Exceptional Security Practices, Human Rights Abuses, and the Politics of Legal Legitimation in the American “Global War on Terror”

by

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A thesis submitted in conformity with the requirements for the degree of Doctor of Philosophy
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Abstract:

Given the contradictory reality of a well-developed human rights and humanitarian regime alongside extensive human rights abuses committed in the “Global War on Terror,” the dissertation asks how and why law has shaped contemporary security policy. Focusing on the American case over time, I examine this problem empirically by tracing the changing impact of both international and domestic legal and normative constraints on torture and interrogation, detention and trial, and surveillance practices, culminating in post-9/11 counterterrorism doctrine. I find that policy makers have increasingly violated rules with the adoption of controversial security and intelligence policies, but have simultaneously employed legalistic arguments to evade responsibility for human rights abuses. Using contrasting realist, decisionist, liberal, and constructivist accounts of the nature of state compliance with norms and law found in International Relations and legal scholarship, the dissertation theoretically explains this outcome and with it, law’s ability to moderate national security practice. In so doing, I propose an original reading of law as a permissive constraint, which challenges us to rethink paradigmatic assumptions in a way that accommodates both strategic and normative factors and recognizes the role of practice in giving content to rules.
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Table of Contents

CHAPTER 1: INTRODUCTION: THE PROBLEM OF EXCEPTION

1.1 INTRODUCTION ............................................................... 1
1.2 AMERICAN EXCEPTIONALISM: COMPLIANCE WITHOUT RATIFICATION ........................................ 1
1.3 EXCEPTIONALISM REVERSED: RATIFICATION WITHOUT COMPLIANCE ........................................... 3
1.4 THE HISTORICAL CONTEXT: OLD WINE IN NEW BOTTLES? ................................................................. 11
1.5 SUMMING UP: THE PUZZLE OF LEGAL LEGITIMATION ................................................................. 15

CHAPTER 2: THEORETICAL FRAMEWORK .................................. 18

2.1 THE LITERATURE: HISTORICAL, CONTEMPORARY, AND NORMATIVE APPROACHES .......... 18
   2.1.1 Historical Intelligence and Security Studies ................................................................. 18
   2.1.2 Contemporary Journalistic and Popular Writing .......................................................... 21
   2.1.3 Normative and Legal Debates ....................................................................................... 22
2.2 THE THEORETICAL CONTEXT: BRINGING IR AND IL BACK IN ......................................................... 24
   2.2.1 Defining Law and Norms ............................................................................................... 27
2.3 REALISM AND DECISIONISM: LAW AS PERMIT ............................................................................ 31
   2.3.1 Realism: The Politics of Survival .................................................................................. 31
   2.3.2 Decisionism: The Politics of Sovereignty ..................................................................... 36
2.4 LIBERALISM AND CONSTRUCTIVISM: LAW AS CONSTRAINT ...................................................... 45
   2.4.1 Liberalism: The Politics of Interests .............................................................................. 46
   2.4.2 Constructivism: The Politics of Ideas ........................................................................... 52
2.5 METHODOLOGY ......................................................................................................................... 63
2.6 CASE SELECTION ................................................................................................................................ 68
2.7 SUMMARY OF FINDINGS ........................................................................................................... 71

CHAPTER 3: TORTURE ................................................................ 77

3.1 INTRODUCTION ................................................................................................................................... 77
3.2 LEGAL TORTURE AND OPEN PRACTICE ...................................................................................... 78
   3.2.1 European Torture .............................................................................................................. 78
   3.2.2 Early American Torture ................................................................................................. 83
3.3 THE EMERGENCE OF THE ANTI-TORTURE REGIME ........................................................................ 85
   3.3.1 Normative Transformation ............................................................................................. 85
   3.3.2 International Prohibitions ............................................................................................... 87
   3.3.3 Domestic Institutionalization ......................................................................................... 92
3.4 ILLEGAL TORTURE AND THE TRANSFORMATION OF PRACTICE .................................................. 98
   3.4.1 Torture as Exception ........................................................................................................ 98
   3.4.2 Covert and Proxy Torture ............................................................................................... 105
   3.4.3 Unauthorized Torture .................................................................................................... 112
3.5 9/11 AND THE REDEFINITION OF TORTURE ................................................................................ 120
   3.5.1 The New Demand for Torture ....................................................................................... 121
   3.5.2 Echoes of Exception and Denial .................................................................................... 122
   3.5.3 A New Approach to Legality ......................................................................................... 128
   3.5.4 The Torture Memos ....................................................................................................... 135
   3.5.5 Torture in the GWOT .................................................................................................... 143
3.6 LEGITIMACY, ACCOUNTABILITY, AND IMMUNITY ............................................................................ 153
3.7 CONCLUSION ...................................................................................................................................... 160
List of Tables

TABLE 1: SUMMARY OF HYPOTHESES .................................................................62

TABLE 2: REGIME VARIATION .................................................................71
CHAPTER 1

INTRODUCTION: THE PROBLEM OF EXCEPTION

1.1 Introduction

On the 2004 United Nations International Day in Support of Victims of Torture, President Bush delivered the following statement:

[T]he United States reaffirms its commitment to the worldwide elimination of torture. The non-negotiable demands of human dignity must be protected without reference to race, gender, creed, or nationality. Freedom from torture is an inalienable human right, and we are committed to building a world where human rights are respected and protected by the rule of law.

To help fulfill this commitment, the United States has joined 135 other nations in ratifying the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture and undertake to prevent other cruel and unusual punishment in all territory under our jurisdiction. American personnel are required to comply with all U.S. laws, including the United States Constitution, Federal statutes, including statutes prohibiting torture, and our treaty obligations with respect to the treatment of all detainees…

These times of increasing terror challenge the world. Terror organizations challenge our comfort and our principles. The United States will continue to take seriously the need to question terrorists who have information that can save lives. But we will not compromise the rule of law or the values and principles that make us strong. Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere.¹

Meanwhile in Iraq, the greatest scandal of the “Global War on Terror” (GWOT) was unfolding. Only a few weeks earlier, the Abu Ghraib torture photographs made their first appearance on 60 Minutes. How to reconcile President Bush’s lofty statements about “human dignity” and “the rule of law” with the reality of the gruesome images that simultaneously traveled around the world poses a genuine puzzle. Was he flat out lying? Was he engaging in Orwellian doublespeak? Alternatively, was he truthfully explaining

American policy as he understood it, despite the actions of a few “bad apples”? What exactly did he mean by “commitment” and “tolerate”?

The paradoxical reality of human rights abuses committed against the backdrop of rhetorical commitment to human rights protections constitutes one of the most troubling dimensions of the politics of the post-9/11 world. Closer investigation reveals that, time and again, American policy makers have in fact authorized interrogation practices that constitute cruel, inhuman, and degrading treatment, and sometimes torture; have held detainees indefinitely without adequate access to legal process at Guantánamo Bay and various Central Intelligence Agency (CIA) “black sites”; and have directed warrantless domestic spying—all in apparent contravention of legal and normative constraints. If the United States was an authoritarian country, a repressive dictatorship, this would not be especially surprising. In such cases, national security is seldom influenced by rights considerations. However, as President Bush’s statement demonstrates, the United States is not such a case. Rather, it aspires to be recognized as a highly legalistic rights-committed polity.

Accounting for the relationship between normative and legal standards and violations of human rights committed by the United States in the Global War on Terror lies at the heart of this study. More specifically, it asks how and why the particular character of constraint in the contemporary era has shaped approaches to controversial security and intelligence practices such as torture, detention and trial, and surveillance. By examining the development of these three practice areas across time in the American case in the context of their corresponding legal regimes, the study explores how differing modalities of rule breaking interact with dominant legal and normative structures. Put
slightly differently, this is not primarily an investigation of why actors violate human rights. Rather, it examines how actors with a preference for engaging in abuses go about perpetrating them, how they try to “get away with it” in a given context, and the factors that determine their success.

The primary empirical finding of the study is that approaches to human rights violations have altered with changes in the structure of constraint. When prohibitive frameworks are lacking, abuses are committed publically and overtly. In other cases, norms and laws do limit the ability of states to openly embrace torture, indefinite detention and unfair trials, and warrantless surveillance; nevertheless, exceptional derogations are justified through appeals to necessity and discriminatory attitudes. In yet other contexts, policy makers prefer to violate rules covertly and deny their actions. In contrast, I find that the post-9/11 period is characterized by a distinct strategy of rule violation—the use of legalistic argumentation to redefine human rights and rationalize abusive practices. The study situates this approach within the current structure of constraint and reflects on its implications for how International Relations and International Law scholars theorize the impact of law and norms on states. The dissertation concludes with a theoretical discussion of law, arguing it functions as a contradictory “permissive constraint” on contemporary American security practice.

1.2 American Exceptionalism: Compliance Without Ratification

The gap between U.S. practice and rhetoric has often been examined within the rubric of American exceptionalism. This approach highlights the U.S. government’s dualistic tendency to force rules on others while simultaneously rejecting the application of external rules to itself. In doing so, it eschews the multilateral constraints developed to
moderate state behaviour. Recently, American exceptionalism has been widely used to explain U.S. human rights policy.

Traditionally, American exceptionalism denotes a belief, held largely by Americans, in America’s unique status as a country founded on republicanism. While exceptionalism has wavered between exemplary and missionary variants and been contested by isolationists and internationalists, “Three main elements of exceptionalist belief have remained relatively consistent throughout American history: that the U.S. is a special country with a special destiny; that it is separate and different from the rest of the world, especially Europe; and that it will avoid the laws of history that determine the rise and fall of all great nations.”

Rooted in Puritan millennial Calvinism’s vision of a shining “city upon a hill,” exceptionalists argue that the distinct founding ethos of the United States has given it a special role in world politics to promote democracy and spread freedom. This sense of divine missionary righteousness has influenced successive leaders.

Despite these core traits, American exceptionalism is a relatively elastic concept. “The theme of American exceptionalism is ‘para-ideological’ because it is a crystallization of a set of related ideas which explain the world and the U.S. role therein,” notes Siobhán McEvoy-Levy. “It does not have the coherence of an ideology nor has it been codified as a means towards some definable political end, but it underwrites much

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of U.S. foreign policy.” Accordingly, its mark can be found in diverse doctrines ranging from Manifest Destiny to Woodrow Wilson’s drive to “make the world safe for democracy” to the fervent anti-communism of the Cold War to H.W. Bush’s New World Order to the neo-conservative advocacy of America’s “benevolent hegemony.”

While the “para-ideology” of American exceptionalism emphasizes the virtuous implications of American foreign policy for the rest of the world, scholars have noted its contradictory character. On the one hand, America has shown tremendous leadership in the construction of international regimes. From the signing of the 1941 Atlantic Charter to the 1944 creation of the Bretton Woods regime to the 1945 founding of the United Nations, Americans have played a central role in the construction of the post-World War II international order. In the form of Robert Jackson’s Nuremberg Tribunals or Eleanor Roosevelt’s UN Declaration of Human Rights, it once seemed as though the United States would become the prime global champion of the rule of law, international cooperation, multilateralism, and global liberalism.

On the other hand, however, a rather different picture emerges sixty years on. In the course of the intervening decades, U.S. policy makers have rejected, failed to sign, unsigned, or failed to ratify numerous international treaties including the Statute of the International Criminal Court, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the Migrant Worker’s Convention, the Covenant on Economic and Social Rights, the Landmines Convention, and the Kyoto Protocols (not to mention numerous treaties such as the Genocide Convention that the United States took decades to ratify, and then only with extensive reservations). The United States withdrew from the United Nations

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6 Ibid.
Educational, Social, and Cultural Organization in 1984, eventually rejoining in 2002, has abandoned the Anti-Ballistic Missile Treaty, maintained domestic practices such as capital punishment for juveniles and the mentally disabled (at stark variance with International Court of Justice rulings), bypassed Chapter VII of the Security Council in favour of covert and preventive war doctrines, and delayed payment of UN dues on multiple occasions.

Michael Ignatieff typologizes three major ways in which this exceptionalism manifests itself:

First, the United States signs on to international human rights and humanitarian law conventions and treaties and then exempts itself from their provisions by explicit reservation, non-ratification, or non-compliance. Second, the United States maintains double standards: judging itself and its friends by more permissive criteria than it does its enemies. Third, the United States denies jurisdiction to human rights law within its own domestic law, insisting on the self-contained authority of its own domestic rights tradition.7

However, neither isolationism nor unilateralism can account for U.S. policy. Despite the aforementioned exemptions and rejections of international mechanisms, the United States remains highly engaged with global politics. Although arguably in the process of hegemonic decline, it continues to assert itself as a global superpower—ideologically, militarily, and economically. It supports international financial institutions such as the World Bank and International Monetary Fund, participates in the World Trade Organization, is active in the G8, NATO, and various regional organizations, wages foreign wars in the name of democracy and human rights from Kosovo to Iraq to Libya, supports ad hoc war crimes tribunals in Yugoslavia and Rwanda, promotes rule of law

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projects around the world, and continues to utilize UN sanctions and UN Security Council diplomacy as an important dimension of its foreign policy.

In light of these incongruities, theoretical investigation has tried to account not simply for U.S. rejectionism on the one hand or internationalism on the other, but a seemingly paradoxical state of affairs:

What is exceptional here is not that the United States is inconsistent, hypocritical, or arrogant. Many other nations, including leading democracies, could be accused of the same things. What is exceptional, and worth explaining, is why America has both been guilty of these failings and also been a driving force behind the promotion and enforcement of global human rights. What needs explaining is the paradox of being simultaneously a leader and an outlier.\footnote{Ibid., 2.}


The case of the Global War on Terror, however, demands a somewhat different focus. It is in many ways, as Koh argues, a case of double standards. But even more so, the problem of post-9/11 politics is one of \textit{ratification without compliance}.\footnote{\textit{Ibid.}, 2.}
1.3 Exceptionalism Reversed: Ratification Without Compliance

Controversial post-9/11 interrogation, detention and trial, and surveillance practices present problems of compliance, not ratification or reservations, nationalism or isolationism. They are not premised on the rejection of standards per se—rather, they violate them. The United States is party to multiple international and domestic laws that forbid torture and abuse, require due process, and promote privacy. Moreover, these constraints are domestically institutionalized or, in some instances, are solely domestic. In these cases, exceptions derogate from the domestic legal and normative order. In constitutional democracies, this type of exception is often associated with a wartime invocation of emergency prerogative or state of exception by the executive. Therefore, contemporary American exceptionalism is more complex and more troubling than America’s traditionally ambivalent attitude towards international treaties.

The following paragraphs briefly establish what some of these international and domestic laws and norms are. The international legal architecture and American domestic law explicitly prohibit many of the practices utilized in the Global War on Terror. The 1949 Geneva Conventions (ratified by the United States in 1955) and their subsequent Additional Protocols create binding standards for the conduct of war, including protections for prisoners of war and detained civilians. The 1966 International Covenant on Civil and Political Rights (ratified by the United States in 1992 with extensive reservations) creates non-derogable protections from “torture” and “cruel, inhuman or degrading treatment or punishment,” slavery, genocide, and infringements on freedom of
religion, thought, and conscience. The 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (ratified by the United States in 1994, again with extensive reservations) prohibits “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted” for the purposes of extracting confessions or coercion. It further prohibits deportation to countries when there is risk of torture.

United States law provides additional substantive protections. The Uniform Code of Military Justice creates standard rules of conduct for American soldiers. The 1996 War Crimes Act allows prosecution of U.S. nationals for violations of the Geneva Conventions committed inside or outside the United States, including violations of Common Article 3 which prohibits “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; … outrages upon personal dignity, in particular humiliating and degrading treatment.” The 1994 Federal Anti-Torture Statute further mandates prosecution of U.S. nationals or non-nationals in the United States for the crime of torture. The Alien Tort Claims Act permits civil liability claims against perpetrators of human rights abuses committed abroad. The U.S. Constitution protects Americans from unreasonable search and seizure, from cruel and unusual punishment, and guarantees due process and the right to a fair trial. In both war and peace, both

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citizens and non-citizens are governed by a well-developed international and domestic human rights regime.

Accordingly, it is fair to label several major policies of the GWOT non-compliant. These include the use of torture and other cruel, inhuman and degrading treatment in the interrogation of suspects; the extraordinary rendition of captives to the torture dungeons of dictatorial allies; the indefinite detention of “unlawful enemy combatants” at Guantánamo Bay and CIA black sites without access to Geneva Conventions protections or due process in the American legal system; the innovation of military commissions to prosecute these prisoners without normal legal safeguards; the authority given to the National Security Agency (NSA) to spy on American citizens in contravention of its traditional foreign intelligence mandate; and the cooperation between intelligence agencies and commercial telecom companies in monitoring communications without court warrants.

Understanding this post-9/11 exceptionalism has important ramifications for real world politics. America’s security practices are hardly the most vicious or brutal in the world, but they have considerable significance beyond their impact on the individuals involved. At the level of world politics, human rights derogation by the world’s preeminent superpower influences the behaviour of other states, creating a more permissive global environment for further violations. At the level of U.S. national security, exceptionalism generates blowback. Evidence of human rights abuses such as the photographs of detainees at Guantánamo and Abu Ghraib have been a prime recruiting tool for Al Qaeda and a source of growing extremist anti-Americanism around

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the world.\textsuperscript{16} Practices such as torture, moreover, are profoundly morally troubling. Other things kill more people and cause pain, but the relation of total domination of interrogator over victim inherent in the act of torture offends the basic precepts of human dignity.\textsuperscript{17} The erosion of due process and privacy threatens to undermine the rule of law, the edifice upon which American democracy rests. These implications make understanding the nature and dynamics of contemporary exceptionalism relevant and pressing.

\textbf{1.4 The Historical Context: Old Wine in New Bottles?}

As noted above, American exceptionalism is present in a variety of issue areas ranging from human rights to environmental protection to arms control. However, security and intelligence methods such as torture, indefinite detention and unfair trials, and warrantless surveillance have been commonly practiced across time and space and thus provide for especially interesting insights. Indeed, intelligence and related irregular security practices are arguably inherently prone to exception in liberal democracies. This is not because intelligence agencies or agents are uniquely nefarious, but because the nature of the work they do. At the level of intelligence data collection, spying often involves a degree of law breaking and norm violation. Human intelligence requires creating false identities, false documents, blackmail, bribes, and general deceitfulness, which, even if authorized by home governments, violate most target countries’ domestic laws. Eliciting confessions and information from non-compliant people often involves mental and physical coercion. Identifying threats may require group profiling, infiltration,

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and entrapment. Signals intelligence requires surreptitious eavesdropping, wiretapping, and satellite reconnaissance that undermine both personal privacy and national sovereignty. The nature of these methods means that they do not conform to normal due process standards in criminal courts. The idea of peacetime foreign intelligence, even in its benign forms and even when pursued by highly ethical individuals, is frequently somewhat exceptional. This allows for the study of exceptional practices in a variety of different legal and political contexts.

Seen in this historical light, post-9/11 security practices are not entirely novel. The 9/11-centricism of popular policy debates often obscures the long history of exceptions to the rule of law found in American security practice. This is important because the extraordinary events of 9/11 are not in themselves a sufficient explanation for the policies in question. Although the specific character of post-9/11 security practices is particular to the context, there is no clear correlation between the resort to human rights abuses and 9/11. It may be a reason, but is not itself the cause.

The modern history of American security and intelligence highlights the varying ways in which abuses may occur. Historical exposition demonstrates that shifting regulatory frameworks do influence the pursuit of exceptional practices. I explore these changes in detail in the following chapters, but in brief, a clear transition is evident between a time when practices were considered legal or acceptable, at least when applied to certain populations, facilitating their relatively open practice, to an era of increased restrictions. The consolidation of the international human rights regime in the mid-twentieth century changed the equation, pushing practices underground. The early Cold War was marked by covert action and “plausible deniability,” evincing awareness of
these growing restraining structures. As rules grew thicker and threat declined, many controversial practices lay dormant. The 9/11 attacks prompted their revival, but in an altered format.

Several factors distinguish the post-9/11 environment as a period worthy of independent investigation. Long time intelligence journalist Thomas Powers describes traditional American intelligence exceptionalism in the following terms:

Think of intelligence organizations as the instrument of a nation’s id—the desire of a government to do certain things without having to explain, defend, or justify them. Fairness, justice, restraint and respect for the rights of others may be important terms in the public language of international politics, but when a foreign government takes action that seems seriously hostile...then the United States government, or any other government with its back up, may decline to turn the other cheek, may seek recourse outside of official remonstrance and international law, and may seek to impose its will in secret with methods it would never confess in public…The black arts are called black for a reason.¹⁸

In contrast, post-9/11 exceptions deviate from the historical pattern of plausible deniability. While secrecy has remained important, methods such as torture, indefinite detention, and warrantless surveillance have become subject to intense legitimation efforts—efforts that have been partially successful. Instead of crude denial, there have been justifications. These justifications, found in memoranda produced by the Bush, and to some extent Obama administrations, have taken on a notable legalistic form.

Under this new paradigm, interrogation practices once farmed out to proxies and publicly denied have become official government policy, vetted by lawyers at the top echelons of the government. Prisoners who would once most likely have been “disappeared” or assassinated by unsavoury U.S. allies in far away conflict zones have been publically taken into American custody, paraded through the spectacle of

Guantánamo Bay, and subjected to convoluted trial proceedings. Manifestly illegal domestic surveillance has been subject to elaborate attempts at post hoc legalization. This trend towards the legal rationalization of and immunization for human rights violations distinguishes the post-9/11 period from the exceptionalism of the past. It raises several questions: How and why have contemporary structures of legal constraint succeeded or failed in shaping security policy? How and why have legalistic rationales, generally considered an anathema to human rights abuses, been employed in their pursuit? What does this say about the ways in which actors can “get away with it” today?

Understanding the nature of this justification process and the reasons behind it are central to comprehending the dynamics of the new security environment. They highlight how American security strategy has attempted to engage international law, but also how legal and normative structures have reciprocally shaped it in turn. The resulting constellation of outcomes challenges both optimistic narratives about the progress of international law, humanitarianism, and human rights towards a cosmopolitan global order and pessimistic projections of resurgent forms of unconstrained anarchy and old style predatory imperialism.

As scholars have long noted, the relationship between law, social order, and violence can take on a variety of characteristics. The legal form is not always a vehicle for liberal norms. Slavery and segregation were once legal in America, as was apartheid in South Africa. The Nazis ran a highly legalistic regime. Law can be both a source of oppression and of emancipation, of particularism and universalism. Between the extremes of a morally principled “law’s empire” and “empire’s law” reflective only of sovereign
prerogative power\textsuperscript{19} lies a complex grey zone. This study aims to account for the nature of this space in regards to contemporary justifications for exceptional security practices.

1.5 Summing Up: The Puzzle of Legal Legitimation

As suggested in the previous discussion, the dissonance between noble human rights rhetoric and the reality of American security and intelligence practices in the Global War on Terror is plainly evident. Traditionally, the problematic of American hypocrisy and double standards has been examined through the framework of American exceptionalism, which emphasizes U.S. reticence towards international law despite its ongoing commitment to progressive values. Post-9/11 developments suggest the need to turn this puzzle on its head. While professing commitment to the international rule of law, U.S. policy makers have authorized security and intelligence practices that seem on face value to violate treaties and legal commitments. Historical investigation, moreover, highlights that this is not a new problem. The shadowy intelligence world has always produced more than its fair share of exceptions. What appears new is the approach to legitimation. Why and how this shift has occurred is the central problematic of this study.

To elucidate this puzzle, the dissertation focuses on three American intelligence and security practices: torture and controversial interrogation methods, detention and trial procedures, and intelligence surveillance. It poses three questions—two empirical and one theoretical. The first asks: What impact do changes in the structure of legal and normative constraint over time have on state approaches to these three human rights violating security practices? By comparing approaches to practice diachronically, we can

better understand how the characteristics of different historical epochs shape the conduct of human rights abuses.

The second question of the study is: To what extent, and if so how have specific rule structures in the contemporary period shaped the American approach to post-9/11 human rights abuses? Despite their interconnectedness, each of the three practice areas in question belongs to a distinct and complex legal tradition. They therefore provide an opportunity to examine whether the degree of universality, inclusivity, and scope of varying legal regimes contributes to their ability to shape state approaches to human rights violations. By comparing the synchronic impact of law in different practice areas, we can better understand how the design of legal rules may contribute to forms of compliance and non-compliance. The third question posed is: How can we account for these diachronic and synchronic observations in light of International Relations and International Law theory? As outlined in the next chapter, IR and IL paradigms hold competing assumptions about the impact of law and norms on practice. The case of the GWOT provides an excellent opportunity to probe theoretical claims.

To sum up, this study explores the interaction between law and norms and approaches to human rights violating practices across time in order to gage the impact of general structures of constraint, and across practice areas in order to gage the impact of specific types of regimes. Insights from major IR and IL paradigms are then employed to generate theoretical arguments. The dissertation proceeds in several parts. Chapter 2 reviews dominant approaches in the literature and advocates bringing International Relations and International Law theory back in as an analytical tool. It discusses methodology and case selection in greater detail. Chapters 3, 4, and 5 respectively focus
on the historical development of torture, detention and trial, and surveillance practices in the context of changing constraints. Finally, the last two chapters summarize the empirical and theoretical findings. Chapter 6 synthesizes and explains the impact of law and norms on practice, while Chapter 7 analyzes the reciprocal effect of practice on law and norms. For however we explain contemporary U.S. policy, it is clear it will have long lasting, international implications.
CHAPTER 2
THEORETICAL FRAMEWORK

2.1 The Literature: Historical, Contemporary, and Normative Approaches

There are numerous strands of scholarship that help address the relationship between normative and legal constraints and human rights violations in one way or another, elucidating partial pieces of the puzzle of why U.S. policy makers have attempted to legalize security practices that violate human rights commitments.

2.1.1 Historical Intelligence and Security Studies

There is a large descriptive and analytical literature on American intelligence and security. Included are ideographic studies, which are light on explanatory arguments about the emergence of practices and doctrines, but which nonetheless provide narrative overviews of developments that serve as a helpful basis for theorizing. A variety of texts summarize the structure of major intelligence agencies and provide useful guides to the major subsets of intelligence (human and technical), the nature of the intelligence cycle, the complex relationship between various branches of the intelligence community, and the workings of covert operations.¹ A rich historical literature has documented the history of intelligence agencies² and examined a multitude of specific cases ranging from the

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Cuban Missile Crisis to the Soviet Estimate to the Vietnam War. Historians have explored themes such as the role of intelligence in war, the changing nature of intelligence in light of contemporary political trends, and the question of intelligence ethics. Handbooks and edited volumes have compiled a huge variety of thematic issues and comparative case studies. A series of insider autobiographies provide interesting, although undoubtedly limited and self-serving insights. The CIA has an extensive in-house research operation that has produced hundreds of manuscripts from analysts that are available electronically. For a critical perspective, the online National Security Archive is an invaluable source of documents and analysis.

When this intelligence literature does depart from description and moves into the realm of explanatory theory it tends to focus on questions of efficacy and reform. In particular, the question of intelligence failure has been prominent. From the surprise

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attack on Pearl Harbor to the Twin Towers, how states can improve their early warning systems and thus prevent catastrophe has preoccupied analysts.\textsuperscript{10} Intelligence failures leading to the Iraq war and false assumptions about WMD have been closely examined.\textsuperscript{11} In explaining failure, scholars have tended to favour psychological and bureaucratic decision making approaches derived from classic foreign policy models.\textsuperscript{12} Insofar as intelligence scholars have addressed the governance and regulation of intelligence as a distinct theme, they have tended to do so through use of an institutional frame that elaborates the structure of Congressional intelligence oversight.\textsuperscript{13} Legal scholars have also engaged the topic, surveying the changing legislative restraints on intelligence and national security and the general state of war and counterterrorism law.\textsuperscript{14}

Despite this extensive range of material, intelligence scholars have argued the field is greatly in need of theoretical elaboration and broader integration with social science research.\textsuperscript{15} Amy Zegart suggests the secretive nature of the intelligence enterprise

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paired with the disciplinary norms of political science, which emphasize broad causal
claims and paradigmatic theorizing not always compatible with the study of intelligence,
contributes to its relative neglect. Therefore, while the obstacles to theorizing
intelligence are real, there are substantial opportunities to explore new themes and
present innovative analyses that integrate political, legal, and social theory.

2.1.2 Contemporary Journalistic and Popular Writing

Throughout the post-9/11 period, a stream of popular literature has emerged to
provide invaluable insights into U.S. conduct in the Global War on Terror. Advocacy
lawyers and investigative journalists have been especially helpful in documenting current
events such as the status of prisoners at Guantánamo Bay, the infamous abuses at Abu
Ghraib prison, the secret CIA flights that have illegally transported kidnapped prisoners
to U.S. allies in the Middle East, and the overall approach to counterterrorism adopted
by the Bush administration. A diverse array of scholars has contributed to an emerging

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literature on torture practices—both contemporary and historical. Anthologies analyzing the so-called “torture memos” have revealed executive authorization for interrogation tactics amounting to torture, or at least inhuman and degrading treatment. On the home front, reporters and historians have revealed cooperation between intelligence agencies and commercial telecom companies in monitoring communications outside of traditional legal safeguards. This literature is an excellent source of descriptive and analytical material, but often lacks an overall theoretical framework.

2.1.3 Normative and Legal Debates

The post-9/11 period has also seen the emergence of a large public policy literature, largely written by constitutional and international law scholars in defence of or in opposition to U.S. government policy. There is an exponentially increasing body of work that examines the nuances and critiques the direction of legal developments. Some

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scholars have defended the concept of the “ticking bomb” scenario to justify torture. Proponents of the “unitary executive” theory have argued for executive leeway. Scholars have advocated reforms to legal structures to improve intelligence. Wrestling with the problem of the tradeoff between security and liberty, a variety of political theorists have suggested prescriptions for balancing the two in ways that address the challenges of emergency but maintain liberal political principles. Meanwhile, others have explored the assumptions underlying the concept of emergency tradeoffs and argued in defence of the maintenance of rule of law, even in times of crisis.

Human rights organizations such as Amnesty International, Human Rights Watch, Human Rights First, the Center for Constitutional Rights, and the American Civil Liberties Union have provided a multitude of critiques of the direction of security.
This highly normative literature addresses the most contentious issues in the Global War on Terror. However, its normativity often means that it is more concerned with judgment and policy advocacy than explanation.

This diverse literature provides helpful, interdisciplinary perspectives. From historians we get excellent background on relevant subject matter, from journalists important revelations about current events, and from legal and political scholars contrasting policy prescriptions. However, historians are often too descriptive, journalists too anecdotal, and public intellectuals and lawyers too normative. The result has been a lack of rigorous accounting for the emergence and nature of controversial post-9/11 security policy. Instead, practices are described, debated, and analyzed, but rarely explained within the rubric of social scientific analysis. This study aims to remedy this omission by examining the efficacy of International Relations and International Law theory for explicating the nature of the post-9/11 American embrace of human rights violations. In doing so, it complements and builds on the aforementioned literatures.

2.2 The Theoretical Context: Bringing IR and IL Back In

In order to better explain America’s open adoption of abusive practices in the Global War on Terror, the study employs International Relations theory, along with related International Law approaches. This literature contains multiple, often competing accounts of the role of legal and normative constraints in shaping state behaviour. As discussed in the introductory chapter, American post-9/11 counterterrorism policy is

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puzzling in light of the United States’ rhetorical commitment to human rights. By engaging theories that purport to address this problem, we can gage whether existing approaches are sufficient to explain contemporary events or whether new theoretical lenses are necessary.

