# Wake Cards Round 5

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#### Our alternative is to repudiate the idea that the law can restrain the power of the sovereign

#### To repudiate a particular law legitimizes the idea that the law can restrain the sovereign, however, this only services to place the sovereign with no checks against its violence other than those it creates that by design further the scope of violence. If the court can’t rule on Korematsu, they will rule on Quirin, if not Quirin then Dred Scott, if not Dred Scott the 3/5ths compromise, if not Hamden, or the next case that Scalia and his conservative companions chuckle through as the sovereign places more cronies on the court that DO NOT BY DEFINITION have the capacity to prevent the sovereign from detaining bodies. INSTEAD, we should use the agency over the imagined act of repudiation to say no to the law as a place to attempt to limit the sovereign, we repudiate the law – this is an exercise in constituted our subjectivities free from the law of sovereignty, your ballot should join us in the enactment of whatever-being.

**the plan legitimizes other forms of imperial violence, de-legitimatizing alternatives to permanent war**

Tran-Creque, 13 -- Center for the Study of the Drone [Steven, "The Forever War is Always Hungry," Center for the Study of the Drone (at Bard College), 6-5-13, dronecenter.bard.edu/the-forever-war-is-always-hungry/, accessed 9-1-13, mss]

And so on. In both popular discourse and the policy press, pundits and commentators have overwhelmingly adopted the same familiar blueprint: a legalistic invocation of sovereignty that emphasizes borders and governmental authority to the exclusion much else. There is a dangerous intellectual poverty in this. We are not, as Trevor Paglen recently observed, “moving toward a surveillance state: we live in the heart of one.” This is the era of total surveillance and extrajudicial killing, of public austerity and mass incarceration, of permanent unemployment and global warming: what Jakob Augstein recognized last week in Der Spiegel as nothing short of totalitarianism. The extraordinary measures of rendition, black sites, secret laws, black budgets and retroactive legalizations that have accompanied the vicious internal targeting of Muslims, protesters and whistleblowers—all of this has become the new normal, and coming decades will reap the whirlwind. This is what Paglen has dubbed the “terror state”: not merely the possibility of “turnkey tyranny” one step away, but its virtual inevitability. As the War on Terror now transforms into the forever war, I think we must begin by asking how exactly we ever got here. Of course, at first glance, the connection between all of this and the question of whose legal jurisdiction prevails in Waziristan seems faint at best. Certainly, no matter how broadly one reads the term “war,” one struggles to find in this anything like the strangely resilient imagery of nation states battling each other with state of the art weaponry, no matter how much this continues to dominate the way we think of war. In none of the usual accounts can one find something like Jean Bodin’s definition of sovereignty as “the absolute and perpetual power of the republic,” one of the principal influences from which Carl Schmitt famously drew his definition of the sovereign as “he who decides on the exception” to the law. But I would insist: these are not esoteric historical or theoretical concerns. I want to offer a very different approach here to the question of what sovereignty means. Sovereignty has never been an anodyne policy question of whose jurisdiction applies, of who controls drones, or of how visible such clandestine military programs will be. Rather, following Eyal Weizman, one should begin by asking how sovereignty came to be exercised as the economistic management of death. In the strangest of places, David Graeber’s historical critique of an old anthropological debate over the divine kingship of the Shilluk of Southern Sudan offers what I find to be the most compelling explanation for the forever war. That is, that the War on Terror is better understood as an unusually visible example of the constitutive principle of sovereignty: a permanent war between the sovereign and everyone else—the only kind of war there is. This is why, as Teju Cole once remarked, the forever war is always hungry. The Raw Material of Sovereignty Weizman’s question is simple. “How, after the evacuation of the ground surface of Gaza, did bodies, rather than territories, or death, rather than space, turn into the raw material of Israeli sovereignty?” In Weizman’s Thanato-tactics, sovereignty is simply the management of death. The Israeli General Security Service’s assassination program, which began in 2000—before 9/11—produced the sprawling surveillance and counterinsurgency apparatus of the occupation. But it also provided the template and testing grounds for the United States’ own assassination program. What Weizman is really interested in is the logic of the lesser evil, by which economizing language produces this environment of managed death. From this perspective, collateral damage calculations are not a humanitarian triumph limiting the scope of violence**.** Rather, they are a crucial part of the ideological apparatus by which acts of state violence are renderedlegal andlegitimate**,** encompassed within the permissible logic of forestalling greater violence**.** Weizman quotes Israeli Air Force commander Eliezer Shkedi saying, before the 2006 invasion of Gaza, that “the only alternative to aerial attacks is a ground operation and the reoccupation.” Assassination, he added, “is the most precise tool we have.” So too with proportionality, balancing, efficiency, pragmatism, the injunction to “be realistic,” and the entire pantheon of reasonable constraints. All of the oppositional forces of military interests and intelligence agencies, human rights groups and journalists, can be incorporated within the same project: the maintenance of humanitarian violence, albeit one that bills itself as a lesser form of violence compared to the alternatives. As Will Saletan put it in Slate earlier this year with memorable enthusiasm: Drones kill fewer civilians, as a percentage of total fatalities, than any other military weapon. They’re the worst form of warfare in the history of the world, except for all the others. … civilian casualties? That’s not an argument against drones. It’s the best thing about them. The choice presented is always between assassination and invasion, between Hellfire missiles and imprecise bombs—between fewer dead and more dead. It is not a choice between war and peace. Well-trained commentators cannot even imagine a world in which such things simply do not happen. And **one never questions the legitimacy of the system in which**, as Hannah Arendt emphasized, **one must choose evil**. Periodic eruptions of unchecked violence—as in the Israeli invasion of Gaza in 2008 and the bombardment in 2012—are neither accidents nor failures. The **normal practice of violence** through checkpoints, annexation, resource extraction, and assassination is maintained against the the ever present threat of greater violence, regularly demonstrated. **The greater evil kept at bay by the lesser evil, in an endless state of war.** This permanent threat of arbitrary violence is precisely what we call sovereignty. The Only War there Is Beginning with his observation that states are “at the same time forms of institutionalized raiding or extortion, and utopian projects,” David Graeber’s definition of sovereignty is simple enough: “the right to exercise violence with impunity.” Graeber offers the example of the Ganda kingship to the south of the Shilluk. In the late 19th century, European visitors to the court of King Mutesa offered a gift of firearms. Mutesa responded by firing the rifle in the street and killing his subjects at random. When David Livingstone asked why the Ganda king killed so many people, he was told that “if [the king] didn’t, everyone would assume that he was dead.” However, the notoriety of the Ganda kings for arbitrary, random violence towards their own people did not prevent Mutesa from also being accepted as supreme judge and guardian of the state’s system of justice. Indeed, it was the very foundation for it. Specifically, Graeber is interested in the transcendent quality of violence: the violence and transgression of the king makes him “a creature beyond morality.” Paradoxically, the sovereign may be arbitrarily violent—the etymology here is telling—and nevertheless seen as the supreme source of justice and law. Graeber calls this transcendent aspect of violence “divine.” It isn’t just that kings act like gods; it’s that they do so and get away with it. This remains the case in the modern state. Walter Benjamin’s famous distinction between “law-making” and “law-maintaining” violence refers to the same phenomenon. We often say that no one is above the law, but if this were true, there would be no one to bring the legal order into being in the first place: the signers of the Declaration of Independence or the American Constitution were all traitors by the legal order under which they were born. There really is no resolution to this paradox. The solution of the left is that the people may rise up periodically and overthrow the existing legal regime in a revolution. The solution of the right is Carl Schmitt’s exception: that sovereignty is exercised by the head of state in putting aside the legal order. But whichever solution one prefers, this really just defers the dilemma: all sovereignty is built on a foundation of illegal acts of violence, and it always carries the immanent potential for arbitrary violence. In 19th-century accounts of rainmakers in Southern Sudan, the function of violence is even clearer. With rainmakers, as with Shilluk kings, the health of the land is tied to the health of the king. If the rains fail to fall, first people will bring petitions, then gifts. But after a certain point, if the rains still don’t come, the rainmaker must either flee or face a community united to kill him. It isn’t hard to see why rainmakers would want something like the state’s monopoly on violence or a retinue of loyal, armed followers. But the crucial point is that insofar as “the people” could be said to exist, they were essentially seen as the collective enemy of the king. European explorers in the region often found kings raiding enemy villages only to find that the villages contained the king’s own subjects. They were delivering arbitrary violence to the people they were supposed to protect. So Graeber reminds us, “predatory violence was and would always remain the essence of sovereignty.” Such is the hidden logic of sovereignty. Above all, it depends on the transcendent quality of violence that allows the sovereign to become, as Hobbes put it, a “mortal god.” But this is also means that arbitrary violence is the constitutive principle of sovereignty, defining the relationship between the sovereign and everything else: What we call ‘the social peace’ is really just a truce in a constitutive war between sovereign power and ‘the people,’ or ‘nation’—both of whom come into existence, as political entities, in their struggle against each other. There is no inside or outside here. Contra Schmitt and his friend-enemy distinction, this constitutive war precedes wars between nations and peoples. From the perspective of sovereign power, “there is no fundamental difference in the relation between a sovereign and his people, and a sovereign and his enemies,” explains Graeber. This constitutive war is a war the sovereign can never win—a forever war that can never end. No War but the Forever War What exactly is one supposed to make of John Brennan’s admission that the war against Al Qaeda will continue for another decade? How did the AUMF and the Patriot Act together come to constitute something like America’s Article 48, creating a permanent state of exception in which something like the NSA’s “giant automated Stasi” is simply accepted as the new normal? How did drones become an inevitable part of the near future in New York City? After all, the War on Terror really isn’t anything like a war at all— at least, not in the conventional imaginary of nation states commanding disciplined military forces on established fields of battle. The United States commands a degree of military power and comparative dominance simply unprecedented in human history—what is elegantly referred to, in the anodyne language of military planners, as “asymmetry.” There are no strictly defined battlefields, and the formal enemies in the War on Terror have rarely amounted to more than the insurgent army of a deposed dictator (funded and armed by the U.S., albeit long ago) and a few hundred religious students in the mountains of Central Asia. It is in fact genuinely strange how resiliently this conventional image seems to persist in both popular and intellectual imagination. Even scholarly responses to the War on Terror begin from the assumption that something new and strange is happening when battlefields and opponents alike are no longer delimited but rather always and everywhere. If one limits oneself to legal documents, this is pretty much the only possible conclusion. The conventional imagery really seems to be most useful in obscuring the more fundamental realities of what war really is. In part, war consists of the far more common practice of civil wars, guerrilla wars, genocide and internal repression—but also, in a larger sense, the fundamental state of war between the sovereign and his people that is the originary, constitutive state for sovereign power itself. The forever war, then, has effectively allowed the United States to claim sovereignty to farthest reaches of the earth. Certainly, this is not a question purely of drones: the apparatus also consists of a deep surveillance state, total international digital surveillance, a military larger than the combined militaries of the rest of the world, and extralegal rendition and detention programs. But at the edges of this arrangement, one finds Agamben’s homo sacer, Fiskesjö’s barbarians: those excluded from the legal order, stripped of rights, subject to death at any time—the point at which an empire converts those beyond its reach into obedient subjects or corpses. This is the logic of sovereign violence taken to its most extreme—and not insignificantly, this has been accomplished in part by euphemizing that violence, whether in the sanitized parlance of the military—“focused obstruction,” “targeted killing,” “kinetic action”—or the more artful, ideological euphemization by which assassination programs become complex and debatable moral issues in the liberal press. It should come as no surprise that this has been accompanied by the infinite expansion of an apparatus of domestic surveillance and control unprecedented in human history. One should never forget that the instruments of sovereignty—drones, militarized police, mass surveillance apparatus—were always directed inwards as much as outwards, because the security state secures one thing: the safety of the sovereign above all. From the perspective of sovereign power, there is no inside and there is no outside. There is only the violence to which we are all subject. “One simple imperative: Know your enemy” The legalistic definition of sovereignty, the preoccupation with policy making, even the basic assumption that the debates we have really matter—all of this starts to look ideological in the worst sense. Following the Prism revelations last week, Christian Caryl wrote a retrospective in Foreign Policy comparing the NSA and the East German Stasi: So which is worse, the Stasi or the NSA? Definitely the Stasi. East German citizens had no defense whatsoever against its intrusions. American citizens can still exercise control over our own intelligence organizations, which are still bound (or so we are told) by the rule of law. But do we really have the will to restrain them? There is admittedly some faint courage in being willing to even make the comparison, but there is something utterly more remarkable in the ideological refrain of asking if “American citizens can still exercise control over our own intelligence organization”—as if the state’s intelligence apparatus had ever been democratic—“or so we are told.” But this is hardly uncommon. Dan Gettinger’s recent piece for the Center here frames the question in terms of legislative oversight in the application of the AUMF: Understanding this legal debate and the evolving strategic situation determines how this country deploys it’s forces abroad, the kinds of military technologies that we invest in, and the degree of oversight that Congress has over the use of force by the Executive Branch. While the outcome of this debate will likely result in some form forever war against terrorism, the question remains as to whether it will be conducted in the shadows of ambiguity or limited by some degree of Congressional observation. And here we are back at the lesser evil. It is significant, I think, that it is fundamentally impossible it is to reconcile any of this with anything like actual democracy. These are questions for policy elites—and perhaps for those who imagine themselves among their ranks. But the question is always between more killing and less killing, between more secrecy and less secrecy, more oversight and less oversight—**always witheringly loyal to the same order of violence that produced these choices in the first place**—and which never bore any of us any loyalty.

**The state of exception applies to all of the sovereign – including the police force and any leader**

**Agamben, 00** (Giorgio, translated by Vincenzo Binetti and Cesare Casarino, “Means without ends,” published in 2000, pg 56-9)

ONE OF the least ambiguous lessons learned from the GulfWar is that the concept of sovereignty has been finally introduced into the figure of the police. The nonchalance with which the exercise of a particularly devastating *ius belli* was disguised here as a mere "police operation" cannot be considered to be a cynical mystification (as it was indeed considered by some rightly indignant critics). The most *spectacular* characteristic of this war, perhaps, was that the reasons presented to justify it cannot be put aside as ideological superstructures used to conceal a hidden plan. On the contrary, ideology has in the meantime penetrated so deeply into reality that the declared reasons have to be taken in a rigorously literal sense-particularly those concerning the idea of a new world order. This does not mean, however, that the Gulf War constituted a healthy limitation of state sovereignties because they were forced to serve as policemen for a supranational organism (which is what apologists and extemporaneous jurists tried, in bad faith, to prove). The point is that the police-contrary to public opinion-are not merely an administrative function of law enforcement; rather, the police are perhaps the place where the proximity and the almost constitutive exchange between violence and right that characterizes the figure of the sovereign is shown more nakedly and clearly than anywhere else. According to the ancient Roman custom, nobody could for any reason come between the consul, who was endowed with imperium, and the lictor closest to him, who carried the sacrificial ax (which was used to perform capital punishment). This contiguity is not coincidental. If the sovereign, in fact, is the one who marks the point of indistinction between violence and right by proclaiming the state of exception and suspending the validity of the law, the police are always operating within a similar state of exception. The rationales of "public order" and "security" on which the police have to decide on a ease-by-case basis define an area of indistinction between violence and right that is exactly symmetrical to that of sovereignty. Benjamin rightly noted that: The assertion that the ends of police violence are always identical or even connected to those of general law is entirely untrue. Rather, the "law" of the police really marks the point at which the state, whether from impotence or because of the immanent connections within any legal system, can no longer guarantee through the legal system the empirical ends that it desires at any price to attain." Hence the display of weapons that characterizes the police in all eras. What is important here is not so much the threat to those who infringe on the right, but rather the display of that sovereign violence to which the bodily proximity between consul and lictor was witness. The display, in fact, happens in the most peaceful of public places and, in particular, during official ceremonies. This embarrassing contiguity between sovereignty and police function is expressed in the intangible sacredness that, according to the ancient codes, the figure of the sovereign and the figure of the executioner have in common. This contiguity has never been so self evident as it was on the occasion of a fortuitous encounter that took place on July 14, 1418: as we are told by a chronicler, the Duke of Burgundy had just entered Paris as a conqueror at the head of his troops when, on the street, he came across the executioner Coqueluche, who had been working very hard for him during those days. According to the story, the executioner, who was covered in blood, approached the sovereign and, while reaching for his hand, shouted: "Mon beau frere!" The entrance of the concept of sovereignty in the figure of the police, therefore, is not at all reassuring. This is proven by a fact that still surprises historians of the Third Reich, namely, that the extermination of the Jews was conceived from the beginning to the end exclusively as a police operation. It is well known that not a single document has ever been found that recognizes the genocide as a decision made by a sovereign organ: the only document we have, in this regard, is the record of a conference that was held on January 20, 1942, at the Grosser Wannsee, and that gathered middle-level and lower-level police officers. Among them, only the name of Adolf Eichmann-head of division B-4 of the Fourth Section of the Gestapo-is noticeable. The extermination of the Jews could be so methodical and deadly only because it was conceived and carried out as a police operation; but, conversely, it is precisely because the genocide was a "police operation" that today it appears, in the eyes of civilized humanity, all the more barbaric and ignominious. Furthermore, the investiture of the sovereign as policeman has another corollary: it makes it necessary to criminalize the adversary. Schmitt has shown how, according to European public law, the principle *par in parmz non habet iurisdictionem* eliminated the possibility that sovereigns of enemy states could be judged as criminals. The declaration of war did not use to imply the suspension of either this principle or the conventions that guaranteed that a war against an enemy who was granted equal dignity would take place according to precise regulations (one of which was the sharp distinction between the army and the civilian population). What we have witnessed with our own eyes from the end of World War I onward is instead a process by which the enemy is first of all excluded from civil humanity and branded as a criminal; only in a second moment does it become possible and licit to eliminate the enemy by a "police operation." Such an operation is not obliged to respect any juridical rule and can thus make no distinctions between the civilian population and soldiers, as well as between the people and their criminal sovereign, thereby returning to the most archaic conditions of belligerence. Sovereignty's gradual slide toward the darkest areas of police law, however, has at least one positive aspect that is worthy of mention here, What the heads of state, who rushed to criminalize the enemy with such zeal, have not yet realized is that this criminalization can at any moment be turned against them. *There is no head of state on Earth today who, in this sense, is not virtually a criminal.* Today, those who should happen to wear the sad redingote of sovereignty know that they may be treated as criminals one day by their colleagues. And certainly we will not be the ones to pity them. The sovereigns who willingly agreed to present themselves as cops or executioners, in fact, now show in the end their original proximity to the criminal.

