (and specifically the Office of Legal Counsel) has provided the Bush administration with legal analysis on the recommended interpretation of everything from jurisdictional limits to torture policy. The Office of Legal Counsel and the Attorney General form an entire arm of the Justice Department devoted to providing legal interpretations to the

These islands do not exist in total isolation. Geographically removed sites like Guantánamo and Bagram are connected into a vast archipelago of detention facilities that span the globe in both space and time. The network of facilities extends the spatiality of detention from isolated super-max islands to spaces like schoolhouses, warehouses, and airport hangers all over the world. These temporary international CIA detention facilities, ‘black sites’, do not convey a consistent set of architectural or infrastructural elements. They don’t need to. Ultimately, black sites are spaces that are made into prisons through their occupation, by the coming together of certain bodies working in the grey areas of international and national law. They cease to function as such as soon as the detainee and their overseer depart—often by way of corporate jetliners. In fact, this network of clandestine detention facilities first became visible by way of planewatchers, people who, as a hobby, keep track of incoming and outgoing flights at various airports (Paglen and Thompson 2006). It was not the spaces themselves that gave the network away but the connections between them. Eventually, President Bush verified that the United States had built, occupied, or run secret detention facilities in Guantánamo Bay, Cuba, Afghanistan, Thailand, and Eastern Europe (Liptak 2005a, 2005b; Mayer 2005b; Murphy 2004; Priest 2005; Sands 2005).

Black sites would be illegal in the United States, and if known about, might indeed be illegal in the countries hosting them (Priest 2005). The existence, location, and approval of these sites are presently the subjects of several international investigations, including queries and potential litigation by the European Union (Watson & Weber 2005). With these facilities, it appears that one sovereign state is attempting (and

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executive branch. While names like John Ashcroft, Alberto Gonzalez, John Yoo, and Stephen Bybee have become prominent, it is important to note that they are not rogues, but part of a systematized agency devoted to legal analysis.

briefly accomplishing) to authorize and administer police activity and detention beyond the limits of its legal jurisdiction. These spaces of detention can only be understood as fleeting and furtive, and their legality seems to hang precariously on their invisibility<sup>34</sup> (Golden, Schmitt, et al. 2006).

And invisible they are. *The New York Times* referred to one recently exposed detention and interrogation facility, Camp NAMA (which is ostensibly the acronym for “Nasty-Ass Military Area”) as being “(h)idden in plain sight just off a dusty road fronting Baghdad International Airport” (Schmitt & Marshall 2006, A1). As the list of facilities continues to grow—Guantánamo Bay, Abu Ghraib, The Salt Pit, Bagram—their names themselves have taken on a certain public presence, a semiotic stand-in for the very private, classified practices of interrogation and torture which take place within. What remains hidden are all of the minute field stations, the temporary black sites, the names of detainees, the number of so-called “ghost detainees” who are secretly flown from place to place—isolated from legal rights and public life. These flights are important to note. They are the spaces between systems of territorial jurisdiction: the furtive and temporary strands that connect detainee bodies in an international network, and in the process, connect state spaces with those of the so-called enemy in a matrix of detention that defies the territorial articulation of political borders and their associated laws. In the next section I look at the way that law, these various forms of detention space, and the body come together in the narrative of the extraordinary rendition of Majer Arar.

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<sup>34</sup> Present reporting assumes that black site facilities have been moved from Europe to ‘Northern Africa,’ though the specific locations are not clear. The choice of Africa resonates with Redfield’s comments about islands noted above. Some attribute the movement of these prisons out of Europe to their exposure in public press and international diplomacy circles.

### **J.F.K. INTERNATIONAL AIRPORT, NEW YORK; DAMASCUS, SYRIA**

On September 26, 2002, the Immigration and Naturalization Services (INS)<sup>35</sup> at JFK Airport in New York detained Majer Arar, a citizen of both Canada and Syria, as he sought to make a flight connection while attempting to return to his home in Canada after a family trip to Tunisia. The reason for his detainment was his alleged connection to the international terrorist organization, al Qaeda, as well as his relationship with two other Syrian-Canadians who were also suspected of being terrorists<sup>36</sup>. What followed, according to Arar, was extensive interrogation by the INS and the FBI at a detention center in Brooklyn, New York and, after 13 days, his rendition to Syria for a ten-month detainment punctuated by brutal physical and psychological abuse. During this period, Arar alleges, he was kept in a dark, rat-infested, coffin-sized cell, deprived of food and beaten on his hands and stomach with fists and a two-inch-thick electrical cable. On October 5, 2003, Syrian intelligence released Arar to the Canadian consulate in Damascus without filing charges, at which point he was flown to Ottawa and reunited with his family. Subsequently, he sued the United States Attorney General John Ashcroft and seven other civilian administrators of various state agencies, as well as ten ‘John Does’ purportedly in the employ of the FBI, who he claims held “him virtually incommunicado for thirteen days at the U.S. border and then ordered his removal to

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<sup>35</sup> The INS was at this time still a part of the US Justice Department. On March 1, 2003, the INS was incorporated into the Department of Homeland Security and divided into three different bureaus: The United States Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE), and the U.S. Customs and Border Protection (CBP).