There is a notable lack of IR theory present in the literature on post-9/11 security practices. Several factors account for this omission. IR theory is designed to account for relations between states, however the Global War on Terror is a conflict between state and non-state actors. IR posits that international politics is something that takes place outside of domestic borders, yet current counterterrorism practices traverse boundaries and are deeply implicated in internal state-society relations. Finally, IR theory typically assumes international military and economic conflicts are the primary vehicles of war, but the GWOT is largely conducted via intelligence agencies and non-traditional forms of security practice. Indeed, many observers quite validly suggest that it is not a war at all. Accordingly, the literature on terrorism and counterterrorism has often been confined to comparative case studies and domestic legal scholarship.

This dissertation fills this gap by refocusing IR and related IL theory on the Global War on Terror. It contends that despite their unconventional nature, the practices in question are forms of statecraft that have evolved in the context of an international security challenge. Their adoption reflects decisions about the conduct of war, insofar as policy makers understand themselves to be engaged in one, about *jus in bello*, and about foreign policy. These decisions are embedded in debates over the correct role and application of international law. They are therefore appropriate subjects for IR theory. Moreover, while some of the practices analyzed have been conducted within the domestic
sphere, they are premised on the construction of dichotomies—citizen/foreigner, war/crime, POW/illegal combatant, etc. While traditionally defined in terms of geographic states, IR offers significant conceptual insights about the relationship between inside and outside, the internal political community and the external frontier. These boundaries can and have emerged within states, not merely between them.

IR theory can be broken down in a variety of ways. Broadly, scholars have noted paradigmatic distinctions between rationalism and reflectivism, or rationalism and interpretivism, between “neo-utilitarianism” and constructivism, or between an instrumental “logic of consequences” and a normative “logic of appropriateness.” Three major “isms” dominate the IR theory landscape: realism, liberalism, and constructivism. The first two foreground power and interest, while the third provides an identity and norm-driven account of politics. Each provides a distinct framework through which to understand the problem of human rights abuses and derogation from legal obligations. To these three paradigms, I add a fourth non-traditional approach to understanding the relationship between law and power. Although originally rooted in theories of the state rather than the international sphere, the decisionist politics of Carl Schmitt and subsequent interlocutors have formed one of, if not the primary framework, through which contemporary critical political theorists and an increasing number of IR and IL scholars have interpreted post-9/11 American policy. By identifying the underlying

causal ontology of the decisionist reading, we can utilize it as an interpretive theory and thus engage this extensive and clearly relevant literature.

The following section draws from IR and IL scholarship to review the main assumptions of each of the four aforementioned schools of thought. It surveys their understandings of international law, the sources of compliance and non-compliance, and the nature and significance of legitimation and justification strategies. In particular, it explores the expectations of each paradigm regarding the first two questions posed in the introduction:

1. What impact do changes in the structure of legal and normative constraint over time have on state approaches to human rights violating security practices?

2. To what extent, and if so how do specific rule structures in the contemporary period shape state approaches to human rights violating security practices?

The paradigms are organized into two groups—those that understand law as a weak constraint on states or even a permit to engage in whatever policies are preferred (realism and decisionism) and those that see law, for either rationalist or normative reasons, as an effective check on state behaviour (liberalism and constructivism).

### 2.2.1 Defining Law and Norms

Before discussing different theoretical approaches to the impact of rules on states, it is necessary to briefly define terms like law and norms. A minimalist, generally positivist definition of law is offered as an opening, but not closing basis for this study.

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Law in this most basic sense is a system of binding rules promulgated by a recognized public authority that attempts to permit, limit, regulate, and prohibit individual, corporate, and government/state action. Actors may face material and normative sanctions for law breaking. In addition to law following, law also contains rules for law making. As H.L.A. Hart notes, law combines primary and secondary rules. Under primary rules, “human being are required to do or abstain from certain actions, whether they wish to or not…Rules of the first type impose duties” and relate to “actions involving physical movement or changes.” In contrast, secondary rules “provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations.”

Depending on the context, there are several sources of law. Domestic law may derive from written constitutions and legislation, court rulings, and prior precedent. International law is somewhat more slippery, resulting in skepticism about its legal character by some scholars. As outlined in Article 38 of the Statute of the International Court of Justice, the most important sources of international law include “international conventions, whether general or particular, establishing rules expressly recognized by the contesting states” and “international custom, as evidence of a general practice accepted as law.” It is important to understand that domestic and international law often function in tandem. In the absence of an international sovereign, international law functions through

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37 United Nations, Statute of the International Court of Justice, April 18, 1946, Article 38, http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0. Other sources include “the general principles of law recognized by civilized nations” and “judicial decisions and the teachings of the most highly qualified publicists.”
the consent of states. With the exception of peremptory norms, most international law must be enacted via municipal law to have practical effect. Likewise, many domestic laws reflect international treaty requirements to uphold certain rights or prohibit certain behaviours. In such cases, international law forms a complementary context for domestic law. Whether the international, domestic, or hybrid grounding of law alters legal efficacy is one of the themes explored in the dissertation through the examination of the impact of specific rule structures on state security practices.

Law can be moral or immoral, inclusionary or discriminatory. What the law ought to be should not be confused with what it is. While from a jurisprudential perspective, we can aspire to a richer, more moral approach to law, we should not label rules that fail to fulfill such aspirations as non-law for the purposes of a social scientific account of the impact of law on actors. For example, there are many satisfying accounts of what law should be that emphasize the universality, predictability, coherence, and morality of law. However, from a sociological perspective, not all formally valid law does reflect these standards and not all actors share this point of view. To insist on a substantive definition of law would a priori define numerous interesting cases of nefarious, iniquitous law out of the problem of legal compliance. It is important to recognize that actors disagree over what is and what should be law, and that analyzing their behaviour vis-à-

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38 The dissertation references numerous domestic American laws that fulfill international legal obligations. Such laws are enacted through municipal legislation, but are also embedded in international commitments. Therefore, compliance and non-compliance with them are matters of international significance that can be explored through the lens of IR and IL theory. On the other side, attention to the dynamics of legal domestication and compliance decisions has the potential to tell us something about the efficacy of international law.

39 See Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964). Fuller argues for an internal procedural morality that allows law to function as a set of purposive rules. He notes eight necessary minimal components for this morality to operate: rules must be general, public, prospective, understandable, consistent with each other, not require powers beyond control, not change so frequently as to be unreliable, and be administered consistent with their wording.
vis their understanding of legal constraints does not constitute an endorsement of their particular vision of legality.

I do not, however, believe that the minimalist definition of law proposed is sufficient to account for varying modalities of law following and law breaking. As Benedict Kingsbury notes, such questions are always unpinned by competing conceptions of what law is. “[T]he concept of compliance with law does not, and cannot have, any meaning except as a function of prior theories of the nature and operation of law to which it pertains,” he writes. It “cannot stand on its own, but must depend on a stipulated or shared theory of law.” 40 These prior theories are explored in the following literature review. But rather than adopt one perspective as the basis of explaining compliance, the approach taken in the dissertation reorients Kingsbury’s formulation by examining what state approaches to compliance tell us about the efficacy of these theoretical perspectives. By looking intensively at the actual empirics of compliance we can examine and assess underlying assumptions about the nature of law. In so doing, the minimalist conceptualization of law is not wrong per se, but proves too thin to account for contemporary outcomes. This point is elaborated on in Chapter 6.

There is less disagreement over the definition of norms. While theoretically bound up with constructivist analysis, theorists of many orientations refer to norms to capture socially accepted rules. As discussed below, norms are standards of appropriateness for an actor with a given identity. They generate a sense of prescriptive oughtness and rightness. In some cases law and norms may converge and be difficult to distinguish. In other cases, they may clash. Either way, law and norms constitute a structure of

constraint. Whether and why they are an effective constraint will be subject to further analysis.

2.3 Realism and Decisionism: Law as Permit

The perspective of law as permit points to the political underpinnings of legal authority. Realists emphasize how the condition of anarchy makes law an appendage of international statecraft, whereas decisionists focus on the existential subordination of norms to politics. Neither approach denies the existence of law or the significance of rules for ordering social and political relations. Rather, they reject a conceptualization of law as an independent constraint on sovereign state power.

2.3.1 Realism: The Politics of Survival

Realist theory is structuralist, materialist, and aimed at the generation of nomothetic covering laws. Its primary assumptions are that states are unitary actors with objective national interests and that the first priority of realist states under the condition of international anarchy is survival.

Realists disagree amongst themselves over the sources of state behaviour and the importance of the defensive and offensive objectives of statecraft. For classical realists, states’ pursuit of relative power derives from a multitude of sources: the insecurity created by international anarchy, the calculations of rational and prudent statesmen, and human nature.41 For neorealists, states are driven solely by the demands of the anarchic system structure, which incentivizes self-help and disincentivizes cooperation.42 Yet all

realists agree that national security is at the core of national interest and that states will violate laws and norms in its pursuit.

Given these expectations, realists make deductive rationalist inferences about state behaviour towards international organizations and laws. States will cooperate with such endeavors only insofar as they benefit them—they will obey international law when it is in their interest to do so, and will not when it is not. Accordingly, the problem of exception is less of a problem for realists than for other theorists. It comes as little surprise that the United States, as the sole global superpower at the moment, should take a cavalier approach to international law. That it “seeks to establish strong legal rules for other states, through international or domestic processes, remaining itself exempt from or even, as far as possible, above the law,” is perfectly natural.

Realists consider faith in international law idealistic. Therefore, early realists advised prudent statesman to reject legalistic illusions. However, the reality of functioning post-World War II international institutions forced realists to take international organizations and international regimes more seriously. Rather than acknowledge them as independent restraints on state power, realists insist international rules reflect the interests and preferences of powerful states. “Rules reflect state calculations of self-interest based primarily on the international distribution of power. The most powerful states in the system create and shape institutions so that they can


maintain their share of world power, or even increase it,” argues John Mearsheimer.46 International law can enhance relative power, particularly when states are structurally privileged in the creation of systemic rules, as the United States and other veto powers are in the UN Security Council.47 Hegemonic stability theory further suggests that the sustainability of international cooperation requires the hegemon to bear the costs of coordination and enforcement, without which the collective action problem would take over.48 It does this not out of altruism, but because it benefits from the resultant rules and interactions. Regimes (defined by Stephen Krasner as “implicit or explicit principles, norms, rules and decision-making procedures around which actors’ expectations converge in a given area of international relations”49) are therefore not considered independent variables, but epiphenomenal to power. Changes in the distribution of material power thus alter regimes.

For realists, international law cannot overcome the structure of the system. Unlike the domestic context of sovereign enforcement, international law is primitive at best. Yet, states can take advantage of the lack of an effective international adjudication process to marshal international law. More than a source of blunt coercion, realists recognize that law can be a useful tool. As Hans Morgenthau observes, in the absence of higher authority, states interpret law for their own purposes:

[In the international field, it is the subjects of the laws themselves that not only legislate for themselves but are also the supreme authority for interpreting and giving meaning to their own legal enactments. They will naturally interpret and

apply the provisions of international law in the light of their particular and divergent conceptions of national interest. They will naturally marshal them to the support of their particular international policies and will thus destroy whatever restraining power, applicable to all, these rules of international law, despite their vagueness and ambiguity, might have possessed.50

Against the backdrop of this interpretive anarchy, law becomes a weapon of politics.

Even relatively clear treaties can be easily contested. “Criminal law is extraordinarily vague. Virtually everyone agrees that genocide and torture and crimes against humanity are international crimes. But when the details of what acts constitute these crimes, and of when these crimes can properly be tried by courts, there is much dispute and little definitive guidance” argue Jack Goldsmith and Stephen Krasner.51 All countries, no matter how despotic or insincere, frequently justify themselves in moral and legal terms.52 “The language of conscience has been exported to the international stage, but conscience itself has not.”53 This is explained by the rational benefits that accrue from engaging in “cheap talk.”

Legalistic justification may further serve as a fig leaf to deflect attention from the real aims of foreign policy such as gaining access resources and territory. As Shirley Scott notes:

While it is often presumed to be in the interests of a state to have a strong legal justification for a major action such as a use force, the perspective of international law-as-decoy suggests that it might almost be preferable for the U.S. to advance a confusing and even confused legal rationale for its actions, thereby keeping the focus on the community of international lawyers engaged intensively on what is any case the decoy.54

50 Morgenthau, Politics Among Nations, 282.
53 Ibid., s136.
International lawyers are key agents of this strategic process, helping states maintain an illusory legal posture that is purportedly separate from naked politics.

The politics of legal justification works both ways, however. Weaker states or non-state actors may also marshal international law. The more the United States attempts to use international law as a tool of hegemonic control, the more others, like the Lilliputians binding Gulliver with hundreds of tiny ropes, may try, as Stephen Walt puts it, to “to exploit America’s own commitment to world order based on effective norms and rule of law, in order to encourage American restraint and insulate the states from the full effects of U.S. preponderance.” However, Walt argues that such strategies are less effective in regards to national security matters than economic ones.

Realism, as I have characterized it, is loosely compatible with some critical approaches to “legalised hegemony.” For instance, neo-Marxist Gramscian theorists emphasize the role of legitimation strategies in obscuring structural conflicts of interest. They examine how international organizations reproduce domination via consent rather than via coercion, and how they naturalize world orders. Unlike realists, however, Gramscians do not believe that the nature of international politics is fixed and inevitable. Rather, it is subject to contestation as constructivists emphasize.

The broad realist propositions outlined above generate several candidate explanations for the phenomena I am exploring here: (1.) The resort to exceptional security practices reflects amoral calculations of national interest and national security by

state elites. (2.) As the world’s sole superpower, the United States is not constrained materially or ideologically by international law, and does not fear serious consequences for non-compliance. (3.) As the hegemon, the United States can shape international legal rules to its advantage; law is not independent of power, but is epiphenomenal to it. (4.) The United States may find it useful to strategically marshal international law as a source of legitimacy or as a decoy or fig leaf. In answer to the specific questions posed, realism suggests the following hypotheses:

1. Changes in legal and normative constraints will not stop states from pursuing practices, including illegal human rights violations, which they calculate are in their state interest. However, policy makers may choose to cynically employ the legal language of the day to mask or justify their actions.

2. The specific character of legal rules may influence how law is rhetorically marshaled, but will not ultimately dictate how practices are pursued. Policy will not be determined by law, but by calculations of state interest.

**2.3.2 Decisionism: The Politics of Sovereignty**

The realist emphasis on the ultimate supremacy of political power over law is in many ways compatible with theoretical treatments of the problem of exception in the domestic context. The concept of prerogative, the exercise of arbitrary or discretionary political power outside the rule of law, has long concerned political theorists.

In the Lockean liberal tradition, the interest of the greater good may demand that law is suspended or ignored. “Prerogative can be nothing, but the Peoples permitting their Rulers, to do several things of their own free choice, where the Law was silent, and sometimes too against the direct Letter of the Law, for the publick good,” [sic] writes
Locke. “People should not go about to set any Bounds to the Prerogative of those Kings or Rulers, who themselves transgressed not the bounds of the publick good. For *Prerogative is nothing but the Power of doing publick good without a rule.*”\(^{58}\) The concept of prerogative ironically shares much in common with the formulation of sovereign power articulated by one of the greatest critics of the liberal rule of law—Weimar, and later Nazi jurist Carl Schmitt, whose ideas are often referenced in accounts of post-9/11 politics.

While realists focus on the weakness of international law under the condition of anarchy, Schmitt’s conceptualization of emergency problematizes the fundamental constitutive relationship between domestic constitutional structures and power. Schmitt argues that exception and rule, power and law are mutually dependent. As articulated in the famous formulation, “Sovereign is he who decides on the exception,”\(^{59}\) exceptions occur when power beyond the law identifies a threat that cannot be addressed within the rules, thus ushering in a state of exception that is not derived from preformed norms or law.\(^{60}\) While law may appear independent during times of normalcy, crisis unmasks the real basis of the legal order and reveals the liberal fiction of the neutral rule of law. As Nomi Lazar explains, “Schmitt holds that “All law is ‘situational law.’”’\(^{60}\) Norms apply only to the normal situation. When the sovereign has decided that a situation is


\(^{60}\) Ibid., 6. Schmitt goes on to argue, “Because the exception is different from anarchy and chaos, order in the juristic sense still prevails even if it is not of the ordinary kind.” (Ibid., 12) However, as Oren Gross points out, this “juristic sense” is meaningless because it is based on the “unlimited authority” of the sovereign dictator. “Whatever the sovereign decides is legitimate. There is no substantive content against which legitimacy of such actions can be measured—not even Hobbes’s minimalist principle of self preservation.” (Oren Gross, “The Normless and Exceptionless Exception,” *Cardozo Law Review* 21 (2000): 1851).
exceptional, ethics are suspended. That ethics have no part to play in the decision itself shows the permanent potential of emergency." 61 In this way, "the exception in jurisprudence is analogous to the miracle in theology." 62 Like the miracle, there is no way to define or anticipate the exception. 63 This reveals the nature of sovereign power, which is fundamentally the "monopoly to decide." 64 "The miraculous parallel of the decision corresponds to an understanding of the world that is more broadly chaotic and mystical …it follows that the mode of managing politics and human affairs must be equally flexible and similarly free of legal and normative constriction." 65

It is this decisionist aspect of Schmitt’s thought that is most relevant to understanding why law fails to bind states in times of crisis. As Tracy Strong explains, “if life can never be reduced or adequately understood by a set of rules, no matter how complex, then in the end, rule is of men and not of law—or rather that the rule of men must always existentially underlie the rule of law.” 66 William Scheuerman further elucidates this point:

Because the possibility of arbitrary and unrestrained force can never be eliminated from the political universe, sovereignty must be redefined in terms of that political agent who monopolizes “the last decision,” or that actor capable of taking on all the potential dangers of a political universe as unavoidably irrational and violent as our own; the guarantee of sovereignty necessarily belongs to the core of any genuine mode of politics. Insofar as existentially authentic politics is characterized precisely by its liberation from all normativities, the height of political action – sovereignty – needs to be defined in terms of the command of

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62 Schmitt, Political Theology, 36.
64 Schmitt, Political Theology, 13.
65 Lazar, “Must Exceptionalism Prove the Rule?,” 261.
that moment or exception where normativities (or norm-based legalisms) are most irrelevant.\textsuperscript{67}

The distinction between friends and enemies and the veneration of political unity and homogeneity are at the core of this authentic politics. According to Schmitt, the political enemy is “the other, the stranger; and it is sufficient for his nature that he is, in a specially intense way, existentially something different and alien.”\textsuperscript{68}

Read against Schmitt’s support of emergent fascism, this perspective holds odious implications.\textsuperscript{69} As characterized by Scheuerman, “consistent decisionism should culminate in a feverish moment when violence is unleashed against the foe…attempts to avoid the final decision amount to nothing but a normativistic antipolitical cowardice.”\textsuperscript{70}

In doing away with constraining legal formalism, the state is authorized to act according to necessity, the parameters of which the sovereign is free to decide.\textsuperscript{71} “The friend, the enemy, and combat concepts receive their real meaning precisely because they refer to the real possibility of political killing. War follows from enmity. War is the existential negation of the enemy,” writes Schmitt.\textsuperscript{72} In this world of “Neitzschean vitalism,”

\begin{itemize}
  \item \textsuperscript{67} William E. Scheuerman, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law* (Cambridge: MIT Press, 1997), 22.
  \item \textsuperscript{68} Carl Schmitt, *The Concept of the Political*, trans. George Schwab (Chicago: University of Chicago Press, 2007), 27.
  \item \textsuperscript{69} There is ongoing scholarly debate over just how bad a Nazi Schmitt was. In a personal sense, the record is clear. Schmitt actively collaborated with the Nazis. Not only did he produce anti-Semitic polemics throughout the 1930s, he convened a conference with the express purpose of purging Jews from the German judiciary in 1936. Schmitt subsequently fell out of favour with top Nazi officials, stunting his political rise. Nonetheless, Schmitt never expressed repentance for his behaviour after the war. In a theoretical sense, the answer is more contentious. Some scholars claim Schmitt’s critique of Weimar reflected a genuine desire to save German politics from impending doom (Thalin Zarmanian, “Carl Schmitt and the Problem of Legal Order: From Domestic to International,” *Leiden Journal of International Law* 19 (2006): 46). Schmitt apologetics have flourished in recent years, particularly with the uptake of his critique of liberalism amongst post-Marxist leftists. Yet, other scholars have highlighted the fundamentally fascist implications of Schmitt’s thought (See Peter C. Caldwell, “Controversies over Carl Schmitt: A Review of Recent Literature,” *The Journal of Modern History* 77 (June 2005): 357–387). I find this latter perspective more compelling, and have chosen to employ it my own analysis.
  \item \textsuperscript{70} Scheuerman, *Between the Norm and the Exception*, 32.
  \item \textsuperscript{71} Ibid., 34.
  \item \textsuperscript{72} Schmitt, *The Concept of the Political*, 33.
\end{itemize}
emergency and war are not tragic realities, but celebrated existential opportunities. As Richard Wolin explains, “Schmitt grounds the foundation concepts of his mature political philosophy in a fundamental value judgment: a condemnation of the prosaicism of bourgeois normalcy combined with an exaltation of the capacities for transcendence embodied the emergency situation.”

Schmitt’s decisionist scholarship was primarily oriented towards an analysis of the collapsing Weimar Republic. It was not a theory of international relations or international law per se. However, there are interesting linkages with IR theorizing.

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74 Interestingly, Schmitt did turn to an examination of international law in his later writings. In The Nomos of the Earth, Schmitt focuses on defending the conceptual basis of the old European order against what he sees as the threat of American imperialism (Carl Schmitt, The Nomos of the Earth in the International Law of the Jus Publicum Europaeum, trans., G.L. Ulmen (New York: Telos Press, 2003)). In an essentially conservative vein, Schmitt favours the institution of absolutist legal sovereign equality of pre-twentieth century Europe, which according to him, allowed warfare to remain a limited “dual” among equals. This state centric order or nomos effectively contained conflict by separating the rational sovereign decision to wage war from claims of morality and justice. It was undermined, says Schmitt, by liberal constitutional legalism, which attempted to legislate sovereignty, and twentieth century international law, which as manifested in the Treaty of Versailles, imposed a moralizing universalism that criminalized equal sovereigns. He is particularly critical of the United States and its attempts to impose a destructive, imperialistic universalism on the world that destroys the spatial order of autonomous, political states. As Martti Koskenniemi explains, “Schmitt did not hide his admiration for the jus publicum europaeum, and though he recognized that there was no return to it, he still used it as the standard for his criticism of the liberal universalism that animated the post-Versailles system and buttressed the power of Western allies over their enemies, now targeted by a “discriminatory,” in principle total war….In fact, Nomos der Erde is less a history of international law than political manifesto against the moralization of warfare that Schmitt saw as a cynical instrument to justify the enormous destruction Western technological superiority was inflicting on its adversaries.” (Martti Koskenniemi, “International Law as Political Theology: How to Read Nomos der Erde?,” Constellations 11, no. 4 (2004): 495) However, as Koskenniemi notes, “in adopting the view of le droit public de l’Europe, Schmitt was in danger of characterizing it precisely in the formal and abstract terms he ridiculed in attempts to defend the Weimar constitution…That Schmitt could possibly identify this superficial network of diplomatic protocols as the nomos of the world and still believe that what he was describing was neither a naturalist abstraction nor an empty contractual positivism…was only possible by recourse to a background assumption about the intrinsic worth of European statehood conceived in the prerevolutionary manner, that is, as absolutist statehood…. [the] endorsement of the old European order emerges from his prewar writings on the state, which supported precisely the kind of absolutist claims of sovereignty against which the Revolution had been initiated.” (Ibid., 497-8) Teschke similarly sees a tension in Schmitt’s conceptualization of domestic and international law: “[H]ow could he reconcile his full and literal embrace of the ius publicum as an adequate representation of the praxis of early modern international relations with his general rejection of Weimar legal positivism? And how could Schmitt’s insistence on absolutism as the historical model for a decisionist polity that gave free rein to the will of rulers in the imposition of domestic law and order be squared with their purportedly law-abiding
Michael Williams notes that there are many parallels, although also differences, between contemporaries Schmitt and Morgenthau:

Morgenthau’s thinking clearly bears the marks of his engagement with Schmitt...his understanding of politics as an undetermined realm of pure will reflects a similar position...on the specificity of politics, and he shares the view that the essence of sovereignty lies in the capacity for decision. However, ...Schmitt’s concept of the political provides a key position against which Morgenthau’s understanding of a limited politics emerges...to avoid the radical realpolitik that is one potential outcome of the specific concept of politics he adopts.  

disposition in foreign affairs and the rationalization of military conduct, formalized in the ius publicum? This pretence to legality by the Great Powers is characteristically un-Schmittian. Logically speaking, the legal groundlessness of the subjective decision should have operated in external relations as much as in internal relations – a conclusion that Schmitt failed to draw.” (Benno Gerhard Teschke, “Fatal Attraction: A Critique of Carl Schmitt’s International Political and Legal Theory,” *International Theory* 3, no. 2 (2011): 197-198) Teschke further notes that Schmitt’s account of warfare in the age of absolutism as restrained and humanistic is factually unsustainable. The truth is that such wars were enormously destructive to both soldiers and civilians, lacked basic standards of *jus in bello*, and were often expressions of privatized interest, not unified sovereignty. He also fails to recognize the unrestrained violence of colonial discovery. “Schmitt’s metaphorical depiction of early modern warfare as a gentlemanly ‘duel’ – a civilized affair – is a mystification. It is grounded in an abstract-literal reading of the *ius publicum*, ultimately rooted in a wider strategic-rhetorical move to elevate the pre-revolutionary age to the paragon of civilized warfare – an interpretative foil licensing the fabrication of a degenerated and inflated ‘total war’ ascribed to Anglo-American liberal universalism.” (Ibid., 207) Rather oddly, Schmitt attributes the threat of unrestrained, unending total war not to the friend/enemy politics of sovereign decisionism, and its arguable real life manifestation in the Nazi dictatorship and its rapacious conquest of Europe, but to the liberal international legal order. Liberalism is dangerous precisely because it rejects the territorialization of the political and the nomos of spatially defined, sovereign, ethnically homogeneous states. (See Andreas Gattini, “Sense and Quasisense of Schmitt’s *Großraum* Theory in International Law – A Rejoinder to Carty’s “Carl Schmitt’s Critique of Liberal International Legal Order” *Leiden Journal of International Law* 15 (2002): 53-68, for an analysis which locates Schmitt’s embrace of regionalized political order within the “ideological and propagandistic Nazi bric-a-brac.” (Ibid., 55)). Although Schmitt declined to link the political with a permanent global warfare, contemporary applications of Schmittian thought have tended to assign both the politics of sovereign decisionism and liberal legal imperialism to the American Global War on Terror. This reconciliation creates a somewhat strained conflation. From this perspective, “The Bush Doctrine and its ideological underpinning, Neo-Conservatism and the ‘Project for a New American Century’, were articulated against a liberal Kelsenite legalization and institutionalization of interstate relations, embracing the distinctly Schmittian idea of the selective transcendence of the liberal rule of domestic and international law – states of exception….This was expressed in the abrupt decline of the post-Cold War notion of global governance and its re-politicization even prior to 9/11 in a neo-authoritarian direction, captured in the discourse of empire and imperialism – full-spectrum dominance. At the horizon of this vision ... a militarized Pax Americana. In the Neo-Conservative project, Schmitt and Kelsen combine to form a paradoxical (mis-)alliance, as the political use of Schmitt is reserved for the US state, supervising a Kelsenian international institutional arrangement for the lesser partners within the liberal zone of peace.” (Teschke, “Fatal Attraction,” 220) Thus, Schmitt’s early decisionist focus reemerges as central to contemporary analysis. American imperialism both produces international legalism, but excepts itself from constraint. As Teschke notes, this leaves progressive neo-Schmittians with few conceptual resources to challenge the “politics of fear.” (Ibid.)

In addition to such direct connections, it is not much of a stretch to read state behaviour in the international realm as manifesting sovereign decisionism in a world of enmity. Many IR scholars have developed related perspectives. For instance, as Williams notes, the Copenhagen School’s securitization theory engages Schmittian concepts:

[T]he specificity of “security” as a particular kind of speech-act in the work of the Copenhagen School is underpinned by an understanding of the politics of enmity, decision, and emergency which has deep roots in Schmitt’s understanding of political order. The focus on “existential threats” as the essence of security echoes Schmitt’s views on the specificity of “politics” as defined by exclusion and enmity. Equally, the definition of securitization as placing an issue “beyond normal politics,” that is, beyond public debate, finds clear resonance in Schmitt’s stress on decision and the politics of emergency. Indeed, it might even be tempting to say that in the Copenhagen School the concept of “security” plays a role almost identical to that which Schmitt defined as his concept of “the political.” 76

As discussed below, a variety of other theorists have observed sovereign decisionism in multiple contexts.

Italian political theorist Giorgio Agamben has become one of the most popular interlocutors in the current Schmittian revival. Agamben argues that the state of exception has become a permanent omnipresent possibility in modern political order. It is the “dominant paradigm of government in contemporary politics,” 77 the primary “technique of government” and the “constitutive paradigm of the juridical order.” 78 In his Arendtian and Foucauldian influenced bio-political reading, exceptions have the power to reduce undesirables to homo sacer or “bare life” that can be killed but not sacrificed, to

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78 Agamben, State of Exception, 6-7.
life that lacks value and is constantly subject to violence. For Agamben, the victims of Nazi concentration camps were the ultimate bearers of this condition. The camp is the place where “everything is possible,” a space of stable normalized exception where “the sovereign no longer limits himself...to deciding on the exception on the basis of recognizing a given factual situation (danger to public safety): laying bare the inner structure of the ban that characterizes his power, he now de facto produces the situation as a consequence of his decision on the exception.”

The camp collapses inside/outside, exception/rule, and licit/illicit, making the concept of juridical protection meaningless. According to Agamben, America’s post-9/11 policy, particularly detainment at Guantánamo, is conceptually comparable to the Nazi lager.

It is important to understand that from this perspective, the exception does not make the norm or the rule irrelevant. Rather, “the most proper characteristic of exception is that what is excluded in it is not, on account of being excluded, absolutely without relation to the rule,” notes Agamben. “On the contrary, what is excluded in the exception maintains itself in relation to the rule in the form of the rule’s suspension. The rule applies to the exception in no longer applying, in withdrawing from it.” While subordinating the norm, the exception does not entirely destroy it.

Scholars of many political stripes have analyzed exceptions to the rule of law in regards to oppressed populations. Colonial orders have always included exceptions based on civilized/uncivilized dichotomies. There are parallels between the human rights

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exceptions experienced by racialized minorities, prison populations, and migrants.

Of course, the Global War on Terror, particularly the creation of the Guantánamo Bay prison, has been extensively analyzed in terms of an imperialistic state of exception.

While not all scholars agree on the characterization of this condition, there has been a remarkable explosion of interest in the thinking of Schmitt, Agamben, and the politics of sovereignty.
Decisionism is not a positivistic explanation for state behaviour in the same sense as realism, but provides an outline of a sociology of power through which we can interpret post-9/11 American policy. The resort to exceptional security practices in a decisionistic world reflects: (1.) The sovereign’s ability to deem and declare threats. (2.) The sovereign’s rejection of legal formalism and its enactment of its duty to defend friends and destroy enemies. (3.) The sovereign’s recognition of the existential supremacy of power over norms. (4.) The sovereign’s ability to suspend and reconstitute the legal order to deal with emergency. In answer to the specific questions posed, decisionism may be abstracted to suggest the following hypotheses:

1. Changes in legal and normative constraints over time will shape practices during times of normalcy. However, in times of crisis, the sovereign decision maker will emerge to identify and counter threats by suspending and reconstituting the law. Human rights abuses may be openly embraced as necessary in the state of exception.