#### The impact is permanent warfare---security and fear-driven politics create the enabling conditions for executive overreach and violence which means it’s try or die and we turn the case

Vivienne Jabri 6, Director of the Centre for International Relations and Senior Lecturer at the Department of War Studies, King’s College London, War, Security and the Liberal State, Security Dialogue, 37;47

LATE MODERN TRANSFORMATIONS are often conceived in terms of the sociopolitical and economic manifestations of change emergent from a globalized arena. What is less apparent is how late modernity as a distinct era has impacted upon our conceptions of the social sphere, our lived experience, and our reflections upon the discourses and institutions that form the taken-for-granted backdrop of the known and the knowable. The paradigmatic certainties of modernity – the state, citizenship, democratic space, humanity’s infinite capacity for progress, the defeat of dogma and the culmination of modernity’s apotheosis in the free-wheeling market place – have in the late modern era come face to face with uncertainty, unpre- dictability and the gradual erosion of the modern belief that we could indeed simply move on, assisted by science and technology, towards a condition where instrumental rationality would become the linchpin of government and human interaction irrespective of difference. Progress came to be associated with peace, and both were constitutively linked to the universal, the global, the human, and therefore the cosmopolitan. What shatters such illusions is the recollection of the 20th century as the ‘age of extremes’ (Hobsbawm, 1995), and the 21st as the age of the ever-present condition of war. While we might prefer a forgetting of things past, a therapeutic anamnesis that manages to reconfigure history, it is perhaps the continuities with the past that act as antidote to such righteous comforts.

How, then, do we begin to conceptualize war in conditions where distinctions disappear, where war is conceived, or indeed articulated in political discourse, in terms of peace and security, so that the political is somehow banished in the name of governmentalizing practices whose purview knows no bounds, whose remit is precisely the banishment of limits, of boundaries and distinctions. Boundaries, however, do not disappear. Rather, they become manifest in every instance of violence, every instance of control, every instance of practices targeted against a constructed other, the enemy within and without, the all-pervasive presence, the defences against which come to form the legitimizing tool of war.

Any scholarly take on the present juncture of history, any analysis of the dynamics of the present, must somehow render the narrative in measured tones, taking all factors into account, lest the narrator is accused of exaggeration at best and particular political affiliations at worst. When the late modern condition of the West, of the European arena, is one of camps, one of the detention of groups of people irrespective of their individual needs as migrants, one of the incarceration without due process of suspects, one of overwhelming police powers to stop, search and detain, one of indefinite detention in locations beyond law, one of invasion and occupation, then language itself is challenged in its efforts to contain the description of what is. The critical scholarly take on the present is then precisely to reveal the conditions of possibility in relation to how we got here, to unravel the enabling dynamics that led to the disappearance of distinctions between war and criminality, war and peace, war and security. When such distinctions disappear, impunity is the result, accountability shifts beyond sight, and violence comes to form the linchpin of control. We can reveal the operations of violence, but far more critical is the revelation of power and how power operates in the present. As the article argues, such an exploration raises fundamental questions relating to the relationship of power and violence, and their mutual interconnection in the complex interstices of disrupted time and space locations. Power and violence are hence separable analytical categories, separable practices; they are at the same time connected in ways that work on populations and on bodies – with violence often targeted against the latter so that the former are reigned in, governed. Where Michel Foucault sought, in his later writings, to distinguish between power and violence, to reveal the subtle workings of power, now, in the present, this article will venture, perhaps the distinction is no longer viable when we witness the indistinctions I highlight above

The article provides an analysis of the place of war in late modern politics. In particular, it concentrates on the implications of war for our conceptions of the liberty–security problematique in the context of the modern liberal state. The first section of the article argues the case for the figure of war as analyser of the present. The second section of the article reveals the con- ditions of possibility for a distinctly late modern mode of war and its imbri- cations in politics. The final section of the article concentrates on the political implications of the primacy of war in late modernity, and in particular on possibilities of dissent and articulations of political agency. The aim through- out is to provide the theoretical and conceptual tools that might begin to meet the challenges of the present and to open an agenda of research that concentrates on the politics of the present, the capacities or otherwise of contestation and accountability, and the institutional locations wherein such political agency might emerge.

The Figure of War and the Spectre of Security

The so-called war against terrorism is constructed as a global war, transcend- ing space and seemingly defiant of international conventions. It is dis- tinguished from previous global wars, including the first and the second world wars, in that the latter two have, in historiography, always been analysed as interstate confrontations, albeit ones that at certain times and in particular locations peripherally involved non-state militias. Such distinc- tions from the old, of course, will be subject to future historical narratives on the present confrontation and its various parameters. What is of interest in the present discussion is the distinctly global aspect of this war, for it is the globality1 of the war against terrorism that renders it particularly relevant and pertinent to investigations that are primarily interested in the relation- ship between war and politics, war and the political processes defining the modern state. The initial premise of the present article is that war, rather than being confined to its own time and space, permeates the normality of the political process, has, in other words, a defining influence on elements con- sidered to be constitutive of liberal democratic politics, including executive answerability, legislative scrutiny, a public sphere of discourse and inter- action, equal citizenship under the law and, to follow liberal thinkers such as Habermas, political legitimacy based on free and equal communicative practices underpinning social solidarity (Habermas, 1997). War disrupts these elements and is a time of crisis and emergency. A war that has a permanence to it clearly normalizes the exceptional, inscribing emergency into the daily routines of social and political life. While the elements of war – conflict, social fragmentation, exclusion – may run silently through the assemblages of control in liberal society (Deleuze, 1986), nevertheless the persistent iteration of war into politics brings these practices to the fore, and with them a call for a rethinking of war’s relationship to politics.

The distinctly global spatiality of this war suggests particular challenges that have direct impact on the liberal state, its obligations towards its citizenry, and the extent to which it is implicated in undermining its own political institutions. It would, however, be a mistake to assume that the practices involved in this global war are in any way anathema to the liberal state. The analysis provided here would argue that while it is crucial to acknowledge the transformative impact of the war against terrorism, it is equally as important to appreciate the continuities in social and political life that are the enabling conditions of this global war, forming its conditions of possibility. These enabling conditions are not just present or apparent at global level, but incorporate local practices that are deep-rooted and institu- tionalized. The mutually reinforcing relationship between global and local conditions renders this particular war distinctly all-pervasive, and poten- tially, in terms of implications, far more threatening to the spaces available for political contestation and dissent.

Contemporary global politics is dominated by what might be called a ‘matrix of war’2 constituted by a series of transnational practices that vari- ously target states, communities and individuals. These practices involve states as agents, bureaucracies of states and supranational organizations, quasi-official and private organizations recruited in the service of a global machine that is highly militarized and hence led by the United States, but that nevertheless incorporates within its workings various alliances that are always in flux. The crucial element in understanding the matrix of war is the notion of ‘practice’, for this captures the idea that any practice is not just situated in a system of enablements and constraints, but is itself constitutive of structural continuities, both discursive and institutional. As Paul Veyne (1997: 157) writes in relation to Foucault’s use of the term, ‘practice is not an agency (like the Freudian id) or a prime mover (like the relation of produc- tion), and moreover for Foucault, there is no agency nor any prime mover’. It is in this recursive sense that practices (of violence, exclusion, intimidation, control and so on) become structurated in the routines of institutions as well as lived experience (Jabri, 1996). To label the contemporary global war as a ‘war against terrorism’ confers upon these practices a certain legitimacy, suggesting that they are geared towards the elimination of a direct threat. While the threat of violence perpetrated by clandestine networks against civilians is all too real and requires state responses, many of these responses appear to assume a wide remit of operations – so wide that anyone interested in the liberties associated with the democratic state, or indeed the rights of individuals and communities, is called upon to unravel the implications of such practices.

When security becomes the overwhelming imperative of the democratic state, its legitimization is achieved both through a discourse of ‘balance’ between security and liberty and in terms of the ‘protection’ of liberty.3 The implications of the juxtaposition of security and liberty may be investigated either in terms of a discourse of ‘securitization’ (the power of speech acts to construct a threat juxtaposed with the power of professionals precisely to so construct)4 or, as argued in this article, in terms of a discourse of war. The grammars involved are closely related, and yet that of the latter is, para- doxically, the critical grammar, the grammar that highlights the workings of power and their imbrications with violence. What is missing from the securitization literature is an analytic of war, and it is this analytic that I want to foreground in this article.

The practices that I highlight above seem at first hand to constitute differ- ent response mechanisms in the face of what is deemed to be an emergency situation in the aftermath of the events of 11 September 2001. The invasion and occupation of Iraq, the incarceration without due process of prisoners in camps from Afghanistan to Guantánamo and other places as yet un- identified, the use of torture against detainees, extra-judicial assassination, the detention and deportation – again without due process – of foreign nationals deemed a threat, increasing restrictions on refugees, their confine- ment in camps and detention centres, the construction of the movement of peoples in security terms, and restrictions on civil liberties through domestic legislation in the UK, the USA and other European states are all represented in political discourse as necessary security measures geared towards the protection of society. All are at the same time institutional measures targeted against a particular other as enemy and source of danger.

It could be argued that the above practices remain unrelated and must hence be subject to different modes of analysis. To begin with, these practices involve different agents and are framed around different issues. Afghanistan and Iraq may be described as situations of war, and the incarceration of refugees as encompassing practices of security. However, what links these elements is not so much that they constitute a constructed taxonomy of dif- ferentiated practices. Rather, what links them is the element of antagonism directed against distinct and particular others. Such a perspective suggests that the politics of security, including the production of fear and a whole array of exclusionary measures, comes to service practices that constitute war and locates the discourse of war at the heart of politics, not just domes- tically, but, more crucially in the present context, globally. The implications for the late modern state and the distinctly liberal state are monumental, for a perpetual war on a global scale has implications for political structures and political agency, for our conceptions of citizenship and the role of the state in meeting the claims of its citizens,5 and for the workings of a public sphere that is increasingly global and hence increasingly multicultural.

The matrix of war is centrally constituted around the element of antago- nism, having an association with existential threat: the idea that the continued presence of the other constitutes a danger not just to the well-being of society but to its continued existence in the form familiar to its members, hence the relative ease with which European politicians speak of migrants of particular origins as forming a threat to the ‘idea of Europe’ and its Christian origins.6 Herein lies a discourse of cultural and racial exclusion based on a certain fear of the other. While the war against specific clandestine organiza- tions7 involves operations on both sides that may be conceptualized as a classical war of attrition, what I am referring to as the matrix of war is far more complex, for here we have a set of diffuse practices, violence, disci- plinarity and control that at one and same time target the other typified in cultural and racial terms and instantiate a wider remit of operations that impact upon society as a whole.

The practices of warfare taking place in the immediate aftermath of 11 September 2001 combine with societal processes, reflected in media representations and in the wider public sphere, where increasingly the source of threat, indeed the source of terror, is perceived as the cultural other, and specifically the other associated variously with Islam, the Middle East and South Asia. There is, then, a particularity to what Agamben (1995, 2004) calls the ‘state of exception’, a state not so much generalized and generalizable, but one that is experienced differently by different sectors of the global population. It is precisely this differential experience of the exception that draws attention to practices as diverse as the formulation of interrogation techniques by military intelligence in the Pentagon, to the recent provisions of counter-terrorism measures in the UK,8 to the legitimizing discourses surrounding the invasion of Iraq. All are practices that draw upon a discourse of legitimization based on prevention and pre-emption. Enemies constructed in the discourses of war are hence always potential, always abstract even when identified, and, in being so, always drawn widely and, in consequence, communally. There is, hence, a ‘profile’ to the state of exception and its experience. Practices that profile particular communities, including the citizens of European states, create particular challenges to the self-understanding of the liberal democratic state and its capacity, in the 21st century, to deal with difference.

While a number of measures undertaken in the name of security, such as proposals for the introduction of identity cards in the UK or increasing surveillance of financial transactions in the USA, might encompass the population as a whole, the politics of exception is marked by racial and cul- tural signification. Those targeted by exceptional measures are members of particular racial and cultural communities. The assumed threat that under- pins the measures highlighted above is one that is now openly associated variously with Islam as an ideology, Islam as a mode of religious identi- fication, Islam as a distinct mode of lifestyle and practice, and Islam as a particular brand associated with particular organizations that espouse some form of a return to an Islamic Caliphate. When practices are informed by a discourse of antagonism, no distinctions are made between these various forms of individual and communal identification. When communal profiling takes place, the distinction between, for example, the choice of a particular lifestyle and the choice of a particular organization disappears, and diversity within the profiled community is sacrificed in the name of some ‘pre- cautionary’ practice that targets all in the name of security.9 The practices and language of antagonism, when racially and culturally inscribed, place the onus of guilt onto the entire community so identified, so that its indi- vidual members can no longer simply be citizens of a secular, multicultural state, but are constituted in discourse as particular citizens, subjected to particular and hence exceptional practices. When the Minister of State for the UK Home Office states that members of the Muslim community should expect to be stopped by the police, she is simply expressing the condition of the present, which is that the Muslim community is particularly vulnerable to state scrutiny and invasive measures that do not apply to the rest of the citizenry.10 We know, too, that a distinctly racial profiling is taking place, so that those who are physically profiled are subjected to exceptional measures.

Even as the so-called war against terrorism recognizes no boundaries as limits to its practices – indeed, many of its practices occur at transnational, often indefinable, spaces – what is crucial to understand, however, is that this does not mean that boundaries are no longer constructed or that they do not impinge on the sphere of the political. The paradox of the current context is that while the war against terrorism in all its manifestations assumes a boundless arena, borders and boundaries are at the heart of its operations. The point to stress is that these boundaries and the exclusionist practices that sustain them are not coterminous with those of the state; rather, they could be said to be located and perpetually constructed upon the corporeality of those constructed as enemies, as threats to security. It is indeed the corporeal removal of such subjects that lies at the heart of what are constructed as counter-terrorist measures, typified in practices of direct war, in the use of torture, in extra-judicial incarceration and in judicially sanctioned detention. We might, then, ask if such measures constitute violence or relations of power, where, following Foucault, we assume that the former acts upon bodies with a view to injury, while the latter acts upon the actions of subjects and assumes, as Deleuze (1986: 70–93) suggests, a relation of forces and hence a subject who can act. What I want to argue here is that violence is imbricated in relations of power, is a mode of control, a technology of governmentality. When the population of Iraq is targeted through aerial bombardment, the consequence goes beyond injury and seeks the pacifica- tion of the Middle East as a political region.

When legislative and bureaucratic measures are put in place in the name of security, those targeted are categories of population. At the same time, the war against terrorism and the security discourses utilized in its legitimiza- tion are conducted and constructed in terms that imply the defence or protection of populations. One option is to limit policing, military and intel- ligence efforts through the targeting of particular organizations. However, it is the limitless construction of the war against terrorism, its targeting of particular racial and cultural communities, that is the source of the challenge presented to the liberal democratic state. In conditions constructed in terms of emergency, war permeates discourses on politics, so that these come to be subject to the restraints and imperatives of war and practices constituted in terms of the demands of security against an existential threat. The implications for liberal democratic politics and our conceptions of the modern state and its institutions are far-reaching,11 for the liberal democratic polity that considers itself in a state of perpetual war is also a state that is in a permanent state of mobilization, where every aspect of public life is geared towards combat against potential enemies, internal and external.

One of the most significant lessons we learn from Michel Foucault’s writ- ings is that war, or ‘the distant roar of battle’ (Foucault, 1977: 308), is never quite so distant from liberal governmentality. Conceived in Foucaultian terms, war and counter-terrorist measures come to be seen not as discontinuity from liberal government, but as emergent from the enabling conditions that liberal government and the modern state has historically set in place. On reading Foucault’s renditions on the emergence of the disciplinary society, what we see is the continuation of war in society and not, as in Hobbes and elsewhere in the history of thought, the idea that wars happen at the outskirts of society and its civil order. The disciplinary society is not simply an accumulation of institutional and bureaucratic procedures that permeate the everyday and the routine; rather, it has running through its interstices the constitutive elements of war as continuity, including confrontation, struggle and the corporeal removal of those deemed enemies of society. In Society Must Be Defended (Foucault, 2003) and the first volume of the History of Sexuality (Foucault, 1998), we see reference to the discursive and institutional continuities that structurate war in society. Reference to the ‘distant roar of battle’ suggests confrontation and struggle; it suggests the ever-present construction of threat accrued to the particular other; it suggests the immediacy of threat and the construction of fear of the enemy; and ultimately it calls for the corporeal removal of the enemy as source of threat. The analytic of war also encompasses the techniques of the military and their presence in the social sphere – in particular, the control and regulation of bodies, timed pre- cision and instrumentality that turn a war machine into an active and live killing machine. In the matrix of war, there is hence the level of discourse and the level of institutional practices; both are mutually implicating and mutually enabling. There is also the level of bodies and the level of population. In Foucault’s (1998: 152) terms: ‘the biological and the historical are not con- secutive to one another . . . but are bound together in an increasingly com- plex fashion in accordance with the development of the modern technologies of power that take life as their objective’.

What the above suggests is the idea of war as a continuity in social and political life. The matrix of war suggests both discursive and institutional practices, technologies that target bodies and populations, enacted in a complex array of locations. The critical moment of this form of analysis is to point out that war is not simply an isolated occurrence taking place as some form of interruption to an existing peaceful order. 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.