<sup>36</sup> In a case that is only now reaching the courts, one of these other men, Ahmad Abou El-Maati, appears to have been similarly rendered to Syria by U.S. agents. His story, which is nothing short of fascinating for political geographers, begins at the U.S./Canada border with agents misreading a map. El-Maati, a truck driver, was originally put on the U.S. border patrol’s watch list in August of 2001 when he attempted to cross the border on a shipping run, and a map detailing a Canadian nuclear research facility was found in the cab of his truck. After he was rendered to Syria, it became known that the map was actually government produced, as a tourist map, for those who visit the compound (Shephard and MacCharles 2006).

Syria for the express purpose of detention and interrogation under torture by Syrian officials”. He brought his legal claims under the Torture Victim Prevention Act and the Fifth Amendment to the U.S. Constitution (Trager 2006:1). Following an extensive investigation by Canadian officials, Arar has received more than eight official apologies from the Canadian government, as well as a financial settlement of \$10 million (Canadian)(Galloway 2007). Despite being cleared of any and all wrongdoing by Canadian officials, he is still barred from traveling to the United States and remains on the government’s watch list.

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Rendition is a controversial practice that the United States has been engaged in since at least the early 1990s, if not before. The practice involves shipping prisoners to other nation-states where they are detained and interrogated<sup>37</sup>. Like the establishment of international “black sites,” the practice has recently been the subject of more direct public scrutiny and international attention. Rendering yields several benefits for the United States. First, as the number of persons detained continues to grow, and the practice of indefinite detention continues, there is a need for secure spaces for incarceration and interrogation<sup>38</sup>. These spaces exist and are in operation around the globe—almost every state has detention facilities. Thus, enlisting the existing spaces of other sovereign states fulfills the spatial requirements of detention and an ever-increasing, ever-mobile prisoner count. The second, and more revealing reason for the

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<sup>37</sup> Traditionally, rendition involves the sending of a detainee to their home country, where their state documentation is, as well as a cultural space more likely to generate a speedy interrogation and fair trial.

<sup>38</sup> In Iraq, the Defense Department says 5,569 detainees have been held for more than six months, 3,801 for more than a year and some 229 for more than two years. Roughly 83,000 people have been detained in the past four years, with present numbers at about 14,500. An additional 500 remain at Guantánamo Bay (Shrader 2005). The concept of indefinite detention is discussed further below.

practice involves the treatment of detainees. The United States sees extraordinary rendition as a boon for improving the potential for gathering information.

In order to open up such spaces, the U.S. administration is applying a very particular reading of Article 3 of the United Nations Convention Against Torture<sup>39</sup>, that requires a “substantial grounds for believing” that a detainee will be tortured abroad. If officials can argue that they are less than 50% sure what will happen to the detainee, then they may render them (Mayer 2005b). Further, U.S. law<sup>40</sup> (relevant for the movement of persons from the United States abroad) clearly states that torture must be understood as a *matter of policy* in the targeted state. In other words, in order for rendition to a foreign country to be considered illegal, the regime governing that country must use torture routinely.

Under international customary law, specifically the Vienna Conventions on Consular Relations (1963), Arar should have had access to the Canadian consulate during the initial phase of his detention in Brooklyn, New York<sup>41</sup>. However, when the case first appeared before the courts in the United States, the Justice Department argued that the treatment of Arar was consistent with that convention based on the fact that he was never actually *in* the United States. Mary Mason, a senior trial lawyer for the government, noted that when foreign travelers present their passport at an

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<sup>39</sup> Ratified by the U.S. in 1994

<sup>40</sup> U.S. Court of Appeals for the Third Circuit in a case involving a deportation to Haiti, Auguste v. Ridge, 395 F.3d 123 (3d Cir. 2005), and the decision of the Bureau of Immigration Appeals in *In re J-- E--*, 23 I&N Dec. 291. (Lederman 2005)

<sup>41</sup> Section (b) of Article 36 of this convention states specifically:

if he so requests, the competent authorities of *the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner*. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph (UN1963, emphasis mine).



American airport—even if only to make a flight connection—they are at that moment seeking to be admitted to the United States. She argued that by denying Arar entry into the country at an international airport, state administrators, mobilizing U.S. immigration law, could move his body to a detention center in Brooklyn while, legally, he was not in U.S. territory. Further, during the time that Arar was outside on the inside (outside of U.S. legal protection but under U.S. control and territorially within the U.S.), his body lay beyond the jurisdictional reach of the Constitution and the legal conventions to which the U.S. state would normally adhere. At most, even if wrongfully detained (the burden of proof lay with the “alien”), this being outside while moving through the inside of state territory only grants a person a right against “gross physical abuse”<sup>42</sup> (Bernstein 2005). This reading of the law allowed the state to detain Arar without access to Canadian diplomats. More importantly, it allowed state agents to skirt the humanitarian protections that come from being a person—whether foreign or not—on U.S. soil.