2. In an emergency, the specific character of legal rules will be reflected in their suspension. The norm will be present via its absence. The exception exists in relation to law, but is not constrained by it.

2.4 Liberalism and Constructivism: Law as Constraint

In contrast to the perspective of law as permit, the perspective of law as constraint suggests that rules do have the capacity to shape the behaviour of powerful sovereign states. For liberals, states comply with rules based on rational calculations of interest and

domestic political considerations. For constructivists, compliance is the product of socialization, normative internalization, and state identity. Both approaches recognize the reality of state non-compliance, which they generally attribute to a failure or breakdown in the necessary conditions posited to promote compliance.

2.4.1 Liberalism: The Politics of Interests

For liberals, international law is a problem-solving mechanism and the basis of a peaceful world order. There are a variety of liberal approaches that are relevant to the present study: neoliberal institutionalism, pluralist liberalism, and republican liberalism.

Neoliberalism posits a rationalist vision of international law as an institution organized around a system of incentives and sanctions that affect egoistic state decision-making. It shares several assumptions with realism about state behaviour including the primacy of rational utility maximization, but argues that states pursue and benefit from absolute, not merely relative gains and that interdependence has made international cooperation a key mechanism for the pursuit of national interest. Neoliberals are more optimistic about the capacity of regimes to mitigate anarchy. Regimes motivate compliance, even in the absence of a hegemon to enforce rules, because of their ability to solve coordination problems, reduce transaction costs, improve information sharing, and facilitate stable expectations and credible commitments. In these ways, regimes help policy makers obtain results that are not possible through unilateral action. In addition to material incentives and constraints, neoliberal institutionalists have examined the role of ideas, including broad worldviews, principled beliefs, and causal beliefs as independent

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influences.\textsuperscript{88} Ideas, they argue, act as roadmaps, coordinate behaviour, and can eventually become institutionalized.

Neoliberals have focused on what they dub “legalization” in order to explain why some regimes are better at achieving compliance than others:

“They Legalization” refers to a particular set of characteristics that institutions may (or may not) possess. These characteristics are defined along three dimensions: obligation, precision, and delegation.\textit{Obligation} means that states or other actors are bound by a rule or commitment or by a set of rules or commitments. Specifically, it means that they are legally bound by a rule or commitment in the sense that their behavior thereunder is subject to scrutiny under the general rules, procedures, and discourse of international law, and often of domestic law as well.\textit{Precision} means that rules unambiguously define the conduct they require, authorize, or proscribe.\textit{Delegation} means that third parties have been granted authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules.\textsuperscript{89}

The more obligatory a commitment, the more precise a rule, and the more effective a third party overseer, the harder the law and the more likely that rational states will feel compelled to comply, even in the absence of an international coercive sovereign.

In addition to identifying incentives for compliance and rule following, liberals have observed the important role of law making and regime construction for bolstering hegemonic power. Values, culture, policies, and institutions are currencies that are just as important as, if not more important than, coercive hard-power tools such as threats, force, side payments, and sanctions. This “soft power” attracts allies and followers and enhances the ability to set agendas.\textsuperscript{90} John Ikenberry emphasizes that political influence, multilateralism, and international law are key contemporary power resources for the


\textsuperscript{89} Kenneth W. Abbott, Robert Keohane, Andrew Moravcsik, Anne-Marie Slaughter and Duncan Snidal, “The Concept of Legalization,” International Organization 54, no. 3 (Summer 2000): 401-419.

\textsuperscript{90} Joseph Nye, Soft Power: The Means to Success in World Politics (New York; Public Affairs, 2004).
United States. They derive from and serve several purposes:

[T]he circumstances that led the United States to engage in multilateral cooperation in the past are still present and, in some ways, have actually increased. In particular, there are three major sources of multilateralism: functional demands for cooperation (e.g., institutional contracts between states that reduce barriers to mutually beneficial exchange); hegemonic power management, both to institutionalize power advantages and, by reducing the arbitrary and indiscriminate exercise of power, to make the hegemonic order more stable and legitimate; and the American institutional political tradition of seeing this domestic rule-of-law orientation manifest in the country’s approach to international order.91

Reflecting these evolving liberal assumptions, Oona Hathaway’s large cross-national quantitative study tests state compliance with international law in the areas of genocide, torture, fair trials, civil liberties, and women’s rights and finds that there is no clear relationship between treaty ratification and compliance in practice.92 This, she suggests, contradicts both normative assertions about the cascading impact of norms and purely rationalist assumptions that cannot explain why countries bother to ratify treaties that are costly to comply with.93 Moreover, republican liberals, she notes, cannot explain why better practices are sometimes correlated with lower ratification rates.94 She thus develops a modified institutionalist argument that suggests that states make complex cost-benefit calculations about compliance. When monitoring is minimal, treaty ratification can promote states’ interests, even when they have no intention of rule following. This is because ratification reduces international pressure. It allows states to express a position and improve their status and reputation without instantiating real change. Democracies, however, “may be more likely to adhere to their treaty obligation

93 Ibid., 1987.
94 Ibid., 1988.
because the existence of internal monitors make it more difficult for such countries to conceal a dissonance between their expressive and actual behavior.” 95 Democracies may also have genuine normative commitment. This model thus expects expressive compliance, but also anticipates exceptions in practice when enforcement is weak.

Pluralist liberal arguments turn on domestic politics and state-society relations. Pluralist liberals argue that state behaviour is an aggregation of the preferences of competing individuals and interest groups. “Thus where Realists model patterns of strategic interaction based on fixed state preferences, Liberals seek first to establish the nature and strength of those preferences as a function of the interests and purposes of domestic and transnational actors.” 96 As Andrew Moravcsik sums up his vision of pluralism:

Pluralist views stress, in lieu of political culture and the “logic of appropriateness,” the interplay of interests and institutions and a “logic of consequences.” Support for and opposition to domestic enforcement of international norms reflect an assessment of costs and benefits in terms of policies favored by alternative political constituents. Such a pluralist calculus reflects institutional structures, substantive policy options, and the distribution of political power. 97

Explicitly addressing American exceptionalism, he suggests that U.S. power (the realist explanation) combined with American domestic stability (and hence lack of incentive to try to “lock in” arrangements), 98 strong partisan disputes over the substance of international law, and decentralized institutional arrangements that favour veto groups, explain ambivalence towards international law. In particular, he notes that exceptionalist

95 Ibid., 2020.
“ideological positions taken by the legal elite, and the defense of the sanctity of the Constitution itself, are not evidence of a unified cultural ethos but a tactic to defend certain domestic political interests, notably...conservative positions.” In other words, a clash of substantive preferences, not U.S. political culture in general, is at the heart of the U.S. approach to international law.

Finally, republican liberalism, derived from Kantian theory, posits a vision of peaceful international relations premised on international institutions, international law, and democracy. It assumes that democracies behave in fundamentally different ways from other polities. Democratic peace theory, for instance, suggests democracies are more likely to be cooperative and pacific with each other. Liberal democracies in particular will promote international law and an international order that reflects their domestic political commitments to individual freedom and pluralism. Anne-Marie Slaughter outlines a hypothetical world of liberal states as:

a world of individual self-regulation facilitated by states; of transnational regulation enacted and implemented by disaggregated political institutions – courts, legislatures, executives and administrative agencies – enmeshed in transnational society and interacting in multiple configurations across borders; of double edged diplomacy and inter-governmental agreements vertically enforced through domestic courts.

Both proponents and critics of republican liberalism have noted, however, that democracies can be highly aggressive towards non-democracies. In such cases, exceptionalism may be justified as just and necessary to preserve liberal principles. There

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is, therefore, a tension in this strand of theory between the assumption that democracies will, because of their nature, be more law abiding and more disposed towards human rights protection, and the observation that democracies may behave in exceptional ways towards non-democratic adversaries, albeit in the name of democracy.

To sum up, neoliberal institutionalists reiterate the realist emphasis on interests, but expand the concept of interest beyond relative power to reflect more complex notions of economic, social, and ideological power. For them, decisions about compliance mirror cost-benefit calculations in light of sanctions and rewards. In contrast to realists who assume states are naturally disinclined towards international law, liberals assume that in a globalizing world, international cooperation and commitments are central to state interests. Pluralist liberals look more deeply into the black box of the state for explanation. They argue domestic pressure group dynamics account for outcomes. One must thus understand the preferences of these groups and their influence on policy making. Finally, republican liberal perspectives expect that democracies will, because of their constitutive nature, be favourable towards international law and the human rights regime. However, they may behave exceptionally towards non-democracies.

These perspectives generate several propositions relevant to my study: (1) American derogation from international law reflects a lack of incentives (coordination, reputation, etc.) for compliance or a failure to appreciate the value of compliance. (2.) International law is terrain upon which states attempt to exercise soft power. Multilateralism has been important dimensions of U.S. strategy in the past. (3.) Domestic interest groups may generate pressures both for ignoring and for complying with law, or pursuing legalistic politics. (4.) As a democracy, the United States is drawn towards
legalism, but may deviate when confronted with non-democratic adversaries. Regarding my specific questions, liberal approaches suggests that:

1. Changes in legal and normative constraints over time will alter incentives and disincentives for resort to abusive practices, and thus, state behaviour. Rational calculations of interest will be refracted through the preferences of dominant domestic constituencies in democratic polities.

2. Specific regime structures will shape which practices are adopted by specifying the consequences of different courses of action for actors. Obligatory, precise, and effectively monitored rules should garner tighter compliance than more ambiguous ones.

2.4.2 Constructivism: The Politics of Ideas

Constructivists believe that that what realists and liberals call “interests” are not solely derived from structural or material imperatives, but are at least in part the result of processes of social construction. The legitimacy and shared social purpose underlying a given order, not simply the power backing it accounts for the persistence of regimes. Anarchy is not an objective condition, but is contingent on “what states make of it.” Some “middle ground” constructivists take a “mediative” position towards ideas, suggesting that they bridge intersubjective understandings and the material world, while “constitutive reflectivists” emphasize the role of language in creating reality through


The former utilize a primarily inductive method, directed towards understanding how actors understand their worlds. Vincent Pouliot dubs this “sobjectivism,” or the objective analysis of subjective beliefs. The latter prefer discourse analysis, Foucauldian genealogy, and various postmodern approaches.

Constructivist theorists have devoted significant attention to questions of international law and norms in recent years. Several approaches to examining the impact of norms have emerged (there is also a large literature on norm creation and evolution). Theorists have focused on the diffusion of international norms to the domestic arena. A series of process-based accounts have looked specifically at the mechanisms and stages of norm diffusion. Others have focused on the ways in which domestic political circumstances shape outcomes. Some theorists have examined constitutive discourses. Finally, scholars have closely examined the concept of legitimacy itself.

A norm is “a standard of appropriate behavior for actors with a given identity.” Most norms include regulative, constitutive, and prescriptive components. As Martha Finnemore and Kathryn Sikkink further note, the content of norms is wide open:

网络科技。[105] 由于现代世界的全球化，互联网的普及和社交媒体的发展，信息传递速度之快，影响之广泛，使得“好”的意识在任何国家和文化中都能获得广泛的应用。这些观点提供了一个深刻的视角，让我们反思国际关系研究中的构造主义方法。

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There are no bad norms from the vantage point of those who promote the norm. Norms most of us would consider “bad”—norms about racial superiority, divine right, imperialism—were once powerful because some groups believed in the appropriateness (that is, the “goodness”) of the norm, and others either accepted it as obvious or inevitable or had no choice but to accept it.

That said, most scholarship on the diffusion of norms from international to domestic settings has been preoccupied with “good” norms such as humanitarianism and arms

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[108] Ibid., 892
control. Theorists argue that international organizations socialize and teach participants who subsequently change their beliefs and behaviours.\textsuperscript{109} International norms reconstitute state conceptualizations of their interests.\textsuperscript{110} For constructivists, law is important primarily as a normative system. Its ability to generate compliance derives from establishing a sense of appropriateness, obligation, and esteem.\textsuperscript{111} When such normative feelings are missing, there is often a disparity between legal ratification and practical compliance.

Process-based accounts have focused more specifically on how norms travel and how compliance works. Finnemore and Sikkink argue that norms have a “life cycle.” Norm emergence is followed by a “tipping point” when enough states adopt the norm, creating a “norm cascade,” and eventually norm internalization.\textsuperscript{112} Thomas Risse and Kathryn Sikkink suggest that states adopt human rights norms through a staged process of internalization, socialization, and institutionalization.\textsuperscript{113} They note the process of rhetorical “self-entrapment” whereby decision makers become compelled to make changes in line with their discursive commitment to human rights.

Several International Law perspectives propose related accounts that trace the sociological processes that foster compliance. While not abandoning the liberal emphasis

\textsuperscript{112} Martha Finnemore and Kathryn Sikkink, “International Norm Dynamics.”
on interests in shaping outcomes, they specify intervening mechanisms compatible with constructivist analysis. Harold Koh’s transnational legal process model suggests that:

the key to understanding whether [states] will obey international law...is **transnational legal process**: the process by which public and private actors—namely, nation-states, corporations, international organizations, and non-governmental organizations—interact in a variety of fora to make, interpret, enforce, and ultimately internalize rules of international law...Those seeking to create and embed certain human right principles into international and domestic law should trigger transnational interactions that generate legal interpretations, and that can in turn be internalized into the domestic law of even resistant nation-states.114

Abram and Antonia Chayes argue that compliance is achieved through “management,” not coercion.115 Non-compliance results from ambiguous legal language, limited capacities and capability, and non-adaptation to changing environments. These are best corrected through an iterative process of persuasion and assistance.

Theorists have, moreover, noted the role of “epistemic communities,” or networks of experts in a given issue area, in promoting policies.116 Others emphasize the role of pressure from transnational civil society and advocacy networks.117 Scholars influenced by Jürgen Habermas suggest that dialogic processes and argument are key to norm adoption.118 As Risse explains, “Arguing and truth-seeking behavior presuppose that

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actors no longer hold fixed interests during their communicative interaction but are open
to persuasion, challenges and counterchallenges geared toward reaching a reasoned
consensus.\textsuperscript{119}

Other constructivists focus more intensely on domestic politics, suggesting
national security cultures mediate outcomes.\textsuperscript{120} Ideas do not “float freely” but are
processed through domestic structures of state-society relations.\textsuperscript{121} Jeffrey Legro notes
the importance of domestic organizational cultures:

An organizational culture approach focuses on the way that the pattern of
assumptions, ideas, and beliefs that prescribes how a group should adapt to its
external environment and manage its internal affairs influences calculations and
actions. In a sense, this approach focuses on “norms” that dominate specific
organizations: culture is, in effect, a set of collectively held prescriptions about
the right way to think and act.\textsuperscript{122}

Jeffrey Checkel emphasizes the idea of cultural match and the compatibility of norms
with domestic institutions and national identity.\textsuperscript{123} Actors, suggests Amitav Acharya,
reconstitute international norms to fit with cognitive and normative priors.\textsuperscript{124} Andrew
Cortell and James Davis argue for better empirical measures of domestic norm
salience.\textsuperscript{125} Because the meanings actors ascribe to norms differ in varying cultural
contexts, contestation and conflict can emerge when actors seek to apply or enact norms
out of context notes Antje Wiener. This may occur when, “elites who have been

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\textsuperscript{119} Risse, “Let’s Argue!,” 33.
\textsuperscript{120} Peter J. Katzenstein, ed., The Culture of National Security: Norms and Identity in World
Politics (New York: Columbia University Press, 1996); Peter J. Katzenstein, “Same War, Different Views:
\textsuperscript{121} Thomas Risse-Kappen, “Ideas Do Not float Freely: Transnational Coalitions, Domestic
\textsuperscript{122} Jeffrey W. Legro, “Which Norms Matter? Revisiting the “Failure” of Internationalism,”
\textsuperscript{123} Jeffrey T. Checkel, “Why Comply? Social Learning and European Identity Change,”
\textit{International Organization} 55, no. 3 (Summer 2001): 553-588.
\textsuperscript{124} Amitav Archaya, “How Ideas Spread: Whose Norms Matter? Norm Localization and
\textsuperscript{125} Andrew P. Cortell and James W. Davis Jr. “Understanding the Domestic Impact of
socialized in domestic political contexts (‘national’ elites)….carry the respective
domestically constituted normative baggage into international negotiation
environments.”126 While not derived from theoretically complex constructivist models,
there is a large historical political culture literature that presages these themes. For
instance, Alexis de Tocqueville identified a distinct American rights culture based on
constitutional patriotism, popular sovereignty, democratic equality, local government,
and a libertarian preference for negative rights.127 Indeed, many traditional approaches to
American exceptionalism are, in fact, arguments about culture and identity.

From yet another angle, discourse theorists look at how policies become possible
through the use of language. Legal texts are read “as sites of disciplinary power, in that
they play a part in the ‘constitution of subjects’: those who read these texts are invited to
become part of the stories they tell.”128 Examining American torture practices, Richard
Jackson argues that:

political discourses do a great deal more than simply set the foundations and
limits of policy formation within government. They also function to create the
necessary political legitimacy and social consensus required to properly enact
those policies; they help to construct new kinds of social reality. In this instance,
in order to enact the agreed-upon torture policy, administration officials had to
deconstruct existing social reality with its conventional morality prohibiting
torture and replace it with a new ‘torture-sustaining’ reality based upon a set of
new morality-defining narratives.129

Narratives that frame the Global War on Terror as a war, not a criminal matter, the
dehumanization and demonization of enemies, and the construction of terrorists as a dire

126 Antje Wiener, “Enacting Meaning-In-Use: Qualitative Research on Norms and International
128 Anne Orford, Reading Humanitarian Intervention: Human Rights and the Use of Force in
International Law (Cambridge: Cambridge University Press, 2003), 77.
129 Richard Jackson, “Language, Policy and the Construction of a Torture Culture in the War on
existential threat, all feed the torture culture. These discourses are made possible by other preexisting discourses about indigenous people, communists, prisoners, and so on.

Finally, constructivists have drawn on many of the aforementioned approaches in examining how the legitimacy of various orders informs actor behaviour. While realism and liberalism emphasize the utility of legitimation as a tool for cultivating compliance and pursuing interests, constructivist ontology suggests that legitimacy is a fundamental basis for the operation of the international system and the dominant institutions, regimes, and laws that comprise it.130 Following John Ruggie’s work on “embedded liberalism,” Steven Bernstein notes, “Legitimacy is understood as embedded in social systems that provide a basis for appropriateness, or that make the purposes, goals, and rationale of an institution understandable and justifiable to the relevant audience in society.”131 This generates a key question: “What basis of legitimacy holds sway in a particular society or how does a prevailing political order generate an intersubjective belief in its legitimacy?”132

Christian Reus-Smit133 argues that modern legal legitimacy is premised on the underlying “constitutional structure” of international society—historically contingent “conceptions of justice and right process”134 distinct from law itself, which in the contemporary period include liberal norms of procedural justice, self-legislation, and

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130 Ian Clark points to the ways in which realists and liberals also rely on a conception of legitimacy as an ordering principal in terms of great power consensus for the former and quasi-contractual constitutionalism for the latter. All agree to a degree that legitimacy plays a role in stabilizing various orders. (Ian Clark, “Legitimacy in a Global Order,” Review of International Studies 29 (2003): 83-84)
132 Ibid., 10.
134 Ibid., 42.
non-discrimination (as opposed to past concepts such as natural law, divine right, and monarchy). Yet, law is also distinguishable from norms in general. It is characterized by a unique form of practical reasoning based on rule application that structures grievance and rights discourses in particular ways.\textsuperscript{135} Accordingly, “actors enter the realm of international law when they feel impelled not only to place reasoned argument ahead of coercion but also to engage in a distinctive type of argument in which principles and actions must be justified in terms of established, socially sanctioned, normative precepts.”\textsuperscript{136} Thomas Franck bridges the liberal preoccupation with compliance incentives created by particular rule structures and a constructivist concern with normative appropriateness, suggesting that the legitimacy of international law rests in perceptions of its determinacy, symbolic validation, coherence, and adherence. “Of these, determinacy seems the most important,” he writes, “being that quality of a norm that generates an ascertainable understanding of what it permits and what it prohibits. When that line becomes unascertainable, states are unlikely to defer opportunities for self-gratification. The rule's compliance pull evaporates.”\textsuperscript{137}

From these perspectives, insofar as legality is a marker of legitimate state action, it constitutes the underlying context of policy making. However, Ian Hurd rightly cautions against attempting to objectively define legitimacy in a way that confuses it with a substantive conception of justice. “Legitimacy refers to the belief by an actor that a rule or institution ought to be obeyed. Such a belief is necessarily normative and subjective,


and not necessarily shared with any other actor.”

Indeed, actions as horrific as genocide might be considered legitimate in certain circumstances to “insiders” even as they repel “outsiders.” The point is crucial—legitimacy itself is sociologically and historically contingent. While certain contemporary standards of legality may be widely perceived as legitimate, this might not have been true in the past or even universally accepted today. On the other hand, Hurd also notes that while legitimacy may ultimately rest in the eye of the beholder, when an internalized belief in legitimacy is sufficiently widespread, it changes the structure of a social system and the strategic situation of all actors within it. Even powerful nonbelievers must take rules and institutions widely held as legitimate into account. “Legitimate social structures reduce the scope of freedom for the strong, as well as for the weak.”

For most constructivists, law per se is less important than the normative commitments underlying it. Norms and standards of appropriateness should mould state behaviour by reconstructing identity and interests. However, the literature on international norm diffusion has been preoccupied with “good” norms. It has tended to focus on the transmission of human rights from the North to the South, producing an underlying assumption of unidirectional progress. Domestic-oriented approaches have a greater tendency to explore non-conformity, and various forms of derogation. They suggest that domestic political, organizational, and cultural factors influence norm adoption and compliance. Discourse theorists further point to how exceptions become

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138 Ian Hurd, *After Anarchy: Legitimacy and Power in the United Nations Security Council* (Princeton: Princeton University Press, 2007), 30. Hurd is also careful to point out that legitimacy is not synonymous with compliance. Rather, “legitimacy changes the relationship between rule and actor in a manner that might increase the compliance pull of the rule but might not.” (Ibid., 44) This point is further examined in the theoretical discussion in Chapter 6.

139 Ibid., 34.
140 Ibid., 47.
imagined. Theorists have explored the role of legitimacy as a source of order and compliance. Yet, these accounts generally assume that norm internalization alters behaviour, thus neglecting the gap between rhetorical commitment to norms and contrary actions.

To conclude, some candidate constructivist answers to my research questions can be deduced: (1.) State adherence to the international legal order reflects an underlying determination of the appropriateness of that order. (2.) Non-compliance with law suggests either the failure to internalize legal norms, or it reflects norm contestation. (3.) This failure may be a failure of process and argument, or a product of competing alternative domestic norms or identities. (4.) Contemporary legitimacy often rests on appeals to legality.

In terms of the two specific questions, constructivism suggests that:

1. Changes in legal and normative constraints over time will influence state approaches to practice if normative prohibitions have been internalized and institutionalized and are compatible with domestic and organizational cultures. Deepening human rights norms should improve human rights practice.

2. The specific structure of constraint will affect behaviour by shaping considerations of appropriateness. If norms are internalized, practices should reflect rule structures.

The contrasting hypotheses in answer to my research questions generated by the theoretical perspectives outlined above are summarized in the following table.
<table>
<thead>
<tr>
<th><strong>Table 1: Summary of Hypotheses</strong></th>
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<tr>
<td><strong>What impact do changes in the</strong></td>
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<td><strong>structure of legal and normative</strong></td>
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<td><strong>constraint over time have on state</strong></td>
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<tr>
<td><strong>approaches to human rights</strong></td>
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<tr>
<td><strong>violating security practices?</strong></td>
</tr>
<tr>
<td><strong>Realism</strong></td>
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<tr>
<td><strong>Decisionism</strong></td>
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<tr>
<td><strong>Liberalism</strong></td>
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<tr>
<td><strong>Constructivism</strong></td>
</tr>
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</table>
2.5 Methodology

There is an ongoing dispute between positivists and interpretivists over whether it is possible to establish true causal accounts in the social sciences. Underlying these schools are contrasting visions of the purpose of research, the role of the researcher, and appropriate approaches to the research process. These disagreements are not merely methodological, but are informed by varying ontologies, or deep assumptions about the nature of the world; different epistemologies, or theories of knowledge; and competing sociological prescriptions for the discipline. Gary King, Robert Keohane, and Sidney Verba have been central proponents of positivist methods, arguing that both quantitative and qualitative research share the same logic of inference. While descriptive inference serves a necessary function, they argue research must strive to produce inferences about causal effects, defined specifically by King, Keohane, and Verba as “the difference between the systematic component of observations made when the explanatory variable takes one value and the systemic component of comparable observations when the explanatory variable takes on another value.” As Martin Hollis and Steve Smith put it, the goal of uncovering these causal effects *cum* generalizable causal laws is explanation or *Erklären*.

The positivist researcher pursues his or her scientific aspirations through a rigorous methodological process. Especially key is falsification—identifying the

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observable conditions under which a theory can be known to be wrong.\textsuperscript{143} To ensure falsifiability, positivism advocates the classic scientific method of proposing generalized theories, deducing hypothetical implications, testing them empirically, and affirming, modifying, or discarding theory.\textsuperscript{144} To ensure the validity of this process, King, Keohane, and Verba posit multiple maxims such as maximizing the observable implications of theory, maximizing concreteness, not making ad hoc adjustments, not choosing cases on the dependent variable, avoiding selection bias, identifying multi-causality or equifinality, controlling for multicollinearity, looking for endogeneity and omitted variable bias, and avoiding inefficiency (among others). Moreover, they insist that research be public, replicable, and traceable.

In contrast, interpretivist theorists prefer understanding, or \textit{Verstehen}, to explanation.\textsuperscript{145} They reject the assumption that the social world could ever be reduced to nomological covering laws and dispute the unity of the natural and social sciences. As outlined by Max Weber, the proper object of social scientific understanding is human action to which individuals attach subjective meaning. The social world cannot be reduced to variables, because the intersubjective character of the social construction of reality means that actors, institutions, and events cannot be isolated from the context from whence they emerge. For the interpretivist the world is made up of semiotic webs that must be sorted out and decoded by the researcher. These meanings cannot be identified by their observable properties, but only from within.\textsuperscript{146} Rejecting the subject-object

\textsuperscript{143} King, Keohane, and Verba, “Designing Social Inquiry,” 100-105. Falsification can be framed in stark Popperian or more permissive Lakatosian ways. For contrasting perspectives on underlying debates in the philosophy of science, see Imre Lakatos and Alan Musgrave, eds., \textit{Criticism and the Growth of Knowledge} (Cambridge: Cambridge University Press, 1970).

\textsuperscript{144} Hollis and Smith, \textit{Explaining and Understanding}, 50.

\textsuperscript{145} Ibid., 71.

\textsuperscript{146} Ibid., 72.
distinction, the interpretive approach argues that researchers always bring concepts to the interpretation of the world and are constantly modifying it through their participation. For interpretivists, a primary method of research is hermeneutics, or the interpretation of texts and text analogues.

Avoiding both extremes, I attempt to provide a causal account of outcomes that is neither dependent on a narrow relationship between dependent and independent variables nor an idiosyncratic “reading” of the post-9/11 Global War on Terror “text.” The most helpful guide to this alternative approach is Alexander George and Andrew Bennett’s *Case Studies and Theory Development in the Social Sciences*. George and Bennett reject the assumption that quantitative and qualitative approaches share the same logic of inference, suggesting instead that qualitative approaches capture a dimension of process that is missing in quantitative correlations. Case studies are also more suited to “complex causal relations such as equifinality, complex interaction effects, and path dependency.”147 They endorse the explication of causal mechanisms, but suggest that there are a variety of ways to test them.148

Process tracing can help identify the causal pathway through which a chain of events or a web of factors produces an outcome. It is “an indispensable tool for theory testing and for theory development not only because it generates numerous observations within a case, but because these observations must be linked in particular ways to constitute an explanation.”149 Process tracing may involve a purely historical narrative,

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148 Causal mechanisms are “unobservable physical, social, or psychological processes through which agents with causal capacities operate, but only in specific contexts or conditions, to transfer energy, information, or matter to other entities” thereby changing “the affected entity’s characteristics, capacities or propensities.” (Ibid., 137)
149 Ibid., 207.
include causal hypotheses, or a purely analytical theory applied to linear or more complex causal processes. It can help test, refine, and sort out theory in ways that correlating variable cannot.

In what follows, I explore shifts in the relationship between legal and normative structures of constraint and state approaches to human rights abuses. I work inductively through process tracing to build an account of how considerations of legality and legitimacy have shaped the practices of torture, detention and trial, and surveillance in the American context. There are two dimensions to this process tracing. The first is macro in scope, tracing general trends across time. The second is micro-oriented, examining the specific links between legal constraints and approaches to post-9/11 policy. In doing so, I reference decisions taken by states, policy makers, administrations, and particular individuals interchangeably. In all cases, it is ultimately human beings who make decisions, whether they be strategic or normative, rational or habitual. People, who may or may not employ raison d’État, dictate state actions. However, particularly when examining general historical shifts over a long period, it is often more efficient to refer to collective decision makers without always probing individual motives. Such necessary simplifications should not be confused with a theoretical claim that there is a distinct logic of unitary state behaviour in some instances, but not in others.  

In order to establish connections between phenomena, I analyze primary documents, especially government legal and policy memoranda; political speeches; legislation; policy makers’ writings; journalistic accounts; legal and NGO briefs; and secondary academic and popular literature. I also leverage interviews with prominent

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150 States may indeed act according to realist propositions, based on realist calculations. However, human agents must decide to do so on behalf of the state.
observers and critics in the human rights and legal communities knowledgeable about
post-9/11 policy. I emphasize direct references to the impact, or lack thereof, of legal and
normative constraints in these accounts.

After the initial inductive investigation summarized in the case study chapters, I
then parse the process tracing observations through the major theoretical lenses of the
field. I examine the extent to which the findings of the impact of law on security practice
appear to confirm, challenge, or suggest modifications to realist, decisionist, liberal, and
constructivist accounts. This is a form of congruence testing, which, as Bennett and
George explain:

begins with a theory and then attempts to assess its ability to explain or predict the
outcome in a particular case. The theory posits a relation between variance in the
independent variable and variance in the dependent variable; it can be deductive
or take the form of an empirical generalization. The analyst first ascertains the
value of the independent variable in the case and then asks what prediction or
expectation about the outcome of the dependent variable should follow from the
theory.151

This “congruence probe” sets the stage for the final two theoretical chapters. Moving
between induction and deduction, my explanation emerges from a double analysis of how
observed patterns fit with or can be read within the boundaries of existing approaches,
and how these approaches might need to be modified, synthesized, and disregarded to
capture an accurate account of the relationship between law and norms and post-9/11
human rights violations in the American Global War on Terror.152

151 George and Bennett, *Case Studies and Theory Development*, 182.
152 In the spirit of what Rudra Sil and Peter Katzenstein call “analytic eclecticism,” the point is not
to prove or disprove theory per se, but to “specify how elements of different causal stories might coexist as
part of a more complex argument that bears on problems of interest to both scholars and practitioners. This
requires engaging and utilizing, not displacing, the well-organized research efforts undertaken by
committed adherents of various traditions.” (Rudra Sil and Peter J. Katzenstein, “Analytic Eclecticism in
the Study of World Politics: Reconfiguring Problems and Mechanisms Across Research Traditions,”
*Perspectives on Politics* 8, no. 2 (2010): 414) Put slightly differently, “In spite of the different
metatheoretical foundations associated with various paradigms, it is possible to explore empirical issues
2.6 Case Selection

Political scientists commonly choose cross-country comparisons as a source of variation in their research. I have decided not to look at national variation in this study, instead focusing primarily on the United States, for several reasons. Firstly, the United States is the most extensively engaged of contemporary democracies in systematic counterterrorist practices that violate human rights. That is not to say that other countries have not also adopted abusive policies, but these forays into the “dark side” appear to be considerably more limited. While such comparisons would be crucial if the explanandum of this study was why states adopt abusive practices, the question at stake here is how legal constraints shape approaches to practice. Although different national histories, laws, and traditions may partly form structures of constraint and thus provide variation on the independent variable, these differences are less significant and less interesting in my assessment than the historical and legal variation I have focused on, discussed below. Moreover, because it is difficult to gage whether the lesser degree of systemically abusive policies in other democratic states is the product of differing preferences or the impact of varying national structures of constraint, such comparisons would be of questionable utility. There are also practical reasons for a U.S. focus. It is

and problems through eclectic, recombinant modes of inquiry that extract, translate, and creatively redeploy theoretical elements drawn from contending traditions.” (Rudra Sil and Peter J. Katzenstein, “De-centering, Not Discarding, the “Isms”: Some Friendly Amendments,” International Studies Quarterly 55 (2011): 482)

An exception is Israel, which is also engaged in a similar program of systemic counterterrorism that combines human rights abuses with legal rationalizations. Indeed, its approach to human rights violating security practices shares remarkable similarities with the American case.