#### Our alt solves rejection of the idea that the law can constrain the sovereign allows for a a new political body outside the sovereign

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(Anne, “Bio-Sovereignty and the Emergence of Humanity,” Theory & Event, Volume 7, Issue 2, Project Muse)

Can we imagine another form of humanity, and another form of power? The bio-sovereignty described by Agamben is so fluid as to appear irresistible. Yet Agamben never suggests this order is necessary. Bio-sovereignty results from a particular and contingent history, and it requires certain conditions. Sovereign power, as Agamben describes it, finds its grounds in specific coordinates of life, which it then places in a relation of indeterminacy. What defies sovereign power is a life that cannot be reduced to those determinations: a life "that can never be separated from its form, a life in which it is never possible to isolate something such as naked life. " (2.3). In his earlier Coming Community, Agamben describes this alternative life as "whatever being." More recently he has used the term "forms-of-life." These concepts come from the figure Benjamin proposed as a counter to homo sacer: the "total condition that is 'man'." For Benjamin and Agamben, mere life is the life which unites law and life. That tie permits law, in its endless cycle of violence, to reduce life an instrument of its own power. The total condition that is man refers to an alternative life incapable of serving as the ground of law. Such a life would exist outside sovereignty. Agamben's own concept of whatever being is extraordinarily dense. It is made up of varied concepts, including language and potentiality; it is also shaped by several particular dense thinkers, including Benjamin and Heidegger. What follows is only a brief consideration of whatever being, in its relation to sovereign power. / "Whatever being," as described by Agamben, lacks the features permitting the sovereign capture and regulation of life in our tradition. Sovereignty's capture of life has been conditional upon the separation of natural and political life. That separation has permitted the emergence of a sovereign power grounded in this distinction, and empowered to decide on the value, and non-value of life (1998: 142). Since then, every further politicization of life, in turn, calls for "a new decision concerning the threshold beyond which life ceases to be politically relevant, becomes only 'sacred life,' and can as such be eliminated without punishment" (p. 139). / This expansion of the range of life meriting protection does not limit sovereignty, but provides sites for its expansion. In recent decades, factors that once might have been indifferent to sovereignty become a field for its exercise. Attributes such as national status, economic status, color, race, sex, religion, geo-political position have become the subjects of rights declarations. From a liberal or cosmopolitan perspective, such enumerations expand the range of life protected from and serving as a limit upon sovereignty. Agamben's analysis suggests the contrary. If indeed sovereignty is bio-political before it is juridical, then juridical rights come into being only where life is incorporated within the field of bio-sovereignty. The language of rights, in other words, calls up and depends upon the life caught within sovereignty: homo sacer. / Agamben's alternative is therefore radical. He does not contest particular aspects of the tradition. He does not suggest we expand the range of rights available to life. He does not call us to deconstruct a tradition whose power lies in its indeterminate status.21 Instead, he suggests we take leave of the tradition and all its terms. Whatever being is a life that defies the classifications of the tradition, and its reduction of all forms of life to homo sacer. Whatever being therefore has no common ground, no presuppositions, and no particular attributes. It cannot be broken into discrete parts; it has no essence to be separated from its attributes; and it has no common substrate of existence defining its relation to others. Whatever being cannot then be broken down into some common element of life to which additive series of rights would then be attached. Whatever being retains all its properties, without any of them constituting a different valuation of life (1993: 18.9). As a result, whatever being is "reclaimed from its having this or that property, which identifies it as belonging to this or that set, to this or that class (the reds, the French, the Muslims) -- and it is reclaimed not for another class nor for the simple generic absence of any belonging, but for its being-such, for belonging itself." (0.1-1.2). / Indifferent to any distinction between a ground and added determinations of its essence, whatever being cannot be grasped by a power built upon the separation of a common natural life, and its political specification. Whatever being dissolves the material ground of the sovereign exception and cancels its terms. This form of life is less post-metaphysical or anti-sovereign, than a-metaphysical and a-sovereign. Whatever is indifferent not because its status does not matter, but because it has no particular attribute which gives it more value than another whatever being. As Agamben suggests, whatever being is akin to Heidegger's Dasein. Dasein, as Heidegger describes it, is that life which always has its own being as its concern -- regardless of the way any other power might determine its status. Whatever being, in the manner of Dasein, takes the form of an "indissoluble cohesion in which it is impossible to isolate something like a bare life. In the state of exception become the rule, the life of homo sacer, which was the correlate of sovereign power, turns into existence over which power no longer seems to have any hold" (Agamben 1998: 153). / We should pay attention to this comparison. For what Agamben suggests is that whatever being is not any abstract, inaccessible life, perhaps promised to us in the future. Whatever being, should we care to see it, is all around us, wherever we reject the criteria sovereign power would use to classify and value life. "In the final instance the State can recognize any claim for identity -- even that of a State identity within the State . . . What the State cannot tolerate in any way, however, is that the singularities form a community without affirming an identity, that humans co-belong without a representable condition of belonging" (Agamben 1993:85.6). At every point where we refuse the distinctions sovereignty and the state would demand of us, the possibility of a non-state world, made up of whatever life, appears.

#### The 1ac’s call for Internment as an investigation into america’s History and then subsequent call for coalitions MASKS anti-black violence – it ignores that the experience of the black body is fundamentally different than those of other minorities….any coalitional strategy which fails to forefront this difference and instead look for similarities will only reinscribe state violence and a system of anti-blackness

Sexton 5 (Racial Profiling and the Societies of Control¶ Jared Sexton¶ Forthcoming in Joy James (ed.) Warfare in the Homeland: ¶ Incarceration in the United States (Durham: Duke UP),

It no doubt strikes one as counterintuitive to think about the proliferation of multiracial coalition politics, or rather the political mobilization of non-black people of color, as either an index of black powerlessness or, worse, a component of an active black disempowerment instituted via large-scale domestic structural adjustments. There is, after all, an almost universal acknowledgement among activists and organizers in Latino, Asian American, and more recently, Arab and Muslim communities that the Civil Rights and Black Power movements were seminal to their current efforts (and occasional successes), both as practical training grounds for many a veteran political worker and as a continuing source of inspiration and instruction for younger generations now moving into the ranks of leadership. More importantly, consistent attempts are made to link, at least rhetorically, analogically, the struggle for immigrant rights (to use admittedly deficient shorthand) with the ongoing black struggle for racial justice.[[1]](#footnote-1) This is usually done in order to promote a more effective and lasting spirit of collaboration among different communities of color; an antidote for the destructive dynamics of “Black/Asian conflict” or “Blacks vs. Browns” and so on, and a precondition for viable coalition, a search for common ground.[[2]](#footnote-2) ¶ However, upon closer examination one detects in the public commentary about both the histories of oppression and the contemporary forms of racial discrimination faced by non-black people of color not only a certain carelessness (a point I’ve already made), but also a strong undercurrent of open disdain toward the recent career of blacks in the US, a subtext of anti-blackness that appears to be both gratuitous (because it is not logically required by the arguments at hand, one can simply present the case as is, sans analogy) and utterly indispensable (because it is never not present in discernible form). We do not find, in other words, a coherent rationale for the animus that seems to lace the strategic calls for multiracial coalition or the conceptual deployment of metaphor between the station of blacks in US society and culture and the evolving attacks on the welfare of non-black minorities. In each case, a claim is made that, say, the vicious assault on immigration reform (from bilingual education programs to health and human services for the undocumented to the militarization of the border), or the spectacular skepticism of government investigative agencies and the corporate media toward the loyalties of Asian Americans as such (from Japanese internment to the Democratic campaign contribution fracas to the Wen Ho Lee affair), or the implementation of aggressive policing against an “Arab-Muslim-Middle Eastern” terrorist profile, etc. are offenses more egregious than those which have been happening to blacks in far greater proportion for nearly indefinite periods of time; in part because all of this is ostensibly unacknowledged as such, not by whites so much as by blacks. ¶ Black suffering, in other words, is utilized as a convenient point of reference – the putative bottom line – in such a way that the specificity of anti-blackness, which is to say its inexorableness and fundamentality to racial formation in the United States, is almost entirely obscured. Meanwhile, blacks are faulted for failing to validate, as it were, and embrace the political claims of non-black people of color. (We might be forgiven for wondering how its is that blacks are constituted here as a court of appeal or an audience, even, in the first place, a question preliminary to any investigation of whether or to what extent blacks do or should or can recognize such claims.)¶ What the multiracial approach fails to appreciate – aside from the inherent injury and insult to the usual suspects of becoming concerned about a problem only when it happens immediately to you and yours – is the highly contingent nature of the injustices in question. This is, perhaps, the most tendentious point of the present argument: whether one is talking about the attack on immigrants or the special registrations of Homeland Security, or even harkening back to the internment of Japanese Americans during WW II, it is not unreasonable to conclude that these undeniably reprehensible and tragic events were nonetheless inessential – though clearly not unimportant – to the operations of the US state and civil society (i.e., it could have done otherwise without fear of crisis, catastrophe or collapse). The mass imprisonment of citizens and non-citizens of Japanese descent, for instance, was dependent upon both the hysteria of the Second World War and the foreign policy objectives of the Roosevelt Administration as a sufficient condition of possibility; the necessary condition was, to put it crudely, the history of anti-Asian racism in the US.[[3]](#footnote-3) The harassment, deportation, and demonizing effected by Homeland Security is fully entangled in the geopolitics of the post-Cold War US Grand Strategy and the unabated warfare required for capturing outstanding oil reserves, illicit drug markets, and natural resources that are becoming absolutely scarce.[[4]](#footnote-4) The anti-immigration movement likewise must be understood as a key component of the regional integration of the Americas and Pacific Rim (to recite the acronyms: NAFTA, FTAA, APEC, etc. viz. IMF/World Bank and WTO) and reflects not only political concessions to the obsessions of hard-line white supremacy but also – the dominant tendency – a disciplinary apparatus to regulate (not end or reverse) the migration of tractable labor pools, secure trade relations and so on.[[5]](#footnote-5) ¶ We see this contingency at work again in the fact that racial profiling, to return to our central point, is operative for blacks anywhere and anytime whereas for Latinos or certain Asian Americans it is more or less confined to poor or working class neighborhoods.[[6]](#footnote-6) Residential segregation as well is a class-bound issue for Latinos and Asian Americans; for blacks it is a cross-class phenomenon, so much so that even the most segregated Asian Americans – including many Southeast Asian refugees – are more integrated than the most integrated middle class blacks.[[7]](#footnote-7) Poverty is principally transitional for immigrants, but trans-generational and deeply entrenched for blacks (“underclass” signifying a segment of the black population permanently expelled from the political economy).[[8]](#footnote-8) Nationally, Latinos are incarcerated at more than twice the rate of whites but blacks are incarcerated at nearly three times the rate of Latinos.[[9]](#footnote-9) This is all to say that whereas the suffering of non-black people of color seems conditional to the historic instance (even if long-standing) and, even empirically speaking, functions at a different scope and scale, the oppression of blacks seems to be invariant (which does not mean that it is simply unchanging, it mutates constantly). This sort of comparative analysis – which would unquestionably impact the formulation of political strategy and the demeanor of our political culture – is roundly discouraged, however, by the silencing mechanism of choice today in progressive political and intellectual circles: don’t play Oppression Olympics![[10]](#footnote-10) To tarry with such details, runs the dogma, is to play into the hands of divide-and-conquer tactics and, moreover, to engage a shameful, callous immorality.[[11]](#footnote-11) One notes readily in this catchphrase the translation of a demand for or question of comparison – our conditions are alike or unlike – into an insidious posture of a priori competition – we will win so that you will lose. I suspect a deep relationship between this pervasive rhetorical strategy and the aggressive analogizing mentioned above (all of which all boil down to assertions about being “like blacks” or worse, “the new niggers”).[[12]](#footnote-12)¶ The good news, if it can be called that, is that this effort to repress a sustained examination of black positionality – “the position of the unthought”[[13]](#footnote-13) – will only undermine multiracial coalition as politics of opposition. Every analysis that attempts to account for the vicissitudes of racial rule and the machinations of the racial state without centering black existence within its framework – which does not mean simply listing it among a chain of equivalents – is doomed to miss what is essential about the situation, because what happens to blacks indicates the truth (rather than the totality) of the system, its social symptom, and all other positions can (only) be understood from this angle of vision.[[14]](#footnote-14) More important for present purposes, every attempt to defend the rights and liberties of the latest victims of racial profiling will inevitably fail to make substantial gains insofar as it forfeits or sidelines the fate of blacks, the prototypical targets of this nefarious police practice and the juridical infrastructure built up around it. Without blacks on board, the only viable option, the only effective defense against the crossfire will entail forging greater alliances with an anti-black civil society and capitulating further to the magnification of state power: a bid that carries its own indelible costs, its own pains and pleasures.

### Advantage

#### Repudiation has already happened. Vote neg on presumption.

Passavant 12

Paul A., Associate Professor of Political Science, Hobart & William Smith Colleges, “Democracy's ruins, democracy's archive” *Reading Modern Law: Critical Methodologies and Sovereign Formations*, edited by Ruth Buchanan, Stewart Motha, Sundhya Pahuja, p. 65 – 67)

Constitutional law in the United States bears the impression of confronting fascism nowhere more disturbingly than in the internment of Japanese Americans, and the Supreme Court's infamous decision Korematsu v. United States upholding the conviction of Korematsu for violating the order, which Yoo cites favourably. How has this case been archived previously? The dissenters in Korematsu recognized at the time that the decision had fallen into the 'ugly abyss of racism', that the 'legalization of racism' plays no justifiable part in a 'democratic way of life' (with Justice Murphy dissenting at 233, 242). One of the dissenters expressed concern regarding the decision's dangerous repetitive potential, as I have already mentioned.

Peter Irons is the author of the definitive study of the law and politics around the internment of Japanese Americans. Discussing his sources, Irons notes that the decision faced immediate and scathing criticism in major law review articles published as early as 1945. Writing in 1983, Irons finds that in the 'years since the publication of these articles ... not a single legal scholar or writer has attempted a substantive defense of the Supreme Court opinions' (1983: 371).

Aside from the fact that this legal decision found that courts must apply 'strict scrutiny' (a legal term of art meaning that the classification in question must be subjected to the most searching inquiry and that there is the greatest presumption against the constitutionality of the governmental policy at issue) to racial classifications, legal scholars do not view this legal opinion as 'good law'. The decision was made at a time when racial segregation was still allowed in the United States, but the Supreme Court found racial segregation to be unconstitutional in Brown v. Board of Education (1954). Law students and others who study constitutional law are taught how the racial classification in Korematsu cannot stand up to the most basic forms of equal protection analysis (because the classification is under-inclusive by failing to include German or Italian Americans, and because it is also over-inclusive by including both loyal and disloyal Japanese Americans; all of this lets us see that the governmental policy is motivated less by security concerns and more by racism).14 The conviction of Korematsu has been overturned because the government was found to have committed misconduct through the suppression of evidence and the inclusion of misinformation. And the United States has both apologized and paid reparations to those interned or their families (Sullivan and Gunther 2004: 668-9, fn. S). As matters of law and policy, everything about Korematsu, except the notion that there is the strongest presumption against racial classifications, has been repudiated and apologized for.

The democratic narrative of Korematsu, based on this archive, is shame and a sense of responsibility for overcoming the outcome of the case, while maintaining the strongest presumption against invidious racial classifications. The ruling was represented as a failure in the struggle against tyranny when it was issued, and in the manner it has been archived since. Yoo's legal opinions attempt to eviscerate the narrative archiving the outcome of Korematsu as wrong, and the principle of racial discrimination as wrong for a democratic society. These, as Justice Jackson recognized, are ruinous iterations. The ideas that a president's word is law or that racial guilt is an acceptable premise for government must be excluded to keep democratic commitments or to send the possibility of a legacy hospitable for democracy.

They think Korematsu is a loaded gun, but the shots been fired – Korematsu has already been repudiated, it exists as a way to distance the courts – the case is not a loaded weapon – they can site other things and always do, given that they don’t site it and the things don’t exist it demonstrates that they don’t need korematsu- this independently reifies a speciest mentality

Nagel and Nocella 13 (The End of Prisons: Reflections from the Decarceration Movementedited by Mechthild E. Nagel, Anthony J. Nocella II)

All highlighting

The original working title for this volume was Prison Abolition. After discussion among the contributors however, we changed the title to The End of Prisons. First, we wish to raise discussions about the telos of prisons – what purpose do they have?Second, Prison abolition is strongly related to a particular movement to end the prison industrial complex. Following Michel Foucault(1977), we argue that prisons are also institutions such as schools, nursing homes, jails, daycare centers, parks, zoos, reservations and marriage, just to name a few. Prisons are all around us and constructed by those in dominant oppressive authoritarian positions. There are many types of prisons – religious prisons, social prisons, political prisons, economic prisons, educational prisons, and, of course, criminal prisons. Individuals leave one prison only to enter another. From daycare to school to a nursing home, we are a nation of instutionalized prisons. Criminal prisons in the United States are not officially referred to as such, but rather as correctional facilities. A prison, as we define it in this volume, is an institution or system that oppresses and does not allow freedom for a particular group. Within this definition, we include the imprisonment of non-human animals and plants, which are too often overlooked. Michel Foucault (1977) famously said, “Is it suprising that prisons resemble factories, schools, barracks, hospitals, which all resemble prisons?” (p. 288). We believe that this volume is one of the first to extend Foucault’s logica, by making a connection between coercive institutions and all systems of domination as forms of prisons. We argue that the conception of prison is far reaching, always changing and adapting to the times and the socio-political environment. We expand the concept of prison from concrete walls, barbed wire, gates and fences to many of the institutions and systems throughout society such as schools, mental hospitals, reservations for indigenous Americans, zoos for non-human animals, and national parks and urban cultivated green spaces for the ecological community. United States imperialism, which promotes global domination and capitalism, not only imprisons convicted criminals byt its people, land, non-human animals, those that surround it (non-United States citizens) and those trapped within it (American Indians and immigrants).