This combination of legal reasoning with the politics and movement of corporeal life resembles what Don Mitchell (2003) refers to as bubble laws. In writing about the legal organization of anti-abortion protestors, Mitchell notes that the U.S. Supreme Court ruled in favor of legislation that put legal restrictions on the spatial limits of anti-abortion demonstrations outside of clinics and, significantly, around the bodies of persons entering and exiting them. These bubble rules inevitably frame the forms that protest and politics can take by legally establishing a textual yet lived and mobile

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<sup>42</sup> The specification of the ‘physical’ nature of this abuse is very important, and will be developed in the second half of the chapter. As I will show, the United States has, over the course of the later half of the 20th Century, assured that they can legally abuse bodies by way of other, non-physical measures.

border in a politically contentious space (Mitchell 2003) <sup>43</sup>. The law stipulates a set of rules for the conduct of people who attempt to cross the border in one direction (protestor moving towards the body of someone approaching the clinic), and leaves unaddressed the spatiality of politics flowing in the other direction. In Arar's case, the limits of his legal bubble were coextensive with the limits of his body, which allowed him to be treated as if he were still outside the protections of the state while his body clearly lay inside state territory. By embodying this legal border, his actions, rights, access, and politics were spatially and politically delimited, but the power of the state was significantly liberalized and expanded. His life was on the outside while the surfaces of his corporeal matter was on the inside and, from the point of this legal paradox forward, the most consistent thing about his subsequent detention, in each of its iterations, was the limit of his body.

Arar's imprisonment began when his body was legally isolated, and his spatial isolation soon followed. But this prison was mobile, and it moved with his body—it *was* his body—from an airport to a detention facility back to the airport and finally overseas to Syria. The many stages and spaces of his detention draw attention to the diverse and fluid nature of contemporary war prisons. While some of these facilities replicate spatial logics that have remained unchanged for centuries, others increasingly occur in the more innocuous globally connected spaces of everyday life under neoliberal capitalism: airports, airplanes, and schools join so-called 'super-max' prisons and the more draconian spaces of prison camps and dungeons. Further, as these everyday spaces become enmeshed with embodied prisons—bodies that by their spatial and political

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<sup>43</sup> I am not here commenting on the justness of the decision, but rather making note of the legal production of a border that defines only one of its sides and dictates the conduct of bodies only on that side. On this point, both the majority and dissenting rulings agree that there was a *target* of the law (Mitchell 2003, 45).

contingencies are rendered as outside law's protections while being inside its reach as a target of discipline and control—law (and not necessarily prison architecture) is tasked with the objective of simultaneously imprisoning and liberating. The walls of the prison are disintegrating.

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The lawfulness of extraordinary rendition depends largely but not exclusively on where one stands politically and ideologically. It is possible to find legality in the voids of law's language: outsides on the inside. While these legal readings are intimately tied to the exceptional crisis state of the War on Terror, this interpretive process is part and parcel of legal interpretations in all instances. Maintaining the desired readings takes constant effort by judges, attorneys, government officials and a population willing to accept the justness of actions it may or may not be able to see. Further, this legal work is productive in that it allows the state to push out at the limits—even if only temporarily—and exercise its sovereign power in spaces that might normally fall outside of its legal jurisdiction. Next, I explore the ways that the governing of bodies in these mobile and corporeal prison spaces has seeped into legal discourse.

## **PART II: MAKING LEGAL MONSTERS AND THE WALLS OF THE ANYWHERE PRISON**

Thoughtcrime does not entail death: thoughtcrime is death.  
—George Orwell (1961)

Kafka-esque doesn't do it justice. This is 'Alice in Wonderland.'  
—Joseph Margulies<sup>44</sup> (2006)

In the following section, I trace the movement away from a detached universality of discipline and incarceration towards an individually directed art of governmental power

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<sup>44</sup> Mr. Margulies is a Northwestern University law professor who has represented several Guantánamo detainees. This citation appears in Leonnig and Rich (2006).

fixated on the unique and isolated body. I place this embodiment into a framework of power and control that is the enmeshing of the more anachronistic societies of sovereignty and discipline with those of security and control. Here, I explore the ways in which the rule of law has become a *technique* employed by new, “petty sovereigns” (Butler 2004) as they search—in the absence of a fixed state territory that clearly locates potential enemies—for more effective ways of controlling individual bodies in perpetuity. What does it mean for a nation-state to move from the rule of law with moral interrogations governed by established practices towards a clandestine circuit of spaces and practices that skirt the margins of legality and jurisdiction? How much does this have to do with the fact that the enemy in the War on Terror does not have land or resources, only bodies and information? How is law *used* to facilitate more open-ended and arguably unlawful performances by the state on the body of its detainees? I will look at the way that torture and coercive interrogation have made their way into U.S. law, and the way that these modes of bodily control are intimately tied to the changing landscape of war. First, I look at the form of torture that involves the abuse of one body by another, how it appears in law. Next, I look at the way that torture has been decentralized through research and psychological study to materialize in ways that do not directly mark the body. Extensive work has been done over the last half-century to make space for these new forms of no-touch torture within U.S. law.

In *Discipline and Punish*, Foucault (1977) notes historical transitions in the methods of punishing the body of the condemned. Punishment has moved over the course of centuries from a gruesome, public spectacle focused on the specific body and the specific crime to a generalized, impersonal, and far less severe form of punishment that was designed to both reify the objectivity of the justice system and convert the soul of the

transgressor. He writes, “the expiation that once rained down upon the body must be replaced by a punishment that acts in depth on the heart, the thoughts, the will, the inclinations” (1977, 16). Discipline leaves marks on the life, not the body. In its historical context, Foucault notes that discipline’s main function is to produce governable docile bodies.