In other words, states such as Canada, Britain, or France may not have adopted systemic abusive policies to the same degree because they do not think they are necessary. If this is the case, their approach to security practices may not reflect a varying structure of constraint but a varying calculation of interest in light of their current strategic situation. Therefore, national variation amongst democracies may not contribute to a reliable “most-similar” case comparison that can account for different approaches to security practices. As Andrew Bennett and Colin Elman note, it can be challenging to “demonstrate that the difference in the value of the independent variable of interest between the two cases, rather than the residual differences between the two cases identified by rival hypotheses, accounts for the difference in
significantly easier to collect necessary data about U.S. security practices than other cases. Due to American media culture and access to information rules, there is exponentially more information available about the United States. In these senses, America is the most relevant and most researchable country to examine.

In methodological terms, the U.S. focus serves another purpose. It is a crucial case for examining a variety of theoretical assumptions. From a realist standpoint, the preponderance of American power makes it most likely to eschew constraints contrary to perceived interests. From a republican liberal point of view, its strong democratic tradition makes it most likely to manifest commitment to rule of law values. From a constructivist perspective, its pioneering role in the articulation and diffusion of international human rights norms should make it most likely to abide by them. Examining the accuracy of these assumptions in light of American practice should thus produce generalizable insights into the efficacy of theoretical claims.

Instead of focusing on spatially defined national comparisons, the dissertation examines cases as instances of a “theoretically defined class of events”—as instances of the impact of legal and normative constraints. Variation is found in the examination of the effect of changing structures of constraint across time and the varying impact of legal regimes in different practice areas. This dual source of diachronic and synchronic outcomes.” (Andrew Bennett and Colin Elman, “Case Study Methods in the International Relations Subfield,” *Comparative Political Studies* 40, no. 2 (2007): 175) Untangling this problem would be a diversion from the motivating puzzle of this study—how and why rules constrain or fail to constrain actors who do hold a preference for engaging in abusive practices.  

155 This is particularly significant when dealing with secretive state security practices. While there undoubtedly are secret U.S. programs that we do not know about, enough information is available that researchers can reasonably generalize about contemporary U.S. intelligence behaviour.


157 Ibid., 2.
variation within the U.S. context generates a wider range of findings than one or the other could. Because historical processes are complex and diffuse, the dissertation is not organized by historical periods. Indeed, determining relevant historical shifts requires extensive inductive exploration of developments in each practice area. Moreover, it necessitates a fair amount of generalization to characterize hundreds of years of history. I have chosen to begin historical exposition as far back as ancient times because it increases the range of interesting variation. To manage this sweep of history, I have taken a more narrative based, less structured approach to historical variation.

It is more straightforward to compare constraints across practice areas, hence the organization of chapters along these lines. Each of the three practices in question is governed by a distinct set of rules. The torture regime is the closest there is to an ironclad prohibition in international law. Not only is there a peremptory norm, the positive treaty law specifically bans derogation. Multiple laws echo overlapping prohibitions, creating a thick, layered anti-torture framework that applies to all people. In contrast, the detention and trial regime is less centrally defined, comprising a hodgepodge of rules relating to war, migration, and human rights. While the torture regime is universal, detention and trial procedures are subject to a variety of jurisdictional variations, creating loopholes and exclusions. As a result, certain categories of people enjoy more protections than others. Finally, international surveillance law is comparatively lax. Notwithstanding principles of national sovereignty and relatively vague concepts of privacy as a human right, surveillance per se, unattached from repression or censorship, does not obviously constitute a grave international crime. Rather, surveillance restrictions are primarily governed by domestic restraints and apply to domestic subjects.
Accordingly, the three practice areas in question are embedded in a spectrum from absolute and universal to jurisdictionally layered to narrow domestic legal prohibition. If this variation is significant, it may point to ways in which regimes could be designed or modified to improve human rights compliance. The contrasting source, jurisdiction, and scope of the relevant legal regimes are summarized in the following table.\footnote{Source of law refers to the conventional and customary grounding of law in the domestic or international sphere; jurisdiction refers to the geographical and subject matter authority of law; and scope, which is partly derivative of jurisdiction, but also reflects legal substance, captures the effect that spatial and conceptual legal boundaries have on the range of people covered by rights protections.}

\textit{Table 2: Regime Variation}

<table>
<thead>
<tr>
<th>Source of Law</th>
<th>Jurisdiction of Law</th>
<th>Scope of Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Torture</td>
<td>International and domestic</td>
<td>Universal, \textit{jus cogens}</td>
</tr>
<tr>
<td>Detention and Trial</td>
<td>International and domestic</td>
<td>Jurisdictionally layered</td>
</tr>
<tr>
<td>Surveillance</td>
<td>Primarily domestic</td>
<td>Domestic</td>
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</table>

To sum up, this dissertation focuses on the United States because it is the most relevant and researchable case. Moreover, it is a strong test case for a variety of theoretical assumptions. Rather than cross-national comparison, historical and regime variation is emphasized. By comparing the selected cases, we can gain insight into how broader sociological, political, and legal conditions as well as specific rule designs constrain, shape, and enable human rights violations.

\textit{2.7 Summary of Findings}

In examining the three practice areas in question, I find that there is a notable pattern in the relationship between changing structures of legal and normative constraint
and alterations in U.S. approaches to human rights violating security practices over time. Taking a long historical view, it is clear that each area of abusive practice under examination was at one time considered legal and legitimate in the Western world. When this was the case, torture, indefinite detention and unfair trials, and warrantless surveillance were openly pursued. Human rights violations were permitted and actors engaged in them. Eventually, however, norms and laws developed that increasingly prohibited abuses, culminating in a spate of treaties and legislation in the mid-late twentieth century.

Evolving human rights and humanitarian regimes were reflected in new approaches to interrogation, detention and trial, and surveillance. In some cases, practices were halted or limited against majority populations, but continued against excluded outsiders deemed “other.” This exclusion could be *de facto*—for instance, torture lynchings of African Americans, which although technically illegal, were widely practiced in the Southern United States while authorities turned a blind eye, or *de jure*—for instance, the denial of due process protections for “enemy aliens.” Such examples of overt human rights violations point towards a reading of law as permit—as a failed constraint, or in some cases, a vehicle of abuse.

The increasing universality of human rights and civil liberties standards reduced, although did not do away with these exclusionary tendencies over time. While not eliminating human rights violations, the resort to exceptional derogations lost legitimacy in the face of thickening prohibitions. Abusive practices were increasingly pushed underground in the post-World War II period. During the Cold War, covert action became a favoured method of engaging in controversial activities. Proxies in client
regimes tortured and executed opponents while American officials denied responsibility. Extensive illegal domestic spying was conducted in secret. These patterns point to the possibility of law as constraint, at least to a point. The deepening of legal and normative prohibitions against human rights abuses impacted approaches to practice, but not resort to human rights violations themselves.

The post-9/11 period ushered in yet another shift in the relationship between practice and constraint. During the 1990s, security and intelligence abuses lay relatively dormant due to the low threat level. The terror attacks renewed American demand for aggressive measures, spurring the creation of a new paradigm. The predominant approach of policy makers in the Global War on Terror has been to attempt to rationalize controversial interrogation, detention and trial, and surveillance practices within the rubric of the positive law. In the face of the most advanced human rights regime in world history, the Bush administration, and to an increasing degree the Obama administration, resorted to complex argumentative maneuvers aimed at permitting abuses without overtly suspending or breaking the law through a strategy of what I call “plausible legality.”

Unlike past attempts at pursing national security under the doctrine of plausible deniability, the post-9/11 American approach to human rights abuses has not simply ignored the positive law and conducted practices in secret. Nor has it taken a wholly decisionist path of suspending the law in the name of emergency necessity. Rather, it has aimed to redefine, reinterpret, and when possible, reconstruct the law to accommodate human rights violating practices. It casts cruel, inhuman, and degrading interrogation, indefinite detention and unfair trials, and warrantless surveillance as legal and permissible.
The attempt to construct a plausibly legal basis for human rights abuses has differed somewhat in each practice area, reflecting variances between the respective regimes of constraint. In the case of interrogation, the primary approach has been to redefine the meaning of the crime of torture in such a way that certain practices fall outside the range of prohibited acts. The pursuit of indefinite detention and military commissions has been rationalized by the revival and stretching of the exclusion of certain subjects from rights protections that is historically embedded in this area of law. While domestic spying has rubbed up against blatant law breaking justified by executive prerogative, a larger effort has been underway to reconstitute the boundaries of foreign and domestic in such a way that expands state power without completely rejecting this foundational dichotomy in surveillance law.

Attention to the relative impact of different regimes further helps specify the ways in which plausible legality is corralled by the existing structure of constraint. As previously noted, strategies differ in each case of practice. The laws governing these practices can be classified along a continuum from a peremptory customary norm supplemented by non-derogable treaty law in the case of torture to a layered multi-jurisdictional and often exclusionary regime in the case of detention and trial, to an almost exclusively domestic constitutional structure in the case of surveillance. By examining American conduct in the post-9/11 period, it becomes clear that these differences shape how practices are pursued, but do not in fact dictate the degree of underlying human rights abuse. Contrary to liberal and constructivist assumptions, neither the extent of legalization nor the depth of normative prohibition appear to significantly determine the adoption of abusive practices. Yet, at the same time, there is
no doubt that the approach policy makers have taken to authorization and the choice of particular practices has been conditioned by rational and normative constraints.

When analyzed in light of existing theories, the strategy of plausible legality both confirms and refutes certain theoretical assumptions. As elaborated on in Chapter 6, I conclude this contradictory development necessitates a theoretical reading of law as a permissive constraint. This analysis suggests that legal and normative prohibitions are more significant checks on national security practice, even in times of crisis, than realists and decisionists might expect. On the other hand, it simultaneously questions the full impact of legal and normative institutionalization and internalization emphasized by liberals and constructivists. Instead, I argue that the pursuit of plausible legality points to a hybrid phenomenon in which cynical agents attempt to navigate the politics of twenty-first century legitimacy, in which realist, even Schmittian inspired actors construct arguments for a liberal world. In a broad sense, this conclusion is ultimately largely constructivist, but points to the needs for constructivism to reorient its research agenda to accommodate the reality of strategic action. Finally, I suggest that the strategic/normative dualism generated by the perspective of law as a permissive constraint can be enriched by recent constructivist legal scholarship rooted in the “practice turn” in IR theory. By identifying the sources of norm instability, we can better understand how rules can simultaneously limit and fail to limit actor behaviour.

In sum, the study begins by asking how structures of constraint shape approaches to human rights abuses. By examining three cases of controversial practices diachronically and synchronically, the dissertation finds a dual movement over time towards the thickening of legal and normative restrictions along with the emergence of
legal rationalizations of abuse. These rationalizations are shaped by the nature of prohibitive laws in interesting ways. These observations point to the need for theoretical synthesis and creative analysis of the ways in which actors try to “get away with it” today.
CHAPTER 3
TORTURE

3.1 Introduction

Torture today is subject to almost universal moral condemnation. Along with slavery, genocide, and other great evils, torture violates basic norms of human rights. In both peace and war, most countries have declared torture fundamentally wrong and illegal. However, this has not always been the case. The story of torture is one of change—in norms, laws, and practices. Indeed, torture was once considered wholly legitimate, used openly in the service of the law. Even after the development of domestic and international legal prohibitions, torture never disappeared. This process of transformation informs the persistence of the torture question in post-9/11 American security and intelligence practice. The resort to torture and other cruel, inhuman, and degrading practices was not invented by the Bush administration. Nor is the entanglement of law and torture new. Rather than a radical rupture with the history of torture, the events of the last decade mark yet another reconfiguration of the constellation of normative, legal, and practical elements that shapes the use of torture.

This chapter develops the necessary context for understanding this new constellation. It briefly reviews the history of Western torture, describes the evolution and content of the international and American anti-torture legal regimes, and documents the history of American torture practices in the pre-9/11 period. After establishing both the emergence of a powerful legal and normative edifice that condemns torture alongside the persistence of various degrees of torture practices, the chapter turns to the role of constraints in shaping torture practices in the post-9/11 era. The chapter concludes with
an analysis of how and why legal argument has limited and enabled torture in the current period.

In sum, the investigation suggests that torture in the contemporary American case is a practice formulated by political and legal elites to accomplish specific goals such as extracting information and disciplining target populations. However, because the structure of domestic and international prohibition is so strong, torture cannot be practiced openly. To evade this constraint in the past, decision makers often resorted to denial. While secrecy persists today, concerns about prosecution and legitimacy, along with the difficulty of concealing torture practices, have spurred a shift towards what I call a strategy of “plausible legality,” or efforts to construe the practice of torture as legal. The primary tactic of doing so hinges on the redefinition of torture. This move highlights ways in which constraints continue to influence the conduct of human rights violating practices.

3.2 Legal Torture and Open Practice

The history of Western Europe and the United States clearly demonstrates that torture was not only once widely practiced, but considered legal and legitimate. While it is common knowledge that despots have always practiced torture, especially in the “East” and the “South,” the history of torture in the “West” is often forgotten. Because much of the American political tradition developed as a reflection of, or in conscious opposition to, European politics, it is worth beginning with an examination of Old World torture.

3.2.1 European Torture
Torture to extract information has an extensive lineage in Europe. It played a key role in the judicial process for hundreds of years. Slaves and foreigners, but not citizens, could be tortured in ancient Greece to obtain legal testimony. Slaves were assumed to always tell the truth under torture, making them ideal witnesses.¹ The Romans continued the practice, extending torture’s reach to a large class of non-Romans.² However, in both cases, citizens were subject to torture for treason, and later for Christianity.³ Judicial torture once again became systematic in Europe with the emergence of Roman-inspired public law in the thirteenth century. This new civil procedure replaced “ordeals,” which had generally involved subjecting suspects to hot iron or cold-water tortures, assuming “a guilty person was unable to secure divine protection, while an innocent individual could go through any ordeal unscathed.”⁴ Instead, judges turned to more reliable “proofs,” stemming from either two eyewitnesses or a confession. When the former was lacking, torture frequently elicited the latter in cases where a “half proof” was available to justify suspicion. A complex structure of rules evolved to regulate the practice.⁵

Torture techniques were often bloody and violent. Explaining torture in eighteenth century France, Lisa Silverman notes, “there were no euphemisms for torture because there was no need to render the reality of pain invisible, no need to deny the process: the publicly and legally acknowledged purpose of judicial torture was precisely

² Ibid., 5.
³ Ibid., 6.
⁴ George Ryley Scott, A History of Torture (London: Bracken Books, 1994), 227. Suspected witches continued to be subjected to ordeals after the transition to proofs.
to render truth visible and audible through the infliction of pain.”

Criticism and commentary on torture at the time advocated moderation, not prohibition. For instance, Flemish jurist Joost Damhouder’s 1554 *The Good Judge* recommends: “Take no notice of the screams, cries, sighs, tremblings or pain of the accused; and all must be done with such care and moderation that the patient be neither driven mad, wounded, hurt nor unduly distressed.”

Torture to obtain confessions in criminal procedure continued to be common practice in Europe from the thirteenth century until its last vestiges were finally phased out on the continent by the nineteenth century.

Despite its ubiquity on the continent, judicial torture was largely absent in England where common law rules of evidence did not require the “proof” of confession. As William Blackstone explained, “trial by rack is utterly unknown to the law of England.” Torture, he noted, is an unreliable source of evidence because “these torments are regulated by pain; they are more or less great in each sufferer, according to his strength of mind or body, the inquisitor directs them, the will bends, hope corrupts, fear enfeebles, so that in the dread and distraction of his situation, there is no place left for the consideration of truth.”

When torture was practiced in England, it was not part of ordinary criminal procedure, but authorized by the Privy Council or monarch. Torture operated according

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9 Ibid., 100.
to Royal prerogative rather than legal imperatives.\textsuperscript{11} The rack was an “engine of state, not of law.”\textsuperscript{12} As religious conflict and war swept Tudor and Stuart England, treachery and sedition were suspected everywhere. Queen Elizabeth’s spymaster Thomas Walsingham frequently subjected suspects to torture. “Without torture I know we shall not prevail,” he declared.\textsuperscript{13} The Tower of London’s rackmasters became infamous.

In addition to extracting confessions, torture was used in both England and the continent as punishment for treason. For instance, the unpleasant death of thirteenth-century Scottish knight William Wallace, popularized in the film \textit{Braveheart}, and the 1757 public torture of Robert-Francois Damiens for regicide, painstakingly described in the opening pages of Michel Foucault’s \textit{Discipline and Punish},\textsuperscript{14} point to a theatrical, didactic dimension of torture that coexisted with its practical information-gathering function. Such practices “made the body of the condemned man the place where the vengeance of the sovereign was applied, the anchoring point for a manifestation of power, an opportunity of affirming the dissymmetry of forces.”\textsuperscript{15} Punitive spectacles of torture lasted until the nineteenth century, when they were replaced by the modern rationalized penal system.

Meanwhile, alongside judicial and state torture, canon law enacted its own torture protocol. In 1215, the Fourth Lateran Council accepted torture in trials under the Roman logic of proofs, prompting its systemic use to produce confessions and recantations from

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\begin{footnotesize}
\textsuperscript{12} Blackstone quoting Tully, \textit{Commentaries}, Book 4, Chapter 25.
\textsuperscript{15} Ibid., 55.
\end{footnotesize}
\end{flushright}
heretics.\textsuperscript{16} For instance, the fifteenth to eighteenth-century Spanish Inquisition focused its ire on the \textit{conversos}, converts to Catholicism accused of practicing Judaism in secret, as well as Muslims, Protestants, and apostates. While only a minority of prisoners was tortured, inquisitorial trials increasingly relied on pain to extract confessions, preferring the \textit{potro} (the rack), the \textit{strappado} or \textit{garrucha} (a form of suspension), and the \textit{toca}, more popularly known today as “waterboarding.”\textsuperscript{17} Convicted heretics were subsequently subject to a grand public spectacle of penitence, the \textit{auto de fe}, after which an unrepentant few would be burned at the stake.

Contemporaneously, both Catholic and Protestant churches and state cooperated to identify and burn alleged witches, mainly women. Witch-hunts dated back to the ancients, but gained new fervor in early modern Europe, especially in Germany between the fifteenth and seventeenth centuries. Torture was widespread and brutal, with detailed hunting procedures documented in several demonology texts, most infamously the \textit{Malleus Maleficarum} or \textit{Witches’ Hammer}, endorsed by Pope Innocent VIII:

\textit{[L]et her be often and frequently exposed to torture, beginning with the more gentle of them; for the Judge should not be too hasty to proceed to the graver kind. And while this is being done, let the Notary write all down, how she is tortured and what questions are asked and how she answers… The next step of the Judge should be that, if after being fittingly tortured she refuses to confess the truth, he should have other engines of torture brought before her, and tell her that she will have to endure these if she does not confess. If then she is not induced by terror to confess, the torture must be continued on the second or third day, but not repeated at that present time unless there should be some fresh indication of its probable success.}\textsuperscript{18}

\begin{thebibliography}{99}
\bibitem{kra} Heinrich Kramer and James Sprenger, \textit{Malleus Maleficarum} (1486), Part III, Second Head, Question XIV, “Of the Method of Sentencing the Accused to be Questioned: and How She Must be
\end{thebibliography}
Investigations aimed not only to extract personal confessions, but uncover witchcraft networks. As James Ross explains, “Because witches were believed to take part in the “sabbat”—a nighttime assembly—it was not enough for the authorities to eliminate an individual witch; hunts required seeking out and destroying all the sect’s members.”\(^{19}\) Criticism of such practices was minimal and muted.\(^{20}\)

### 3.2.2 Early American Torture

Meanwhile, across the ocean, a rather distinct history was developing in the United States. Most significantly, judicial torture never took root in America. However, the Salem Witchcraft trials of 1692-1693 mark one limited reproduction of the European torture model. One hundred and fifty people were tried in Massachusetts, including Giles Corey, an eighty-year old farmer, who died by crushing after being tortured under heavy stones—the practice of *peine fort et dure*. Torturous practices were also inflicted on disgraced Puritan citizens, who were branded with the letter marking their crime as punishment.\(^{21}\) Even so, Americans were generally moderate compared to their European counterparts.

Unfortunately, Americans did nonetheless develop a unique torture regime. Like so much of early American history, the practice of slavery encouraged the emergence of a parallel set of rules to govern the African American population. Forms of torture ranging from whipping, to body mutilation, to rape were commonly inflicted on blacks for

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punishment, discipline, and sadistic enjoyment. Because slaves were considered property, their owners could openly abuse them with impunity. While the Bill of Rights clearly forbade torture, decisions such as the infamous 1857 *Dred Scott* Supreme Court ruling reaffirmed that slaves were not citizens and enjoyed no constitutional protections.\(^2\)

Tales of horrific torture were common in slave narratives. As recounted by Lewis Clarke:

> [My mistress’s] instruments of torture were ordinarily the raw hide, or a bunch of hickory-sprouts seasoned in the fire and tied together. But if these were not at hand, nothing came amiss. She could relish a beating with a chair, the broom, tongs, shovel, shears, knife-handle, the heavy heel of her slipper, or a bunch of keys; her zeal was so active in these barbarous inflictions, that her invention was wonderfully quick, and some way of inflicting the requisite torture was soon found.

One instrument of torture is worthy of particular description. This was an oak club, a foot and a half in length, and an inch and a half square. With this delicate weapon she would beat us upon the hands and upon the feet until they were blistered. This instrument was carefully preserved for a period of four years. Every day, for that time, I was compelled to see that hated tool of cruelty lying in the chair by my side. The least degree of delinquency, either in not doing all the appointed work, or in look or behavior, was visited with a beating from this oak club. That club will always be a prominent object in the picture of horrors of my life of more than twenty years of bitter bondage.\(^3\)

Perpetrators did not need to hide their cruelty as evidenced by an ad for a runaway slave:

*Mississippi Gazette*, July 23, 1836

Josiah is five feet eight inches high, heavy built, copper colour; his back very much scarred with the whip, and branded on the thigh and hip in three or four places thus: “J.M” The rim of his right ear has been bitten or cut off. He is about 31 years of age.\(^4\)

\(^{2}\) *Dred Scott v. Sandford*, 60 U.S. 393 (1857).


\(^{4}\) Quoted in Rejali, *Torture and Democracy*, 56.
The point cannot be overstated: the institution of slavery included a government-sanctioned institution of legal torture.

This unpleasant history of torture in both Europe and the United States reminds us of the fact that, for hundreds of years, torture was legal in a variety of circumstances and openly practiced. Accordingly, resort to torture was not at all puzzling; it reflected the dominant normative assumptions and legal rules in place. Whether utilized to extort confessions or to demonstrate power, torture complied with rather than violated prevailing norms.

3.3 The Emergence of the Anti-Torture Regime

As the previous discussion makes clear, torture has been legally practiced in Europe and the United States to various degrees throughout history. However, despite the persistence of the reality of torture, few other practices have been so thoroughly rejected and delegitimized through the progressive instantiation of anti-torture norms and laws. This is seen in the emergence of the international and American anti-torture regimes—regimes that constitute some of the thickest prohibitions on state conduct available. The absolute prohibition on torture is reiterated throughout multiple United Nations declarations and treaties and is firmly rooted in American law.

3.3.1 Normative Transformation

Eventually, the growth of Enlightenment thinking transformed the status of torture from an accepted tool to an illegitimate practice. Torture became characterized as uncivilized, irrational, and inhumane. In 1764, Cesare Beccaria argued in the highly
influential *On Crimes and Punishments* that torture “is a sure route for the acquittal of robust ruffians and the conviction of weak innocents.” Voltaire concurred:

> It has often been said, that torture was a means of saving a robust offender, and of destroying a feeble one…it is absurd to inflict torture to acquire the knowledge of a crime, as it was formerly ridiculous to order a duel to decide the guilt of the accused party…a thousand fatal mistakes ought to induce legislators to put an end to this cruel practice.

These ideas helped lead to the eventual elimination of legal torture. By 1874, Victor Hugo declared that “torture has ceased to exist.”

Enlightenment ideals were especially important in shaping the American constitutional tradition. Notwithstanding the parallel system of rules used to govern chattel slaves, American law was often framed as an antidote to the barbarities of Europe. The Fifth Amendment to the U.S. Constitution states that no one “shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law,” and the Eighth Amendment that “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” In 1868, the Fourteenth Amendment overturned *Dred Scott* and the exclusion of African Americans from legal protections:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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28 United States Constitution, Amendment V, 1791.
29 United States Constitution, Amendment VIII, 1791.
30 United States Constitution, Amendment XIV, 1868.
The American founding fathers also rejected torture in warfare. George Washington famously ordered that enemy soldiers captured in the Battle of Princeton be well treated: “Treat them with humanity, and let them have no reason to Complain of our Copying the brutal example of the British Army in their treatment of our unfortunate brethren…. Provide everything necessary for them on the road.” Later, during the Civil War, the Lieber Code was developed to regulate conduct in battle. As Article 16 of the 1863 Instructions for the Government of Armies of the United States in the Field states:

Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

These ideas helped form the bedrock of contemporary anti-torture prohibitions.

While torture was once legal and legitimate, Enlightenment thinking gradually contributed to a normative transformation. This shift was reflected from the beginning in the American Bill of Rights and rules for the treatment of prisoners in war. Eventually, with the abolition of slavery, these protections were technically extended to African Americans. Although not always reflected in real-life practice, prohibitions on torture were progressively introduced and institutionalized in domestic law.

3.3.2 International Prohibitions

Alongside these early domestic prohibitions, a substantial international regime emerged to govern torture. Not only are there numerous treaties that prohibit torture, it is

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widely considered a customary norm with *jus cogens* status in international law alongside crimes such as slavery and genocide. Torture has unambiguously become illegal in international law.

What would become the international humanitarian regime began with the signing of the first Geneva Convention in 1864. It was followed by the Hague Convention, which states that prisoners of war “must be humanely treated.” After the barbarities of the two World Wars, Common Article 3 of the 1949 Geneva Conventions (common because it appears in all four Conventions) reaffirmed the prohibition on torture, stating that “Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely.” It bans “Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture”; “Outrages upon personal dignity, in particular, humiliating and degrading treatment”; and demands that “The wounded and sick shall be collected and cared for.”

Human rights law is also rife with prohibitions on torture. Article 5 of the 1948 Universal Declaration of Human Rights states that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” The 1966 Covenant of Civil and Political Rights states in Article 7 that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.” Furthermore,

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while states may derogate from the convention in times of emergency, Article 4 clarifies that no derogation from Article 7 is permitted.\(^{36}\)

The Organization of American States’ American Convention on Human Rights echoes similar sentiments within a regional framework. Article 5 states that “Every person has the right to have his physical, mental, and moral integrity respected,” and that “No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.”\(^{37}\)

These general prohibitions on torture culminated in a specific treaty to ban the practice. The 1984 Convention Against Torture (CAT) is now the most important cornerstone of the anti-torture regime.\(^{38}\) Article 1 defines torture:

For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Article 2 clarifies that “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” Article 3 states that “No State Party shall expel,

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return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” The Convention demands that state parties criminalize and prosecute torture within their jurisdiction and over their nationals. The CAT tasks an elected Committee Against Torture to monitor compliance.39

Article 16 of the CAT further prohibits “cruel, inhuman, and degrading treatment” (CID): “Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” While the CAT never defines CID treatment, the Vienna Convention on the Law of Treaties demands, “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”40 The United Nations Code of Conduct for Law Enforcement Officials states, “The term “cruel, inhuman or degrading treatment or punishment” has not been defined by the General Assembly but should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental.”41


Conference on Human Rights emphasizes that one of the most atrocious violations against human dignity is the act of torture, the result of which destroys the dignity and impairs the capability of victims to continue their lives and their activities” and that “The World Conference on Human Rights reaffirms that under human rights law and international humanitarian law, freedom from torture is a right which must be protected under all circumstances, including in times of internal or international disturbance or armed conflicts.”

Most recently, the 1998 Rome Statute of the International Criminal Court again prohibits torture. Article 7 labels tortures committed systemically against civilians as a crime against humanity, defining torture as “the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.” Article 8 deems torture and degrading and inhuman treatment as a war crime, namely grave breaches of the Geneva Conventions perpetrated against those protected by the Conventions. It reiterates this prohibition in situations “not of an international character.”

For those that hold torture to be jus cogens, state sovereignty should not pose an obstacle to the prosecution of torture. This approach is evidenced in several universal jurisdiction cases. Most notably, in *Pinochet No. 3* (1999), the British Law Lords

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44 *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3) [2000] AC 147. This was the third in several complex and not entirely consistent legal rulings on the question. While asserting universal jurisdiction over Pinochet in a geographical sense, the decision was primarily rooted in a reading of the UN Convention Against Torture, as domesticated into British law via the 1988
nullified former Chilean dictator Augusto Pinochet’s head of state immunity, permitting extradition proceedings to Spain for the international crime of torture. While the case was eventually aborted due to Pinochet’s failing health, it symbolically signaled strong international opposition to torture and the growing willingness of states to enforce the torture prohibition beyond their borders.

3.3.3 Domestic Institutionalization

The United States has produced its own robust anti-torture laws. Not only has it internalized international rules, it has independently generated and institutionalized a strong anti-torture regime. In addition to general constitutional protections, torture is banned in numerous statutes.

American military law has always prohibited torture. The Uniform Code of Military Justice (UCMJ) applies to military personnel, persons serving with or accompanying armed forces in the field in a time of war, prisoners of war in the custody

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Criminal Justice Act, rather than customary law. It thus restricted temporal jurisdiction to acts committed after 1988, thereby limiting potential prosecution to the period after Pinochet had committed his most systemic and egregious crimes.