#### makes extinction inevitable

Gottlieb 94 — Roger S. Gottlieb, Professor of Humanities at Worcester Polytechnic Institute, holds a Ph.D. in Philosophy from Brandeis University, 1994 (“Ethics and Trauma: Levinas, Feminism, and Deep Ecology,” *Crosscurrents: A Journal of Religion and Intellectual Life*, Summer, Available Online at http://www.crosscurrents.org/feministecology.htm, Accessed 07-26-2011)

Here I will at least begin in agreement with Levinas. As he rejects an ethics proceeding on the basis of self-interest, so I believe the anthropocentric perspectives of conservation or liberal environmentalism cannot take us far enough. Our relations with nonhuman nature are poisoned and not just because we have set up feedback loops that already lead to mass starvations, skyrocketing environmental disease rates, and devastation of natural resources. The problem with ecocide is not just that it hurts human beings. Our uncaring violence also violates the very ground of our being, our natural body, our home. Such violence is done not simply to the other – as if the rainforest, the river, the atmosphere, the species made extinct are totally different from ourselves. Rather, we have crucified ourselves-in-relation-to-the-other, fracturing a mode of being in which self and other can no more be conceived as fully in isolation from each other than can a mother and a nursing child. We are that child, and nonhuman nature is that mother. If this image seems too maudlin, let us remember that other lactating women can feed an infant, but we have only one earth mother. What moral stance will be shaped by our personal sense that we are poisoning ourselves, our environment, and so many kindred spirits of the air, water, and forests? To begin, we may see this tragic situation as setting the limits to Levinas's perspective. The other which is nonhuman nature is not simply known by a "trace," nor is it something of which all knowledge is necessarily instrumental. This other is inside us as well as outside us. We prove it with every breath we take, every bit of food we eat, every glass of water we drink. We do not have to find shadowy traces on or in the faces of trees or lakes, topsoil or air: we are made from them. Levinas denies this sense of connection with nature. Our "natural" side represents for him a threat of simple consumption or use of the other, a spontaneous response which must be obliterated by the power of ethics in general (and, for him in particular, Jewish religious law(23) ). A "natural" response lacks discipline; without the capacity to heed the call of the other, unable to sublate the self's egoism. Worship of nature would ultimately result in an "everything-is-permitted" mentality, a close relative of Nazism itself. For Levinas, to think of people as "natural" beings is to assimilate them to a totality, a category or species which makes no room for the kind of individuality required by ethics.(24) He refers to the "elemental" or the "there is" as unmanaged, unaltered, "natural" conditions or forces that are essentially alien to the categories and conditions of moral life.(25) One can only lament that Levinas has read nature -- as to some extent (despite his intentions) he has read selfhood -- through the lens of masculine culture. It is precisely our sense of belonging to nature as system, as interaction, as interdependence, which can provide the basis for an ethics appropriate to the trauma of ecocide. As cultural feminism sought to expand our sense of personal identity to a sense of inter-identification with the human other, so this ecological ethics would expand our personal and species sense of identity into an inter-identification with the natural world. Such a realization can lead us to an ethics appropriate to our time, a dimension of which has come to be known as "deep ecology."(26) For this ethics, we do not begin from the uniqueness of our human selfhood, existing against a taken-for-granted background of earth and sky. Nor is our body somehow irrelevant to ethical relations, with knowledge of it reduced always to tactics of domination. Our knowledge does not assimilate the other to the same, but reveals and furthers the continuing dance of interdependence. And our ethical motivation is neither rationalist system nor individualistic self-interest, but a sense of connection to all of life. The deep ecology sense of self-realization goes beyond the modern Western sense of "self" as an isolated ego striving for hedonistic gratification. . . . . Self, in this sense, is experienced as integrated with the whole of nature.(27) Having gained distance and sophistication of perception [from the development of science and political freedoms] we can turn and recognize who we have been all along. . . . we are our world knowing itself. We can relinquish our separateness. We can come home again -- and participate in our world in a richer, more responsible and poignantly beautiful way.(28) Ecological ways of knowing nature are necessarily participatory. [This] knowledge is ecological and plural, reflecting both the diversity of natural ecosystems and the diversity in cultures that nature-based living gives rise to. The recovery of the feminine principle is based on inclusiveness. It is a recovery in nature, woman and man of creative forms of being and perceiving. In nature it implies seeing nature as a live organism. In woman it implies seeing women as productive and active. Finally, in men the recovery of the feminine principle implies a relocation of action and activity to create life-enhancing, not life-reducing and life-threatening societies.(29) In this context, the knowing ego is not set against a world it seeks to control, but one of which it is a part. To continue the feminist perspective, the mother knows or seeks to know the child's needs. Does it make sense to think of her answering the call of the child in abstraction from such knowledge? Is such knowledge necessarily domination? Or is it essential to a project of care, respect and love, precisely because the knower has an intimate, emotional connection with the known?(30) Our ecological vision locates us in such close relation with our natural home that knowledge of it is knowledge of ourselves. And this is not, contrary to Levinas's fear, reducing the other to the same, but a celebration of a larger, more inclusive, and still complex and articulated self.(31) The noble and terrible burden of Levinas's individuated responsibility for sheer existence gives way to a different dream, a different prayer: Being rock, being gas, being mist, being Mind, Being the mesons traveling among the galaxies with the speed of light, You have come here, my beloved one. . . . You have manifested yourself as trees, as grass, as butterflies, as single-celled beings, and as chrysanthemums; but the eyes with which you looked at me this morning tell me you have never died.(32) In this prayer, we are, quite simply, all in it together. And, although this new ecological Holocaust -- this creation of planet Auschwitz – is under way, it is not yet final. We have time to step back from the brink, to repair our world. But only if we see that world not as an other across an irreducible gap of loneliness and unchosen obligation, but as a part of ourselves as we are part of it, to be redeemed not out of duty, but out of love; neither for our selves nor for the other, but for us all.

#### Repudiation of past wrongs only rehabilitates white supremacy and makes racial privilege possible- good intentions about internment are irrelevant and ignore how we are always already positioned by racialized structures

Cho, 98 -- DePaul University law professor, CLPEF principle investigator on Japanese internment

[Sumi, PhD in Ethnic Studies from UC Berkeley; principal investigator for the Civil Liberties Public Education Fund grant on the first coordinated legal research on Japanese American interment, redress, and reparations; and currently serves on the Board of Directors for LatCrit, “Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption,” Boston College Third World Law Journal, 19:1, 12-1-1998, <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1183&context=twlj>, accessed 12-31-13]

Racial redemption can be thought of generally as a racial project, containing both a structural-material and a representational-cultural component. As described above, the meaning of whiteness is at stake in the project of racial redemption, and the outcome will have significant material consequences. More specifically, the value of whiteness is maintained through its reputational rehabilitation, shown above to occur **through** the operation of various component projects, from **repudiation** of white supremacy and burial of historical complicities in white supremacy to transformation toward a redeemed and innocent whiteness.425 The property value of whiteness and the social structure of racial privilege **depend** on this rehabilitation. Importantly, the theoretical construct of the racial project provides a mechanism for linking Warren's personal history with broader societal and political processes of racial formation. When viewed through the lens of the racial project, we may postulate homologous and isomorphic relationships between both the personal and societywide drive for racial redemption. In addition to the common sense appeal of reading Warren's personal need for redemption into his Supreme Court race jurisprudence, the concept of racial project helps us to understand how that personal need arose within, and was conditioned by, a broader matrix of social and political forces and relations. From the perspective of the racial project, we cannot plausibly divorce Warren's personal story (and the kind of individual and spiritual/ religious redemption he perhaps sought) from the broader contours of racial formation in his society. Understanding Brown as integral to the process of racial redemption becomes, in part, an exercise in placing the "personal" motivations of Warren in their proper social context. Warren's individual intentionality, the primary focus of most biographical narratives regarding his remorse for the internment, and, to some extent, his race jurisprudence, becomes a false category of analysis. As it unfolded within the universe of postwar racial projects, Warren's processing of his role in internment and his role on the Court are not primarily manifestations of purely subjective processes, but rather must be understood first as outcomes and constituents of objective processes of racial formation. When understood as a racial project, racial redemption does not necessarily imply coordinated actions by conspiratorial groups of whites openly and consciously seeking to maintain white domination over peoples of color. The theory of racial formation and the racial project are more nuanced than that, accounting for race-conservative, **"well-intentioned" liberal interventions**, and progressive resistances to such domination.426 The actions of individuals and groups **occur within** a field of **thoroughly racialized** relations, **structures**, discourses and meanings.427 So, in the case of Chief Justice Warren, we may bracket linear notions of causality and motivation in understanding how he perceived his actions in the internment of Japanese Americans, what he did to rectify those wrongs and how he effected race jurisprudence as a member of the Supreme Court. According to the racial formation theory, Warren is always already within the racial matrix, and our job is to construct a coherent theory for grasping the nature of racial projects to which he contributed. In this sense, we might place Warren in a more direct relationship with neoconservatives of the post-civil rights era whose racial project has been to "rearticulate"428 the meaning of various liberational concepts of the previous era such as colorblindness and "reverse discrimination." 429 Warren's relationship to later rearticulatory practices, as discussed above, has been one of complicated antecedence. This ambiguous posture has allowed modern neoconservatives to deploy Warren's legacy in their racial project of rearticulating the meaning of Brown's racial equality as colorblind individualism rather than as a "group or collective concern. "430 Again, this racial project analysis says nothing about Warren's intentionality. Instead, it argues that **the** tensions inherent in the **repudiatory** and burial **stages of** his **racial redemption create conditions conducive to** subsequent **retrenchment of (reformulated**) **white supremacy**.

### Solvency

#### Over-ruling one precedent doesn’t change anything- if the motive exists in the future new precedent will be established

Tushnet, 3 -- Georgetown University Law Cente law professor

[Mark, "Defending Korematsu?: Reflections on Civil Liberties in Wartime," Wisconsin Law Review, 2003 Wis. L. Rev. 273-307, scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1260&context=facpub, accessed 12-30-13]

A final general observation also should occasion skepticism, this time about the limits of social learning. The pattern I have described is one that might be called fighting the last war.72 72. As Geoffrey Stone puts it, "[O]ne might say that the Court learns just enough to correct the mistakes of the past, but never quite enough to avoid the mistakes of the present." ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 8 (Lee. C. Bollinger & Geoffrey R. Stone eds., 2002). That is, the legal world's retrospective evaluation of actions taken the last time around is that those actions were unjustified. Judges and scholars develop doctrines and approaches that preclude the repetition of the last generation's mistakes. Unfortunately, each new threat generates new policy responses, which are-almost by definition-not precluded by the doctrines designed to make it impossible to adopt the policies used last time. And yet, the next generation again concludes that the new policy responses were mistaken. We learn from our mistakes to the extent that we do not repeat precisely the same errors, but it seems that we do not learn enough to keep us from making new and different mistakes."73 73. For a similar observation, see David Cole, The New McCarthyism: Repeating History in the War on Terrorism, 38 HARV. C.R.-C.L. L. REv. 1, 3-4 (2003) ("While it has altered slightly the tactics of prevention to avoid literally repeating history, in its basic approach the government today is replaying the mistakes of the past. **All we** have **learn**ed **from history is how to mask** the **repetition**, **not how to avoid the mistakes**.").

#### Coming decisions aren’t about Korematsu precedents, but rather carry strong connections to Dred Scott era cases- proves there are always precedents the law can revert to

Brecher and Smith 7 (Brendan Smith is co-founder of Voices for a Sustainable Future, and senior fellow at the Progressive Technology Project, Jeremy Brecher is a historian and acclaimed author- he has like 10 books, “Guantanamo, Dred Scott and the Amistad”, http://www.alternet.org/story/49433/guant%C3%83%C2%A1namo,\_dred\_scott\_and\_the\_amistad)

Can a US court declare that a group of human beings have no rights and can be enslaved or abused at will with no legal recourse? That question will soon be coming before the Supreme Court.¶ In the last days of 2006, the GOP-led Congress passed the Military Commissions Act, which among other things stripped the right of habeas corpus from the captives held at Guantanamo. In late February the District of Columbia Court of Appeals upheld that part of the law. Now both the Center for Constitutional Rights, which represents the captives, and the Solicitor General's Office have asked the Court for expedited review at its next conference on March 30.¶ Before they make a final decision, the Justices should consider

the cases of two of the Court's most famous imprisoned petitioners: the freed slave Dred Scott and the captive voyagers on the slave ship Amistad.¶ The Dred Scott decision is often regarded as the most shameful in the history of the Supreme Court. Scott was held as a slave even though his late owner had promised to free him at his own death. Scott's petition for a writ of habeas corpus was granted and upheld by the lower courts. But it was overturned by the Supreme Court in 1857 on the grounds that a Negro has "no rights which the white man was bound to respect ... They are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States."¶ A century and a half later, in Boumediene v. Bush and Al-Odah v. United States , the DC Court of Appeals has similarly overturned writs of habeas corpus granted by lower courts on the grounds that this fundamental right can be denied to a specified group of human beings. The court ruled that the Military Commissions Act of 2006 strips Guantanamo detainees of the right to challenge their detention in US federal courts. Hina Shamsi, deputy director of Human Rights First's Law and Security Program, explains it this way: "The Court of Appeal's ruling runs counter to one of the most important checks on unbridled executive power enshrined in the US Constitution: the right to challenge imprisonment in a full and fair proceeding. If allowed to stand, this ruling would permit the government to hold prisoners, potentially indefinitely, without having to show to a court of law why the person has been detained."¶ Before the Justices risk going down the shameful road to a modern-day version of the Dred Scott decision, they should also consider the landmark decision from an earlier struggle for human rights -- the 1841 Amistad case, restored to our national memory by Stephen Spielberg's movie Amistad.¶ In the Amistad case, the Supreme Court courageously held that human rights and the rule of law must apply to captives who had been seized in Africa and imprisoned in the United States.¶ The Amistad captives were mostly Mendi people -- men and children abducted in their homeland of Sierra Leone, shipped to Cuba and sold as slaves. They revolted, seized control of the Amistad and sailed up the Atlantic coast towards New England and they were captured by the US Navy and imprisoned in Connecticut. The US Attorney General -- an appointee of President Martin Van Buren, who curried favor with the Southern slaveocracy -- demanded that the courts turn them over for delivery to Spanish authorities -- even planning to send them on an official US government ship so Connecticut courts could not intercede with a writ of habeas corpus.¶ The Amistad case and today's Guantanamo cases raise the same two fundamental questions of human rights and the rule of law: Does the executive branch of government ever have the authority to seize people, imprison them and abuse them with no appeal to a court? And does the executive ever have authority to act without any possibility of review by the judiciary? In the Amistad case, the Supreme Court answered no to both questions.¶ The executive's position in the Amistad case met withering scorn from former President John Quincy Adams -- splendidly portrayed in Spielberg's movie by Anthony Hopkins -- who defended the Amistad captives before the Supreme Court.¶ Adams charged that the government was depriving the captives of the most fundamental rights. "Have the officers of the US Navy a right to seize men by force ... to fire at them, to overpower them, to disarm them, to put them on board of a vessel and carry them by force and against their will to another state, without warrant or form of law? ... Is it for this court to sanction such monstrous usurpation and executive tyranny?"¶ Adams condemned the Van Buren Administration's attempt to usurp the authority of the courts. Perhaps, Adams conceded, it may be easy for the royal governor at Havana "to seize any man" and "send him beyond seas for any purpose." But "has the President of the United States any such powers? Can the American executive do such things?"¶ Adams argued that overriding the jurisdiction of the courts "would be the assumption of a control over the judiciary by the President, which would overthrow the whole fabric of the Constitution; it would violate the principles of our government generally and in every particular."¶ The Supreme Court ruled that US courts were bound to protect the rights of the Amistad captives. The rights of the case "must be decided upon the eternal principles of justice and international law." To rule otherwise would "take away the equal rights of all foreigners, who should contest their claims before any of our courts, to equal justice," or "deprive such foreigners of the protection given them" by "the general law of nations."¶ In 1841 the Supreme Court took a bold stand against executive tyranny and for human rights and the rule of law. Now the Court is again being asked whether the United States will remain a government under law or whether we allow it to become a presidential dictatorship. The pending action in the Guantanamo cases will test whether it wishes to be remembered along with the authors of the monstrous Dred Scott decision or rather with the friends of freedom who defended the human rights of the Amistad captives.

## 2NC

### ! Overview

**And, independently, we must abandon conceptions of sovereignty to obtain a meaningful life**

**Agamben, 00** (Giorgio, translated by Vincenzo Binetti and Cesare Casarino, “Means without ends,” published in 2000, pg 61-3)

The concepts of *sovereignty* and of *constituent power,* which are at the core of our political tradition, have to be abandoned or, at least, to be thought all over again. They mark, in fact, the point of indifference between right and violence, nature and *logos,* proper and improper, and as such they do not designate an attribute or an organ of the juridical system or of the state; they designate, rather, their own original structure. Sovereignty is the idea of an undecidable nexus between violence and right, between the living and language-a nexus that necessarily takes the paradoxical form of a decision regarding the state of exception (Schmitt) or *ban* (Nancy) in which the law (language) relates to the living by withdrawing from it, by abandoning it to its own violence and its own irrelatedness. Sacred life the life that is presupposed and abandoned by the law in the state of exception-is the mute carrier of sovereignty, the real *sovereign subject.* Sovereignty, therefore, is the guardian who prevents the undecidable threshold between violence and right, nature and language, from coming to light. We have to fix our gaze, instead, precisely on what the statue of justice (which, as Montesquieu reminds us, was to be veiled at the very moment of the proclamation of the state of exception) was not supposed to see, namely, what nowadays is apparent to everybody: that *the state of exception is the rule,* that naked life is immediately the carrier of the sovereign nexus, and that, as such, it is today abandoned to a kind of violence that is all the more effective for being anonymous and quotidian. If there is today a social power *[potenza],* it must see its own impotence *[impotenza]* through to the end, it must decline any will to either posit or preserve right, it must break everywhere the nexus between violence and right, between the living and language that constitutes sovereignty. While the state in decline lets its empty shell survive everywhere as a pure structure of sovereignty and domination, society as a whole is instead irrevocably delivered to the form of consumer society, that is, a society in which the sole goal of production is comfortable living. The theorists of political sovereignty, such as Schmitt, see in all this the surest sign of the end of politics. And the planetary masses of consumers, in fact, do not seem to foreshadow any new figure of the polis (even when they do not simply relapse into the old ethnic and religious ideals). However, the problem that the new politics is facing is precisely this: is it possible to have a *political* community that is ordered exclusively for the full enjoyment of wordly life? But, if we look closer, isn't this precisely the goal of philosophy? And when modern political thought was born with Marsilius of Padua, wasn't it defined precisely by the recovery to political ends of the Averroist concepts of "sufficient life" and "well-living"? Once again Walter Benjamin, in the "TheologicoPolitical Fragment," leaves no doubts regarding the fact that "The order of the profane should be erected on the idea of happiness."! The definition of the concept of "happy life" remains one of the essential tasks of the coming thought (and this should be achieved in such a way that this concept is not kept separate from ontology, because: "being: we have no experience of it other than living itself"). The "happy life" on which political philosophy should be founded thus cannot be either the naked life that sovereignty posits as a presupposition so as to turn it into its own subject or the impenetrable extraneity of science and of modern biopolitics that everybody today tries in vain to sacralize. This "happy life" should be, rather, an absolutely profane "sufficient life" that has reached the perfection of its own power and of its own communicability-a life over which sovereignty and right no longer have any hold.