The docile body is one whose mechanics are mined for their increased utility (in the economic sense), while its forces and potential for disorder (in the political sense) are minimized by meticulous methods of control and coercion. It labors more, and indeed more efficiently, towards certain ends. Additionally, the docile body is to become more obedient as it becomes more economically useful. As Foucault notes, a body is docile that “may be subjected, used, transformed and improved” (1977, 136). Therefore discipline does not suppress forces, it guides and amplifies them in specific practices. These forces have a particular scale that sets them apart from the earlier techniques of bodily domination and rule by decree epitomized by sovereign power. Specifically, discipline works on each body individually through subtle coercion rather than ‘wholesale’ as if all bodies formed a unified and cohesive mass. It may also be juxtaposed to the practices of earlier societies in that it no longer deals with the behavior per se, but with the efficiency and economy of action. Discipline is a spatial micro-politics, a set of regulatory forces that Foucault reads as a “general formula of domination” (1977, 137). This would seem to be the model of the modern rule of law system, which sees incarceration as a potential means of rehabilitation and capital punishment as a solemn and rational responsibility at the edges of the rule of law. This paradigm is extended in the international sphere, where the Geneva Convention and the High Commission on Human Rights rationalize the process of discipline and establish the field of rights. The

centrality of the body is removed in this highly ordered, repetitive practice: the focus of discipline becomes to administer a degree of control over the soul of the subject, to limit the unruliness of the future.

But this is not necessarily the case in the War on Terror. While discipline is geared towards the generation of future governable populations, the U.S. nation-state is presently not interested in generating docility in its detainees, in harnessing their power and exploiting their mechanics into the future. Rather, its detention strategy is aimed more at exploring the limits of the detainee body through coercive interrogation techniques in order to extract *immediate* information for the security of its population. The body is merely a conduit for knowledge. Dylan Rodriguez (2006), writing on the disciplining of radical intellectuals in the United States, refers to the structured impossibility of rehabilitation within a disciplinary regime that already considers the bodies of the imprisoned abject from the realm of morality. These are monsters. The contemporary war prison similarly dispenses with the rehabilitative functions of the disciplinary prison space in favor of one that explores the limits of the body

## **SECOND CIRCUIT COURT, BROOKLYN, NEW YORK**

On February 16, 2006 in New York's Second Circuit Court, U.S. District Judge David J. Trager ruled against Majer Arar based on a set of legal precedents that included the limitation of the constitutional protection of aliens on U.S. soil as well as the court's lack of jurisdiction over what he claims are the purview of the executive and legislative branches of government. While developing the legal precedents for his 88-page ruling, Trager states the following with regard to the legality of torture in the War on Terror:

“While one cannot ignore the “shocks the conscience” established in *Rochin v. California*, 342 U.S. 165, 172-73, 72 S.Ct. 205, 209-10, 96 L.Ed. 183 (1952), that case involved the question whether torture could be used to extract evidence for the purpose of prosecuting criminal conduct, a very different question from the one ultimately presented here, to wit, whether substantive due process would erect a per se bar to coercive investigations, including torture, for the purpose of preventing a terrorist attack” (Trager 2006:55).

Judge Trager continues, in a footnote citing the case *Filartiga v. Pena-Irala* (2d Cir. 1980), that although there has been near “universal condemnation of torture in numerous international agreements and the renunciation of torture as an instrument of official policy by virtually all nations of the world (in principle if not in practice)” and that it “violates established norms of the international law of human rights, and hence the law of nations” the barring of cruel and unusual punishment “dictum does not address the constitutionality of torture to prevent a terrorist attack” (2006, 55). Trager here stipulates that although there is ample precedence clearly prohibiting torture as a form of policy, the cases do not *explicitly* take up the use of torture for the extraction of information to prevent a terrorist attack, implying that, perhaps, in the prosecution of this new type of war, a void in the language of the law may open up the legal space for torture. Finally, Trager’s footnote provides a unique take on the binding nature of international agreements, arguing that “(a)lthough the United States has, in the context of various international undertakings, made certain treaty commitments against torture, these obligations, unlike the Due Process clause, can be repudiated” (2006, 55). International obligations, by way of this ruling, need not be seen as a hindrance to US statecraft.

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The legal work that Judge Trager performs in this ruling is part of an extensive chain of research, policy, legislation, and action that, throughout the 20th Century, has

been aimed at developing a safe space within U.S. law for a particular form of torture. In this decision, the idea that law and legality are the normative bars by which an ideal such as justice is measured is put to rest. Law, even within legal decisions, is molded to meet the needs of the security state. In this case, there is always the potential for a body to cause future destruction, and this unknown has activated a whole series of performances justifying violent governmental conduct. These justifications make their way into law. Theorist Slavoj Žižek notes that it is precisely because the threat that these bodies pose is always virtual, “one can’t wait for its actualization; one must strike in advance, before it’s too late. In other words, the omnipresent invisible threat of ‘terror’ legitimizes the all too visible protective measures of defense” (Žižek 2005, 270). Trager’s decision elucidates the fragmented nature of the legal prosecution of the war, and highlights the fact that Arar, like many others, was a prisoner not in a specific space but in (and in between the letters of) the law.

Criticisms of recent approaches to the legality of torture and coercive interrogation generally fall into three camps. The first argues that torture and abuse are counter to an American ethic. This broad argument states that *they* (suicide-bombers, Islamist fundamentalists) are not like *us* (American citizens), and that *we* should not sink to *their* level. The second criticism deals more specifically with the context of the War on Terror, by concluding that abusing prisoners is counterproductive to the U.S. war effort, as it shows a side of the democratic rule of law paradigm that is *not* ethical, and thus, offers itself up as fodder for extremists. This position presents the possibility that with existing policy, *we* may not be positioning ourselves differently enough from *them*. The third criticism is again based on productivity in the war, stating that abusing the body yields inaccurate information as prisoners will say whatever is necessary to stop



the pain. This position seems to accept the *need* for coercive interrogation techniques and does not question their ethics per se, only their reliability.