45 There has been considerable disagreement over the exact meaning and implications of Pinochet No. 3. Indeed, the Law Lords themselves were divided over the correct reasoning underlying the decision. Particularly contentious has been whether jus cogens crimes like torture create an exception to state immunity ratione materiae (in criminal and/or civil contexts) or whether such crimes should be conceptualized as inherently non-state acts (a rather odd construction considering the CAT defines torture as acts committed in an “official capacity”). There have moreover been debates about the role of treaty ratification as an implied waiver of state immunity. These complex issues reemerged in Democratic Republic of Congo v. Belgium (“Case concerning Arrest Warrant of 11 April 2000,” ICJ Reports, 2002), where the International Court of Justice took a relatively conservative approach that protected state immunity for criminal official acts, although the definition of the latter remained opaque. Despite these ambiguities and the reality that there is no clear international consensus on the appropriateness of universal jurisdiction, the Pinochet case served an important symbolic role – signaling politically, if not entirely clearly legally, that state officials who committed gross human rights abuses such as torture would not enjoy unquestioned, ironclad impunity. See Michael Byers, “The Law and Politics of the Pinochet Case,” Duke Journal of Comparative & International Law 10 (2000): 415-441; Campbell McLachlan, “Pinochet Revisited,” International and Comparative Law Quarterly 51 (2002): 959-966; Philippe Sands, “International Law Transformed? From Pinochet to Congo...?” Leiden Journal of International Law 16 (2003): 37–53; Naomi Roht-Arriaza, “Universal Jurisdiction: Steps Forward, Steps Back,” Leiden Journal of International Law, 17 (2004): 375–389; and Ed Bates, “State Immunity for Torture,” Human Rights Law Review 7, no. 4 (2007): 651-680.
of the armed forces, and spies. Territorially, it applies in all places: “Any person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct.”\textsuperscript{46} The \textit{Human Intelligence Collector Operations Field Manual FM 34-52} (1992, updated 2006) reproduces the Geneva Conventions. Moreover, it instructs that “in all cases, detainees are treated humanely” and that the “mistreatment or abuse of detainees is a violation of the UCMJ for which violators may be punished.”\textsuperscript{47} Detainees must be given food, water, and prompt medical treatment. The repertoire of authorized interrogation techniques are taught to interrogators at Fort Huachuca in Texas.\textsuperscript{48}

Americans have championed judicial enforcement of humanitarian law abroad since the end of the Second World War, first backing the Nuremberg and Tokyo trials and later the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. Yet, despite a commitment to anti-torture norms, the United States has treated the international law on torture as it has all other international treaties—namely, as non-self-executing. This means that Americans do not accept international law as binding unless it has been signed by the President and ratified by a majority in the U.S. Congress. Congressional ratification of the UN anti-torture regime has been rife with reservations and selective adherence. The United States has


refused to join the ICC, citing concerns about foreign jurisdiction and politically motivated prosecutions of U.S. soldiers.

While the United States did ratify the Convention Against Torture, its approval was subject to conditions:\(^{49}\)

I. The Senate's advice and consent on the CAT includes the following reservations:

(1) That the United States considers itself bound by the obligation under Article 16 to prevent "cruel, inhuman or degrading treatment or punishment," only insofar as the term "cruel, inhuman or degrading treatment or punishment" means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

II. The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Convention:

(1) (a) That with reference to Article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

III. The Senate's advice and consent is subject to the following declarations:

(1) That the United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing.

One implication of the American ratification process is that once treaties are agreed to, they are seamlessly incorporated into domestic law. In 1994, the United States

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passed the Federal Anti-Torture Statute.\textsuperscript{50} It contains identical definitions as the Senate’s CAT advice and consent:

(a) Offense.— Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

(b) Jurisdiction.— There is jurisdiction over the activity prohibited in subsection (a) if— (1) the alleged offender is a national of the United States; or (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

(c) Conspiracy.— A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

U.S. Federal Courts referenced the CAT over 1000 times between 1999 and 2005, suggesting its impact on domestic legal thinking.\textsuperscript{51}

In 1996, the United States further adopted the War Crimes Act, which prohibits and makes punishable “grave breaches” of the Geneva Conventions within domestic law when the victim or perpetrator is American. Amongst theses breaches are violations of Common Article 3, which as described previously, forbids torture and mandates humane treatment. Private tort remedies also complement criminal law. For instance, the Torture Victim Protection Act (TVPA) of 1991, passed in 1992, supplements the 1789 Alien Tort Claims Act, which states “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”\textsuperscript{52}

\textsuperscript{50} United States Code, Title 18, Part 1, Chapter 113C, § 2340A (Federal Anti-Torture Statute), http://www4.law.cornell.edu/uscode/18/usc_sec_18_00002340---A000-.html.


\textsuperscript{52} United States Code, Title 28, Part IV, Chapter 85, § 1350 (Torture Victim Protection Act of 1991), http://www.law.cornell.edu/uscode/uscode28/usc_sec_28_00001350----000-notes.html.
authority, or color of law, of any foreign nation….subjects an individual to torture shall, in a civil action, be liable for damages to that individual.” 53 In other words, torture victims can sue their torturers in U.S. court.

Finally, repatriation cases shed further light on U.S. anti-torture law. Fear of torture based on membership in a protected group (e.g. an ethnic or religious minority) is grounds for claiming refugee status. Fear of torture for other reasons such as political or ideological activity can be the basis for halting deportations. This anti-torture regime is reflected in several U.S. policy initiatives. For instance, the Torture Victims Relief Act (1998) provides funding for the medical treatment of torture victims from around the world and supports USAID’s Victims of Torture Fund, which collaborates with NGOs and regional human rights bodies to rehabilitate and seek justice for torture victims. The United States is a donor to the United Nations Voluntary Fund for Victims of Torture. The U.S. Department of Health and Human Services’ Office of Refugee Resettlement provides support for torture victims.

Reaffirming America’s position on torture, the U.S. State Department annually reviews the human rights practices of other countries, including torture practices, using the “internationally recognized individual, civil, political, and worker rights, as set forth in the Universal Declaration of Human Rights” as a guide. 54 The reports document torture and CID treatment, frequently citing local and international NGO reports for evidence of alleged abuse. For example “beating with batons and whips, burning with cigarettes, whipping soles of the feet, prolonged isolation, electric shock, denial of food or sleep,

hanging upside down, and forced spreading of the legs with bar fetters” as well as rape and genital mutilation are practices cited in the 2008 report on Pakistan. The 2008 report on Afghanistan documents that “Torture and abuse included pulling out fingernails and toenails, burning with hot oil, beatings, sexual humiliation, and sodomy” and notes that “police frequently raped female detainees and prisoners” and that “approximately half of the children in detention centers and orphanages were exposed to physical abuse.”

In Iraq, the State Department reports that “electricity and cold water, which leave few physical traces, were the most commonly used torture methods,” followed by a gruesome litany of offenses. Egypt reportedly “employed torture methods such as stripping and blindfolding victims; suspending victims by the wrists and ankles in contorted positions or from a ceiling or door-frame with feet just touching the floor; beating victims with fists, whips, metal rods, or other objects; using electric shocks; dousing victims with cold water; and sexual abuse, including sodomy.” In Tunisia, “Reported abuses included sexual abuse; sleep deprivation; electric shock; death threats; submersion of the head in water; beatings with hands, sticks, and police batons; suspension, sometimes manacled, from cell doors and rods resulting in loss of consciousness; and cigarette burns.” The reports are notable in that they combine obvious forms of torture with allegations of “prolonged isolation,” “denial of food or

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sleep,” “stripping and blindfolding victims,” “dousing victims with cold water,”
“submersion of the head in water,” and various stress positions within the range of
abusive practices.

To sum up, the above discussion clearly highlights the depth of the anti-torture
regime, both domestic and international. Moving from general commitments in the
nineteenth and early twentieth centuries to a flurry of post-World War II treaties to the
domestic institutionalization of anti-torture rules, there can be no doubt that torture was,
by the turn of the millennium, totally illegal in all circumstances. As far as the United
States is concerned, the problem of torture is one of compliance, not the positive law.

3.4 Illegal Torture and the Transformation of Practice

Despite the emergence of numerous normative and legal prohibitions, torture
practices have persisted. The illegality of torture means, however, that it cannot by
definition be practiced legally. Therefore, the growth of constraints has forced authorities
wanting to use torture to either suspend or flaunt the law, or break it secretly. In other
cases, formal state compliance has not prevented unauthorized group or individual
actions. The exceptional, covert, and unauthorized models of torture in the face of legal
restraints are discussed below.

3.4.1 Torture as Exception

The concept of exception is helpful for understanding the persistence of torture in
fascist and colonial contexts long after its prohibition in Europe. The Nazis produced
what was in many ways an archetypal state of sovereign exception. While Schmitt’s
conceptualization of the sovereign decider is not necessarily wedded to fascist
jurisprudence, his model of normless emergency politics closely mirrors it.

Notwithstanding the progress of the Enlightenment and the delegitimation of torture over prior decades, the ascendancy of fascism returned openly practiced torture to the heart of Europe with a vengeance. In Franco’s Spain, Mussolini’s Italy, Hitler’s Germany, Vichy France, and the Nazi occupied countries, torture was a common and unconstrained method of both extracting information and communicating political authority. The fascist interlude in the West highlights the possibility of law’s suspension, despite the presence of pre-existing normative and legal frameworks. Law does not constrain actors who adopt the mantle of dictator or decider.

Despite disgust with fascist practices and the emergence of an increasingly institutionalized international human rights regime after World War II, Europe’s great democracies also used torture to rout national liberation movements and maintain colonial oppression. Appeals to prerogative in the face of emergency necessity undermined respect for human rights protections. Colonies became zones where law was effectively suspended and reconstituted to serve the demands of counterinsurgency.

While cases are too numerous to document, two especially egregious instances of state-sanctioned torture are worth noting.

French torture in the Algerian war is widely documented. As French General Jacques Massu admitted “Was there really torture? I can only reply in the affirmative…I am not frightened of the word.” Torture, notes General Paul Aussaresses in his war memoir, was “inevitable in a situation that clearly defied every rule…torture was

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legitimate in cases when it was urgent to obtain information.”62 While torture was committed with impunity, efforts were taken to minimize evidence. As Darius Rejali notes in his sweeping account of the history of torture, “If there was a distinctive modern style in torture, it was French modern: the field telephone magneto adapted with alligator clips, usually conjoined with water torture, either pumping (the tube, tuyau) or choking (the bathtub, baignoire). French modern was a stealthy style, one that was pioneered to avoid unwanted publicity and to create plausible deniability.”63 Thus, even in this space of exception, awareness of human rights constraints was evident.

Less well known are British torture practices in 1950s Kenya. In one of many horrific passages in her chilling history of counterinsurgency, Caroline Elkins describes the campaign of systematic terror unleashed against the Kikuyu:

Alongside the barracks of the Kenya Regiment, were interrogation rooms where local villagers were brought in for torture. Men and women were questioned incessantly about their knowledge of Mau Mau and told to confess their oaths if they wanted to live. Hung upside down from rafters, they were beaten with whips, clubs and rifle butts. Women were often held for days and raped repeatedly by black and white alike. Some were gang raped, others molested by individuals. They were raped a gunpoint, at knifepoint, or were tied up or held down by the force of a boot or the butt of a gun. Men were also sexually assaulted, sodomized with bottles and rifle barrels, and castrated.64

Public condemnation of torture grew in both France and Britain, but perpetrators largely escaped consequences.

Exceptions to the torture prohibition were not solely a European phenomenon. Despite the collapse of slavery, African Americans continued to be subject to a reign of terror. As the hopes of Reconstruction faded throughout the South, “Black Codes” and

63 Ibid., 167.
later Jim Crow laws attempted to exclude and segregate freed slaves. While basic constitutional protections applied *de jure*, systemic police and judicial racism created *de facto* impunity for extensive human rights abuses. Most notably, public torture lynchings, along with extreme violence short of murder, were widespread in late nineteenth-century and early twentieth-century America.

Just as monarchs once tortured traitors, these torture spectacles were primarily disciplinary. Torture functioned as part of a widespread terrorist campaign to “restore the balance of racial power to approximate pre-war conditions” and to “shame a threatening “other” into abject submission.” The Ku Klux Klan (KKK) targeted men, women, and children, including whites who transgressed the colour line. Violence often took the form of sexualized voyeuristic rituals including stripping, sexual posturing, bucking (in which a person is tied to a log for whipping), rape, rape in front of intimates, gang rape, child rape, genital torture and mutilation of men and women, tarring and feathering, skinning, burning, and hanging.

Law enforcement did little to stop the atrocities—either because they sympathized with the perpetrators or because the KKK had sufficient power to immobilize local authorities. Police condoned and often participated in violence. As James Clarke explains:

> After the removal of federal troops and the restoration of states' rights in 1877, violence became more public, for without even the limited fear of federal prosecution, disguise and night-time raids were no longer necessary. Klan hoods and robes of the early 1870s, for example, were replaced with uniforms and badges in the 1880s, for there was no longer any need for concealment as the

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66 Ibid., 710.
67 Ibid., 714-22.
68 Ibid., 784.
Klan's terrorist functions became institutionalized, condoned by state and local law enforcement. Lynching became a public spectacle, symbolizing the enforcement component of white supremacy and the Southern wing of the Democratic party. Since lynching enhanced the objectives of social control, and was not a punishable crime in the South, it flourished virtually unchecked by the law or community pressure.\textsuperscript{69}

Sometimes wavering efforts to check Klan power did result in trials, but acquittals and light punishment were common. “At no point during the Klan’s reign of terror was law employed with the sort of dexterity and resolve that might at once have ended the most violent expressions of racial hatred and allayed the trauma endured by so many of its victims,” notes Lisa Cardyn.\textsuperscript{70} The KKK often operated as a counter-revolutionary law unto itself.\textsuperscript{71} Torture, moreover, sometimes found its way directly into the criminal justice process. For instance, in the 1936 \textit{Brown v. Mississippi} case of black defendants accused of killing a white man, openly tortured confessions were admitted as evidence in the trial by local and later Mississippi state judges, a decision eventually overturned by the Supreme Court.\textsuperscript{72}

Other pockets of exception have emerged in the history of American torture, most notably in the penal system. Chain gangs subjected prisoners to notoriously brutal conditions. Various water tortures were commonly employed at Sing Sing and San Quentin prisons in nineteenth century.\textsuperscript{73} Folsom prison had a chloride of lime cell that created burning noxious fumes.\textsuperscript{74} During World War I, conscientious objectors were tortured in custody. While President Wilson championed democracy abroad, prisoners

\textsuperscript{70} Cardyn, “Sexualized Racism,” 790.
\textsuperscript{71} Ibid., 799.
\textsuperscript{73} Rejali, \textit{Torture and Democracy}, 285.
\textsuperscript{74} Ibid., 289.
found themselves subjected to a litany of abuses. As described in a 1918 account by former detainees at the Camp Funston Guard House in Kansas:

[“The Officer of the Day”] proceeded to abuse and insult us, referring to those of Jewish birth as “damn kikes,” etc. He then had our beds and blankets taken from us, and ordered that we be given raw rations — pork and beans — which we were to cook in the latrine, if we wanted to eat...In the afternoon Larsen was brutally assaulted, being choked, his head banged against the wall, and dragged around the room by the Sergeant of the guards...The bayonet was applied to all of us — Larsen receiving a scar. Kaplan and Breger were beaten with the butt end of the rifle. All were kicked and shoved about... We were compelled to take a cold shower once in the morning and once in the afternoon...The Captain himself brought forth scrubbrushes, used ordinarily for cleaning toilet seats and brooms used for sweeping, and ordered that we scrub each other with them...Mr. Kaplan was forced to remain seated while cold water was trickled on his head and this process was continued until he fainted, while Mr. Kaplan was bound with his hands above his head in a manner so painful that he felt his arms were being broken and the pain caused him to scream repeatedly...

“Most of the mistreatment took place outside,” notes the report, “with large groups watching the sorry and revolting spectacle of defenseless men being most brutally punched, shoved, and abused.”

In Delaware, the whipping post remained a legislated punishment until 1972. Even today, many prisoners have been subject to beatings, stun shocks, chemical sprays, and sexual assault while incarcerated. Human rights investigations have uncovered a systemic failure to prevent and prosecute widespread sexual abuse of women and

76 David Eichel, et al., Report of Treatment of Conscientious Objectors at the Camp Funston [Kansas] Guard House [events of Sept. 5 to Oct. 21, 1918], (Material was also included as part of a 12 page pamphlet of the National Civil Liberties Bureau, entitled What Happens in Military Prisons: The Public is Entitled to the Facts, dated Dec. 13, 1918), http://www.marxists.org/history/usa/groups/aclu/1918/1021-eichel-funston torture.pdf.
men. Moreover, the punitive/disciplinary practice of solitary confinement may arguably amount to torture when imposed for extended periods. With the explosion of “supermax” prisons, the once dark dirty “hole” has gone high tech. “In some places, the environment is so severe that people end up completely isolated, confined in constantly bright or constantly dim spaces without any meaningful human contact—torturous conditions that are proven to cause mental deterioration,” notes an investigative report. “In much the same way that a previous generation of Americans countenanced legalized segregation, ours has countenanced legalized torture. And there is no clearer manifestation of this than our routine use of solitary confinement—on our own people, in our own communities, in a supermax prison,” argues Atul Gawande.

It should be clear from this discussion that legal prohibition does not necessarily prevent torture. Even after states have accepted human rights principles, extensive abuses are possible. One way this occurs is through the declaration by the official state sovereign or more localized authorities—either overtly or more tacitly and informally—of law free zones where victims can be abused with impunity. The law is in essence suspended and pushed aside, allowing someone in power, be it a fascist dictator, colonial administrator, zealous general, local sheriff, or sadistic prison warden, to exercise their unmitigated power. Torture can be practiced relatively openly because no higher authority is willing or able to stop it.

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3.4.2 Covert and Proxy Torture

Notwithstanding the aforementioned examples of exception, the experience of World War II and growing disgust with abuses in the colonies internationally and Jim Crow in the United States meant that the legitimacy of exceptions declined through time. This trend was complemented by the expanding architecture of the international human rights regime and the growing political utility of the dichotomy between the democratic West and totalitarian East during the Cold War. Accordingly, when Western democracies, including the United States, decided to torture, or at least cooperate with torturers, they increasingly did so in secret or via proxies.

This style of torture has been associated with intelligence agencies, often operating under the cover of plausible deniability. Unlike a state of exception, practices conducted in this way do not suspend the law or openly transgress norms, but violate them stealthily. The demand for denial evinces awareness of the distinction between legality and illegality and the risk of sanction, embarrassment, and blowback. While secrecy is legitimate for protecting intelligence “sources and methods”—for instance, to conceal the identity of an informer—plausible deniability has traditionally been associated with covert action.

Covert action denies agency. As explained in NSC 1012, covert operations should be “so planned and executed that any U.S. Government responsibility for them is not evident to unauthorized persons and that if uncovered the U.S. Government can plausibly disclaim any responsibility for them.”82 Covert action ranges from propaganda, to financial aid, to violent intervention. As defined by contemporary U.S. law, covert action

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is “an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the [government] will not be apparent or acknowledged publicly.”

For much of the Cold War, plausible deniability of covert action was the name of the game. The stakes of the conflict demanded morality be put aside. As the classified 1954 Doolittle Report put it, the threat of an “implacable enemy whose avowed objective is world domination by whatever means and at whatever cost” necessitated that “hitherto accepted norms of conduct” cease, that “long-standing American concepts of “fair play”” be reconsidered, and that “no one should be permitted to stand in the way” of the “fundamentally repugnant philosophy” of ruthless covert action.

Avoiding Soviet retaliation, conflict escalation, and counter-espionage were pragmatic motives for secrecy. But stealth concerned more. For instance, “backfire,” Secretary Rogers told Henry Kissinger in the context of anti-Allende efforts in Chile, implied “getting caught doing something. After all we have said about elections, if the first time a Communist wins the U.S. tries to prevent the constitutional process from coming into play we will look very bad.” Through omission and commission, plausible deniability facilitated intelligence activities that violated other countries’ sovereignty, promoted anti-democratic forces, engaged in paramilitary violence, or was implicated in illegal, immoral, or hypocritical behaviours.

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American covert policy took many problematic forms over the years. The CIA secretly manipulated elections and distributed propaganda in post-war Europe.\(^8^6\) They backed coup attempts in Iran, Guatemala, Indonesia, Vietnam, Cuba, Congo, Chile, Greece, and Pakistan.\(^8^7\) Assassination plots targeted Fidel Castro, Rafael Trujillo, and Patrice Lumumba.\(^8^8\) As characterized by the ground breaking Church Committee reports of the mid 1970s: “Previous excesses of drug testing, assassination planning, and domestic activities were supported by an internal structure that permitted individuals to conduct operations without the consistent necessity or expectation of justifying or revealing their activities.”\(^8^9\) Secrecy helped create an atmosphere of amoral impunity.

Many of these activities involved torture. Torture was common in Cold War conflicts waged in Central America, Southern Africa, South East Asia, and Afghanistan, where Americans oversaw, colluded with, and failed to prevent torture by their proxy allies. For example, USAID’s Office of Public Safety trained police in harsh interrogation in dozens of countries through the 1960s, focusing increasingly on South Vietnam. As the war intensified, CIA organized Provincial Reconnaissance Units (PRUs) brought


prisoners to Provincial Interrogation Centers where torture was common.\textsuperscript{90} In 1967, police, military, and counterinsurgent units were coordinated into a “centralized pacification bureaucracy,” Civil Operations and Rural Development Support (CORDS). As part of CORDS, the CIA developed the Phoenix Program, a covert operation run by specially trained PRUs aimed at routing the elusive National Liberation Front network. Phoenix relied increasingly on assassination and torture.\textsuperscript{91} The South Vietnamese, who had learned techniques like magneto torture from the French, generally committed the abuse while American “advisors” stood by.\textsuperscript{92} By 1972, Phoenix operatives had “eliminated” 81,740 suspected Vietcong and killed 26,369 prisoners.\textsuperscript{93}

Dictatorial allies with infamously poor human rights records, including widespread torture, also received financial aid and political support throughout Latin America. In some cases, Americans directly supported torture, applying lessons learned in the Vietnam theatre to Project X, a comprehensive exportable training program.\textsuperscript{94} For example, in the 1960s, the CIA trained Brazilians in the craft of field telephone torture.\textsuperscript{95} Electric needles manufactured by the CIA’s Technical Services Division were shipped to Uruguay.\textsuperscript{96} Dan Mitrione, head of the American Office of Public Safety in Montevideo, advised on torture techniques, a fact that became widely publicized after he was kidnapped by Tupamaro guerillas.\textsuperscript{97}

\begin{footnotes}
\item[90] Alfred McCoy, \textit{A Question of Torture: CIA Interrogation, From the Cold War to the War on Terror} (New York: Henry Holt and Company, 2006), 63.
\item[91] Ibid., 64.
\item[92] Rejali, \textit{Torture and Democracy}, 172.
\item[93] McCoy, \textit{A Question of Torture}, 68.
\item[94] Ibid., 71.
\item[95] Rejali, \textit{Torture and Democracy}, 218.
\item[96] Ibid., 186.
\end{footnotes}
Several torture manuals were used by Project X. The manuals were distributed by advisors on the ground and via officer training at places like the School of the Americas (SOA). Rejali notes that South American torture practices did not in fact necessarily reflect the manuals, but they were produced all the same. Most well known is the 1963 KUBARK Counterintelligence Training Manual (KUBARK was the CIA’s codename for itself). Interestingly, the manual evinces constant awareness of the legal problems that might result from the exposure of torture:

Interrogations conducted under compulsion or duress are especially likely to involve illegality and to entail damaging consequences for KUBARK. Therefore prior Headquarters approval at the KUDOVE level must be obtained for the interrogation of any source against his will and under any of the following circumstances:

1. If bodily harm is to be inflicted.
2. If medical, chemical, or electrical methods or materials are to be used to induce acquiescence.

The manual goes on to explain the most efficacious techniques:

The following are the principal coercive techniques of interrogation: arrest, detention, deprivation of sensory stimuli through solitary confinement or similar methods, threats and fear, debility, pain, heightened suggestibility and hypnosis, narcosis, and induced regression... The more completely the place of confinement eliminates sensory stimuli, the more rapidly and deeply will the interrogatee be affected. Results produced only after weeks or months of imprisonment in an ordinary cell can be duplicated in hours or days in a cell which has no light (or weak artificial light which never varies), which is sound-proofed, in which odors are eliminated, etc. An environment still more subject to control, such as water-tank or iron lung, is even more effective... It has been plausibly suggested that, whereas pain inflicted on a person from outside himself may actually focus or intensify his will to resist, his

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99 Rejali, Torture and Democracy, 428.
100 Central Intelligence Agency, KUBARK Counterintelligence Interrogation (July 1963), 8, http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB27/01-01.htm. KUDOVE is a cryptonym for the CIA’s Office of the Director.
101 Ibid., 85.
102 Ibid., 90.
resistance is likelier to be sapped by pain which he seems to inflict upon himself.\textsuperscript{103}

To detect feigned illness and malingering, KUBARK recommends threatening electric shock treatment and frontal lobotomy.\textsuperscript{104}

The KUBARK manual’s preoccupation with concepts such as “regression” and “self-induced pain” reflected almost two decades of CIA experimentation. Nazi scientists had applied mescaline to concentration camp inmates at Dachau. Not long after, the Office of Strategic Services set up its own “truth drug” program in cooperation with the Manhattan Project.\textsuperscript{105} After the war, Americans were alarmed as zombie-like prisoners confessed in Stalinist show trials. They became increasing concerned with the psychology of torture when robotic American prisoners of war appeared on television during the Korean War. To uncover the secrets of mind control, the CIA launched a secret program that combined “esoteric, often bizarre experiments with hallucinogenic drugs, from 1950 to 1956; then, more conventional research into human psychology until 1963.”\textsuperscript{106} Early investigations were consolidated under the secret MKUltra program in 1953, run by the macabre character Sidney Gottlieb, whose other interests included assassination methods.\textsuperscript{107}

MKUltra’s experimental projects included the application of LSD to unsuspecting subjects such as Frank Olson, who committed suicide after suffering a mental collapse.\textsuperscript{108}

The CIA built on McGill University researchers Donald Hebb and Eugene Cameron’s pioneering experiments into the effect of sensory deprivation. It further utilized the

\begin{itemize}
  \item \textsuperscript{103} Ibid., 94.
  \item \textsuperscript{104} Ibid., 102.
  \item \textsuperscript{106} McCoy, \textit{A Question of Torture}, 26.
  \item \textsuperscript{107} Central Intelligence Agency, \textit{Family Jewels}.
  \item \textsuperscript{108} McCoy, \textit{A Question of Torture}, 30.
\end{itemize}
findings of prominent American behavioural scientists who worked under direct and indirect CIA and other government contracts and “advised the agency about the role of self-inflicted pain in Communist interrogation.”\textsuperscript{109} As Marks notes, CIA research “systematically violated the free will and mental dignity of their subjects,” many of whom were undesirables—mental patients, foreigners, drug addicts, and prisoners.\textsuperscript{110} The cumulative result was a new paradigm of psychological torture that eschewed obvious physical torture in favour of the methods advocated by KUBARK.\textsuperscript{111}

Despite the post-Church Committee creation of new House and Senate intelligence oversight committees, many problematic CIA practices persisted, albeit with some greater scrutiny. For example, the KUBARK manual was reformulated as the 1983 Human Resource Exploitation Manual to aid the Contras. As noted by Thomas Blanton and Peter Kornbluh, the “original text stated that “we will be discussing two types of techniques, coercive and non-coercive. While we do not stress the use of coercive techniques, we do want to make you aware of them.” However, “after Congress began investigating human rights violations by U.S.-trained Honduran intelligence officers, that passage was hand edited to read “while we deplore the use of coercive techniques, we do want to make you aware of them so that you may avoid them.”\textsuperscript{112}

By the 1990s, old-style alliances with human rights abusers were subject to mounting condemnation. According to a 1992 report by the Assistant to the Secretary of Defense for Intelligence Oversight, seven Spanish language training manuals distributed

\textsuperscript{109} Ibid., 32-33. McCoy notes that the research of several major figures including Albert Biderman, Irving Janis, Harold Wolff, Lawrence Hinkle, and Stanley Milgram influenced (sometimes unwittingly) the emerging CIA paradigm.

\textsuperscript{110} Marks, The Search for the “Manchurian Candidate,” 10.

\textsuperscript{111} McCoy, A Question of Torture, 59.

at the School of the Americas and by U.S. Mobile Training Teams between 1987 and 1991 contained objectionable material.\textsuperscript{113} Public campaigns such as SOA Watch, launched in response to revelations that SOA trained operatives were implicated in the 1981 El Mozote massacre in El Salvador, were increasingly successful. In the mid-1990s, American lawyer Jennifer Harbury exposed a widespread terror campaign by SOA-trained, CIA-paid Guatemalan officers after her husband, a Mayan activist, was captured, brutally tortured, and murdered.\textsuperscript{114} By 2001, SOA was compelled to relaunch and rebrand itself as the Western Hemisphere Institute for Security Cooperation. According to Ruth Blakely, SOA now offers a high quality human rights curriculum and does not teach torture.\textsuperscript{115}

Throughout the Cold War, the United States never publically endorsed or advocated torture. Conflict with the Soviets was often framed as a battle for human rights and democracy, ideals clearly incompatible with torture. Yet growing legal and normative constraints were not enough to prevent torture where policy makers thought it would aid their strategic objectives. Rather, torture along with other questionable behaviour was driven underground, conducted in secret, and denied. This approach to torture, where it occurred in a systemic, authorized way, dominated American practice until 9/11.

\subsection*{3.4.3 Unauthorized Torture}

\begin{footnotesize}
\begin{enumerate}
\item Blakely, “Still Training to Torture?,” 1441.
\item Blakely, “Still Training to Torture?,” 1449.
\end{enumerate}
\end{footnotesize}
Given America’s leadership in establishing international law and the thrust of the
domestic legal tradition, one would not expect the United States to be a major torture
perpetrator. In the American case, torture has generally not been officially authorized in
war. While something akin to exception is present in other areas of national security
practice (to be discussed in later chapters), Presidents and generals have not openly
permitted soldiers to torture their enemies. “Dwight Eisenhower made a point to
guarantee exemplary treatment to German POWs in World War II, and Gen. Douglas
McArthur ordered application of the Geneva Convention during the Korean War, even
though the U.S. was not yet a signatory. In the Vietnam War, the United States extended
the convention’s protection to Viet Cong prisoners even though the law did not
technically require it.”

Torture by Americans in war has occurred, of course, but most often on an
unauthorized basis. In these cases, “bad apples” involve themselves in non-sanctioned
behaviour. The government may be responsible for creating a toxic institutional climate
that gives the “green light” to torture, but unauthorized torture is distinct from cases of
exception and denial where there is systemic, authorized torture. When “bad apples” are
captured, they are generally disciplined and prosecuted, signaling the state does not accept
the legitimacy or legality of their actions.

Often unauthorized torture dovetails with proxy torture. For example, in the
Spanish American War (1899-1902), U.S. troops began to emulate their Philippine allies
who were themselves copying the Spanish, employing the “water cure” against enemy
detainees. As described by one American officer at the time:

116 Kennedy Jr, “America’s Anti-Torture Tradition.”
117 Rejali, Torture and Democracy, 280.
Summary executions are, and will be, necessary in a troubled country, and I have no objection to seeing that they are carried out; but I am not used to torture. The Spaniards used the torture of water, throughout the islands, as a means of obtaining information; but they used it sparingly, and only when it appeared evident that the victim was culpable. Americans seldom do things by halves. We come here and announce our intention of freeing the people from three or four hundred years of oppression, and say, "We are strong, and powerful, and grand." Then to resort to inquisitorial methods, and use them without discrimination, is unworthy of us, and will recoil on us as a nation.118

According to Richard E. Welch Jr., these “terror tactics never received the sanction of official policy either in Washington or Manila. Such acts were usually the work of junior officers and enlisted men inspired by anger, boredom, and racial animosity and freed by the nature of the war from close supervision by their superiors.”119 While rampant racism and imperialism ensured that public outrage was muted, the exposure of torture practices and other atrocities led to the United States Committee on the Philippines, led by Henry Cabot Lodge, to launch an investigation in 1902. After repeated evasions by the administration, U.S. authorities eventually opened prosecutions, court martialing and convicting several officers for violations of the laws of war, although punishments were weak.120 Despite the imperialistic character of turn of the century American foreign policy, battlefield torture was understood as contrary to the laws of war and worthy of condemnation.