**Conditions of sovereignty lead to inevitable warfare**

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Under conditions of vertical sovereignty and splintering colonial occupation, communities are separated across a *y*-axis. This leads to a proliferation of the sites of violence. The battlegrounds are not located solely at the surface of the earth. The underground as well as the airspace are transformed into conflict zones. There is no continuity between the ground and the sky. Even the boundaries in airspace are divided between lower and upper layers. Everywhere, the symbolics of the *top* (who is on top) is reiterated. Occupation of the skies therefore acquires a critical importance, since most of the policing is done from the air. Various other technologies are mobilized to this effect: sensors aboard unmanned air vehicles (UAVs), aerial reconnaissance jets, early warning Hawkeye planes, assault helicopters, an Earth-observation satellite, techniques of “hologrammatization.” Killing becomes precisely targeted. Such precision is combined with the tactics of medieval siege warfare adapted to the networked sprawl of urban refugee camps. An orchestrated and systematic sabotage of the enemy’s societal and urban infrastructure network complements the appropriation of land, water, and airspace resources. Critical to these techniques of disabling the enemy is *bulldozing*: demolishing houses and cities; uprooting olive trees; riddling water tanks with bullets; bombing and jamming electronic communications; digging up roads; destroying electricity transformers; tearing up airport runways; disabling television and radio transmitters; smashing computers; ransacking cultural and politico-bureaucratic symbols of the proto- Palestinian state; looting medical equipment. In other words, *infrastructural warfare*.58 While the Apache helicopter gunship is used to police the air and to kill from overhead, the armored bulldozer (the Caterpillar D-9) is used on the ground as a weapon of war and intimidation. In contrast to early-modern colonial occupation, these two weapons establish the superiority of high-tech tools of latemodern terror.59 As the Palestinian case illustrates, late-modern colonial occupation is a concatenation of multiple powers: disciplinary, biopolitical, and necropolitical. The combination of the three allocates to the colonial power an absolute domination over the inhabitants of the occupied territory. The *state of siege* is itself a military institution. It allows a modality of killing that does not distinguish between the external and the internal enemy. **Entire populations are the target of the sovereign**. The besieged villages and towns are sealed off and cut off from the world. Daily life is militarized. Freedom is given to local military commanders to use their discretion as to when and whom to shoot. Movement between the territorial cells requires formal permits. Local civil institutions are systematically destroyed. The besieged population is deprived of their means of income. Invisible killing is added to outright executions.

**Producing an internal state of exception while claiming to put homo sacers under the rule of law fuels genocide and the racist practices they critique**

**Rogers 08** – PhD, a Lecturer in law at the School of Law and Justice at Southern Cross University, Lismore

(Nicole, Law Text Culture, “Terrorist v Sovereign: Legal performances in a state of exception,” Lexis)

There is no doubt that legal contests between the accused terrorist and the sovereign are occurring with some frequency in the state of exception which arguably characterises contemporary Western societies. Their very occurrence could be perceived as an anomaly given the theoretical parameters of the state of exception as a lawless void. However, Agamben describes a relationship of mutual dependency in which the judicial order 'must seek in every way to assure itself a relation' with this 'space devoid of law' (2005:51). In any event, some of these 'legal' performances, for instance those staged by the Bush administration in processing the Guantanamo Bay detainees, are quasi-legal proceedings and not necessarily representative of the rule of law. Fleur Johns rejects this conclusion and contends that the regime at Guantanamo Bay is, in fact, 'a profoundly anti-exceptional legal artefact' (2005: 615) with no space for option, doubt and responsibility in the legal procedures which apply therein. This [\*164] description, however, suggests bureaucracy rather than law -- the sort of murderous bureaucracy which engendered mass genocide during the Third Reich: the 'governmental violence that -- while ignoring international law externally and producing a permanent state of exception internally -- nevertheless still claims to be applying the law' (Agamben 2005: 87).

### Alt

#### our alternative is to break from the state by breaking from the common ground of the soveirgn. The state is granted power by the way that it can identify label and carry out actions on certain groups. – that’s caldwell This inevitability means the question is not should not be how many different ways we can watch the executive skirt its regulations but rather confuse and shame the state to open up a form of governance where there are no particular attributes and reform goverance to a system that cannot be broken into discrete parts.

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An example of a gesture is the student who faced down a tank on Tiananmen Square. He had no clear goal, he did not shout any slogans, he simply stood there alone in front of the tank. Physically he could never have stopped a tank, so his act had a different meaning. And this gesture confused the political power. This image, which travelled over the whole world, is somewhat more anonymous than, for example, the revolutionary icon Che Guevara. This image has no author, no proclamations.

For Agamben, gesture plays an important role in the dismantling of sovereign power. Gesture is an opportunity for life to throw sand into the cogs of the machinery of law and politics. Crucial to understanding gesture, it is important to realize that in Agamben this ‘throwing sand’ is gestural and hence is not at all a matter of political activism, of overthrowing power – which always threatens to become stuck in the same structure as that which it fights. Nor is it a matter of using the law or sovereign power in the right way. Rather, it is a matter of playing with the law, confusing it in a way that renders it inoperative. Kafka’s work is bursting with diffuse events and gestures, gestures that make the relation between law and life inoperative. Gestures are the activity of creatures that are only being-thus. Gestures ‘show’ being-thus. I will give two examples below of gestures in Kafka’s work: shame and acting ‘as not.

Kafka as the prophet of shame

On the eve of his thirty-first birthday two men enter Joseph Ks home. ‘Were they ‘[o]ld second-rate actors or opera singers?’ K. wonders, but they do¶ not respond to his question, ‘At which theatre are you engaged?’ They prove to be his questioners who have come to torture him. They take him to an¶ old quarry where they stab him in the heart with a knife. And thus ends The Trial and the life of Joseph K.:¶ As his sight faded, K. saw the two men leaning cheek to cheek close to his face as they observed the final verdict. ‘Like a dog!’ he said. It seemed¶ as if his shame would live on after him?¶ How must we understand t he execution of K. and his shame at the end of The Trial? Is it a betrayal of the immanence that this book expresses, as Deleuze¶ and Guattari have claimed?30 Is it a defeat of K.? Or has it another function?¶ According to Agamben, Kafka has given us an immanence of shame. Kafka’s genius consists in the gesture to ‘renounce theodicy and forego the old¶ problem of guilt and innocence, of freedom and destiny, in order to concentrate solely on shame’ (IP. 85). Walter Benjamin claims that the shame that¶ survives is Kafka’s noblest and strongest gesture and characterizes Kafka as a prophet of shame. Agamben also describes Kafka as a good prophet (RA, 104) and The Trial as a truly prophetic book (MWE, 122). Moran has looked closer at the relationship between prophecy, shame and dehumanizing political situations. What Kafka prophesied was not only an oppressive future, but also a potential freedom fueled by shame. He portrays Kafka as a¶ prophet of shame, but what is the role of shame in this story of Kafka?¶ Shame: Between passivity and activity, undergoing and undertaking¶ At first glance, shame seems to have little to do with resistance and more with defeat, with passivity, with paralysis. But Karl Marx attributed a major¶ role to the emotion of shame. When the Hegelian Arnold Ruge states that no single revolution ever originated in shame, Marx responds that shame is¶ already a revolution in itself (cited in MWE, 131). Agamben, who cites Marx approvingly points out that in ancient Greece shame was not an uncomfortable feeling. Rather, people who were confronted with their shame rediscovered their courage and compassion, as Hector did before the exposed¶ breast of his mother Hecuba (IP, 85). Agamben sees this shame, which placed such an important role in ancient Greece, returning in Kafka’s work, in¶ the mythic filth of his courts and castles (IP, 83). Thus, shame is not only a passive emotion but also includes active elements. But these elements do not¶ need to lead to a Greek heroic act or a communist revolution. Rather, they refer to a more subtle relation to oneself, to power and most of all to ethics.¶ According to Mills, for Agamben, ‘shame is the mode by which the subject cornes to ethical responsibility¶ Shame: Not guilt but subjectivity¶ Agamben sees a special relationship between shame, subjectivity and testimony. Shame is not about guilt but about subjectivity. Agamben defines shame¶ as the impossibility of removing oneself from oneself, the impossibility of removing oneself from a particular presentation of oneself.¶ If, for example, we are ashamed of be:ng naked, then we are not ashamed because we feel guilt. We are ashamed because we are seen and cannot¶ withdraw our being-thus from this gaze. We feel that we are desubjectified, we do not feel a subject, but a naked version of ourselves. At the same time,¶ not only are we seen but we see that we are seen. If we do not see that someone sees us naked, we would not be ashamed. We are witnesses of our own¶ desubjectification.¶ In shame, the subject thus has no other content than its own desubjectification; it becomes witness to its own disorder, its own oblivion as a subject. (RA, 106)¶ Agamben’s philosophy of subjectivity is developed in close relation with desubjectivity; subjectivity can only exist in relation to a process of desubjec¶ tivity and shame is the process that illustrates this best.¶ Two things are important here: first, shame is a gesture that binds people in a different way to their subjectivity. As we saw at the beginning of this¶ book, Agamben, following Foucault, rejects the idea of a subject as the basis for a theory of freedom. The subject comes to existence in a power relation¶ and cannot be conceived in its entirety apart from this. In shame, the subject witnesses his own desubjectification. Shame is both loss of self and being¶ inseparably connected to oneself and thus not being able to do anything else but take possession of oneself This shame is twofold according to Moran:¶ shame about the decomposition of the subject and shame about the relationship between the subjectivity and the power. This last one is the type of shame that will survive. But Agamben also sees a possibility in this experience of shame. Shame is nothing other than the fundamental feeling of being a subject in both opposite meanings of the word: on the one hand, we are subjected and, on the other, are sovereign, independent (RA, 107). Shame,¶ then, is the feeling by which the human being most closely approaches himself’ (IP, 84).

The second important point in the above citation is the relation between shame and testimony Shame makes testimony possible, even though it cannot be directly assigned to a specific subject. At the same time, shame is the dwelling place of the subject. What survives with shame is testimony.¶ So shame itself is not so much a gesture, but the testimony of shame, the testimony of Joseph Ks shame that leaps forward to us through Kafka and¶ Agamben. Agamben investigates the relation between shame and testimony further via testimonies from Nazi concentration camps.38¶ Shame: Ethical responsibility¶ One author that is especially important for Agamben’s theory of shame and subjectivity is Auschwitz survivor Primo Levi. In 1983, the Italian publisher¶ Einaudi asked the writer Primo Levi to translate Kafka’s The Trial into Italian (RA, 18). Agambem sees a strong connection between the work of Levi¶ and Kafka. In his memoirs, Levi describes a specific kind of shame he experienced in the camps: shame about the fact that one is human.¶ The shame ... that the just man experiences at another man’s crime, at the fact that such a crime should exist, that it should have been introduced¶ irrevocably into the world of things that exist and that his will for good should have proved too weak or null and should not have availed in de¶ fence.39¶ Agamben describes a similar type of shame in his journal on the political situation in Italy: the shame we feel when we are confronted with a certain¶ vulgarity in thinking, when we watch certain TV shows, when we are confronted with the self-conscious smiles of ‘experts’ who cheerfully lend their¶ expertise to the political game of the media. It is the shame we feel when Joseph K. is killed like a dog.¶ In this shame the fullness of gesturality is revealed, a sign of resistance, because those who suffer this shame of being human rebel against their being¶ subjected and thus rebel against the political power under which they live. It nourishes their thoughts and forms the beginning of a revolution or an¶ exodus whose end is barely in sight. At the moment when the knife of his questioners penetrates his heart, Joseph K. succeeds, with a final leap, in holding on to the shame that will survive him CMWE, l32). In that way, he makes a gesture, breaks the tie to political power and eludes political power.¶ For what is Joseph K. ashamed about? His shame betrays a limit that has been reached, a new ethical dimension that has been touched in his existence.¶ Something overcomes him and he cannot testify to that something in any other way But his shame flies through time like a silent apostrophe to reach¶ us, to testify for him (RA, 104).¶ Agamben argues that Kafka attempts to save ‘at least its shame’ for humankind. Our only possible innocence consists of subjecting ourselves to shame,¶ a shame without embarrassment, a shame that lets us regain our courage and pity, as in ancient Greece. Kafka shows us how we can use this shame: not¶ to free us from shame but to free the shame in ourselves. That is what Joseph K. attempts during the whole process. What he attempts to save is not his¶ own innocence but his own shame (IP, 85). In this sense, The Trial is a prophetic book and not only with regards to the camps. It reveals a situation of¶ political suffering that we cannot witness as subjects, but can only respond to with shame.

### Laclau

**Fourth, Particularized approaches to resistance fails – the universal contestation of the alternative is key.**

**Brophy, 9** – Professor at York University

(Susan Dianne, “Lawless Sovereignty: Challenging the State of Exception,” Sage Publishing, Social Legal Studies, Vol 18., No. 2)

What ensues is a form of the ‘boomerang effect’: the constituting power of justice, which was once ﬁctitiously held by the state, lies not in the state’s juridical order but in the universalized externality represented in the act of dissent itself. This stands to undo, at least partially, the paradox of sovereignty by placing the limiting and limited version of state sovereignty alongside and in opposition to a form of sovereignty that lies extra-juridically, and therefore, outside state. In that case, state sovereignty cannot claim that there is nothing outside the law because, as this article has come to demonstrate, justice itself is outside the law and it thereby presides as the constituting force that substantiates the sovereign power of the (lawless) universalized standpoint. The references to colonialism have helped to demonstrate (a) the degree to which the state of exception gets normalized at the expense of life and justice, and (b) the importance of challenging the state of exception from outside the juridical order so as to expose the ﬁctional quality of the relations between law and life from a universalized standpoint. In the capitalist colonial sense, acts of dissent against the state of exception can be similarly conceptualized as having to emerge from the universal externality that upholds lawlessness. There are numerous distinctive experiences of the state of exception as the limit-ﬁgure on life, which is a mode of governance that is highlyconducive to reckless capitalist growth (hence the term ‘capitalistcolonialism’), and has deep afﬁnities with the ever-expanding ‘war on terror’. Whether these universalizable distinctions are experienced at the level of class, gender, race and/or ethnicity, they nonetheless stand to represent a shared externality that can never truly be ‘included’ in the juridical order of any given sovereign power. The compromised form of consent that characterizes these externalities in relation to the state of exception makes it such that the excluded, despite short-term attempts at inclusion, will always ﬁnd their footing in the constituting power of universal justice. If the sovereign power of state lies in indistinction, meaning in the power of inclusive exclusion, then challenges to the state of exception must appeal to universalized distinctions, to that which is always external and must always be external to state insofar as universality itself can never be ‘included’ in the juridico-political operations of any given state. The state will always choose the state; it exists for itself, and the state of exception is an extreme example of the truth of this fate.

### Link / Perm

Pugliese, 13 -- Macquarie University Cultural Studies professor

[Joseph, Macquarie University MMCCS (Media, Music, Communication and Cultural Studies) research director, *State Violence and the Execution of Law: Biopolitcal Caesurae of Torture, Black Sites, Drones,* 3-15-13, ebook accessed via EBL on 8-30-13, mss]