This criticism of administration policy is countered by those who seek to amplify the administration's position, to make torture, in select circumstances, legal. Advocates of this position cite the fact that this war is different not only because of its lack of territory, but also, agreeing with the policy's critics, because the people we are fighting against are different as well. Charles Krauthammer has argued that there are three types of detainees: 1) the ordinary soldier caught on the field of battle, 2) the captured terrorist, who "by definition is an unlawful combatant," (2005, 25) and 3) the terrorist with *information*. According to Krauthammer, only the first type of detainee commands the protection of the Geneva Conventions and the rights guaranteed therein. The other two types of bodies, based on their transgressions of the laws of war, abuse of civilians, and potential as a source of life-saving information, are rendered as monsters and deserving of no such protection.

As the war continues, the images of orderly modes of detention and interrogation are slowly blurring away, revealing the detached rationality of legal judgment to be a socially contingent force. For the contemporary liberal nation-state, law must facilitate *ends*, it must enable the opening of spaces previously closed, or produce an in-between legal status that justifies apparent transgressions. Punishment in these detention centers is once again personal, and the rule of law paradigm is shocked out of its position of distance and objectivity: it becomes a question of individual bodies, of life. This is not a law that falls under the preventative and prescriptive isolation that is associated with disciplinary power (although, law most certainly does retain vestiges of this framework). Instead, it is an instrumental law in the service of security—

intervening in open processes and open spaces, guiding them towards (hopefully) fortuitous ends (Agamben 2002). The result is a prison space enclosed by the surface of the skin, and a legal framework that allows for multiple forms of bodily abuse.

#### **UNITED STATES DISTRICT COURT, WASHINGTON DC**

Majid Khan was detained in 2003, and deemed so dangerous by the United States government that he was held in a secret “black site” prison overseas for approximately three years<sup>45</sup>. Because of his extra-territorial detention, his combatant status was never reviewed as would be required at Guantánamo Bay by the ruling in Hamdi v Rumsfeld or the Detainee Treatment Act of 2005 (an amendment to the 2006 Department of Defense Appropriations Bill). He was transferred to Guantánamo Bay, with thirteen other “high value” detainees, where he eventually took advantage of the Supreme Court ruling in Rasul v Bush and challenged his imprisonment (Rich and Eggen 2006). Trying again to proffer the State Secret Doctrine, the Justice Department is building a case around the need to keep the specifics of this case from ever entering into the courts. Writing an affidavit in this trial (Khan et al. v Bush et al), Marilyn Dorn, an information review officer for the CIA’s National Clandestine Service (NCS), put forth a striking justification for Khan’s secret detention and enforced indefinite silence. After establishing the extensive legal and policy history and importance of classifying information for reasons of national security—including the varying scales of classification that organizes Sensitive Compartmented Information (SCI) programs—she states that “(b)ecause Majid Khan was detained by CIA in this program, he may have come into possession of information, including locations of detention, conditions of

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<sup>45</sup> Kahn was not charged with a crime and never given the designation of enemy combatant. The Center for Constitutional Rights filed a *habeas corpus* petition hours before the passage of the Military Commissions Act of 2006 (Leonnig and Rich 2006).

detention, and alternative interrogation techniques, that is classified at the TOP SECRET//SCI level” (Dorn 2006, 6). Further, “(i)mproper disclosure of details regarding the conditions of detention and specific alternative interrogation procedures could also cause exceptionally grave consequences” (2006:6). Finally, she concludes “that Majid Khan may have come into possession of national security information that is classified at the TOP SECRET//SCI level, (2006, 8)” and thus that he should be detained without having the specifics of his case ever aired. Kahn’s case is currently under review by military tribunal in Guantánamo Bay. Reporters are barred from entry.

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The United States has emphasized the importance of preserving the secrecy of its interrogation techniques, particularly with the onset of the War on Terror, for reasons of both national security and maintaining their overall efficacy. Their disclosure, as Marilyn Dorn notes, could have “exceptionally grave consequences”. However, as I show below, there is a lengthy documented history of the development of these techniques and their slow but intentional disappearing into the spaces of U.S. readings of international human rights legislation. These “secrecy” of these modes of conduct was made by and through legal discourse.

Alfred McCoy (2006a) has written extensively on the research and implementation of these interrogation techniques. He locates their origins in the early days of the Cold War, when the United States was looking for ways to dominate and defeat the ascendant communist ideology through large-scale mind control projects and mass persuasion. At that time, the scientific community, working largely in and through the U.S. university system, began to focus on the use of “drugs, electric shock, and sensory deprivation on individual consciousness,” and the research into interrogation methods

“moved ever deeper inside a clandestine complex of military, intelligence, and medical laboratories” (2006a, 25). At its height in the mid-1950s, over 1 billion dollars a year was being funneled into these research projects. The end result of this particular symbiotic relationship between the American academy and the U.S. military apparatus was the 1963 Kubark Counterintelligence Interrogation handbook. This CIA handbook outlined, in great detail, intense modes of psychological abuse that combined the strategies of two strands of research into psychological stress: 1) sensory deprivation, and 2) self-inflicted pain. The resultant effect was a form of torture that, “for the first time in two millennia of this cruel science, was more psychological than physical”(McCoy 2006a, 50).