The nature of American involvement in torture in the Vietnam War has long been subject to contestation. Evidence tends to be more testimonial than documentary. The credibility of soldier, activist, and government claims has been subject to debate. As

discussed in the previous section, it does seem clear that intelligence agents were involved in a systemic pattern of collaboration with South Vietnamese torture. However, not all torture was part of an authorized campaign. For instance, torture committed by American soldiers was generally far more ad hoc than Phoenix. As Rejali explains:

> Once one separates out torture from other atrocity allegations and dispenses with fabricated accounts, a fairly coherent picture of American torture emerges. The different sources conform quite well to the official reports and court martial records. They describe repeatedly the same range of techniques. Moreover, the evidence they present suggest torture was not official U.S. policy in Vietnam as it was in Algeria. The evidence veterans provided suggests an underground subculture of military interrogators who shared techniques tolerated and shielded by midlevel commanders. These soldiers were careful to hide what they did from superiors and were quite aware of military rules prohibiting torture. Torture techniques appear to have migrated not from the top down, but from unit to unit as interrogators imitated their interpreters, ARVN interrogators, and each other.\(^{121}\)

In other words, the American military did not permit torture as a matter of policy. Nonetheless, as the war progressed, American soldiers increasingly observed or participated in torture. This was confirmed by internal army investigations such as the Army Criminal Investigation Division re 172\(^{nd}\) Military Intelligence Detachment.\(^{122}\)

Nonetheless, prosecutions for human rights abuses were minimal, highlighting the grey zone between weak condemnation and tacit permission.

On the domestic front, police interrogation has been another problematic site of torture. Until well into the twentieth century, the so-called “third degree” was often applied to suspects of all races. Practices included use of the “sweat box,” or confinement

\(^{121}\) Rejali, *Torture and Democracy*, 581-82. Note that Rejali does not differentiate between direct torture and proxy torture/cooperation with torture. He is primarily concerned with how torture methods contribute to denial rather than the political or legal cover given to torture. He nonetheless provides ample evidence of the systemic torture associated with Phoenix committed by the South Vietnamese. Therefore, I think it fair both to concur with Rejali’s argument that torture by Americans was not official military policy, while also asserting that covert collaboration with local proxy torture through Phoenix was.

In a hot stinking enclosure.\textsuperscript{123} In 1931, the American Bar Association’s Wickersham Commission produced a Report on Lawlessness in Law Enforcement, which documented the situation:

In uncompromising language, the \textit{Report on Lawlessness in Law Enforcement} concluded that “[t]he third degree—that is, the use of physical brutality, or other forms of cruelty, to obtain involuntary confessions or admissions—is widespread.” Specific tactics included protracted questioning, threats and methods of intimidation, physical brutality, illegal detention, and refusal to allow access of counsel to suspects. The report declared unequivocally that “the third degree is a secret and illegal practice.”\textsuperscript{124}

Amongst the specific techniques of physical brutality documented by the Commission were sleep deprivation, beatings, use of light and electricity, exhaustion exercises, water and air torture, sweatboxes, drugs, and positional devices.\textsuperscript{125} The “third degree” was a clear violation of constitutional rights. Because of this, police did not admit torture.\textsuperscript{126} “Clean” techniques that left no marks were employed to evade legal restrictions in the face of growing public concern.\textsuperscript{127}

There have been a series of investigations and court rulings that have confirmed the illegality of abusive interrogation in the United States. In 1944, \textit{Ashcraft v. Tennessee} excluded coerced confessions as evidence.\textsuperscript{128} The concept of voluntary confession evolved with \textit{Miranda v. Arizona} (1966),\textsuperscript{129} requiring that suspects be read their rights. In 2003, the Supreme Court ruled in \textit{Chavez v. Martinez} that police questioning of a man suffering from gunshot wounds in hospital violated his constitutional rights, even though

\begin{itemize}
  \item \textsuperscript{123}Skolnick, “American Interrogation,” 112.
  \item \textsuperscript{125}Rejali, \textit{Torture and Democracy}, 71-73.
  \item \textsuperscript{126}Skolnick, “American Interrogation,” 113.
  \item \textsuperscript{127}Rejali, \textit{Torture and Democracy}, 73.
  \item \textsuperscript{128}Ashcraft \textit{v. State of Tennessee}, 322 U.S. 143 (1944).
  \item \textsuperscript{129}Miranda \textit{v. Arizona}, 384 U.S. 436 (1966).
\end{itemize}
they were not responsible for the injuries and he was not under arrest. The rise of new norms and concrete legal guidelines helped eliminate torture as a regular method for obtaining criminal conviction. By the mid-twentieth century, the “third degree” was increasingly uncommon.

Nonetheless, there have been notable pockets of “bad apples” throughout the country’s police departments. In 1990, Michael Goldston, an investigator for the Chicago Police Department’s Office of Professional Standards, identified a systemic pattern of brutality and torture including electrocution, asphyxia, beating, and suspension between 1973 and 1986, with subsequent investigations finding torture practiced up until 1991. Commander Jon Burge, who learned electric magneto torture in Vietnam, led the abuse. Burge was eventually fired, but none of the major players in the Chicago scandal have been convicted of a crime. As John Conroy notes:

All of the known victims are black. Some were sent to death row on the basis of tortured confessions and perjured testimony by police, and many are still serving long sentences. All of their confessions are suspect. Most of the accused police officers are white. Many have been promoted or have retired with pensions. Some of the prosecutors informed of the torture are now judges. One serves on the Illinois Appellate Court. And one is the mayor.

Finally, after years of inaction and after activists brought their concerns to the UN Committee Against Torture and the Inter-American Commission on Human Rights, Burge was indicted in fall 2008 on perjury and obstruction of justice charges relating to his testimony in previous abuse investigations. “There is no place for torture and abuse in a police station. There is no place for perjury and false statements in federal lawsuits,”

declared U.S. Attorney Patrick Fitzgerald. “No person is above the law, and nobody—even a suspected murderer—is beneath its protection. The alleged criminal conduct by defendant Burge goes to the core principles of our criminal justice system.”134 Other infamous cases of police brutality include the Rodney King case in Los Angeles and the Abner Louima case in New York City. The former resulted in acquittals, the latter prison sentences.

In cases of non-authorized torture, exposure has led to political condemnation, sometimes to prosecutions, and, in a few cases, convictions. Even when subcultures produce relatively systemic torture, police torture, like military torture, has not generally been considered legally legitimate in the United States. While policy makers might be willing to turn a blind eye to torture, they are reluctant to openly defend torturers once they are successfully exposed. Between 1999 and 2005, 284 law enforcement officers were convicted of civil rights violations, mainly for excessive force. While prisons have expanded as spaces of exception in some ways as previously discussed, certain forms of localized abuse have been challenged by the state. For instance, between 1980-2004, the Department of Justice (DOJ) Civil Rights Division initiated action against 400 institutions for improper treatment of inmates.135 That said, the line between exception, denial, and non-authorized torture is often blurred. This is reflected in relatively weak prosecution efforts.

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135 U.S. Department of State, Second Periodic Report.
Clearly, the resort to torture is neither new nor terribly mysterious. People torture other people for a variety of reasons—to shame them, to punish them, to demonstrate their power over them, and to extract information. There is not a completely clear pattern that accounts for why torture is sometimes practiced as an overt exception to the rule of law, in secret or through proxies, on an ad hoc basis, or not at all. The above examples cannot be easily organized along any single social scientific variable. There appears to be a great deal of contextual contingency to how torture is carried out.

That said, the beliefs and calculations of political agents—concerning the legitimacy of torturing various victims and the political and legal risks of getting caught doing so—have arguably shaped approaches to torture. Ideologically anti-democratic political proclivities, deep racial and political hatreds, and/or perceptions of danger and threat make it more likely that exceptions to the rule of law—either overt or tacit—will seem justified. These phenomena are evident in various combinations in episodes of fascism, in colonial contexts, in the post-Reconstruction American South, and to at least some degree in the penal system. In these cases, existing human rights laws and norms may have little impact on actor behaviour. However, the legitimacy of racially based exceptions have declined over time while the impermissibility of derogating from torture laws has increased, making exceptional torture increasingly rare.

In contrast, covert and clandestine torture is more likely when actors are highly conscious of the negative repercussions of torture. When they are concerned about their normative legitimacy, the risk of legal sanction, or the strategic implications of torture, they are unlikely to practice or endorse it openly. This approach appears common in the
history of post-World War II American intelligence agencies that have frequently been tasked with the state’s secret “dirty business.”

Finally, there is often a fine line between authorized and unauthorized practices. The distinction has significant political ramifications. It is thus with some trepidation that the previous discussion classifies cases of American wartime abuses as unauthorized. It does seem, however, that unlike their European counterparts, Americans have not had a history of officially permitting military torture. While torture is often the predictable result of American counterinsurgency campaigns, torture per se has not been considered publicly legitimate. The same goes for domestic law enforcement, at least since the success of the Civil Rights Movement. In both the military and policing contexts, torture has usually not been the result of orders or from above, but has emerged from subcultures below. When uncovered, it is condemned and occasionally prosecuted.

3.5 9/11 and the Redefinition of Torture

Before 9/11, two distinct periods are evident in the development of the relationship between structures of constraint and torture practices. In the first, torture was considered a legitimate tool of judicial investigation and state and church power. There was no need to hide torture. With the dawn of the Enlightenment, however, torture increasingly came to be seen as illegitimate, eventually resulting in its total prohibition in constitutional and human rights law and the humanitarian laws of war. These limits were reflected in changing approaches to practice in states that had internalized these shifts. Sometimes torture reflected a declaration—tacit or overt—of a state of exception in which law was suspended. More common in America was resort to secrecy and plausible deniability. Torture was hidden or delegated to proxies. In yet other cases, torture has not
been officially permitted, but has resulted from unauthorized behaviour by “bad apples” and has been punished as such. In practice, these models overlap to a degree, the common thread being that torture is increasingly legally problematic within the liberal democratic paradigm.

The universalization of rights standards, the growth of accountability mechanisms, and an overall reduction in perceived threat with the winding down of the Cold War meant that, by the 1990s, torture appeared to be largely obsolete and irrelevant in the United States. Save a police brutality case here and there, there was no systemic overt or covert use of torture evident. Certainly, the United States maintained close relationships with many states known to torture, but began to press more strongly than ever for improvements to human rights practices.

After 9/11, however, torture once again emerged as a systematic and authorized practice. But unlike in previous eras, torture would not be pursued under the rubrics of exception or denial. Rather, as I argue in the following pages, the combination of non-derogable, universal contemporary anti-torture law, the growth of media and NGO monitoring capability, and the creation of a U.S.-run CIA interrogation program, produced a new approach to torture. The primary thrust of this shift was the attempted redefinition of the meaning of law and of torture to reconcile these seemingly contradictory phenomena.

3.5.1 The New Demand for Torture

Several factors colluded to produce resurgent demand for torture. For the first time since Pearl Harbor, the United States found itself directly under attack. Public fear and anger along with policy makers’ anxious desire to prevent another strike helped
legitimize “a whatever it takes” attitude. Pundits, academics,136 and even TV shows such as Fox’s 24137 fuelled the flames with “ticking bomb” scenarios.138

As has been common in the history of torture, the religious, racial, and cultural difference of Muslim extremists—the “evildoers”—served to dehumanize them in the eyes of many. As Thomas Bass characterizes it, “Targets of torture are reduced to the status of ‘other,’ and racial stereotypes further reduce them to being ‘inferior.’ Their subaltern position excuses and almost invites their being tortured, as if the act of torture could confirm what skin color and race had already implied about their disloyalty to Western values.”139 The hawkish predilection for military aggressiveness and executive power held by George Bush, Dick Cheney, and their national security team,140 American inexperience with direct intelligence interrogation and detention in the post-Vietnam era, and the frustratingly asymmetrical, amorphous nature of Al Qaeda, combined to create a context ripe for the growth of abusive practices. Grow they did. A litany of abuse allegations emerged from detainees at Guantánamo, Abu Ghraib, other Iraqi and Afghan prisons, CIA “blacksites,” and from prisoners rendered to U.S. allies for torture.

3.5.2 Echoes of Exception and Denial

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136 For instance, Professor Alan Dershowitz has famously advocated “torture warrants” in certain scenarios. See Why Terrorism Works: Understanding the Threat, Responding to the Challenge (New Haven: Yale University Press, 2002).


140 Jane Mayer, The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals (New York: Doubleday, 2008), 58.
Before turning to a discussion of how the post-9/11 approach to torture is in many ways novel, it is important to acknowledge the ways in which it could be interpreted to mirror past practice. For popular author Naomi Wolf, the post-9/11 world has “historical echoes” of fascism, contemporary events are “mirrored in history.”¹⁴¹ She analogizes the rhetoric of the Bush administration to that of the Nazis.¹⁴² More importantly, she argues, there is a “structural echo”: “the way dictators take over democracies or crush pro-democracy uprisings by invoking emergency decrees to close down civil liberties; creating military tribunals; and criminalizing dissent.”¹⁴³ By invoking threats, establishing secret prisons, developing paramilitary forces, surveilling and infiltrating ordinary citizens groups, arbitrarily detaining people, targeting individuals and restricting the press, casting dissent as treason, and subverting the rule of law, the Bush administration, according to Wolf, set America on a path towards the fascist tipping point. Other observers have made parallels between the opinions offered by Nazi jurists and the Bush administration’s legal arguments.¹⁴⁴ Numerous scholars and lawyers have argued that the Bush administration cast detainees into a lawless void reminiscent of a state of exception.¹⁴⁵

While such overt associations with fascism are clearly hyperbolic, there are elements of the Bush administration’s attitude towards human rights that lend themselves

¹⁴² Ibid., 10.
¹⁴³ Ibid., 10.
to such a reading. As will be discussed below, American policy makers authorized torture and CID treatment, rejected the application of the Geneva Conventions, and created the Guantánamo prison with the express intent of removing detainees from human rights monitoring. In so doing, the Bush administration frequently invoked wild claims about its right to exercise executive prerogative under Article II of the Constitution.

Accordingly, many theorists have interpreted human rights abuses in the GWOT as exceptional derogations from human rights standards, authorized via the logic of sovereign decisionism. While there is validity to this view, I will suggest it is empirically and theoretically problematic. As I document in the following pages, it appears that the Bush administration was not actually eager to openly declare a state of exception or justify a turn to emergency powers. Clearly, executive power has grown tremendously, but not anything has been possible in the post-9/11 context. With some interesting exceptions, the United States has not overtly claimed the right to torture people, put prisoners in concentration camps, ignore the Bill of Rights, or break international treaty obligations. In this sense, how post-9/11 policy is different from, not simply similar to the exception paradigm, is important for understanding the terrain of contemporary human rights abuses.

There are also similarities and differences with the paradigm of plausible deniability. Undoubtedly, covert operations to influence political outcomes around the world continue today. More importantly, counterterrorism activities have increasingly

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146 It can be difficult to untangle the theoretical beliefs of certain key individuals and the actual claims of the administration. For instance John Yoo provocatively responded to a question as to whether any law prevented “crushing the testicles of the person’s child” with “No treaty” and “I think it depends on why the president thinks he needs to do that.” (Mayer, The Dark Side, 153) While OLC memos have claimed Article II powers do permit the President to do whatever he wants in wartime, including resort to any interrogation methods deemed fit, the same memos assert that CIA techniques do not amount to torture, leaving such prerogative arguments at the purely hypothetical level.
come to resemble covert action, blurring the line between intelligence and paramilitary activities. Such operations are often unacknowledged rather than traditionally covert, are “overt covert.”147 As Vice President Cheney explained in language echoing the sentiments of earlier eras:

We also have to work, though, sort of the dark side, if you will. We’ve got to spend time in the shadows in the intelligence world. A lot of what needs to be done here will have to be done quietly, without any discussion, using sources and methods that are available to our intelligence agencies, if we’re going to be successful. That’s the world these folks operate in, and so it’s going to be vital for us to use any means at our disposal, basically, to achieve our objective.

According to Jane Mayer, Cheney closely studied the Vietnam Phoenix Program—“a program of state sanctioned torture and murder”—as a model.148

Notable post-9/11 versions of the “repugnant philosophy” have included the practice of extraordinary rendition that outsourced brutal torture of alleged terrorists to proxies.149 Interestingly, rendition is not an invention of the Bush administration, but began its current incarnation in the 1990s, pushed by Michael Scheuer, head of the CIA’s Osama Bin Laden Unit. At that time, CIA capacity was at a low point. As Stephen Grey explains, “In essence, the U.S. government chose to outsource its handling of terrorists because neither the first President Bush, nor Clinton nor his Republican opponents were prepared to establish a proper legal framework for the United States to capture, interrogate, and imprison terrorists itself.”150

Prominent victims of GWOT rendition include Canadian citizen Maher Arar, who

147 Treverton, Intelligence for an Age of Terror, 209.
148 Mayer, The Dark Side, 144.
150 Grey, Ghost Plane, 138.
faced months of horrific interrogation in Syria after he was secretly deported by U.S. authorities. In another infamous instance, CIA officers kidnapped Osama Moustafa Hassan Nasr off a Milan street, sending him to Egypt for torture. In many cases, European states facilitated rendition flights. Rendition denial is key for all parties involved. The United States cannot justify blatant torture; cooperating European states cannot admit their complicity; and receiving Muslim countries fear the political consequences of close cooperation with America.

In addition to these ghost prisoners, torture denial has taken other forms. As Rejali documents in his extensive study, many interrogation techniques such as stress positions, isolation, sleep deprivation, environmental manipulation, and water torture favoured in the GWOT have a long pedigree in democracies that are concerned about public image, because these methods leave few obvious scars or marks, making them difficult to prove. “Public monitoring leads institutions that favor painful coercion to use and combine clean torture techniques to evade detection, and, to the extent that public monitoring is not only greater in democracies, but that public monitoring of human rights is a core value in modern democracies, it is the case that where we find democracies torturing today we will also be more likely to find stealthy torture.” Without the photographic evidence that emerged at Abu Ghraib, it would arguably have been nearly impossible to establish the extent of abuses. Not surprisingly, the CIA destroyed waterboarding tapes of Abu Zubaydah and Abd al-Rahim al-Nashiri. At Camp Nama

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151 See Maher Arar’s website at http://www.maherarar.ca.
153 Rejali, Torture and Democracy, 8-9.
in Iraq, the walls “were posted with placards warning against leaving marks on the
detainees, with the motto “No Blood, No Foul,” reports Mayer.\textsuperscript{155}

Knee jerk secrecy has been pervasive since 9/11 in variety of contexts. Previously
available documents have been reclassified, banal inquiries have been made subject to
Freedom of Information Act requests, journalists who produced critical stories have been
denied access to policy makers, and leaking has been made subject to increased
sanctions.\textsuperscript{156} “Secrecy was both the Bush administration’s rhapsody and its ruin,” notes
Lichtblau.\textsuperscript{157} While President Barack Obama has increased openness with the
declassification of several important memos and investigative reports, secrecy continues.
For example, when British judges planned to release information about British
intelligence agency involvement in torture, Secretary of State Hilary Clinton reportedly
threatened to end intelligence cooperation.\textsuperscript{158} The President reversed his earlier decision
to make more Abu Ghraib photographs publicly available. The Obama administration has
repeatedly invoked the “States Secrets Privilege” to block investigations of abuses.

Despite the turn to covertness, however, secrecy has hardly been effective or long
lasting. As Olson notes, “The U.S. intelligence community has been under a magnifying
glass: second-guessed at every turn, criticized in Congress, and lambasted in the press.
Long gone are the days when American spies could do whatever they needed to do
“quietly, without any discussion.”\textsuperscript{159} Journalists and human rights investigators have
revealed an extraordinary amount of information about torture practices. “I knew that an

\textsuperscript{155} Ibid., 250.
\textsuperscript{156} Eric Lichtblau, \textit{Bush’s Law: The Remaking of American Justice} (New York: Anchor Books,
2009), 133.
\textsuperscript{157} Ibid., 138.
\textsuperscript{159} James, M. Olson, “Intelligence and the War on Terror: How Dirty Are We Willing to Get Our
interrogation program this sensitive and controversial would one day become public,” notes President Bush in his memoirs.\textsuperscript{160}

Moreover, policy makers have not always wanted to conceal their actions. Vice President Cheney announced America’s embrace of the “dark side.” President Bush informed reporters that the CIA was using “alternative” procedures of interrogation. Notwithstanding recent protestations about revealing “sources and methods,”\textsuperscript{161} just about all the details of officially sanctioned torture, including waterboarding, were available long before President Obama’s April 2009 declassifications. While never openly admitting illegality, the Bush administration was not averse to informing domestic and international audiences of America’s new tough stance, that as counterterrorism official Confer Black told the Senate, “After 9/11, the gloves come off.”\textsuperscript{162} Intimidating enemies and building a reputation for ruthlessness through “shock and awe” theatrics was a significant strategic goal in itself.\textsuperscript{163}

With these limitations in mind, when the harsh light of day inevitably shone on the administration’s controversial programs, there was always, it appears, another strategy in the works. This was also a plan of denial, but not the traditional kind. It would not primarily conceal or deny factual information, but would insist that no laws were broken.

3.5.3 A New Approach to Legality

\textsuperscript{162} Mayer, \textit{The Dark Side}, 43.
Governments may evade accusations of human rights violations in multiple ways. As typologized by sociologist Stanley Cohen, “implicatory denial” is premised on justifying or minimizing violations. Justifications may include asserting the righteousness of a cause, claiming emergency necessity, blaming and dehumanizing the victim, making advantageous comparisons with others, and rejecting universal standards.\(^\text{164}\) Demonizing the enemy is especially important to rationalize suspension of law in states of exception. On the other hand, while enemy images remain pervasive, plausible deniability is essentially a form of “literal denial”—the claim that violations did not happen or someone else was responsible. This form of denial is often accompanied by attacks on the credibility and motives of victims, witnesses, and journalists.\(^\text{165}\)

Despite mirroring exception and denial in important ways, the approach taken to security and intelligence practice in the GWOT is better understood under a third distinctive paradigm that I term “plausible legality.” To be clear, plausible legality is a strategy for getting away with human rights abuses. It should definitely not be confused with an assertion that arguments produced via this strategy are in fact plausible or convincing. Just as Cold War plausible deniability was generally fallacious, so too are most of the legal claims referenced in the following pages.

Plausible legality is form of what Cohen terms “interpretive denial” that reframes meanings, employs euphemisms and legalisms, fudges lines of responsibility, and claims abuses are isolated incidents.\(^\text{166}\) Sometimes “evasions are deployed because some categorizations are so pejorative, stigmatic, and universally condemned that they cannot

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\(^{165}\) Ibid., 524.

\(^{166}\) Ibid., 524-529.
be openly admitted or defended,” he notes. In such cases, states pay lip service to human rights considerations, forcing human rights advocates “to reveal the pictorial reality (Orwell's "mental pictures") that lies beneath the intricate facade of legalism. … to expose the gap between noble rhetoric and actual reality.”167 Debate is shifted to the terrain of interpretation—a struggle made all the more difficult by its legitimate function in normal legal argument.

Plausible legality has played a large and arguably decisive role in post-9/11 U.S. decisions about torture. A close examination of the development of interrogation policy demonstrates that legal interpretation was intentionally stretched to authorize coercive techniques, while the choice of techniques was, at least partly, shaped, by legal arguments attempting to legitimize their use. In this circular equation, law was neither suspended nor simply ignored. Instead, policy makers attempted to employ legal rationales for what on first glance appear blatantly illegal practices. Accordingly, plausible legality combines the desire to break with existing norms found in states of exception with an awareness of reputational and legal risks apparent in the practice of plausible deniability. It attempts to legalize the exception without publicly suspending the existing order. It aspires to reconcile the normally irreconcilable—to permit the impermissible without fully admitting the move. As Lichtblau notes, “For the architects of this new war, there was a constant drumbeat: the rule of law still had to be followed, they said, but just what those rules really meant was often malleable, subject to twisting, flexing, and reinterpreting so long as the tactics were justified to stop another attack.”168

167 Ibid., 526-528.
168 Lichtblau, Bush’s Law, 7.
In doing so, plausible legality hides rather than highlights derogations from the rule of law.

While plausible legality was elevated to a doctrinal level post-9/11, it is far from unprecedented. The indeterminacy of law has long given lawyers an important role in granting and withholding legitimacy from foreign policy decisions. \(^{169}\) Scholars have examined the role of law in justifying the 1962 Cuban Missile Crisis blockade. \(^{170}\) More recently, NATO’s intervention in Kosovo without UN Security Council approval raised questions about the role of lawyers and legality in rationalizing violations of the UN Charter. \(^{171}\) In a highly legalistic society such as the contemporary United States, legal considerations are bound to become entangled in political decisions, manipulated to serve various ends.

In the Global War on Terror, the Office of Legal Counsel (OLC) at the Department of Justice, tasked with advising the executive on matters of law, became the home base of this strategy. Their numerous analyses played a key role in constructing policy. As Mayer characterizes it, “the lawyers…were defining the counterterrorism policy, since the elected officials wanted to do everything that the law could possibly be said to allow.” \(^{172}\) Perhaps most infamous are the 2002 decisions dubbed the “torture memos,” largely written by John Yoo and signed by Jay Bybee. The first memo notoriously argues that torture “must be equivalent in intensity to the pain accompanying

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\(^{172}\) Mayer, *The Dark Side*, 267.
serious physical injury, such as organ failure, impairment of bodily function, or even death.”

Despite their often wildly permissive conclusions, OLC’s opinions claimed conformity to U.S. obligations under international and domestic law and previous precedent. Presidents have never been bound by customary international law, the argument went, only domestically enacted treaties. Whether bombing civilians in World War II or mining Nicaraguan ports in the 1980s, executives have always claimed the right to ignore customary constraints. Yoo acknowledged torture is illegal under American law, while asserting the legality of “cruel, inhuman, and degrading treatment” under the Convention Against Torture. He denounced the “terrible nature” of Abu Ghraib abuses, but defended Guantánamo. From this perspective, denial of Geneva Conventions protections was appropriate and legal, not exceptional: “Far from radical, President Bush’s decision drew on traditional rules of war. The customary laws of war have always recognized stateless fighters as illegal, unprivileged enemy combatants…the were never allowed the status reserved for legal combatants who obeyed the rules of civilized warfare.” The positive law is, claimed Yoo, compatible with the controversial policies pursued. Critics, not the Bush administration, have attempted to change the status quo.

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176 Ibid., 198.
177 Ibid., 45.
The strategy of plausible legality is driven by several interacting objectives: to maintain legitimacy, avoid accountability, and establish immunity. It reflects the difficulty of literal denial and the growth of a litigious culture that restrains exception. One cannot simply override or ignore law in the contemporary era. “Had the OLC stood firm…it is difficult to imagine even the Bush-Cheney White House going forward with a program that the OLC said was illegal,” notes David Cole.\footnote{David Cole, The Torture Memos: Rationalizing the Unthinkable (New York: The New press, 2009), 15.}

As former OLC attorney Jack Goldsmith suggests, “the main reason why lawyers were so involved is that the war itself was encumbered with legal restrictions as never before. Everywhere decision makers turned they collided with confining laws that required a lawyer’s interpretation and—in order to avoid legal liability—a lawyer’s sign-off.”\footnote{Jack Goldsmith, The Terror Presidency: Law and Judgment Inside the Bush Administration (New York: W.W. Norton & Company Inc., 2007), 130.} This context is underpinned by “three related Washington pathologies: the criminalization of warfare, the blame game, and the cover-your-ass syndrome. Everyone agrees that risks must be taken to confront the terrorist threats. But no one wants to be blamed when the inevitable errors occur. Everyone wants cover.”\footnote{Ibid., 164. One need not sympathize with Goldsmith’s hostility to international law to find his observations about the impact of legal restrictions on certain actors useful.} Reflecting these pressures, the torture memos were reportedly solicited by Cheney to convince the CIA to be more aggressive.\footnote{Michael Ratner and the Center for Constitutional Rights, The Trial of Donald Rumsfeld: A Prosecution by Book (New York: The New Press, 2008), 189.} Perceiving that they had been burned in the past, the agency was hesitant to cross legal lines. The effort was successful—the memos became their “golden shield.”\footnote{Mayer, The Dark Side, 268.} In this sense, legal argument became a prime mechanism for avoiding responsibility.
For many observers, the legal decisions generated by the OLC were obviously in bad faith, they intentionally obscured the law, distorted precedent, and were part of a “criminal conspiracy.”\textsuperscript{183} The purpose of this “illegal lawyering” was to commit crimes by aiding and abetting human rights violations, making the lawyers as guilty as the perpetrators.\textsuperscript{184} Legal decisions reflected a “preordained policy of aggression that came from the very top,” notes Philippe Sands. Lawyers “gave their names as jurists to cloak the policy with a veneer of legality” and as such, “bear direct responsibility for decisions.”\textsuperscript{185} While law always invites a range of plausible interpretations, “It is the consistent pattern of result-oriented reasoning, insistently maintained in secret over several years by multiple lawyers—even as both the statutory law and the administration’s own public statements seemed to become more restrictive—that is ultimately the most compelling evidence of bad-faith lawyering.”\textsuperscript{186}

This is not to say, however, that legal argument per se \textit{caused} human rights violations to occur. Many practices were underway before they were legally authorized. If lawyers had rejected proposed policy, they would more than likely have been replaced with more cooperative attorneys—something that did in fact happen on several occasions. Decisions were kept secret to avoid scrutiny, undermining any real process of peer review. When courts rejected legal arguments, the administration sought new legislation to change the law and immunize past acts. As summed up by Cole, “The pattern is clear: interpret laws, preferably in secret, to permit what they would, on any standard reading, prohibit. When those interpretations are made public, aggressively defend them,

\footnotesize\textsuperscript{183} Ratner, \textit{The Trial of Donald Rumsfeld}, 191.  
\footnotesize\textsuperscript{184} Ratner, 195-6.  
\footnotesize\textsuperscript{185} Sands, \textit{The Torture Team}, 275. Both Ratner and Sands build convincing detailed cases against several high-ranking individuals to establish this point.  
\footnotesize\textsuperscript{186} Cole, \textit{The Torture Memos}, 20.
regardless of their merit…If necessary, seek congressional authorization after the fact, preferably with retroactive immunity for all who acted on the administration’s bad advice in the first place.”  

3.5.4 The Torture Memos

There is ample evidence of the strategy of plausible legality available in dozens of known memoranda addressing human rights matters. While plausible legality may not have caused abuses, legal arguments helped set the contours of emerging policies. Because legality was a loose constraint, existing law posed certain barriers to exceptional security practices while simultaneously defining the logic of violation. By examining opinions rendered on torture in more detail, the logic of plausible legality becomes evident.

The absolute nature of the torture prohibition makes violating it within the bounds of plausible legality difficult. Declaring the inapplicability of the Geneva Conventions was one of the first moves made towards this goal. Because Al Qaeda was not a state party and broke the law of war, it was therefore deemed ineligible for its protections. As Alberto Gonzales famously stated in a January 25, 2002 memo, the Global War on Terror “renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions.”