In examining the violence of useless suffering in the context of the genocides of the twentieth century, Levinas notes that ‘the very phenomenon of suffering in its uselessness is, in principle, the pain of the Other. For an ethical sensibility - confirming in itself in the inhumanity of our time, against this inhumanity - the justification of the neighbour's pain is certainly the source of all immorality.’16 The US state's inflicting of violence and useless suffering on the other - whether through torture practices or civilian mutilations and deaths due to drone strikes - has been justified through the use of law. As a law-abiding state, in contradistinction to what it terms the ‘ungoverned places of the world,' the US state's invocation of the rule of law in order to justify and legitimate its torturous and exterminatory violences is crucial in enabling it to maintain what Max Weber terms ‘the monopoly of the legitimate use of physical violence within a certain territory.’ ‘The state,’ having arrogated this monopoly, ‘is held to be the sole source of the "right" to use violence.’ As Austin Sarat and Thomas Kearns note, law's claim to legitimacy in its use of violence is ‘the minimal answer to skeptical questions about the ways law's violence differs from the turmoil and disorder law is allegedly brought into bbeing to conquer.’18 In invoking law`s power ‘to conquer,’ they underscore the manner in which **this** minimal **claim to legitimacy works to occlude the imperial vocation of law to exercise violence** in order **to render the other's violence as lawless, uncivilized and irrational**. As I demonstrate in what follows, the violent force of this binary is precisely what scripts, under the imprimatur of a range of laws, the US state’s conduct of its war on terror. The minimal status of the US state's claim to legitimacy through law in the conduct of this same war is precisely what emerges as dubious and untenable. Law, as deployed by the state, acts to legitimate the state`s violent practices even as it can also be rendered irrelevant to the state`s prerogative to exercise violence. ‘The ideological core of the modern state,’ writes Alan Hunt, ‘lies in the varieties of the idea of a state based on law (Rechtsstaat) epitomised by the constitutional doctrine of the rule of law.' However, as Hunt immediately qualifies, ‘This powerful ideological motif coexists with legal renunciation, the self-conscious recognition of arenas of state action with which the courts will not interfere. The standard example is the exclusion of matters of "national security" from legal scrutiny.’19 As I discuss in some detail in Chapter 5, the ruse of ‘national security' is precisely what animates the deployment by the state of strategies of redaction and material destruction of incriminating evidence; censorial strategies that place the state and its agents beyond legal scrutiny and juridical accountability. For the state's monopoly on violence to continue to appear as a non-negotiable actuality. it must be exercised infact. Etienne Balibar delineates what is at stake: ‘if the so-called "foundational violence" of state power is to exist (or appear as foundational), it must not only be idealized or sacralized - that goes without saying – but also actually exercised and implemented at some points and times, in some visible "zones" of the system.’ Once situated in these zones, Balibar writes, ‘we realize that, in many cases, we are at the extreme borders of cruelty.’20 The torture practices that were legally licensed by the Torture Memos offer a graphic instantiation of this visible exercise of state violence at, and beyond, the extreme borders of cruelty. They offer, moreover, tangible evidence of the manner in which law enables the state to couch its right to exercise violence in a rationalist mode; to speak its violent enactment with a tone of neutral and reasoned modulation that legitimates the use of violence precisely by disavowing its devastating lived effects as endured by its target subjects.21 As those subjects who have been at the receiving end of state violence repeatedly testify, it is law's capacity for rationalist instrumentalization that disassociates it from the violence it at once sanctions and enables. Only in this way can the memos coolly argue, for example, that the collective acts that constitute waterboarding fail to breach the US Torture Statute: Assuming adherence to the strict limitations discussed herein, including the careful medical monitoring and available intervention by the team as necessary, we conclude that although the question is substantial and difficult, the authorized use of the waterboard by adequately trained interrogators and other team members could not reasonably be considered specifically intended to cause severe physical or mental pain or suffering and thus would not violate sections 2340-2340A [of the US Torture Statute].22 As l discuss in Chapter 4, the role of medical personnel in the torture sessions went well beyond mere ‘monitoring.’ Here, however, their invocation underscores the rational tenor of the discourse as the objective and veridical status of the medical sciences will further evidence the mem0's reasoned conclusions: As we understand Hom OMS [CIA's Olfice of Medical Scivices] personnel familiar with the history of the waterboarding technique . . . there is no medical basis to believe that the technique would produce any mental effect that directly accompanied its use and the prospect that it will be used again." The discourse of medical science here functions to anesthetize the agents of torture, not their victims, from the possibility that their actions will produce severe pain, even as the discourse of law works to exonerate these same agents from the culpability of their actions. The use of qualifications of (‘the question is substantial and difficult’) marks the reflective process of reason at work; everything has been carefully weighed and considered before coming to a reasonable and clinical conclusion: waterboarding does not cause severe physical or mental pain. Abu Zubaydah, in his torture testimony. describes his experience of waterboarding: I was put on what looked like a hospital bed, and strapped down very tightly with belts. A black cloth was then placed over my face and the interrogators used a mineral water bottle to pour water on the cloth so I could not breathe . . . The pressure of the straps on my wounds caused severe pain. I vomited. The bed was again lowered to a horizontal position and the same torture carried out . . . I struggled to breathe. I thought I was going to die. I lost control of my urine. Since then I still lose control of my urine when under stress.24 The decision of former President Bush, on 7 February 2002, to suspend the applicability of the Geneva Conventions toward both al-Qaeda and Taliban ﬁghters in Afghanistan enunciated a signiﬁcant shift in policy, what he termed ‘a new paradigm,’ 25 that would effectively ramify down to the lowest levels of US military doctrine and practice. In ‘The Legal Narrative,’ an essay that discusses the ofﬁcial memos that preceded and followed Bush’s decision to suspend the Geneva Conventions with regard to both Taliban and al-Qaeda detainees, Joshua Dratel writes: ‘like the Nazis’ punctilious legalization of their “ﬁnal solution,” the memoirs reproduced here [in The Torture Papers ] reveal a carefully orchestrated legal rationale, but one without valid legal or moral foundation.’ 26 ‘The torture lawyers,’ writes David Luban, aimed ‘to construct a judicially- endorsed practice of permissible torture’; they ‘were constructing a torture culture.’ 27 This torture culture, however, was not something abruptly brought into being by the memoranda. On the contrary, as I discuss in the chapters that follow, torture practices in the US have a long and complex genealogy that stretches back to the colonial wars against Native Americans; 28 it encompasses the lynching and systematic mutilation of African Americans into the twentieth century, the waterboarding and beating of Filipino prisoners during the imperial Filipino–American War 1899–1913, 29 the CIA propagation of torture during the Cold War and the Vietnam War, 30 and it assumes contemporary dimensions, as I discuss in Chapter 2, in the torture of African American prisoners by police in Chicago’s infamous Area 2. 31 Torture, in other words, has been a normative practice in the operation of the US nation- state in terms of its laws and its agents – both legal (for example, army and police) and extralegal (vigilantes and lynching parties). As Darius Rejali has noted, torture and democratic states have a long history of working hand- in-hand; indeed, democratic states have been ‘innovators in this area, in that techniques they ﬁrst used appear in many places around the world.’ 32 As a recursive practice that inscribes the history of the US since the colonial foundation of the nation, torture has been ﬁrmly embedded in law; this has worked to render its operations invisible because normative. The enjoyment of torture’s invisibility, however, has been the exclusive privilege of those normative subjects who have rarely ever been its targets: white human- rights-bearing- citizen subjects. For those subjects classiﬁed as non- normative by the state, the state’s exercise of violence has been, on the contrary, only too visible in the context of their everyday lives. Situated in this context, I read the Torture Memos as contemporary codiﬁcations of state violence that must be situated along a continuum of torture practices. Moreover, they must be seen as retrospectively sanctioning torture practices that were already in train: the torture of detainees by US agents is documented as actually pre- dating the writing of the Torture Memos, having ‘begun as early as December 2001,’ thus well prior to the ofﬁcial imprimatur that the Torture Memos would give to such practices. 33 The scripting of the Torture Memos as ‘exceptional’ can only be maintained by effacing the extensive genealogies of US torture that animate and enable its contemporary manifestations – which is not to say that this in any way vitiates the enormity of the violence that they unleashed under the legitimating aegis of law. The spurious legal rationales espoused by the Torture Memos, that effectively suspended the Geneva Conventions, work to cast this same convention as, in the words of Alberto R. Gonzales, White House Counsel, ‘quaint’ and therefore ‘obsolete’ in the context of a ‘new paradigm.’ 34 As the American Bar Association argued, in its condemnation of the Administration’s refusal to include both Taliban and al-Qaeda detainees under the protection of the Geneva Conventions, ‘There is no indication that there is any category of armed conﬂict that is not covered by the Geneva Conventions. The Geneva Conventions apply to the totality of a conﬂict including the regular forces, irregulars (whether or not privileged combatants) and civilians.’ 35 The rhetorical moves deployed by the Administration to render the provisions of the Geneva Conventions ‘quaint’ and ‘obsolete’ functioned to undermine both the credibility and relevance of the Conventions so as to enable the eventual dismissal of much more substantive aspects of the Geneva Conventions: First, some of the language of the GPW [Geneva Conventions Relative to the Treatment of Prisoners of War] is undeﬁned (it prohibits, for example, ‘outrages upon personal dignity’ and ‘inhuman treatment’), and it is difﬁcult to predict with conﬁdence what actions might be deemed to constitute violations of the relevant provisions of GPW. 36 The framing of both ‘outrages upon personal dignity’ and ‘inhuman treatment’ as amorphous and ‘undeﬁ ned’ categories enabled these same categories to be dismissed in their application to both Taliban and al-Qaeda detainees. The voluminous exchange of memos between President Bush and his legal advisers discloses a paper trail driven by the need to construct the elaborate appearance of a legal rationale that will legitimate torture. Foundational to this construction of a legal rationale for torture was the Bybee Memo. Judge Jay S. Bybee, as Legal Counsel to the President, produced the Memorandum for Alberto R. Gonzales, Counsel to the President, articulating the ‘Standards of Conduct for Interrogation under 18 USC §§ 2340–2340A’ in the context of the conduct of interrogations outside of the United States. The Bybee Memo is concerned with deﬁ ning torture in order to establish certain interrogation practices that could be used by US interrogators without risking prosecution for violating the US Torture Statute. 37 Bybee opens his Memo by outlining his legal deﬁ nition of torture: You have asked for our Ofﬁ ce’s views regarding the standards of conduct under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment as implemented by Sections 2340–2340A of the title of the United States Code. We conclude below that Section 2340A proscribes acts inﬂ icting, and that are speciﬁ cally intended to inﬂ ict, severe pain or suffering, whether mental or physical. Those acts must be of an extreme nature to rise to the level of torture within the meaning of Section 2340A and the Convention. We further conclude that certain acts may be cruel, inhuman, or degrading, but still not produce pain and suffering of the requisite intensity to fall within Section 2340A’s proscription against torture. We conclude by examining possible defenses that would negate any claim that certain interrogation methods violate the statute. 38 Putting to the side the examination of a convenient list of ‘possible defenses’ that might offer the perpetrators of torture legal immunity, the Ofﬁ ce of Legal Counsel is here promulgating what would appear to be a ﬁ nely nuanced biopolitical program of torture that pivots on questions of ‘intensity’ and ‘severity.’ Torture is here positioned as only coming into ontological existence when the torturers produce levels of pain that are ‘of an extreme nature.’ Torture is, through this move, circumscribed to an ontological ground that must be, at every turn, shadowed by the possibility of death. The disturbing consequences of this biopolitical circumscription are clinically and lucidly elaborated under Section B of this memo, under the rubric of Severe Pain or Suffering: The key statutory phrase in the deﬁ nition of torture is the statement that acts amount to torture if they cause ‘severe physical or mental pain or suffering’. . . Section 2340 makes plain that the inﬂ iction of pain or suffering per se, whether it is physical or mental, is insufﬁ cient to amount to torture. Instead, the text provides that pain or suffering must be ‘severe.’ The statute does not, however, deﬁ ne the term ‘severe.’ In the absence of such a deﬁ nition, we construe a statutory term in accordance with its ordinary or natural meaning . . . These statutes suggest that ‘severe pain,’ as used in Section 2340, must rise to a similarly high level – the level that would ordinarily be associated with a sufﬁ ciently serious physical condition or injury such as death, organ failure, or serious impairment of bodily functions – in order to constitute torture. 39 Torture, then, is delimited to the inﬂ iction of pain such that it either causes death or, alternatively, places the victim within the fatal parameters of ‘organ failure or serious impairment of bodily functions.’ Any violent action inﬂ icted on the victim that fails to produce potentially fatal results is thereby quarantined from qualifying as torture. In terms of military doctrine, this extraordinary qualiﬁ cation must be seen as enabling and legitimating the wide range of violent acts inﬂ icted, as I discuss in Chapter 2, on the prisoners at Abu Ghraib – as long as they did not result in death. In the wake of this fatal circumscription, torture is ofﬁ cially sanctioned along a continuum of carefully managed intensities, punctuated by levels of pain that, the reﬂ exively disciplined torturer ‘knows,’ must not go beyond that deﬁ ned level of intensity that will place their victim within the domain of possible death. As an ex-CIA interrogator recounts: ‘When I read the legal support for our instructions – the now infamous Department of Justice “torture memo” – it was simply transparent that the justiﬁ cation was a “do- what-you- want” card that swept away in one executive note extensive American and international jurisprudence and proscriptions against torture.’ 40 Articulated in the Bybee Memo is a biopolitical economy of torture that is predicated on an objectifying theatricalization of pain. This objectifying theatricalization of pain demands that the victim produces an intelligible, codiﬁ ed range of signiﬁ cations that will alert the torturer to the fact that they are crossing a seemingly visible and intelligible line in the exercise of violence and the production of pain toward a clearly discernible death. This semiotics of torture produces a body that communicates its intensities of pain to the torturer in an apparently unequivocal manner, signalling through its repertoire of cries, moans, screams or faints whether or not the victim is approaching the irreversible line where they cross over to death. Posited here is the notion of the torturer as a type of legal hermeneut, decoding and interpreting the symptomatology of pain and anguish offered up by the victim’s body. The torturer plies the body and tears, assaults and violates its surfaces and its interior. In the process, the torturer is positioned as semiotically intextuating the body: every injury is available to be interpreted as a sign that will communicate to the torturer precisely where, along this clearly legible continuum of pain (mild to severe), the victim is located. Inscribed within this economy of torture is a double violence: at the same time that the body is violently compelled to perform a repertoire of signs of trauma, the victim must speak the linguistic truth of confession, delivering up a narrative of secrets that fundamentally supplements the truth- in-violence exercised upon the body of the tortured. Within this political economy of torture, the facticity of torture qua torture really only comes into being in the death of the victim. The veridicality of torture, its truth- value, must be seen as ultimately predicated on the production of death. If one pursues the legal rationale of this memo to its logical conclusion, at the moment of the victim’s death, the torturer is ﬁ nally confronted with the incontrovertible evidence of having produced torture as such : the cadaver of the victim bears mute testimony to this fact. Before the unarguable evidence of this fact, the victim had merely been on a trajectory toward torture. Within this violent teleological economy of biopolitical violence, it is only the terminus in death that establishes the fact that torture as such has taken place. Drones and imperial laws of war If the US government produced, in its Torture Memos, a series of legal rationales by which to justify its use of torture, then an equivalent scenario has emerged in the context of its use of drones to kill at- a-distance. In the face of international outcries over the dubious legality of the use of drones to kill targets in foreign states, the US government has issued legal brieﬁngs that argue that the use of drones, in places such as Afghanistan and Pakistan, has been legitimated by both domestic and international law. The US Department of State argues that drone attacks are conducted under formal laws – speciﬁ cally, the Authorization for Use of Military Force (AUMF) that Congress passed days after the 9/11 attacks. In two key sentences that have no expiry date, the AUMF gives the president sole power to use ‘all necessary and appropriate force against nations, groups or persons who committed or aided the attacks, and to prevent future attacks.’ 41 Harold Hongju Koh, Legal Adviser, US Department of Justice, has stated that: it is the considered view of this [Obama] Administration – and it has certainly been my experience during my time as Legal Adviser – that US targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war. The United States agrees that it must conform its actions to all applicable law. As I have explained, as a matter of international law, the United States is in an armed conﬂict with al-Qaeda, as well as the Taliban and associated forces, in response to the horriﬁc 9/11 attacks, and may use force consistent with its inherent right to self- defense under international law. As a matter of domestic law, Congress authorized the use of all necessary and appropriate force through the 2001 Authorization for Use of Military Force (AUMF). These domestic and international legal authorities continue to this day. 42 Koh’s invocation of ‘domestic and legal authorities’ operates to provide the ‘legal guidance’ that will justify the use of drones as lethal technologies that kill at-a-distance. Drone strikes are conducted by both conventional military personnel and the CIA. The CIA, in the execution of its own drone program is, in effect, operating as a paramilitary organization. John A. Rizzo, who served as the CIA’s acting general counsel, helped draft the protocols for such lethal attacks. Requests for targeted killings are sent to the CIA’s Counterterrorism Center, northern Virginia, ‘where lawyers – there are roughly 10 of them, says Rizzo – write a cable asserting that an individual poses a grave threat to the United States. The CIA cables are legalistic and carefully argued. If the targeted killing is approved, the general counsel signs off and adds the term “concurred.” Rizzo has been quoted as boasting “How many law professors have signed off on a death warrant?” ’ 43 As Dana Priest and William Arkin have observed: ‘Rizzo, the lawyers at the CTC [Counterterrorism Center], and the head of the National Clandestine Service (formerly the CIA Directorate of Operations) would act as judge and jury on these terrorism ﬁ les’; the targeted subject was thus effectively killed ‘without a hearing, without giving the targeted man a chance to refute the information or even to admit guilt and surrender.’ 44 In the words of one former senior US intelligence ofﬁ cial, the CIA drone program has turned the agency ‘ “into one hell of a killing machine” . . . Blanching at his choice of words, he quickly offered a revision: “Instead say, ‘one hell of an operational tool’.”’ 45 The kill lists that constitute the drone targeted killing program have, indeed, expanded so as to now include US citizens. The US government has assassinated three of its native- born citizens – Anwar al-Awlaki, his 16-year old son Abdulrahman al-Awlaki, and Samir Khan – through drone strikes in Yemen. Awlaki was actually called in to advise the Pentagon after the 9/11 attacks ‘on how to promote moderate over extreme Islam. But as has since become evident, whatever advice those clerics gave to the US war- planners was not followed. Two murderous invasions and occupations, replete with atrocities against innocent civilians,’ have incited hundreds of Muslims, including Anwar Awlaki, to take up arms against the US. 46 In the current deployment of drone strikes to execute its own citizens, US government lawyers have argued that ‘the president should have unreviewable authority to kill Americans.’ 47 The deployment of drones across different nations against which the US is not at war, including Pakistan, Yemen, Somalia and Libya, has been ofﬁ cially legitimated by a ‘domestic policy of anticipatory self- defense.’ 48 The policy of ‘anticipatory self- defense’ can be seen as President Obama’s re- codiﬁ cation of the Bush imperial doctrine of ‘preventive war’; both policies evidence the continued re- animation of the notion of US exceptionalism. 49 Anticipatory self- defence offers the US administration carte blanche to conduct war wherever it ‘anticipates’ its suspect targets might lurk. As I discuss in Chapter 6, under the Obama administration Bush’s ‘war on terror’ has morphed into a ‘war against al-Qaeda.’ 50 This shift in nomenclature is signiﬁcant as it enables the exercise of war wherever suspect al-Qaeda targets supposedly lurk, regardless of geography, national boundaries or sovereignties. In this unbounded arena of war, drones emerge as the perfect weapons that silently transgress the very things that the US government is so preoccupied in protecting on its own homeland: national sovereignty and security. Drones have been represented by the administration as ideal attack weapons ‘in dealing with terrorist groups in ungoverned places of the world.’ 51 The Orientalist trope of the lawless and ungoverned other has lost none of its force or salience in the opening decade of the twenty-ﬁrst century as the customary way of legitimizing imperial incursions in places such as Afghanistan or Pakistan. 52 Indeed, the international law doctrine of territorial sovereignty is conveniently reduced, by the US administration’s apologists, to a mere ‘diplomatic ﬁction’ that cannot be equally applied to all nation- states. Such apologists duly discount the possibility of drone attacks in, for example, ‘London or Paris’ as what is justiﬁ ed in the ungoverned regions of Somalia or Yemen is a different matter applied to places under the rule of law such as our friends and allies. The United States is not going to undertake a targeted killing in London. The diplomatic ﬁction of the ‘sovereign equality’ of states makes it difﬁcult to say, as a matter of international law that, yes, Yemen is different from France, but of course that is true. 53 Postcolonial legal scholars have drawn attention to the historical foundation of the discipline of international law in the violent moment of the colonial encounter. In his genealogical tracking of the historical emergence of international law in Francisco de Vitoria’s jurisprudential work on the relations between imperial Spain and its Indian colonies, Antony Anghie notes that ‘The vocabulary of international law, far from being neutral, or abstract, is mired in this history of subordinating and extinguishing alien cultures.’ 54 The Orientalist logic that enables the discursive practices of imperial intervention is perhaps nowhere more graphically evidenced than in the US military’s neologism ‘AfPak’ to describe the ‘zone of hostilities’ in which it is conducting its current war. 55 AfPak, in keeping with its Orientalist determinations, homogenizes and collapses two different nations, Afghanistan and Pakistan, into one undifferentiated amalgam. The conceptual ﬂ attening and erasing of difference that is operative in this geopolitical neologism functions to legitimate the conduct of war across the terrain of both sovereign nations, Afghanistan and Pakistan, as though they were one. The imperial position that argues that target nations can have their sovereignty violated with impunity – because their territory is undifferentiated, malleable and always ‘open’ to the entitlements of empire – is clearly evidenced by current US doctrine: ‘Wherever the enemy goes, we are entitled to follow and attack him as a combatant. Geography and location – important for diplomatic reasons and raising questions about the territorial integrity of states, true – are irrelevant to the question of whether it is lawful to target under the laws of war; the war goes where the combatant goes.’ 56 In the words of one US senator, ‘This is a worldwide conﬂ ict without borders.’ 57 More accurately, this is a worldwide conﬂ ict in which the borders of the target nations of the Global South are rendered irrelevant through the US state’s exercise of imperial power, even as its own borders are defended through processes of militarized securitization. Out- law no- bodies The use of law to justify the torture and killings that the state can perpetrate is predicated on the understanding that the state’s target subjects are, as the embodiment of ungovernable violence, at once anathema to and beyond law and thus outside of any ethical consideration. A documentary history of torture in the United States evidences the recursive marking of the state’s black and colored subjects as, in Thomas Jefferson’s words, ‘out of the protection of the laws.’ 58 The torture and killing of such subjects, Denise Ferreira da Silva writes, does ‘not unleash an ethical crisis because these persons’ bodies and the territories they inhabit always- already signify violence.’ 59 In the diffuse and malleable schema of the war on terror, the loaded descriptors ‘terrorist,’ ‘enemy combatant,’ ‘sand nigger,’ ‘Muslim,’ ‘insurgent,’ ‘of Middle Eastern appearance’ and so on – all identify subjects who always- already signify violence in advance of the fact of actually having committed any violent acts. As embodiments of violence, they are out-laws situated beyond due processes of law. **As**, in da Silva’s words, ‘**no- bodies’** ‘**with/out legality**,’ 60 **they are mere biological matter that can be exterminated without compunction. As** I examined **in** my discussion of the Torture Memos and **drone legal briefs**, **the liberal democratic state uses law** in order **to present an ofﬁcial front of due process** and ordered governance, **thereby legitimating its monopoly on violence**. At the same time, this use of law is also inscribed with an aporetic contradiction: the liberal democratic state at once legislates and executes law in order to be seen as just in its violent conduct, even as, in places such as the secret black site prisons, as I discuss in Chapter 5, it places its target subjects beyond the reach of law. Giorgio Agamben elaborates on this aporia in his theorization of ‘zones of exception’ that are constituted by the ‘inexecution’ of law. 61 ‘One of the paradoxes of the state of exception,’ writes Agamben, ‘lies in the fact that in the state of exception it is impossible to distinguish transgression of the law from the execution of law.’ 62 It is in the zones marked as states of exception that Agamben famously situates the ﬁgure of ‘bare life’ that can be killed with impunity. Reviewing the contemporary biopolitical state, Agamben decisively concludes that the ‘exception everywhere becomes the rule.’ In other words, the space of the camp and the ‘unpunishability’ of killing bare life have interpenetrated the very fabric of the contemporary state so as to assume normative dimensions. 63 As I discuss below, outside spaces of exception (black site prisons) are already inside the US state (Immigration and Customs Enforcement prisons).