Of sensory deprivation, psychologist Dr. Donald O. Hebb from the Canadian Defense Research Board (a partner with the CIA in this research) concluded that he could:

“induce a state of psychosis in an individual within 48 hours. It didn't take electroshock, truth serum, beating or pain. All he did was had student volunteers sit in a cubicle with goggles, gloves and headphones, earmuffs, so that they were cut off from their senses, and within 48 hours, denied sensory stimulation, they would suffer, first hallucinations, then ultimately breakdown” (McCoy 2006b, NP).

Neurologists working at the Cornell Medical Center in New York City uncovered the power of the second strand of research. These scholars had been studying K.G.B. torture techniques and had determined that the most effective technique in interrogations was self-inflicted pain—often in the form of “extended periods standing still ... And so what happens is the fluids flow down to the legs, the legs swell, lesions form, they erupt, they suppurate, hallucinations start, the kidneys shut down” (McCoy 2006b, NP).

The aim of the interrogation techniques specified in the Kubark handbook was to drive the detainee “deeper and deeper into himself, until he is no longer able to control his responses in an adult fashion”(McCoy 2006a, 51). Once the subject was disoriented (often facilitated through the initial use of some degree of physical force), then the interrogation moved to the second phase involving self-inflicted pain. The hallmarks of this form of psychological torture include stress positions, hoodings, subjection to noise, sleep deprivation, and food deprivation and diet disorientation. The use of each of these measures has been documented in the interrogation spaces in the War on Terror.

By leaving none of the traditional signs of abuse, this new form of psychological control granted a significant degree of leverage within existing human rights law. “No-touch torture” thus appears as an assemblage of scientific research, political maneuvering, and legislative signings that opens the space for a form of bodily control unlike any seen before. This mode of control is premised not on the visibility or proof of physical pain on the surface of the body, but on pain’s invisibility and affective internality. It does not make for graphic or gut-wrenching photographs, differing from older, more physical torture techniques in that the abuse comes not from another body, but from a particular arrangement of one’s body in space. This mental abuse amounts to the body being used against its environment and itself. The body is quite literally transformed into an inescapable prison—subject to forces of gravity and forces of corporeal need. This is a form of abuse that seemingly places the body of the individual at the center of responsibility for their own pain<sup>46</sup>, and one that has been made to

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<sup>46</sup> In addition to outlining the history of the development of these techniques, McCoy (2006a) also traces their geographical spread, notably to regions in Central America where the U.S. was engaged in proxy wars and supporting counterinsurgencies. The dissemination of these modes of interrogation shares a remarkable historical parallel with that of neoliberal economic reforms.

disappear from U.S. interpretations of international human rights law through a lengthy and concerted political effort.

The legislative erasure of these techniques began with the Reagan Administration, who worked to eliminate psychological abuse from the signing of the UN Convention Against Torture. That convention, unanimously signed by the UN General Assembly in 1984, defined torture thusly: “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purpose as obtaining from him or a third person information or confession” (UN 1984, Part I, Article I). When the administration sent it to Congress to sign into law four years later, it simultaneously issued a series of reservations that would lead to the convention being stalled in the Senate for another six years. Specifically, Reagan’s reservations cited the vagueness of the use of the word “mental” to describe torture, and through a State Department issued exception to the convention’s approval, worked to redefine mental torture to include only that which caused prolonged mental harm by “1) intentional infliction or threatened infliction of severe physical pain or suffering; 2) the administration ... of mind-altering drugs; 3) the threat of imminent death; or 4) the threat that another person will be subject to death ... or procedures calculated to disrupt profoundly the senses of personality” (McCoy 2006a, 100).

As McCoy notes, excluded from this definition were sensory deprivation, self-inflicted pain, and disorientation—the techniques which had been researched and in use at that time for twenty years. This U.S. redefinition of mental torture (essentially accepting only half of the international definition of torture) ultimately made its way into the U.S. ratification of the convention in 1994, and became incorporated into

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Indeed, the production of technical knowledges of the body and the responsiblization of the subject might convincingly be read as a neoliberalization of torture.

domestic criminal law soon thereafter. In 1993 President Bill Clinton attended a Vienna human rights convention advocating for a universal humanitarian standard. While there he noted his opposition to “regional peculiarities” in understanding these benchmarks by repressive regimes the world over. Nonetheless, this narrow understanding of mental pain would eventually appear in subsequent human rights legislation, including the 1991 Protection for Victims of Torture Act, the 1996 War Crimes Act (2006a).

The uncomfortable irony of this history is that human rights legislation has provided a progressive vessel for many of these techniques to be “disappeared”. Through a selective and tactical use of the law, through the conditional signing of international and national anti-torture legislation and human rights laws, the United States has over the course of the last thirty years, assured that the prohibition of these modes of psychological abuse are removed from the pages of international legislation (or at least the conditions of U.S. their adherence thereto), and effectively erased them from public discourses of torture. It is not surprising then that in the limited public debate surrounding the use of torture in the War on Terror the primary focus has been on what is clearly the most *physically* imposing interrogation technique—waterboarding—while such tactics as “long time standing” are cavalierly dismissed by then Secretary of Defense Donald Rumsfeld, noting on a Department of Defense memo, “I stand for 8-10 hours a day. Why is standing limited to four hours?” (Malinowski 2004, B07). Further, the secrecy surrounding the use of these coercive interrogation methods, such as those supposedly performed on Majid Khan, has less to do with maintaining their confidentiality for national security reasons (there is, after all, an extensive historical record of their development and implementation) than it does with preventing an open

public discourse on what, exactly, psychological or mental torture is, and how it has been intentionally erased from U.S. interpretations of human rights legislation.