Similar claims were made regarding other laws: constitutional protections were limited to the sovereign territory of the United States; the UCMJ applied to the military, but not to the CIA; only humanitarian law, as in the

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discarded Geneva Conventions, not human rights laws such as the ICCPR and the CAT, were relevant to conduct in war. Yet despite these assertions, the administration was clearly cognizant of limitations on legal interrogation, regardless of Geneva POW status. In particular, OLC memos were highly preoccupied with the 1984 Convention Against Torture,\(^\text{189}\) which clearly defines and prohibits torture, at least in so far as it is enacted in domestic law via the Federal Anti-Torture Statute.\(^\text{190}\)

Given the strict and unambiguous rules of the anti-torture regime, the administration’s pursuit of plausible legality necessitated resort to convoluted legal reasoning, the core claim being that U.S. interrogation practices did not meet the definition of torture laid out by the CAT. While the first Bybee memo, or “torture memo,” Bybee I, is well known, the second Bybee memo, Bybee II, released in April 2009 perfectly illustrates this logic. Building on Bybee I, the memo considered what rises to the level of torture in terms of inflicting “severe physical or mental pain or suffering.” Like Bybee I, it concluded that torture requires pain “of an intensity akin to the pain accompanying serious physical injury.”\(^\text{191}\)

The techniques evaluated by the memo were products of reverse engineering the military’s Joint Personnel Recovery Agency’s (JPRA) Survival, Evasion, Resistance, and Escape (SERE) program, used to train U.S. soldiers to withstand interrogation. SERE trainers met several times with administration officials in the summer of 2002 and continued to advise on interrogation protocol for the next two years. On July 26, 2002, JPRA provided a memo at the behest of Department of Defense counsel, Physical

\(^\text{189}\) See section 3.3.2 above, “International Prohibitions.”

\(^\text{190}\) See section 3.3.3 above, “Domestic Institutionalization.”

Pressures Used in Resistance Training and Against American Prisoners and Detainees.

“The list included techniques such as the facial slap, walling, the abdomen slap, use of water, the attention grasp, and stress positions,” explained an investigation by the Senate’s Committee on Armed Services. “The first attachment also listed techniques used by some of the service SERE schools, such as use of smoke, shaking and manhandling, cramped confinement, immersion in water or wetting down, and waterboarding.” Finally, the memo explained that techniques such as “isolation or solitary confinement, induced physical weakness and exhaustion, degradation conditioning, sensory deprivation, sensory overload, disruption of sleep and biorhythms, and manipulation of diet” could be used to induce compliance and submission.\textsuperscript{192} Bybee II examined many of these techniques relative to Bybee I’s interpretation of the law, ultimately determining that none constituted torture.

For instance, without citing any rationale, the memo opined, “any pain associated with muscle fatigue is not of the intensity sufficient to amount to “severe physical pain or suffering” under the statute, nor, despite its discomfort, can it be said to be difficult to endure.”\textsuperscript{193} Neither confinement in a box nor sleep deprivation were thought to do so either. “Even those techniques that involve physical contact between the interrogator and the individual do not result in severe pain.”\textsuperscript{194} As to waterboarding, it stated that “the procedure does not inflict actual physical harm. Thus, although the subject may experience the fear or panic associated with the feeling of drowning, the waterboard does

\textsuperscript{192} Committee on Armed Services, United States Senate, \textit{Inquiry into the Treatment of Detainees in U.S. Custody}, 110th Cong., 2nd sess., November 20, 2008, 27-28, \url{http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf}.

\textsuperscript{193} Ibid., 10.

\textsuperscript{194} Ibid., 10-11.
not inflict physical pain.”¹⁹⁵ Rather, “The waterboard is simply a controlled acute episode, lacking the connotation of a protracted period of time generally given to suffering.”¹⁹⁶ Assuming an absence of undefined “substantial repetition,” the memo declared that “Even when all of these methods are considered combined in an overall course of conduct, they would still not inflict severe physical pain and suffering.”¹⁹⁷

As to mental pain and suffering, the memo concluded that “it is plain that none of these procedures involves a threat to any third party, the use of any kind of drugs, or for the reasons described above, the infliction of severe physical pain.”¹⁹⁸ Thus the legal question hangs on whether the conduct “constitutes a threat of severe physical pain or suffering, a procedure designed to disrupt profoundly the senses, or a threat of imminent death”—assuming the subject is a “reasonable person.” No threats, concluded the memo, can be inferred from the actions themselves—“the type of actions that could be reasonably anticipated would still fall below anything sufficient to inflict severe physical pain or suffering.”²⁰⁰

In a characteristic twist of logic, the memo argued that although the waterboard “constitutes a threat of imminent death,” this is not severe mental pain and suffering because, “based on your research into the use of these methods at the SERE school and consultation with others with expertise in the field of psychology and interrogation, you do not anticipate that any prolonged mental harm would result from the use of the waterboard.”²⁰¹ The same rationale applied to the application of the techniques in an

¹⁹⁵ Ibid., 11.
¹⁹⁶ Ibid., 11.
¹⁹⁷ Ibid., 11.
¹⁹⁸ Ibid., 12.
¹⁹⁹ Ibid., 12.
²⁰⁰ Ibid., 13.
²⁰¹ Ibid., 15.
escalating fashion. Even if they were reasonably inferred to constitute a threat of severe physical pain or death, no prolonged mental harm is anticipated. If no severe physical or mental pain or suffering or prolonged mental harm is anticipated in good faith, there is no crime: “Because specific intent is an element of the offense, the absence of specific intent negates the charge of torture.”

In a particularly convoluted passage referring to the introduction of an insect into a confinement box, the direct advisory role of the memos in shaping and guiding interrogation practices becomes clear:

As we understand it, you plan to inform Zubaydah that you are going to place a stinging insect into the box, but you will actually place a harmless insect in the box, such as a caterpillar. If you do so, to ensure that you are outside the predicate act requirement, you must inform him that the insects will not have a sting that would produce death or severe pain. If, however, you were to place the insect in the box without informing him that you are doing so, then, in order to not commit a predicate act, you should not affirmatively leave him to believe that any insect is present which has a sting that could produce severe pain or suffering or even cause his death.

This was not detached analysis, but specific advice.

In authorizing techniques, the memos frequently invoked their own set of covers. Reference to the medical opinions of on-site doctors and psychologists associated with the CIA’s Office of Medical Services (OMS) were ubiquitous. This purported medical monitoring of interrogations was an important component of deeming them legal.

Accordingly, mirroring indictments of the “torture team” by other lawyers, Physicians for Human Rights has accused participating medical professionals of violating basic ethical standards by engaging in “human experimentation” that not only could have been construed as legitimizing abuses, but also actively sought to improve the effectiveness of

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202 Ibid., 16.
203 Ibid., 14.
techniques. While OMS informed the CIA Inspector General that its approval of techniques was exaggerated, the effort to establish plausible legality relied on these highly questionable medical assessments of the impact of interrogation practices.

To sum up so far, notwithstanding numerous references to executive prerogative and the jurisdictional limitation of legal statues, the basic claim of the Bush administration was that interrogation techniques did not meet the legal definition of torture. Interestingly, however, lawyers did evince awareness that certain methods might amount to CID treatment. For instance, Bybee I cited a European Court of Human Rights ruling that wall standing, hooding, subjection to noise, sleep deprivation, and deprivation of water and food might amount to CID, but not torture. It argued that the CAT in all cases does not prohibit CID. CAT reserves legal penalty for torture alone, indicating it is a graver offense. The memo went on to assert that the history of executive and legislative understandings and reservations regarding CAT make clear only “the most extreme acts” constitute torture.

As scrutiny grew and the political context changed in the later years of the Bush administration, OLC arguments were somewhat modified, reflecting the interpretive adaptability of the strategy of plausible legality. “While we have identified various disagreements with the August 2002 Memorandum,” wrote Daniel Levin after the withdrawal of Bybee I in 2004 by Jack Goldsmith, “we have reviewed this Office’s prior

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207 Ibid., 5.
208 Ibid., 19.
opinions addressing issues involving treatment of detainees and do not believe that any of
their conclusions would be different under the standards set forth in this
memorandum.” Waterboarding was not legally renounced, despite rejection of some of
the original authorization’s rationales. In 2005, Steven Bradbury reaffirmed this OLC
position, also elaborating on why none of the CIA’s enhanced techniques jurisdictionally
or substantively violated the CAT’s Article 16 prohibition on CID treatment. Arguing
that CID treatment for the purposes of the Act was defined relative to the Fifth, Eighth,
and Fourteenth Amendments as conduct that “shocks the conscience,” the methods in
question were deemed acceptable.

After the OLC’s position that Article 16 of the CAT did not apply outside U.S.
territory was challenged by the 2005 McCain Amendment and Detainee Treatment Act
(DTA), which banned CID regardless of jurisdiction and nationality, and after the
Supreme Court ruled in *Hamdam v. Rumsfeld* (2006) that Common Article 3 of the
Geneva Conventions, and by implication the War Crimes Act, did in fact apply to
detainees who were not POWs, the CIA requested additional assessments of its programs.

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Department of Justice, Office of Legal Counsel (December 30, 2004), 2,
clear that Goldsmith, who resigned from the OLC, and his replacement Levin, had serious misgiving about
prior memos (see Goldsmith, *The Terror Presidency*, 141-176). However, formal repudiation was relatively
limited.

Department of Justice, Office of Legal Counsel (August 6, 2004), 1-2,
Senior Deputy General Counsel, Central Intelligence Agency, Re: Application of 18 U.S.C. §§ 2340-2340A
to Certain Techniques That May Be Used in the Interrogation of High Value al Qaeda Detainee*, U.S.
Department of Justice, Office of Legal Counsel (May 10, 2005), 1-46,

211 Steven Bradbury, *Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central
Intelligence Agency, Re: Application of United States Obligations Under Article 16 of the Convention
Against Torture to Certain Techniques That May Be Used in the Interrogation of High Value al Qaeda
Detainees*, U.S. Department of Justice, Office of Legal Counsel (May 30, 2005), 1-40,
Bradbury opined that the CIA’s “conditions of confinement” were legal under both the DTA\textsuperscript{212} and Common Article 3 standards.\textsuperscript{213} In a highly detailed 2007 memo, he moreover reauthorized six techniques proposed by the CIA including prolonged sleep deprivation, dietary manipulation, the “facial hold,” the “attention grab,” the “abdominal slap,” and the “insult slap” under DTA and Geneva standards.\textsuperscript{214} While waterboarding was dropped from the list of interrogation techniques, the memo was ambiguous about whether it would be prohibited under the new rules,\textsuperscript{215} suggesting that the CIA program had always complied with the DTA provisions as a matter of policy, if not law. The Bradbury memos, notes Cole, are the worst examples of bad faith. “They use less incendiary language, but they ultimately reach even more unreasonable positions than the initial memos.”\textsuperscript{216}

Similarly, as concerns about rendition emerged, the administration adapted, claiming the United States was not guilty of violating Article 3 of the CAT because it sought “assurances” from other states that they would not torture transferred prisoners. As the U.S. periodic report to the UN’s Committee Against Torture stated: “The United States continues to recognize its obligation not to “expel, return (‘refouler’) or extradite a person to another state…where the United States believes it is “more likely than not” that

\begin{thebibliography}{99}
\bibitem{215} Ibid., 13.
\bibitem{216} Cole, \textit{The Torture Memos}, 26.
\end{thebibliography}
they will be tortured.” What constitutes the relevant standard of likelihood was not made clear.

President Bush always insisted he did not authorize torture: “I had asked the most senior legal officers in the U.S. government to review the interrogation methods, and they had assured me they did not constitute torture. To suggest that our intelligence personnel violated the law by following the legal guidance they received is insulting and wrong.”

Rather than openly admitting derogation from human rights law, the administration instead denied using impermissible interrogation techniques and deployed legal arguments to rename and reframe abuses so that they appeared to fall within the bounds of existing restraints.

3.5.5 Torture in the GWOT

There is clear and substantial evidence that the legal arguments outlined above were directly reflected in torture practices. By filtering the meaning of prohibition, they mediated the impact of the anti-torture regime, giving a green light to numerous abusive techniques.

At Guantánamo Bay, interrogation practices were developed in accordance with legal authorizations. For example, the interrogation of Mohammed Al Qahtani demonstrates the OLC’s advice in practice. In September 2002, interrogators received SERE training. Meanwhile, as documented by Philippe Sands, Department of Defense General Counsel William Haynes, White House legal advisors David Addington and Alberto Gonzales, and CIA counsel John Rizzo, visited the base in September 2002. They expressed interest in Al Qahtani and enhanced interrogation methods. Soon thereafter,

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218 Bush, *Decision Points*, 111.
Mike Dunlavey, Commanding Officer of Joint Task Force 170, sent a request for enhanced interrogation permission to SOUTHCOM, including a list of 18 techniques divided into three levels. The techniques were given low-level preliminary sign off by Guantánamo Staff Judge Advocate Diane Beaver. Neither Dunlavey nor Beaver were told about the OLC memos during the September visit, but as Sands suggests:

the techniques the OLC signed off on in Bybee II influenced the eighteen techniques in indirect ways, communicated through the CIA and DIA personnel down at Guantánamo. Addington, Haynes, Gonzales and Rizzo were all well aware of the contents of all three OLC opinions, and as they discussed interrogation techniques with Dunlavey they would have known that they already had approval by the OLC. So it didn’t really matter what Beaver wrote, although her legal opinion would provide useful cover later.\(^{219}\)

On November 23, 2002 Secretary of Defense Rumsfeld gave verbal authorization for the Al Qahtani interrogation to go forward. The “Haynes memo” followed on December 2, which declared that all 18 techniques may be “legally available,” but only level I and II methods should be employed as a matter of policy. Rumsfeld’s authorization was annotated with his hand written comments: “I stand for 8-10 hours a day. Why is standing limited to 4 hours?”\(^{220}\)

Interrogators created a detailed 84-page log to document Al Qahtani’s interrogation, suggesting that they believed their actions to be fully authorized.\(^{221}\) As summarized by attorneys at the Center for Constitutional Rights, abuses included extensive sleep deprivation, multiple twenty hour interrogations, threats against family, religious and sexual humiliation, forced nudity, psychological degradation, stress

\(^{219}\) Sands, *The Torture Team*, 92.
positions, exposure to dogs, exposure to noise and temperature manipulation, and medical abuse. While the log is most striking when read as a cumulative experience, accounts such as the following are illustrative:

0315: White noise. He was offered a drink of water and he refused.
0400: P/E down. Showed detainee banana rats standard of life vs his standard of life in his wooden booth. Compared his life in a wooden booth to the life he could have with his brothers in Cuba.
0430: Detainee was walked for 10 minutes. Detainee refused water.
0450: Detainee listened to white noise.
0530: Detainee required to sit and watch as interrogator and linguist played checkers. Laughed and mocked detainee throughout game. White noise present in background.
0630: 10 minute exercise period and used bathroom. Detainee refused water and stated that he was on a food/water strike. However, he stated that he was not on an interrogation strike. Detainee reminded of his low self worth and that this life he has chosen here in this wooden box will not cease until he has come to terms that lying is not an option. Detainee was instructed to clean room. Interrogator told detainee that he will not be allowed to leave trash all around and live like the pig that he is. He picked up all the trash from the floor while hands were still cuffed in front of him and interrogator swept the trash towards him. He was told that it is his responsibility to make sure the room is kept clean and he would have to clean it daily.
0650: Corpsman drew detainee’s blood.
0700: Detainee instructed to go to sleep.
1100: Detainee awakened by music, taken to bathroom and walked 10 minutes.

Female interrogators were also commonly used to humiliate detainees at Guantánamo.

For example, allegations include incidents where a woman sat on a detainee’s lap, “making sexual affiliated movements with her chest and pelvis while again speaking sexually oriented sentences” and where “a female military interrogator...wiped what she told the detainee was menstrual blood on a detainee's face and forehead.”

Between December 2002 and January 2003, Navy General Counsel Alberto Mora

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223 Interrogation Log, Detainee O63 (December 16, 2002), 41.
224 Committee on Armed Services, United States Senate, Inquiry into the Treatment of Detainees, 133-34.
raised multiple concerns about interrogation at Guantánamo, threatening to send a legal memo asserting that “the majority of the proposed category II and all of the proposed category III techniques were violative of domestic and international legal norms in that they constituted, at a minimum, cruel and unusual treatment and, at worst, torture.”

On January 15, 2003, Rumsfeld withdrew his previous authorization and the enhanced Al Qaeda interrogation was suspended.

Subsequently, Rumsfeld struck a Detainee Interrogation Working Group to assess various techniques. However, despite extensive concerns expressed by FBI agents and JAG officers about the legality of 36 proposed methods, the OLC’s initial opinions continued to drive DOD policy. Contrary advice was ignored. In February, a “Final Report” recommended 26 techniques that included 19 standard Field Manual techniques and 7 additional techniques including “hooding, mild physical contact, dietary manipulation, environmental manipulation, sleep adjustment, false flag, and threat of transfer” as well as 10 exceptional techniques for use in special circumstances including “isolation, prolonged interrogations, forced grooming, prolonged standing, sleep deprivation, physical training, face slap/stomach slap, removal of clothing, increasing anxiety by use of aversions, and the waterboard.”

As the original August 1, 2002 memos were written specifically in service of his interrogation, it is no surprise that Abu Zubaydah’s interrogation directly mirrored legal authorizations produced by the OLC. A 2007 ICRC report on 14 high value detainees held at CIA black sites suggests that these practices were also extended to others. According to the report, continuous solitary confinement, incommunicado detention,

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225 Ibid., 108.
226 Ibid., 124-125.
prolonged use of stress positions, forced nudity, forced shaving, diapering, walling, slapping, kicking, punching, extensive sleep deprivation, exposure to cold temperatures and loud noises, confinement in a box, prolonged shackling, denial of solid food, dousing with cold water, and waterboarding were experienced by various detainees, sometimes constantly for months at a time.\footnote{227}{International Committee of the Red Cross, Regional Delegation for United States and Canada, ICRC Report on the Treatment of Fourteen “High Value Detainees” in CIA Custody (February 14, 2007), http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf.}

Most of these techniques had overt OLC approval as previously outlined. Ironically, however, the OLC’s detailed memos did not necessarily translate into in depth training on the ground. Only two weeks instruction were offered to prepare interrogators for the use of “enhanced techniques.”\footnote{228}{Central Intelligence Agency Inspector General, Special Review, 31-1.} The nuances of legal decisions failed to trickle down in a timely manner. According to the CIA Inspector General, “No formal mechanisms were in place to ensure that personnel going to the field were briefed on the existing legal and policy guidance.”\footnote{229}{Ibid., 41.} As a result, interrogators went beyond legal restrictions in several instances, employing threats, mock executions, and various forms of unapproved physical abuse. “Agency personnel reported a range of improvised actions that interrogators and debriefers reportedly used at that time to assist in obtaining information from detainees. The extent of these actions is illustrative of the consequences of the lack of clear guidance at that time,” explains the IG.\footnote{230}{Ibid., 69.} The line between these “illegal” actions and legally authorized techniques such as waterboarding, walling, and stress shackling will doubtless be subject to further controversy.
The impact of legal authorizations on military interrogation in Afghanistan and Iraq has been somewhat more elusive. After the Abu Ghraib scandal broke, the Bush administration denounced the abuses, labeling the abusers “bad apples” and “rogue” criminals who had corrupted America’s sterling reputation. As former Under Secretary of Defense for Policy Douglas Feith has claimed:

[T]he abuse [the photos] recorded was, in fact, a matter of personal sadism by a small number of individuals. The abuse had not been inflicted as an interrogation technique. It had not been done on orders from higher authorities. It violated the Defense Department’s policies requiring the proper treatment of prisoners. And it violated the Geneva Conventions, which the administration, without controversy, had from the outset recognized were applicable in Iraq.\(^{231}\)

This argument, however, is largely inaccurate. Human rights abuses were authorized based on legal rationalizations offered by government lawyers. In Afghanistan and Iraq, interrogation practices did reflect the torture memos, albeit in a considerably confused and arbitrary fashion. Methods designed for the CIA migrated to the combat theatre, producing a series of highly ambiguous rules. Beyond specific advice, a sort of broken telephone emerged where legal directives were recycled, promoting a permissive culture where abuses flourished.

In fall 2002, members of the Special Mission Unit Task Force Afghanistan visited Guantánamo to learn about SERE methods. Upon its return, the team “proposed new interrogation techniques such as the use of strip searches for "degradation;" hoods for "sensory deprivation;" "sensory overload" through lights, darkness, noises, and dogs; and manipulation of the detainees' environment through "cold, heat, wet, discomfort, etc."\(^{232}\)

An October 27 follow up memo recommended "imaginative but legal use of non-lethal

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\(^{232}\) Committee on Armed Services, United States Senate, Inquiry into the Treatment of Detainees, 150.
psychological techniques (i.e., battlefield noises/chaos, barking dogs, etc.)" as well as stress techniques such as "sensory deprivation (hoods, silence, flex cuffs), sensory overload (shouting, gun shots, white noise, machinery noise) and manipulation of the environment (hot, cold, wet, windy, hard surfaces)." In December 2002, two detainees, Habibullah and Diliwar, were killed in custody at Bagram. “Army investigators concluded that the use of stress positions and sleep deprivation combined with other mistreatment at the hands of Bagram personnel, caused or were direct contributing factors in the two homicides.” Nonetheless, these interrogation methods continued and became progressively codified in standard operating procedures (SOPs).

From Afghanistan, techniques further migrated to Iraq. In September 2003, SERE trainers instructed members of Special Mission Unit Task Force Iraq (SMU). In July 2003, the first Iraq SMU standard operating procedure included instructions to: “vary comfort positions” (sitting, standing, kneeling, prone); presence of military working dogs; 20-hour interrogations; isolation; and yelling, loud music, and light control.” Soon thereafter, Captain Carolyn Wood, Interrogation Officer in charge of the newly established Abu Ghraib prison, received a copy of the SMU Iraq SOP, submitting it to her chain of command as policy. In late August, Guantánamo commander Geoffrey Miller visited Iraq. Despite clearly deplorable conditions, Miller reportedly accused the Iraq Study Group of “running a country club” for detainees and recommended they “GTMO-ize” interrogations.

233 Ibid., 151.
234 Ibid., 152.
235 Ibid., 159-160.
236 Ibid., 167
237 Ibid., 191. Note that GTMO is popular military shorthand for Guantánamo Bay.
Iraqi commander General Ricardo Sanchez subsequently issued a series of contradictory SOPs throughout the fall of 2003. Approval for techniques was authorized, withdrawn, and then reauthorized. One source of confusion was the applicability of the Geneva Conventions. For instance, while Iraq was supposedly a Geneva theatre, implying that enemy prisoners of war enjoyed Geneva Convention protections, approved procedures continued to reflect those in use in Afghanistan, which was deemed a non-Geneva conflict. According to Sanchez, “with few exceptions, persons captured after May 1, 2003 were not entitled to EPW [Enemy Prisoner of War] status as a matter of law.” Captain Wood claimed that no EPWs were at Abu Ghraib.238 In October 2003, yet another SOP was introduced. “Techniques included controlled fear (muzzled dogs), stress positions, sleep deprivation/adjustment, environmental manipulation, yelling, loud music, and light control, removal of comfort items, isolation, false documents/report, multiple interrogator, and repeat and control.”239

The abuses committed by Military Police (MPs) and Military Interrogators (MIs) at Abu Ghraib in fall 2003 in many ways reflected these guidelines. The entire prison was put under MI command, placing MPs in the unorthodox role of preparing prisoners for interrogation. MPs were not given specific directions or guidelines beyond this. Use of military dogs, stress positions and forced exercise, forced nudity, sleep management/deprivation, and sensory deprivation/isolation were commonly practiced, reflecting at times overt authorization and at others tacit permission via confused and ambiguous instructions.240 Nudity was “standard operating procedure,” Lynndie England

238 Ibid., 201.
239 Ibid., 206.
240 Ibid., 208-216.
explained regarding the infamous image of her leading a naked man on a leash.\textsuperscript{241}

Amazingly, the same repertoire of SERE based Guantánamo techniques was continually reauthorized in multiple interrogation SOPs for Iraq and Afghanistan until May 2004, well after the Abu Ghraib scandal broke.\textsuperscript{242}

Some things that occurred at Abu Ghraib, such as beating detainees to death, were not authorized. Prison personnel were young, ignorant, angry, and fearful. There doubtlessly were “bad apples” around. But there is also ample evidence of a direct link between the legal opinions proffered by the OLC in 2002 and subsequent torture. As the Senate report summarizes:

The abuse of detainees at Abu Ghraib in late 2003 was not simply the result of a few soldiers acting on their own. Interrogation techniques such as stripping detainees of their clothes, placing them in stress positions, and using military working dogs to intimidate them appeared in Iraq only after they had been approved for use in Afghanistan and at GTMO. Secretary of Defense Donald Rumsfeld's December 2, 2002 authorization of aggressive interrogation techniques and subsequent interrogation policies and plans approved by senior military and civilian officials conveyed the message that physical pressures and degradation were appropriate treatment for detainees in U.S. military custody. What followed was an erosion in standards dictating that detainees be treated humanely.\textsuperscript{243}

Just as Guantánamo interrogators logged their activities, MPs in Iraq did, too. But unlike the former, the latter Abu Ghraib photos were impossible for anyone to defend openly. No one, not even John Yoo or Dick Cheney, would support techniques that appeared so obviously wrong. Abuses at Abu Ghraib violated international law and the Uniform Code of Military Justice. The fact is, however, that they often mirrored practices that in the


\textsuperscript{242} Committee on Armed Services, United States Senate, \textit{Inquiry into the Treatment of Detainees}, 219-224.

\textsuperscript{243} Ibid., xxix.
abstract had been vetted and approved by America’s leading policy makers and their lawyers.

In the preceding discussion, I suggested that torture practices in the GWOT frequently followed legal guidelines established by the OLC. However, not all GWOT torture has followed this pattern. As noted previously, extraordinary rendition is a covert, deniable means of having proxies torture detainees. It represents a parallel paradigm, reminiscent of previous eras. Why some “high value” suspects were rendered while others were subject to CIA interrogation is not entirely clear. Grey speculates that it was often a practical matter: the CIA was overstretched and lacked capacity for the vast influx of detainees. Moreover, “The CIA knew too that once it took full custody of key prisoners, it could be stuck with them almost indefinitely. The methods of interrogation it would use would be rigorous. And no political leader would ever want those methods described in a courtroom, whether military or civil, and want to risk their release by a judge.”244 What is evident is that American torture practice is distinct from Pakistani or Egyptian torture, and that the difference reflects, at least to some degree, the policy guidelines created by American officials. These policy guidelines followed a concerted post-9/11 attempt to legalize certain torture techniques. When Americans cognizant of these legal restrictions wanted to go beyond these methods, they could not do it themselves.

To sum up, bracketing instances of ad hoc torture, there have been several systematic types of torture in the GWOT. The first is torture that was specifically designed to meet OLC authorizations, which is evident at both Guantánamo and in the CIA program. The second reflected the twisted logic and reproduced the permissive

244 Grey, *Ghost Plane*, 240.
culture of the memos, but often went beyond specifically authorized techniques because of confusion, misunderstandings, and poor leadership. Lastly, some torture practices were so beyond the pale that they had to be conducted through proxies. In all these cases, the Bush administration’s version of legality shaped resultant torture practices.

3.6 Legitimacy, Accountability, and Immunity

In this final section, I consider whether or not plausible legality has been effective. Has it succeeded in legitimating human rights abuses, avoiding policy maker accountability, and immunizing criminals?

Attempts to legitimate harsh interrogation techniques in the eyes of the American public have had mixed results, undoubtedly reflecting the complex political, social, and personal factors that contribute to popular sentiment. However, for the average American, considerations of interrogation effectiveness are likely as much or more important than the nuances of legality. Therefore, Dick Cheney has emphasized efficacy over law in attempts at self-exculpation. More significant to gauge for our purposes is the reaction of legal and government elites capable of influencing policy. Amongst this community, the evidence is starker, suggesting the failure of specifically legal attempts at legitimation. For while it may be true in some cases that “it is difficult to agree on any clear criteria or tests for determining when a legal argument or position…is so clearly erroneous or politically slanted as to be simply ‘out of the ballpark’ and beyond the range

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245 For instance, according to World Public Opinion.org, in 2009 59% of Americans favoured banning physical torture, down from 66% in 2004, while those who thought this too restrictive rose to 39% from 30%. See “Majority of Americans Favor Complete Ban on Torture” (June 24, 2009), http://www.worldpublicopinion.org/pipa/articles/brunitedstatescanadara/617.php?lb=brusc&pnt=617&id= &id=.

of permissible good-faith argument, “lawyers often do “have a keen sense of when the
indeterminacy of international law is being taken too far and when the justification given
is too far-fetched to be considered plausible.”

“Arcane,” “bizarre,” and “fallacious” are some of the adjectives used to
describe the Bush administration’s analysis from human rights quarters. According to the
DOJ’s Office of Professional Responsibility (OPR), tasked with investigating whether
professional ethics were violated in the construction of OLC decisions, the Bybee and
Yoo memos contained “errors, omissions, misstatements, and illogical conclusions…their
cumulative effect compromised the thoroughness, objectivity, and candor of the OLC’s
legal advice.” In particular, the OPR found that memos ignored and misrepresented
relevant precedents, mischaracterized the law, and omitted important information.

To accept that waterboarding is not torture requires “an affirmative suspension of
disbelief,” notes Cole. For many members of the bar, the OLC’s arguments were not
only implausible; despite their legalese, they did not even meet the standard of legal, as
opposed to political reasoning. As Sands explains, the OLC’s advice was a form of policy
advocacy dressed up in legal language. Jeremy Waldron argues that the prohibition on
torture is a fundamental “legal archetype” that marks the aspiration to prevent terror from
becoming a mode of governance. The rule of law simply cannot accommodate torture:

249 Ratner, The Trial of Donald Rumsfeld, 185.
250 United States Department of Justice, Office of Professional Responsibility, Report:
Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central
Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists (July 29,
251 Cole, The Torture Memos, 9.
To be willing to abandon the prohibition on torture or to define it out of existence is to be willing to sit back and watch the whole enterprise unravel. It is to be ready to contemplate with equanimity the prospect that the rule of law will no longer hold out the clear promise of nonbrutality—that the state, which it aims to control, will be permitted to operate toward some individuals who are wholly under its power with methods of brutality from which law itself recoils.\(^{253}\)

To claim the positive allows torture is not only factually wrong, it guts the very substance of modern liberal legality.

International observers have also been particularly vocal critics. After some European states’ cooperation with extraordinary rendition flights came to light, European parliamentarians strongly denounced the practice:

\[\text{T}he\ United\ States\ has\ introduced\ new\ legal\ concepts,\ such\ as\ “enemy\ combatant”\ and\ “rendition”,\ which\ were\ previously\ unheard\ of\ in\ international\ law\ and\ stand\ contrary\ to\ the\ basic\ legal\ principles\ that\ prevail\ on\ our\ continent…\text{Thus, across the world, the United States has progressively woven a clandestine “spiderweb” of disappearances, secret detentions and unlawful interstate transfers, often encompassing countries notorious for their use of torture. }\ldots\text{The spiderweb has been spun out with the collaboration or tolerance of many countries, including several Council of Europe member states. This co-operation, which took place in secret and without any democratic legitimacy, has allowed the development of a system that is utterly incompatible with the fundamental principles of the Council of Europe…The Assembly condemns the systematic exclusion of all forms of judicial protection and regrets that, by depriving hundreds of suspects of their basic rights, including the right to a fair trial, the United States has done a disservice to the cause of justice and has tarnished its own hard-earned reputation as a beacon of the defence of civil liberties and human rights.}\right]^{254}

The United Nations Special Rappoteur on Torture has suggested that “diplomatic assurances with regard to torture are nothing but attempts to circumvent the absolute prohibition of torture and refoulement….\[\text{States should}\] refrain from seeking and


\[^{254}\text{Council of Europe, Parliamentary Assembly, Resolution 1507 (2006), }\text{http://assembly.coe.int/Main.asp?link=/Documents/ AdoptedText/ta06/ERES1507.htm#1.}\]
adopting such assurances with States with a proven record of torture.”