#### Legal solutions merely mask sovereign power and legitimatize exclusion

Kohn, 6 -- University of Florida political science assistant professor

[Margaret, "Bare Life and the Limits of the Law," Theory & Event, 9:2, 2006, muse.jhu.edu/journals/theory\_and\_event/v009/9.2kohn.html, accessed 9-12-13, mss]

Giorgio Agamben is best known for his provocative suggestion that the concentration camp – the spatial form of the state of exception - is not exceptional but rather the paradigmatic political space of modernity itself.  When Agamben first made this claim in Homo Sacer (1995), it may have seemed like rhetorical excess. But a decade later in the midst of a permanent war on terror, in which suspects can be tried by military tribunals, incarcerated without trial based on secret evidence, and consigned to extra-territorial penal colonies like Guantanamo Bay, his characterization seems prescient. The concepts of bare life, sovereignty, the ban, and the state of exception, which were introduced in Homo Sacer, have exerted enormous influence on theorists trying to make sense of contemporary politics. Agamben recently published a new book entitled State of Exception that elaborates on some of the core ideas from his earlier work. It is an impressive intellectual history of emergency power as a paradigm of government. The book traces the concept from the Roman notion of iustitium through the infamous Article 48 of the Weimar constitution to the USA Patriot Act. Agamben notes that people interned at Guantanamo Bay are neither recognized as prisoners of war under the Geneva Convention nor as criminals under American law; as such they occupy a zone of indeterminacy, both legally and territorially, which, according to Agamben, could only be compared to the Jews in the Nazi Lager (concentration camps) (4). Agamben's critique of the USA Patriot Act, at least initially seems to bare a certain resemblance to the position taken by ACLU-style liberals in the United States. When he notes that "detainees" in the war on terror are the object of pure de factorule and compares their legal status to that of Holocaust victims, he implicitly invokes a normative stance that is critical of the practice of turning juridical subjects into bare life, e.g. life that is banished to a realm of potential violence. For liberals, "the rule of law" involves judicial oversight, which they identify as one of the most appropriate weapons in the struggle against arbitrary power. Agamben makes it clear, however, that he does not endorse this solution. In order to understand the complex reasons for his rejection of the liberal call for more fairness and universalism we must first carefully reconstruct his argument. State of Exception begins with a brief history of the concept of the state of siege (France), martial law (England), and emergency powers (Germany). Although the terminology and the legal mechanisms differ slightly in each national context, they share an underlying conceptual similarity. The state of exception describes a situation in which a domestic or international crisis becomes the pretext for a suspension of some aspect of the juridical order. For most of the bellicose powers during World War I this involved government by executive decree rather than legislative decision. Alternately, the state of exception often implies a suspension of judicial oversight of civil liberties and the use of summary judgment against civilians by members of the military or executive. Legal scholars have differed about the theoretical and political significance of the state of exception. For some scholars, the state of exception is a legitimate part of positive law because it is based on necessity, which is itself a fundamental source of law. Similar to the individual's claim of self-defense in criminal law, the polity has a right to self-defense when its sovereignty is threatened; according to this position, exercising this right might involve a technical violation of existing statutes (legge) but does so in the name of upholding the juridical order (diritto). The alternative approach, which was explored most thoroughly by Carl Schmitt in his books Political Theology and Dictatorship, emphasizes that declaring the state of exception is the perogative of the sovereign and therefore essentially extra-juridical. For Schmitt, the state of exception always involves the suspension of the law, but it can serve two different purposes. A "commissarial dictatorship" aims at restoring the existing constitution and a "sovereign dictatorship" constitutes a new juridical order. Thus, the state of exception is a violation of law that expresses the more fundamental logic of politics itself. Following Derrida, Agamben calls this force-of-law. What exactly is the force-of-law? Agamben suggests that the appropriate signifier would be force-of-law, a graphic reminder of the fact that the concept emerges out of the suspension of law. He notes that it is a "mystical element, or rather a fictio by means of which law seeks to annex anomie itself." It expresses the fundamental paradox of law: the necessarily imperfect relationship between norm and rule. The state of exception is disturbing because it reveals the force-of-law, the remainder that becomes visible when the application of the norm, and even the norm itself, are suspended. At this point it should be clear that Agamben would be deeply skeptical of the liberal call for more vigorous enforcement of the rule of law as a means of combating cruelties and excesses carried out under emergency powers. His brief history of the state of exception establishes that the phenomenon is a political reality that has proven remarkably resistant to legal limitations. Critics might point out that this descriptive point, even if true, is no reason to jettison the ideal of the rule of law. For Agamben, however, the link between law and exception is more fundamental; it is intrinsic to politics itself. The sovereign power to declare the state of exception and exclude bare life is the same power that invests individuals as worthy of rights. The two are intrinsically linked. The disturbing implication of his argument is that we cannot preserve the things we value in the Western tradition (citizenship, rights, etc.) without preserving the perverse ones. Agamben presents four theses that summarize the results of his genealogical investigation. (1) The state of exception is a space devoid of law. It is not the logical consequence of the state's right to self-defense, nor is it (qua commissarial or sovereign dictatorship) a straightforward attempt to reestablish the norm by violating the law. (2) The space devoid of law has a "decisive strategic relevance" for the juridical order. (3) Acts committed during the state of exception (or in the space of exception) escape all legal definition. (4) The concept of the force-of-law is one of the many fictions, which function to reassert a relationship between law and exception, nomos andanomie. The core of Agamben's critique of liberal legalism is captured powerfully, albeit indirectly, in a quote from Benjamin's eighth thesis on the philosophy of history. According to Benjamin, (t)he tradition of the oppressed teaches us that the 'state of exception' in which we live is the rule. We must attain a concept of history that accords with this fact. Then we will clearly see that it is our task to bring about the real state of exception, and this will improve our position in the struggle against fascism. (57) Here Benjamin endorses the strategy of more radical resistance rather than stricter adherence to the law. He recognizes that legalism is an anemic strategy in combating the power of fascism. The problem is that conservative forces had been willing to ruthlessly invoke the state of exception in order to further their agenda while the moderate Weimar center-left was paralyzed; frightened of the militant left and unwilling to act decisively against the authoritarian right, partisans of the rule of law passively acquiesced to their own defeat. Furthermore, the rule of law, by incorporating the necessity of its own dissolution in times of crisis, proved itself an unreliable tool in the struggle against violence. From Agamben's perspective, the civil libertarians' call for uniform application of the law simply denies the nature of law itself. He insists, "From the real state of exception in which we live, it is not possible to return to the state of law. . ." (87) Moreover, **by masking the logic of sovereignty, such an attempt could actually further obscure the zone of indistinction that allows the state of exception to operate.** For Agamben, law serves to legitimize sovereign power. Since sovereign power is fundamentally the power to place people into the category of bare life, the law, in effect, both produces and legitimizes marginality and exclusion.

### Coalitions

**Third, Their authors have it backwards – the state of nature is produced, not replaced, by sovereign authority.**

**Prozorov, 9** – Professor of Political Science at the University of Helenski

(Sergie, “The Appropriation of Abandonment: Girgio Agamben on the State of Nature and the Political”, February 15th, International Studies Association, http://www.allacademic.com/meta/p313215\_index.html)

In contrast to Hobbes’s mythologization of the state of nature, Agamben’s goal is to restore the state of nature to its status of the product of sovereign power, a contingency that is an effect of sovereign decision as opposed to a contingency that calls for sovereign decision. Thus, what Agamben does is not dehistoricise Hobbes’s state of nature, but rather restore reality to this ahistorical figure by dismantling the spatiotemporal distinction between the state of nature and the Commonwealth and recasting the state of nature as a ‘principle internal to the City’. ‘The political does not replace nature; it creates it. The state from which Hobbes’s sovereign rescues us is the state into which Agamben’s sovereign plunges us.’ (Rasch 2007, 101) The state of nature is constituted by the sovereign decision that, by treating the civil state as dissolved, suspends the operation of its internal laws and norms that define it as bios and thereby reduces the existence of its population to ‘bare life’, which differs from the natural zoe that human beings have irrevocably left behind precisely because it only comes into existence by being stripped of all positive attributes of its bios (Cf. Agamben 1998, 181. See also Mills 2005, 219; Ziarek 2008, 90). In this condition, the Covenant is treated as void and the subject is simultaneously abandoned by the sovereign, i.e. left without his protection, and abandoned to the sovereign’s unlimited exercise of violence. Homo sacer is thus in a strict sense the remnant not of the state of nature but of the covenant that is no longer in force by the decision of the sovereign. Rather than being ‘pre-juridical’, the state of nature is then graspable as an instance of the non-juridical within the juridical, a constitutive outside of a juridical order or its inherent transgression (see Ojakangas 2004, 23-29; Rasch 2000). In Foucault’s terms (2003, 93), instead of being spatially and temporally transcended in the establishment of the Commonwealth, the state of nature remains a ‘permanent backdrop’ of every constituted authority. Let us now address the way in which this anomic backdrop enters and survives in the nomos of the Commonwealth.

## 1NR

### 2NC – Practical

#### Internment based on Korematsu precedent is inevitable unless it is repudiated [Antonin Scalia chuckles to himself]

Ilya Somin, 2/8/2014. Professor of Law at George Mason University School of Law. “Justice Scalia on Kelo and Korematsu,” The Volokh Conspiracy, http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/08/justice-scalia-on-kelo-and-korematsu/.

In a recent speech in Hawaii, Supreme Court Justice Antonin Scalia made some interesting predictions about two of the Supreme Court’s most notorious decisions:Kelo v. City of New London (2005), which ruled that government can condemn private property and give it to other private owners to promote “economic development,” and Korematsu v. United States (1944), which upheld the internment of over 100,000 Japanese-Americans in concentration camps during World War II.

On Kelo, Scalia reiterated his 2011 prediction that the decision will eventually be overruled, stating that it “will not survive.” Kelo was a closely divided 5-4 decision (Scalia voted with the dissenters) that generated an unprecedented political backlash across the political spectrum, and has also been repudiated by every state supreme court which has considered the question of whether to adopt it as a guide to the interpretation of their state constitutions’ public use clauses. In 2011, Justice John Paul Stevens, the author of the Kelo majority opinion, conceded that he made a significant, “embarrassing to admit” error in his analysis of precedent (though he continues to defend the result on other grounds).

It is difficult to say whether Scalia’s prediction about Kelo will turn out to be correct. In the short run, a complete reversal is unlikely, because none of the five majority justices in Kelo has since been replaced by a successor likely to vote the other way in a similar future case. But history does show that closely divided, unpopular decisions are more likely to be overruled than lopsided and relatively uncontroversial ones. Justice Stevens’ admission might potentially further undermine Kelo’s reputation, thereby increasing the odds of a reversal.

On Korematsu, Scalia unequivocally stated that the ruling was “wrong,” thereby differing with the small but noteworthy group of conservatives who have defended the decision in recent years, such as Judge Richard Posner and columnist Michelle Malkin. But he also predicted that a similar internment might be upheld in the future:

“But **you are kidding yourself if you think the same thing will not happen again**,” he said.

He used a Latin expression to explain why. “Inter arma enim silent leges … In times of war, the laws fall silent.”

“That’s what was going on — the panic about the war and the invasion of the Pacific and whatnot,” Scalia said. “That’s what happens. It was wrong, but I would not be surprised to see it happen again — in time of war. It’s no justification but it is the reality.”

There is some validity to this pessimistic prediction. Courts have often let the government get away with unconstitutional actions in time of war. On the other hand, the Court has been more assertive in wartime in recent years, striking down several Bush administration policies during the War on Terror. If an unconstitutional internment enjoys overwhelming support from political elites and the general public, as happened during World War II, the Court may well not act. But it is more likely to do so in a case where public and elite opinion are at least substantially divided, as happened during the Bush Administration or the Korean War, when the Court curbed the Truman administration in the famous Youngstown case. **In my view, the errors of Korematsu are less likely to be repeated if the Court clearly repudiates that ruling**. There are also other good reasons to explicitly overrule the Japanese internment cases.

#### Even if they win its still on the books, its pariah status alone is sufficient to prevent its use

Harris, 11 – University of Pittsburgh law professor

[David, "On the Contemporary Meaning of Korematsu: “Liberty Lies in the Hearts of Men and Women”," Winter 2011, Missouri Law Review 76.1, law.missouri.edu/lawreview/files/2012/11/Harris.pdf, accessed 12-31-13]

IV. CONCLUSION The common perception that Korematsu is dead is just plainly incorrect. In fact, Korematsu remains very much alive, and in the post-9/11 world, there are many who want it fully rehabilitated and ready for use. They want the central principle in the case, what Justice Jackson called a “loaded weapon,” readily available in this new era in which we face a new threat from a homogenous, external group. This forces Americans to ask whether something like the Japanese American internment could ever happen again. Given what the nation knows now, the question has two answers. Yes, the law and the Constitution could permit this to happen again – put differently, the Constitution would not stop it. But the other answer comes from Judge Learned Hand’s instruction that, in the end, Americans need more than the Constitution to make them free. Real freedom – liberty itself – must come from the people themselves, from their hearts. The reaction to the government’s actions in the wake of the terrorist attacks of September 11, 2001 tells us that, unlike in 1944, we can see that liberty does indeed live in the hearts of Americans. The actions of Japanese Americans, first among those to caution against the potential for government excess, tell us much about how we have taken Judge Hand’s ideas to heart and internalized them. It appears Americans have learned something from Korematsu – at least enough of them have – that when the specter of internment arises, some Americans speak up and say no. And the lesson of history is that, when some people stand against injustice, others will gather courage from them and may follow. That is what will prevent another internment, even though Korematsu remains alive on the pages of the law books. What Judge Hand said was true: when liberty is alive in the hearts of men and women, it is bigger and more important than the law.240

### 2NC – Legal

#### Korematsu has no legal precedent:

#### A. Brown and other civil rights cases overwrote Korematsu

Green, 10 -- Temple Law School associate professor

[Craig, "Ending the Korematsu Era: A Modern Approach" August 2010, works.bepress.com/cgi/viewcontent.cgi?article=1002&context=roger\_craig\_green, accessed 12-28-13]

This “loaded weapon” idea is orthodox in analysis of Korematsu as a racist morality play. The passage is cited as evidence that Supreme Court precedents really matter, and that tragically racist errors retain their menacing power throughout the decades.271 Students are reminded that Korematsu has never been directly overruled, thereby inviting imagination that Korematsu itself is a loaded weapon just waiting for a President to grasp and fire.272 This conventional approach is incomplete. As we have seen, the first and decisive precedent supporting World War II’s racist policies was not Korematsu but Hirabayashi; thus, Jackson himself helped to “load” the doctrinal “weapon” over which he worried just a year later.273 Jackson’s willingness to eviscerate Hirabayashi in Korematsu only exemplifies (as if anyone could doubt it) that no Supreme Court decision can fiat a legal principle “for all time.”274 Past cases can be overruled, disfavored, ignored, or reinterpreted if the Court finds reason to do so, and this is effectively what has happened to Korematsu and Hirabayashi themselves **in the wake of Brown, the civil rights era, and other modern history**.275 Korematsu was a direct “repetition” of Hirabayshi’s racism for “expand[ed]” purposes, yet it only launched these two cases farther toward their current pariah status.276

#### B. War on terror cases

Green, 10 -- Temple Law School associate professor

[Craig, "Ending the Korematsu Era: A Modern Approach" August 2010, works.bepress.com/cgi/viewcontent.cgi?article=1002&context=roger\_craig\_green, accessed 12-28-13]

Analyzing the Korematsu era also illuminates recent Supreme Court precedent. Starting in 2004, the Court has issued a historically unmatched number of rulings that limit executive war power.14 Each of these cases was decided narrowly, on very specific legal grounds, with little explicit effort to contradict Korematsu-era precedents or upset the constitutional status quo.15 Nevertheless, I propose that the Court’s War on Terror cases are antithetical to an essential principle of Korematsu era: that courts are institutionally unable to second-guess presidential claims of military necessity. Hidden among the recent cases’ technicalities, we shall see that the modern Court has repeatedly set aside presidential claims about what the military needs to keep our country safe. My approach suggests that these rulings mark an important repudiation of what the Korematsu era stands for, and that they likewise offer safeguards against future executive abuse if they can be understood more deeply.