Ultimately, the reason that Majid Khan is forced to maintain his silence and be perpetually removed from public life is based not on the airing of any specific evidence against him, but because of what his body might have endured, and what he might have potentially learned once in captivity. Public crimes are secondary to the revelation of information about secret detention practices. As was the case in chapter 2, where the legal organization of what classifies one as an enemy combatant was troubled, here, what one lives once so determined is enough to justify this classification *in perpetuity*. The circular logic of these legal arguments is confounding. It opens up the possibility that one can be detained for anything (or nothing) and put in a cell that, only because they have seen where their captors have placed them, or felt the force of their specific techniques of interrogation, justifies them being silenced indefinitely. How does one establish justice in this paradoxical space?

### **PART III: AN EMPTY ROOM, ANYWHERE**

Sergeant Mackey, you *are* the new infantry, and this is the new front.

—Chris Mackay and Greg Miller, *The Interrogators* (2004)

You're doing this to yourself. Cooperate with us, and you can sit down.

—Alfred McCoy, *Democracy Now! Radio Broadcast* (2006)

You are standing in an empty room. There are no video cameras. There are no large metal doors. There are no bars over the windows. By all accounts, this could be any space. This *is* any space.

Now imagine there is someone else in this innocuous room, and they have placed a blindfold over your eyes and large objects over your ears so that you can no longer see



where you are nor hear what surrounds you. Your hands are in stiff gloves and cannot move. This person sits you in a rickety chair with no back and only two legs and requires you to stay balanced, or perhaps demands that you stand in a “stress position”, with all of your body weight on one leg. They enforce this demand with the threat of violence, or the threat of harm to your family, or perhaps no direct threat at all. You endure this for hours. Suddenly, they remove your earpiece and begin to ask you questions, for which you may or may not have answers. They ask the same questions over and over, and then abruptly stop and replace your earpiece. In the end, they never lay a hand on you.

As time passes (hours? days?), the temperature drops until you feel a chill in your bones. Gravity becomes overwhelming and you begin to feel its forces pushing you further down. The more you struggle to remain in the required position, the more painful resisting the Earth’s pull becomes. This room, this space—this *any room*, this *any space*—begins to attack your body. You curse your own corporeality for the discomfort you are enduring, for weakening under the crushing capacity of this ostensibly passive space. It is you and your body that are responsible for this pain. You curse the person who may or may not still be in the room with you. They, and their state’s political and judicial framework have put you here. Your body and this space are destroying you. If you capitulate to the will of physics and biology, you expose yourself to the will of the state and its associated violences—a lose-lose situation.

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This collision of discourse, power, space and the body is the neo-liberal war prison. Its walls might be the stone of a super-max facility, the sheetrock of a schoolhouse, or the skin of a body. Its location is fluid: an island, a globally connected node in a vast

network, or a seat on a corporate jetliner. Its prisoners are monsters—included and excluded from the law as political conditions merit. Its violence is gruesome and external or internalized and affective.

The legal production of these spaces, and the legal rights of their prisoners is made through technical, calculable, and studied approaches to law and legal discourse, and the results are paradoxical.

The war prison is anywhere, and law has helped to lay the foundations.

# 4

## CONCLUSION Demons, Phantoms, Monsters

HORATIO: Is it a custom?

HAMLET: Ay marry is't  
But to my mind, though I am native here  
And to the manner born, it is a custom  
More honour'd in the breach than the observance.  
—William Shakespeare, *Hamlet* (c. 1600 CE)

You won't see us, but you will see what we do.  
—IBM Commercial, *Nagano Winter Olympics* (1998)

In this thesis, I have endeavored to explore the muddled frontiers of legal order through an investigation of the use of law in the War on Terror. My aim with this research was first to highlight the complex and often contradictory nature of law in a time of war, and second, to focus attention on the different ways in which the human body—its physical and intellectual limits—has become a fundamental geopolitical unit. The body has come into its own as a terrain that is negotiated, fought over, molded, and that ultimately has become the biopolitical entity defining the landscape of geopolitics as we move forward in the 21st Century. How detainees at Abu Ghraib, Guantánamo Bay and the impromptu interrogation rooms across the globe are positioned within a legal framework and subsequently treated has become a central focus of the war effort and, similarly, this scholarship.

In the first chapter, I focused on the struggle over the most effective, ethical, and just application of law and the laws of war. At issue in this debate has been both how to interpret existing laws, and how to balance the liberal governance of all with the increasing need for law to isolate and manage specific populations—the balance between freedom and control. My focus was this precarious limit. Mill focused on the importance of this frontier, and on how the determination of its precise location is a “subject on which everything remains to be done” (Mill, 1956:7,8). How law appears at this border has changed significantly over the last century, and with it has its jurisdiction and potential to be used as a tool for achieving ends. Law is mobilized through public rhetorical work that both challenges its effectiveness *and* calls on it to guide future action, regardless of whether law is capable of securing the yet-unknown. This instrumental use of the law has called into question the nature of liberal freedom and serves to flatten the distinction between freedom and control.