#### C. *Adarand* decision repudiates the constitutionality of Korematsu

Conkle, 13 -- Indiana University law professor

[Dan, Robert H. McKinney Professor of Law, "Correction: Review of important new \*essay\* by Peter Irons -- and a forwarded comment from him," 3-13-13, lists.ucla.edu/pipermail/conlawprof/2013-March/042191.html, accessed 12-30-13]

Hasn't the Court **effectively repudiated the constitutionality** of the Japanese internment in dicta already? I'm thinking of the following passage from Adarand Constructors v. Pena, 515 U.S. 200, 236 (1995), which seems at least to repudiate the underpinnings of Korematsu: Korematsu demonstrates vividly that even "the most rigid scrutiny" can sometimes fail to detect an illegitimate racial classification, compare Korematsu, 323 U.S. at 223 ("To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race "), with Pub. L. 100-383, § 2(a), 102 Stat. 903-904 ("These actions [of relocating and interning civilians of Japanese ancestry] were carried out without adequate security reasons . . . and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership"). Any retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future.

#### D) Legal and social doctrine

Muller, 2 – UNC Distinguished Professor of Law in Jurisprudence and Ethics

[Eric, "12/7 and 9/11: War, Liberties, and the Lessons of History," West Virginia Law Review, 104 W. Va. L. Rev. 571, Spring 2002, HeinOnline, accessed 12-31-13]]

Justice Jackson, as was his habit, put things rather more gracefully and more memorably. Jackson did not believe himself to be in a position to secondguess the military's assessment that the wholesale exclusion of Japanese, but not Italian or German, Americans was necessary. 69 For that very reason, he did not think it right or wise for the Court to review the order for conformity with the Constitution. "A military commander may overstep the bounds of constitutionality," Jackson wrote, "and it is an incident."70 But when the Court reviews that decision and approves it, "that passing incident becomes the doctrine of the Constitution." And the danger of that, for Justice Jackson, lay not in the present but in the future. Once approved by the Court in the name of the Constitution, the military order acquires "a generative power of its own, and all that it creates will be in its own image."'', The Court's Korematsu opinion, said Jackson, had "for all time validated the principle of racial discrimination in criminal procedure and of transplanting American citizens.,' 72 That principle, Jackson worried, would "lie[ ] about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need., 73 Perhaps in the government's policies of the last five months, we can discern some evidence that Justice Jackson may have predicted wrongly. The fact is that the Court's opinion in Korematsu has not had the generative power that Justice Jackson feared. It is true that the Korematsu decision has never been formally overruled, and some worry that this means some on the Court might still see the case as good law.74 **I think not**. First, the main reason that Korematsu has not been overruled is that happily-and contrary to Justice Jackson's prediction-nothing like the facts of Korematsu have arisen in the last sixty years. In order to overrule a precedent, as distinct from merely disapproving it, that precedent must stand squarely in the way of the Court's achieving a desired outcome in a new case. Thus, the Court has not overruled Korematsu primarily because it has not needed to. But more importantly, to the extent that Korematsu stands at all today, it stands as a deeply discredited decision. **Eight of the nine** currently sitting Justices on the Court have either written or concurred in opinions describing Korematsu as an error75 -even as spectacular an error as the Court's Dred Scott decision. 76 It seems safe to say that the majority opinion in Korematsu would not command a single vote today, let alone a majority. The sixty years that passed between December 7, 1941, and September 11, 2001, were eventful ones in the legal and social development of race and ethnicity in this country. Ten years after Korematsu came the Court's stunning and unanimous decision in Brown v. Board of Education.7 That, in turn, was followed by decades of effort by the federal courts to implement Brown and dismantle a deeply entrenched system of racial separation and subordination in public education. The political branches joined the effort twenty years after Korematsu with the passage and signing of the 1964 Civil Rights Act,78 barring public and private discrimination in a wide variety of settings. The military, which clung to racial segregation during World War II, transformed itself into an integrated institution. The stories of people other than European whites came for the first time into broad public view, in grade school textbooks, on television, and in the movies, and these stories began to weave themselves into the national fabric. And, perhaps most symbolically for our purposes today, Korematsu itself was gutted in the political process when Congress passed and President Reagan signed into law the Civil Liberties Act of 1988.79 That Act confirmed the findings of an independent commission that the wartime internment of Japanese Americans had been unjustified by military necessity as well as illegal,80 called for the President to issue a formal apology to the surviving internees, and authorized a $20,000 token redress payment to each of them. To be sure, the story of these past sixty years has not been one of relentless progress on racial matters. Deep difficulties remain, and racial and ethnic differences continue to be flashpoints of controversy and even violence in our society. But the restraint in the government's response thus far to the trauma of September 11 might suggest an important change in the legitimacy of racial and ethnic assumptions in our policymaking. The general responsible for ordering the eviction and incarceration of Japanese Americans from the West Coast in 1942 defended his decision with the memorable quip that "a Jap's a Jap.,' s Any effort at distinguishing citizen from alien, or loyal from disloyal, was, for the general, pointless. His comment caused little outcry, because the public knew what he meant, and most agreed. That is the sort of reasoning, if you wish to call it that, that sixty years of time and change have pushed to the very fringes of legitimate policymaking discourse, or perhaps beyond them. To be sure, the Court's opinion in Korematsu did leave a loaded weapon lying about, as Justice Jackson feared. **But the** **passage of six decades** may have **emptied** much of **the** **ammunition from its chambers**.

### Anthro

#### The 1AC’s conception of race both turns solvency and links to our K

**Heydt 2010**

(Sam, “AMERICAN ABATTOIRS”, 12-20, http://samheydt.wordpress.com/2010/12/20/224/, DOA: 8-18-11, ldg)

Patriarchy, slavery and the social matrix of speciesism emerged in tandem to one another from the same region that fathered agriculture in the Middle East during the Chalcolithic Age. Sumer, now modern Iraq, was the first civilization to engage in core agricultural practices such as organized irrigation and specialized labor with slaves and animals. They raised cattle, sheep and pigs, used ox for draught their beast of burden and equids for transport (Sayce 99).The knowledge to store food as standing reserve meant migration was no longer necessary to survive. The population density bred social hierarchies supported at its base by slaves (Kramer 47). In Sumer, there were only two social strata’s to belong to: lu the free man and arad the slave (Kramer 47). Technologies such as branding irons, chains and cages that were developed to dominate animals paved way for the domination over humans too. The “human rule over the lower creatures provided the **mental analogue** in which many political and social arrangements are **based**” (Patterson 280). Caged and castrated, slaves were treated **no different from chattel**. Thousands of years later, the tools developed in the Middle East for domestication were used by the Europeans during colonization to shackle slaves. “When the European settlers arrived in Tasmania in 1772, the indigenous people seem not to have noticed them…By 1830 their numbers had been reduced from around five hundred to seventy-two. In their intervening years they had been used for slave labour and sexual pleasure, tortured and mutilated. They had been hunted like vermin and their skins had been sold for a government bounty. When the males were killed, female survivors were turned loose with the heads of their husbands tied around their necks. Males who were not killed were usually castrated. Children were clubbed to death.” (Gray 91). This horrific account illustrates how the indigenous people of Tasmania were enslaved, skinned and slaughtered by the Europeans. Meanwhile across the globe, the trans-Atlantic slave trade was at its peak in the 18th century. Africans were taken from their native land, branded, bred, and sold as property. Linguistically these acts of violence and exploitation **are tied to animals**- branded, skinned, slaughtered, sold. Be that as it may, “**as long as men massacre animals, they will kill each other”** (Pythagoras in Patterson 210). Racism, colonialism, anti-Semitism and sexism **all stem from the same systems of domination that initially subjugated animals.** Until we cease to exploit living beings as resources, the threat of man being stripped of his humanity looms. Although we cringe at the inhumane actions of our ancestors, the scale and efficiency of murder and oppression has only advanced, while the notion of ‘human’ remains increasingly obscured.

### 2NC – Defense

#### No offense- Korematsu discussion does nothing to advance anti-racism

Green, 10 -- Temple Law School associate professor

[Craig, "Ending the Korematsu Era: A Modern Approach" August 2010, works.bepress.com/cgi/viewcontent.cgi?article=1002&context=roger\_craig\_green, accessed 12-28-13]

Most often, Korematsu is studied as a “negative” precedent, to show how doctrine can be abused in the service of racial prejudice.63 Yet even as an illustration of how racial issues should not be treated under the Constitution, Korematsu deserves secondary prominence. The Court’s decisions in Dred Scott, the Civil Rights Cases, and Plessy all incorporate governmental racism more directly,64 and of course the most robust evidence of racial oppression lies altogether outside federal courts, amidst lynchings, de facto segregation, voter intimidation, employment abuse, and suchlike.65 Thus, although the “internment cases” are a horrible instance of American racism, their segment of that narrative is incomplete and unrepresentative. Korematsu also sheds little light on current debates over racial profiling, affirmative action, disparate impact, and the treatment of non-racial groups like homosexuals.66 In simplest terms, **if Korematsu were studied** today **simply for its contribution to equal protection jurisprudence, its doctrinal importance would be mild** indeed.

### 2NC Frontline

#### Repudiating Korematsu rehabilitates white supremacy by removing the stigma from the history of white supremacy.

#### Outweighs the affirmative- rehabilitation creates a new more resilient racism and is the only way contemporary white supremacy can operate. Mass internment based on race is no longer possible post-Jim Crow- white supremacy has to rely on rehabilitation to justify contemporary oppressions.

#### Takes out solvency- repudiation is a formula for forgetting wrongs- the affirmative rewrites history so that white power structures are forgiven for correcting the wrongs of the past. Good intentions about internment are irrelevant and ignore racialized power structures that determine the meaning of the plan- that’s the 1NC Cho evidence.

#### AND- Re-writing Korematsu erases the warning sign- keeping it on the books is more effective at preventing repetition

Sheridan, 13 -- San Francisco Law School constitutional law professor

[Robert, "Correction: Review of important new \*essay\* by Peter Irons -- and a forwarded comment from him," 3-13-13, lists.ucla.edu/pipermail/conlawprof/2013-March/042186.html, accessed 12-30-13]

So we have this legal principle which is still law, decided in as much good faith as the Court possessed, despite, one hopes, being unaware of the fraudulent record that produced the case. Is the way to correct the error to accept an appeal of a case that is now moot? Or does this open the way to further such attempted corrections? In NYT v Sullivan, as I recall, the Court commented on the Alien and Sedition Acts allowing the deportation of Aliens by presidential order and forbidding adverse comment on certain elected officials, like the president (Adams) but not the vice-president (Jefferson), the proponents disliking Jefferson. What the Court said in Sullivan was that the Alien and Sedition Acts had been deemed unconstitutional in the court of public opinion or the court of history, I forget which. I thought that a nice way of chiming in that a portion of our spotty history of doing right was wrong. No moot or otherwise nonjusticiable appeal. Do we really want the Court to serve as a court of historical review of decisions that time has not respected? What would it say about Dred Scott that hasn't already been said? Suppose there were some points in a decision like that which weren't controversial except that they'd been included in a dreadful decision. Does the Court cherry pick and eliminate the bad points and endorse the rest? Or does this embroil them, and us as citizens, in even more tangle? The parties in the Internment cases seem to have been recognized officially as unfortunate wartime victims of a fear that over-rode fairness and due process. But **the decisions themselves remain as monuments** to what happens when fear overwhelms us, which it does from time to time. They may be **performing a public service as glaring examples of what not to do**, warning signs of "Don't go there," which we would be foolish to ignore. Would a successful appeal **remove the warning flags?** It occurs to me to look to warning signs, like what the Nazis did, and what we did, in our worst moments, for their informative value. Or we could erase the markers and pretend that we're not prone to the weaknesses of the rest of mankind. Exceptional beings that we are, this is a tendency that has been remarked upon…

#### Keeping Korematsu on the books is an effective warning against repeating the past- the stigma of the mistake is what is powerful

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On the question of erasing memorials to bad memory, not advised, we now have examples of terrible things done that have been most consciously memorialized in order to provide a lesson. Ever since decided, **these cases have served as a** sort of **living memorial** in just about every Conlaw class in the land annually ever since. Every lawyer, at least, knows something about them.

That must be worth preserving. Perhaps one has spoken to some now old-timers about wartime on the West Coast, as I occasionally have. One, who was in law school at the time, expressed what I assume to be a widely held attitude, that there were no regrets over interning the AJAs as these people were sometimes called when not being called much worse, alas. Wartime doesn't bring out our best in terms of humane feeling, especially when we start confusing categories, Americans of Japanese Ancestry and citizens or subjects of the Empire of Japan, for example. We don't have too many memorials of our mistakes. I'd be careful about removing any of the few we have.

1. Quiroz-Martínez, Julie, “Missing Link,” *Colorlines* 4:2 (2001). Available online: (http://www.arc.org/C\_Lines/CLArchive/story4\_2\_01.html). [↑](#footnote-ref-1)
2. Conflicts arise between the native born black population and black immigrant groups as well, however black immigrants do not have available to them the racial capital of non-black immigrants of color. They find themselves, in other words, consistently folded back into the spaces of homegrown blackness, as it were, and subject to the same protocols of violence, especially in subsequent generations. It gets worse, not better, as is the case with most immigrants. Moreover, a good number of the most sensational conflicts between “blacks and immigrants,” as the dichotomy is typically drawn, involve black immigrants against other non-black immigrant groups. Black immigrants do not, then, so much disrupt the paradigm as demonstrate why it is correct, at this level, to speak of an irresolvable discrepancy between blackness and immigrant status. [↑](#footnote-ref-2)
3. Robinson, Greg, *By Order of the President: FDR and the Internment of Japanese Americans* (Cambridge: Harvard UP, 2003). [↑](#footnote-ref-3)
4. Deffeyes, Kenneth, *Hubbert’s Peak: The Impeding World Oil Shortage* (Princeton: Princeton UP, 2003); Michael Klare, *Resource Wars: The New Landscape of Global Conflict* (New York: Owl Books, 2002); Peter Dale Scott, *Drugs, Oil, and War: The United States in Afghanistan, Columbia, and Indochina* (New York: Rowman & Littlefield, 2003). [↑](#footnote-ref-4)
5. Estevedeordal, Antoni et al, eds., *Integrating the Americas: FTAA and Beyond* (Cambridge: Harvard UP, 2004); Peter Hakim & Robert Litan, eds., *The Future of North American Integration: Beyond NAFTA* (Washington, D.C.: The Brookings Institution, 2000); John Ravenhill, *Asian Pacific Economic Cooperation: The Construction of Pacific Rim Regionalism* (New York: Cambridge UP, 2001). [↑](#footnote-ref-5)
6. Goldberg, Jeffrey, “The Color of Suspicion,” *The New York Times Magazine* (July 20, 1999). Available online: (http://www.nytimes.com/library/magazine/home/19990620mag-race-cops.html). [↑](#footnote-ref-6)
7. Massey, Douglass, “The Residential Segregation of Blacks, Hispanics, and Asians, 1970-1990,” Gerald Jaynes, ed., *Immigration and Race: New Challenges for American Democracy* (New Haven: Yale UP, 2000). [↑](#footnote-ref-7)
8. Wilson, William Julius, *The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy* (Chicago: Univ. of Chicago Press, 1987). [↑](#footnote-ref-8)
9. Human Rights Watch, “Race and Incarceration in the United States: Human Rights Watch Press Backgrounder” (2002). Available online: (http://www.hrw.org/backgrounder/usa/race/). This fact is mediated by longstanding US imperial interventions across Latin America for the purposes of regulating drug production, distribution, and consumption. See Curtis Marez, *Drug Wars: The Political Economy of Narcotics* (Minneapolis: Univ. of Minnesota Press, 2004), for a detailed treatment of this history. [↑](#footnote-ref-9)
10. See, for instance, Elizabeth Martínez, *De Colores Means All of Us: Latina Views for a Multi-Colored Century* (Boston: South End Press, 1998). [↑](#footnote-ref-10)
11. Of course, this dogma is aided and abetted by certain black leaders as well. Take, for instance, the chastising statement made recently by the longtime civil rights activist, Rev. Richard Lowery, on the occasion of the Immigrant Workers Freedom Ride: “We may have come over on different ships but we’re all in the same damn boat now.” Chris McGann, “Busloads of Activists,” *Seattle Post-Intelligencer* (July 8, 2003). Available online: (http://seattlepi.nwsource.com/local/129926\_freedom08.html). [↑](#footnote-ref-11)
12. See, for instance, Hasham Aidi, “Jihadis in the Hood,” included in this volume. [↑](#footnote-ref-12)
13. Hartman, Saidiya, “The Position of the Unthought: An Interview with Frank Wilderson,” *Qui* *Parle* 13:2 (2003). [↑](#footnote-ref-13)
14. Something similar can be said about hip hop as a multiracial culture of *resistance*. The ubiquity of “nigga” as a term of address among non-blacks, including many whites, may provide a potent enjoyment of one’s defiant sense of marginalization – degradation measured by one’s proximity to blacks, literally or figuratively – but it has only contributed to the *loss* of clarity, not a refinement, and the *blunting* of analysis, not an expansion. No doubt, hip hop brings people together, particularly young people – “one love” – but so do football games and Young Democrats meetings. If we are being honest, we must concede that, as a rule, hip hop promotes political obscurantism, even when self-described as “conscious.” Political radicalism in this realm is exceptional. [↑](#footnote-ref-14)