Next, the war is being fought in the public theater of cities, streets and villages—in the states of the Middle East in particular—in which military formations move, security forces patrol, and the images of war appear in the form of camouflage, machine guns and improvised explosive devices. This more traditional war theater remains the main focus of public dialogues of success or failure, troop numbers, casualties and security benchmarks. The second chapter of this thesis concentrated largely on this theater, highlighting the legal power to organize the militarized bodies that occupy the ‘public’ spaces of international conflict. Here the legal authority to produce rigid status categories is juxtaposed to the flexibility with which instrumental interpretations of law can unsettle these very classifications. The laws that purport to distinguish between one status category and another can, by the voids hidden in their texts, actually disrupt these stable readings significantly. Into these voids come new, corporatized and globalized formations of violence.

Finally, this public theater has a parallel in the dark, private prison spaces that dot the landscape, across the globe. The third chapter looked at the geographies of detention and interrogation that have been mobilized by maneuvering *through* the law in very particularized ways. The nature of this conflict has put pressure on power to modify the structures of incarceration, and produced startling changes in the nature of the prison spaces themselves. Prison spaces in the War on Terror are fragmented, hidden from oversight in plain view, located in a wide array of state spaces and disused institutional structures. Through law, and more than fifty years of academic research into the physical limits of the body, the walls of the prison are quite literally disappearing. Prisons might appear anywhere, and the body is rendered as a prison unto itself, returning the focus of this study back to the nature of freedom in the

contemporary liberal state.

When each of these three facets of the war is viewed together, the resultant landscape resonates with the adage, “It is not what is illegal that stuns, but what is legal”. This maxim is almost entirely appropriate for describing the preceding chapters, but not precisely, as I have shown that even what is legal and what is illegal are not the most satisfyingly agreed upon terms in the halls of justice or on the fields of battle. Indeed, law is the very medium through which distinctions between legal and illegal are being erased.

It was quite deliberate that the vignettes that appear throughout this work were not full of outlines of the moments in which the President or the Vice President made exceptional decisions. Rather, my intention was to outline narratives that include a diffused set of spaces and agents across the legal and political spectrum. Some of the most disturbing legal revelations that have made their appearance in the War on Terror have legal and policy histories stretching back fifty years or more. As previously stated, modern sovereign power is not about the abuses by Bush and Cheney, as is often implied by critics of the war and this Administration’s policies, but how all of us—the population, the structures of our decisionism, our institutions, and our rules—are entwined with a vast and fluid field of power. Thus, I have here concentrated on the problematics of law, legal interpretation, and legal discourse in organizing and rationalizing the landscape of war. Focusing on this convoluted landscape helps to reveal the uneasy geographies in which bodies are no longer considered as separate from the battlefield, where war is synonymous with security, and accountability tied not to a normative rule, but to a constantly morphing narrative process of convenience.

These processes are tied to and propped up by the somewhat supernatural

assemblages of language and power. Indeed, the forces that make their appearance in the war have generated a haunted discourse—from ghost detainees to the disappeared to black sites—rhetoric used to describe people who are not there and places that we cannot see. To this vocabulary we can now add the tenuous geographies I have focused on in this thesis 1) law as a demon force conjured by power to exert a particularized control over bodies in space and into the yet-unknown future; 2) the phantom-like border between the lawful and the unlawful; and 3) the monstrous bodies that occupy this precarious borderland.

\* \* \*

As the war continues into its seventh year, many scholars, judges and legal theorists are doing work to more clearly articulate and concretize the legal challenges that make their appearance in spaces of fragmented, international conflict. However, echoing Mill, these complicated geographies will continue to need to “be done” long after the days of the Global War on Terror have faded. I look forward to continuing through some of the doors opened up by this thesis, so that I might count myself among those who are attempting to work on law, rather than passively looking to or at it.

This exercise has encouraged me to think about power, specifically organizational power, in myriad new ways. I have found the research devastating at times—such as when I learned that psychological torture had been erased from U.S. humanitarian law, or when I found that the legal determinations which structure international violence left room for entire populations to act with impunity. Other times, I was challenged by the complexity of such words as “freedom” or “lawful”. Ultimately, however, I come away from this research with a better understanding of some of the “hows” of power: How it builds up over time, and buries more and more secrets within its vast histories; how it is

produced through assemblages of minute bodily actions—actions by bodies who all have agency in producing the techniques of their own domination; how productive it is in making forms of knowledge and truth; and lastly, how spatial it is—with forces acting on bodies, objects, and discourses in equal measure. In the final analysis, this thesis was incredibly broad, moving across spatial, institutional, and legal scales with somewhat limited contextualization. Turning to the next phase of research, I am compelled to push these thoughts further, to see what will come from consolidating this mode of spatio-legal analysis onto one specific site or one specific law. My assumption is that, by focusing the lens even closer on the discrete, minute, embodied practices that accumulate at the margins of the legal geographies of war, a larger, more tenuous landscape of contradictory power will be revealed.

What I have shown in this work, and what I hope to focus on in the future, is that aside from not being a war on law, this war through law is the momentary coming together of forces that are enabled both by members of the administration, and members of our communities. The agents that have played a part in the vignettes in this thesis have been members of the administration, members of the legal community, and citizens ostensibly disassociated from the legal and policy discourses altogether. By using events from the battlefield, descriptions of detention facilities, and the more innocuous spaces of the courthouse, I have shown that the use of law during wartime is a spatially and politically fragmented practice, one in which we are all engaged in every day.



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