Groups like the International Commission of Jurists have further noted that the legal rationalization of abuse has contributed to the erosion and undermining of the humanitarian and human rights legal regimes around the world. Authoritarian countries have invoked the fight against terrorism to justify abuses. At the diplomatic level, the United States has lost moral authority. Human rights violators have not shied from highlighting American hypocrisy. In this sense, while the strategy of plausible legality may have met with scorn from international scholars, politicians, and rights advocates, it has succeeded in lowering standards of international conduct in practice.

Notwithstanding its implausible assertions, the strategy of plausible legality has effectively helped policy makers evade accountability. The Abu Ghraib scandal exemplifies the failure of command responsibility. The Bush administration successfully propagated its “bad apple” theory, placing sole blame on the low level soldiers who perpetrated abuses. Despite the direct line that ran from interrogation techniques officially authorized by top administration officials for use at Guantánamo to Afghanistan and Iraq, critics have been unable to effectively win the migration argument. Even after the release of numerous memos, the emergence of detailed accounts of secret programs, and the revelations of former officials, enough confusion and ambiguity remain to obscure responsibility. When offences by poorly trained soldiers are widely


\[257\] Committee on Armed Services, United States Senate, Inquiry into the Treatment of Detainees.
deemed illegal torture, but officially authorized waterboarding is considered a controversial form of “enhanced interrogation,” plausible legality has worked.

While several soldiers implicated in the Abu Ghraib abuses were prosecuted and jailed, plausible legality has facilitated formal immunity for many human rights abusers in the GWOT. In 2005, the Detainee Treatment Act accepted “good faith reliance on advice of counsel” as a legitimate defence for human rights violations:

In any civil action or criminal prosecution against an officer, employee, member of the Armed Forces, or other agent of the United States Government who is a United States person, arising out of the officer, employee, member of the Armed Forces, or other agent's engaging in specific operational practices, that involve detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States, its interests, or its allies, and that were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defense that such officer, employee, member of the Armed Forces, or other agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful.258

In other words, the memos are indeed a “golden shield.” Their legal form and the authority associated with it have survived despite widespread criticism of their content. In this sense, plausible legality can succeed as an exculpatory strategy without widespread consensus about substantive validity.

It is highly unlikely that any members of the Bush administration will be prosecuted. While clearly rejecting torture and withdrawing previous OLC decisions upon taking office,259 President Obama voiced a desire to move on. Attorney General Eric Holder appointed a special prosecutor to investigate CIA abuses, however, his mandate was confined to acts conducted outside of legal guidelines, rather than the

origins or merits of legal authorizations. In summer 2011, save for two ongoing murder investigations, the agency was exonerated.\textsuperscript{260} While there are undoubtedly political and practical considerations driving this restrained stance, such a limited scope of recrimination would be far more contentious without the cover of plausible legality. If President Bush had declared his right to unilaterally derogate from the CAT, if Yoo had authorized electrocution, the rack, or ripping out fingernails, if the CIA had created their black sites without DOJ sign off, it would be much harder to pass over probing the responsibility of high ranking officials.

This apparent reticence towards domestic prosecutions has shifted accountability efforts out to foreign prosecutions and universal jurisdiction cases and down to professional ethics boards and civil suits. However, with the exception of the 2009 conviction of 23 American agents tried in abstentia in Italy for their role in kidnapping and rendition,\textsuperscript{261} foreign investigations have achieved few successes. Prosecution efforts in Germany failed. Evidence suggests extensive American diplomatic force was leveraged to undercut German charges against CIA agents accused of kidnapping and rendering Khaled el-Masri to Afghanistan for torture.\textsuperscript{262} While Judge Balthazar Garzon of Spain, famed for his investigation of Chilean dictator Augusto Pinochet, indicated a willingness to proceed, his investigation of high-ranking White House, OLC, and Department of Defense figures was cut short due, at least in part, to heavy U.S.


\textsuperscript{261} John Hooper, “Italian Court Finds CIA Agents Guilty of Kidnapping Terrorism Suspect.” The defendants left Italy to evade prosecution and the United States has refused to extradite them.

One potential exception to this trend may be civil suits filed by Americans kept in abusive detention conditions. In one such case, two American private contractors who became FBI informants after witnessing illegal arms sales to Iraqi insurgents, were detained at Camp Cropper in Iraq in 2006 and subjected to a variety of enhanced interrogation techniques approved by American authorities. They are suing Donald Rumsfeld for his role in this torture. “Plaintiffs have alleged sufficient facts to show that Secretary Rumsfeld personally established the relevant policies that caused the alleged violations of their constitutional rights during detention,” ruled the Chicago based Seventh Circuit Court of Appeals in August 2011. While such privately brought cases keep the issue of prosecution alive, the Department of Justice has sided with Rumsfeld, not the victims.

Many human rights advocates hoped that the release of the highly anticipated DOJ Office of Professional Responsibility report would contribute to accountability, yet it has disappointed. Despite being highly critical of legal opinions, the OPR focused more on the process of memo writing than the substance of memo conclusions. Accordingly, Yoo is lambasted for putting “his desire to accommodate the client above his obligation to provide thorough, objective, and candid legal advice…he therefore committed intentional professional misconduct,” but Bradbury’s more thorough reasoning process is deemed professionally appropriate, despite ultimately authorizing

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266 United States Department of Justice, Office of Professional Responsibility, Investigation into the Office of Legal Counsel, 254.
the same techniques approved in the Bybee memos.\textsuperscript{267} This suggests that outlandish attempts at legalizing abuse are likely to face stronger criticism than more cautiously worded efforts, even if they provide similarly problematic advice. More troubling is that despite a “professional misconduct” finding against Yoo and Bybee, the Department of Justice under the guidance of Associate Deputy Attorney General David Margolis declined to recommend further censure or punishment, preferring instead to adopt a “poor judgment” reading of the memo writing process.\textsuperscript{268} This is in many ways consistent with the efficacy of plausible legality as a strategy, which makes bad faith difficult, if not impossible to prove. As a result, the lawyers appear to have escaped any serious legal consequences for their actions.

3.7 Conclusion

The role of legality in the conduct of the GWOT has been contradictory, reflecting a complex interplay of ideological proclivities and political calculations. I have suggested that legal considerations played a significant role in shaping human rights abuses, a role often echoing, but in many ways distinct from the frameworks of exception and plausible deniability. While there is a good deal of overlap, a third framework of plausible legality has been proposed, which captures the desire of policy makers to evade restrictions on security and intelligence practices while simultaneously seeking to maintain legitimacy, avoid responsibility, and secure immunity for crimes. Rather than suspend the law in the name of emergency and instead of stealthily breaking it, top

\textsuperscript{267} Ibid., 259.
administration officials set out to rename and reframe the meaning of abuses and the nature of legal restrictions.

The post-9/11 authorization of torture epitomizes this strategy of legal rationalization. Notwithstanding numerous references to executive prerogative and the jurisdictional limitation of legal statues, the basic claim of the Bush administration was that interrogation techniques did not meet the legal definition of torture. As a universally proscribed practice, torture could not be openly admitted or defended. Nor could it simply be conducted in secret in the current communications and monitoring environment. The structure of legal and normative constraint compelled policy makers to feign conformity with the law to avoid consequences for breaking it. They in many ways succeeded.

These observations point to contradictory conclusions about law’s ability to control national security practice in contexts where the rule of law is supposed to be a standard of appropriateness that carries consequential implications for violations. Realists may be right that law will not stop policy makers from pursuing their agendas or impose morality on states, but it does shape how they go about doing their dirty work. Law in this sense acts as a permissive constraint—it can be manipulated to allow abuse, but it imposes at least some limits on the possible. Even when bent to the breaking point, it still serves as an important boundary marker. Policy makers care about law because law matters. The theoretical implications of the strategy of plausible legality for understanding law’s impact on policy are taken up in Chapter 6. The reciprocal effects of policy’s impact on law are addressed in Chapter 7.
CHAPTER 4
DUE PROCESS IN DETENTION AND TRIAL

4.1 Introduction

At first glance, the right to due process in detention and trial seems relatively straightforward. This is at least somewhat true in the American criminal justice system, where individuals accused of crimes have recourse to a variety of procedural and substantive safeguards aimed at ensuring fairness and preventing wrongful confinement and conviction. Like the prohibition on torture, these due process rights have evolved over centuries of normative, legal, and practical changes, reflecting the expansion of human rights principles in liberal polities. There is a generally unilinear story to be told about the advancement of due process from the bad old days of monarchical prerogative to the birth of constitutional protections to the current context in which prisoners must be informed of their rights and given access to legal support. Likewise, in the military setting, battlefield rules have developed progressively over time to manage detentions and ensure humane treatment.

However, closer inspection of the current state of due process rights in the Global War on Terror (GWOT) suggests a rather different picture. After 9/11, American policy makers used immigration and material witness laws to detain hundreds of mostly Muslim men, sometimes secretly and incommunicado. Abroad, they interpreted the Geneva Conventions to deny protections to enemy fighters, detain prisoners in problematic conditions at Guantánamo Bay and other CIA “black sites,” and permit legally questionable military commissions to try accused terrorists. Due process rights have, at times, been almost entirely absent from officially promulgated security policy.
Considering these seemingly contradictory developments, this chapter traces several historical paths. It explains the emergence of due process rights in civilian and military contexts and the evolution of current standards. While distinct areas of law, the boundaries between rules governing crime and war are increasingly blurred, requiring we examine both to understand the genealogy of contemporary policies. The chapter goes on to explore changing modalities of due process denial. As with torture, there have been cases of covert and unofficial due process violations. More significantly, there are persistent forms of exception and exclusion that have characterized the application of due process standards. Due process rights have never been fully universalized or evenly practiced. Rather, the meaning of due process in both theory and practice has varied jurisdictionally, creating different rules for different people based on factors such as immigration or combatant status or geographical location.

In the aftermath of 9/11, the Bush administration revived, reinvented, and exploited these jurisdictional ambiguities to facilitate an aggressive detention policy. In the spirit of the strategy of plausible legality, they attempted to construct a detention regime that met their security objectives, but which was not overtly illegal. This finding reinforces the general significance of the impact of legal considerations on policy and highlights the way in which the specific contours of structures of constraint inform the logic of violation.

4.2 Detention and Trial in Historical Context

Contemporary liberal democracies hold due process rights to be a cornerstone of the rule of law. *Black’s Law Dictionary* defines due process:
Due Process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law.¹

Persons must not be detained without cause and must be able to contest their detention in front of a neutral examiner (the right to habeas corpus). Defendants in criminal proceedings must know the charges and evidence against them and have access to independent counsel. The law must be applied equally to similarly situated people and not be used in a discriminatory or biased fashion. While due process standards are considerably weaker in contemporary military contexts, prisoners who have not been convicted of a crime may only be detained temporarily, during which time they must be treated humanely. Certain combatants are eligible for a variety of additional rights related to prisoner of war (POW) status. Detainees who are tried for crimes must have access to a fair trial. Outside the conduct of lawful warfare, combatants and non-combatants cannot be maimed or killed.

The history of due process rights relating to detention and trial is complex, reflecting multiple domains and jurisdictions—domestic and interstate, criminal and military. Clearly, where torture is practiced, as described in the previous chapter, what we would consider due process rights today are wholly lacking. Where evidence and confessions are coerced through torture, fair trials are impossible. Where imprisonment includes subjection to torture as a matter or course, detention is unjust. As with torture, prohibitions on such practices did not always exist.

There is a long history of denying due process rights and other humanitarian protections to captives in the West. Both military and civilian prisoners taken in war were often executed or otherwise abused with impunity. The ancients would enslave not only captured enemy soldiers, but also the entire civilian population of conquered lands. As dramatized by Euripides in *The Trojan Women*, a life of bondage awaited vanquished foes:

**FIRST WOMAN.**

How say'st thou? Whither moves thy cry,
    Thy bitter cry? Behind our door
    We heard thy heavy heart outpour
Its sorrow: and there shivered by
    Fear and a quick sob shaken
From prisoned hearts that shall be free no more!...

**ANOTHER (wildly).**

Look, my dead child! My child, my love,
The last look....

**ANOTHER.**

Oh, there cometh worse.
A Greek's bed in the dark....

**LEADER.**

But lo, who cometh: and his lips
    Grave with the weight of dooms unknown
A Herald from the Grecian ships.
    Swift comes he, hot-foot to be done
And finished. Ah, what bringeth he
Of news or judgment? Slaves are we,
    Spoils that the Greek hath won!²

During the eleventh-thirteenth century Crusades, defeated populations were often massacred, and captives were sexually abused, tortured, or used as human shields. Rather than restrain such abuses, zealous religious faith, which was beginning to regulate some

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forms of warfare within Christendom, legitimized violence against non-believers as absolute enemies. ³ As gleefully recounted by Ambroise:

Two thousand seven hundred, all
In chains, were led outside the wall,
Where they were slaughtered every one…
For this be the Creator blessed! ⁴

Cruelty also persisted in inter-European conflict. Henry V’s order to kill French soldiers after the 1415 Battle of Agincourt was immortalized by Shakespeare in *Henry V*:

King Harry: The French have reinforced their scattered men. Then every soldier kill his prisoners. (*The soldiers kill their prisoners.*)

Fluellen: Kill the poys and the luggage! ‘Tis expressly against the laws of arms ‘Tis as arrant a piece of knavery, mark you now, as can be offert. In your conscience now, is it not?

Gower: ‘Tis certain there's not a boy left alive. And the cowardly rascals that ran from the battle ha’ done this slaughter. Besides, they have burned and carried away all that was in the King's tent; wherefore the King most worthily hath caused every soldier to cut his prisoner's throat. O ‘tis a gallant king. ⁵

Reflecting the chaotic, segmented political situation in early modern Europe, approaches to prisoners varied considerably. Massacres were common, particularly in cases of ethnic or confessional conflict. Defeated towns and villages were often subject to reprisals, hostage taking, and extortion by victorious armies. The ancient practice of holding captives for slavery or ransom persisted. In other cases, prisoners were forced to join their captor’s ranks. ⁶ Instead of internment, prisoner redistribution through re-enlisting detainees on the other side, bloc prisoner exchange “cartels,” and the practice of “parole”

³ Frédéric Mégret, “A Cautionary Tale from the Crusades? War and Prisoners in Situations of Normative Incommensurability,” in *Prisoners in War*, ed. Sibylle Schiepers (Oxford: Oxford University Press, 2010). For instance, the 1139 Lateran Council banned the use of the crossbow and the longbow, but only against fellow Christians.
⁴ Quoted in Frédéric Mégret, “A Cautionary Tale from the Crusades?,” 25.
—release on the promise not to return to hostilities, were the most common ways of dealing with prisoners prior to the nineteenth century.\(^7\) In this context, contemporary humanitarian principles were not particularly relevant. With some limited exceptions, polities lacked an effective, consistent, constraining legal structure to limit the exploits of bloodthirsty rulers and soldiers.

In non-military contexts, concern for human rights was also lacking. As discussed in the previous chapter, victims of church and monarchical prosecution often faced detention and punishment without recourse to a neutral justice system. In the United States, the institution of slavery was a core marker of the lack of universal due process rights. As commodities rather than people, slaves simply had no rights whatsoever.\(^8\)

### 4.3 The Evolution of Due Process Norms and Laws

Despite the aforementioned lack of systematic due process rights historically, calls for greater fairness in detention and trial in both civil and military contexts eventually led to the growth of constraining rules.

#### 4.3.1 Human Rights Law

As far back as the thirteenth century, a modicum of due process rights were one of the English monarchy’s concessions to the nobles in the *Magna Carta*:

> No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.\(^9\)

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\(^8\) *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

Nonetheless, the infamous Star Chamber court, designed to try nobles, was increasingly used to repress political opposition and religious dissent. It was eventually abolished with the Habeas Corpus Act of 1640, followed by further legislation in 1679, some of whose provisions would be echoed in American law.\(^\text{10}\)

Many American founders were deeply committed to just detention and fair trials, at least for white men. As John Adams wrote of his unpopular, but ultimately successful legal advocacy on behalf of British soldiers accused in the 1770 Boston Massacre:

> The Part I took in Defence of Cptn. Preston and the Soldiers, procured me Anxiety, and Obloquy enough. It was, however, one of the most gallant, generous, manly and disinterested Actions of my whole Life, and one of the best Pieces of Service I ever rendered my Country. Judgment of Death against those Soldiers would have been as foul a Stain upon this Country as the Executions of the Quakers or Witches, anciently. As the Evidence was, the Verdict of the Jury was exactly right.\(^\text{11}\)

Quoting William Blackstone, Alexander Hamilton emphasized the importance of habeas corpus:

> To bereave a man of life (says he) or by violence to confiscate his estate, without accusation or trial, would be so gross an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person by secretly hurrying him to goal, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.\(^\text{12}\)

Due process rights were considered sufficiently important that they were integrated into the “Suspension Clause” of Article I of the American Constitution: “The Privilege of the


Writ of Habeas Corpus shall not be suspended, unless when in Case of Rebellion or Invasion the public Safety may require it.”\textsuperscript{13}

Multiple aspects of due process rights were more extensively guaranteed by the Bill of Rights. The Fifth Amendment mandates grand juries, precludes double jeopardy, provides rights against self-incrimination, and states that no person shall “be deprived of life, liberty, or property, without due process of law.”\textsuperscript{14} The Sixth Amendment further declares that:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.\textsuperscript{15}

The Eighth Amendment states that “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”\textsuperscript{16} The Fourteenth Amendment later universalized these rules to all Americans regardless of race, clarifying that “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”\textsuperscript{17}

These constitutional protections have been enhanced over time with legislation. In an attempt to preclude executive wartime internment on the grounds of necessity, the

\textsuperscript{13} The Constitution of the United States of America, Article I, Section 9 (1787). The federal habeas statute, 28 U.S.C. § 2241, lays out the power to grant the writ in further detail.
\textsuperscript{14} United States Constitution, Amendment V (1791).
\textsuperscript{15} United States Constitution, Amendment VI (1791).
\textsuperscript{16} United States Constitution, Amendment VIII (1791).
\textsuperscript{17} United States Constitution, Amendment XIV, Section 1 (1868).
Non-Detention Act of 1971 states that “No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”¹⁸ The Federal Rules of Criminal Procedure elaborates processes for protecting rights in criminal matters. Varying court rulings have further extended rights. For example, in *Miranda v. Arizona*, the U.S. Supreme Court ruled that criminal suspects must be informed of their rights, including the right to counsel and the right not to incriminate themselves, in order for their statements to be admissible as evidence in court proceedings.¹⁹

In addition to domestic protections, multiple international instruments mandate due process rights. The Universal Declaration of Human Rights states that, “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”²⁰ Articles 9, 14, and 15 of the International Covenant on Civil and Political Rights (ICCPR) further lay out extensive due process requirements.²¹ Non-binding standards like the 1988 General Assembly Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment provide additional guidelines.²²

### 4.3.2 Humanitarian Law

Due process rights in wartime are relatively limited compared to the more extensive regime found in peacetime. Nonetheless, the law of armed conflict (LOAC) has

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long regulated the rights of prisoners of war and other detainees, rights that are premised on underlying categorizations. Even before the advent of contemporary humanitarian law, nascent rules applied to at least some detainees. For example, The Third Lateran Council required humane treatment of Christian prisoners of war.\textsuperscript{23} Laws of chivalry developed in the twelfth and thirteenth centuries, requiring knights to be merciful and honourable, if only towards other knights.\textsuperscript{24}

Within the United States, George Washington ordered that Hessian mercenaries and British soldiers captured during the revolutionary war be treated humanely. The Civil War era Lieber Code developed systematic regulations to govern ethical military conduct. Recognizing the principle of distinction between combatants and civilians, it laid out standards for the treatment of enemy prisoners:

56. A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity.
57. So soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity he is a belligerent; his killing, wounding, or other warlike acts are no individual crimes or offenses. No belligerent has a right to declare that enemies of a certain class, color, or condition, when properly organized as soldiers, will not be treated by him as public enemies.

However, it also suggested that some fighters were illegitimate—a theme to be echoed in the Global War on Terror:

82. Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers--such men, or squads of men, are not public enemies, and therefore, if captured, are not

\textsuperscript{23} Solis, \textit{The Law of Armed Conflict}, 5.
\textsuperscript{24} Ibid., 5.
entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.\textsuperscript{25}

Although some aspects of the Lieber Code, such as the right of reprisals against civilian populations are no longer considered acceptable, it laid the groundwork for subsequent articulations of humanitarian law. In 1863, the International Committee of the Red Cross (ICRC) was created to provide humanitarian aid for victims of war. In 1864, under the leadership of Henry Dunant, it convinced several governments to adopt the original Geneva Convention (GC) on the condition of the wounded, which required that injured soldiers be cared for. It was followed by the Brussels Declaration on Laws and Customs of War (1874), the Hague Rules on land warfare (1899, revised 1907), and further elaborations of the Geneva Conventions in 1929 and 1949. Today, the role of the ICRC is enshrined in the GCs, which mandates the organization to monitor the treatment of prisoners of war and civilian internees.\textsuperscript{26}

The Geneva Conventions of 1949 are the \textit{lex specialis} governing armed conflict and remain the single most important set of regulations relating to the detention and trial of captives. The GCs lay out several specific rights of detainees and prisoners of war. They are domesticated into American municipal law via the 1996 War Crimes Act, which fulfills the Geneva requirement that “grave breaches” of the conventions be met with effective penal sanction.\textsuperscript{27} American soldiers are expected to comply with the Act under the Uniform Code of Military Justice (UCMJ). Because of their core significance to U.S. conduct in the GWOT, it is worth reviewing the GCs at some length.


\textsuperscript{26} History of the ICRC, http://www.icrc.org/eng/who-we-are/history/overview-section-history-icrc.htm.

Under the Geneva Conventions, rules vary based on conflict type. In an
International Armed Conflict (IAC)—a conflict between High Contracting Parties (states)
or involving occupation by a High Contracting Party—all four conventions apply (I, II, III, and IV). They cover two general categories of persons—civilians and combatants. All persons are one or the other—there is no in between category.

According to the ICRC, civilians are defined negatively as all persons who are not members of armed forces (state or non-state) or a levée en masse. Combatants are members of the armed forces of one party to a conflict, including irregular militias, volunteer corps, and organized resistance movements, or a levée en masse. They are required to meet four criteria to maintain their immunity under the combatant’s privilege (the right to fight and kill the enemy without sanction) and qualify as prisoners of war upon capture: “(a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.”

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33 Melzer, Interpretive Guidance, 20.
34 ICRC, GC III, Article 4.
number of special rights for POWs such as treatment based on military rank, the right to wear badges and decorations, and access to canteens and recreational sports and games.\footnote{ICRC, GC I-III.}

Fighters in an IAC who fail to meet the requirements of a privileged combatant lose their right to POW treatment and can be tried for war crimes or other criminal offences under domestic or international law. They may fall into several categories. When ambiguity arises, detainees must be subject to a hearing by a competent tribunal, a simple summary procedure, to determine their proper status.\footnote{ICRC, GC III, Article 5.} Some unprivileged combatants may be members of an organized armed group, which requires they hold a “continuous combat function.” Other actors may in fact be civilian belligerents, engaged in more sporadic hostilities. Civilians are protected persons, unless certain conditions apply. According to GC IV, Article 5:

Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.

Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.\footnote{ICRC, GC IV, Article 5.}
Geneva Convention IV further specifies that “Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.”\textsuperscript{38} Civilians who have not been accused of crimes and who are interned based on absolute necessity must have their detention frequently reconsidered.\textsuperscript{39} At all times, all detainees must be treated humanely, per the terms of Common Article 3. Secret and incommunicado detention is strictly prohibited by the Geneva Conventions.\textsuperscript{40}

Reflecting the changing character of war and the growing influence of Third World national liberation and guerilla movements, there have been attempts to update Geneva rules over the years. The 1977 First Additional Protocol (AP 1) to the Geneva Conventions expanded the combatant’s privilege and associated IAC protections to non-state fighters engaged in “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.”\textsuperscript{41} AP 1 further altered rules for privileged conduct:

2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a

\textsuperscript{38} ICRC, GC IV, Article 27.
\textsuperscript{39} ICRC, GC IV, Articles 41, 42, 43, 46.
combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

(a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate. Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c).

4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.42

Strenuously objecting to this change, the United States has not ratified the Additional Protocols. It has, however, recognized many aspects of AP 1 as customary international law since 1986:

We support in particular the fundamental guarantees contained in article 75, such as the principle that all persons who are in the power of a party to a conflict and who do not benefit from more favorable treatment under the Conventions be treated humanely in all circumstances and enjoy, at a minimum, the protections specified in the Conventions without any adverse distinction based upon race, sex, language, religion or belief, political or other opinion, national or social origin, or any similar criteria.43

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42 ICRC, AP 1, Article 44.
AP 1, Article 75 further helps clarify detention and trial standards for all detainees in an IAC:

3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:
   (a) The procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defense;
   (b) No one shall be convicted of an offence except on the basis of individual penal responsibility;
   (c) No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
   (d) Anyone charged with an offence is presumed innocent until proved guilt according to law;
   (e) Anyone charged with an offence shall have the right to be tried in his presence;
   (f) No one shall be compelled to testify against himself or to confess guilt;
   (g) Anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   (h) No one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgment acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;
   (i) Anyone prosecuted for an offence shall have the right to have the judgment pronounced publicly; and
   (j) A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.\(^{44}\)

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\(^{44}\) ICRC, AP 1, Article 75.
Interestingly, despite its objections to the Additional Protocols, the United States had complied with many Geneva requirements “as a matter of policy” in previous irregular combat theatres. For instance, even though North Vietnam was not recognized as a country with which the United States was at war, “the official position of the United States, stated as early as 1965, and repeated consistently thereafter, was that the hostilities constituted an armed international conflict, that North Vietnam was a belligerent, that the Viet Cong were agents of the government of North Vietnam, and that the Geneva Conventions applied in full.”\textsuperscript{45} U.S. Military Assistance Command, Vietnam (MACV) ordered that all captured combatants, including “Viet Cong,” be treated as POWs, while suspected terrorists, spies, and saboteurs would be subject civilian prosecution – a position the ICRC called a “brilliant expression of a liberal and realistic attitude.”\textsuperscript{46} For its part, although North Vietnam stated it would treat captives humanely, it excluded Americans from Geneva POW protections, arguing that U.S. soldiers were “pirates” who had waged an illegal war of aggression against their country. Of course, neither side lived up to their rhetoric in practice. The North Vietnamese tortured and horribly abused Americans captives. American soldiers and operatives participated in numerous war crimes against both military captives and civilians. The U.S. practice of transferring prisoners to South Vietnamese custody undoubtedly resulted in further brutality and bloodshed. However, MACV’s promotion of Geneva adherence at a policy and training level is a notable precedent in the American application of international humanitarian law to an unconventional military context.

\textsuperscript{46} Ibid., 65.
There are far fewer rules governing Non-International Armed Conflicts (NIACs) in the 1949 GCs, regarding which only Common Article 3 and customary law applies. Additional Protocol 2 (AP 2) of the GCs extends basic standards of conduct in IACs to NIACs, such as protection of the sick and wounded and the principle of civilian distinction. While unratified by the United States, it has been considered customary law by U.S. authorities. President Obama signaled his intent seek ratification in 2011. All armed conflicts must either be an IAC or a NIAC. According to the ICRC, “organized armed violence failing to qualify as an international or non-international armed conflict remains an issue of law enforcement, whether the perpetrators are viewed as rioters, terrorists, pirates, gangsters, hostage-takers or other organized criminals.”

Technically speaking, there are no privileged combatants in NIACs in the sense that there are in IACs because this combatant category is a creature of the latter. Therefore, there cannot by definition be POWs on any side in a NIAC. Rather, there are belligerent civilians of varying degrees, “dissident armed forces,” “other organized armed groups,” and the state armed forces of the national government (including foreign forces operating at the invitation of the host national government). Non-state actors and civilians are not expressly prohibited from engaging in hostilities by international law, but are subject to domestic law, which typically only allows participation in state armed forces. As in an IAC, non-state fighters do not enjoy protected status as civilians for as long as they are engaged in a “continuous combat function.” However, belligerent civilians may

49 Contrary to popular belief, the implication is that U.S. and allied soldiers operative in the Afghan NIAC are not eligible for POW status.
51 Ibid., 83-84.
be targeted like members of armed forces only for as long as they are taking direct part in hostilities, defined as “specific acts.” In other words, their loss of protection is demarcated by behaviour rather than status. “Individuals who continuously accompany or support an organized armed group…remain civilians assuming support functions…recruiter, trainers, financiers and propagandists…are not members of an organized armed group…unless their function additionally includes activities amounting to direct participation in hostilities.” Upon capture, civilians may be subject to domestic and international criminal law and the laws of war. Because they lack the combatant privilege, these belligerents may be tried for crimes like murder or assault as well as war crimes. Considered customary in both IACs and NIACs, Common Article 3 along with the aforementioned AP1, Article 75, set vague but basic standards for belligerent detainees in NIACs.

The correct application of these standards has been contested in recent years, as will be discussed in further detail later. Firstly, there has been substantial disagreement over what constitutes a matter of criminal law, triggering domestic criminal procedure, and what constitutes a NIAC, triggering the humanitarian law regime. Secondly, the definition and implications of unprivileged armed forces and belligerent civilians have been debated. There is no question that these actors can be tried for crimes in accordance

52 Ibid., 16-17. There are three criteria used to define direct participation in hostilities: “The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack” and there must be “a relationship of direct causation between the act and the expected harm” and “a belligerent nexus between the act the hostilities.” (Ibid., 46) Direct participation is differentiated from indirect participation. Acts such as imposing financial sanctions, supplying a party to a conflict, the design, production, and transport of weapons, and recruitment and training do not qualify as direct participation unless they are conducted “for the execution of a predetermined hostile act.” (Ibid., 53) While prohibited by IHL and criminal law, “collective punishment, hostage-taking, and the ill-treatment and summary execution of persons in physical custody…are not a part of the conduct of hostilities.” (Ibid., 62) They do not trigger loss of protection, which “is not a sanction for criminal behavior but a consequence of military necessity in the conduct of hostilities.” (Ibid., 62)

53 Ibid., 34.
with applicable law and basic due process provisions. Less clear is whether unprivileged armed forces and civilians, who are suspected of posing a future security threat, are subject to detention with the aim of keeping them off the battlefield, much like detained POWs in an IAC. Regarding the former, members of armed forces who have had a “continuous combat function” can be detained until the cessation of hostilities. Irregular status cannot exempt a fighter from the same fate as a normal soldier. However, the situation of civilians is more complex. Human rights advocates insist that there is no preventative detention authority via the Geneva Conventions. In their view, civilian detainees can only be held for as long as they pose an immediate threat or if they are subject to prosecution. Unlike a captured combatant, they cannot be held until the end of a conflict. The Bush and Obama administrations have posited their own interpretations of this nebulous area without due deference to the important distinction between irregular combatants and hostile civilians.\(^{54}\)

In addition to the Geneva Conventions, there are a variety of historical precedents that inform the law of military detention and trial. The post-Second World War Nuremberg International Military Tribunals (IMTs) helped inspire the emergence of international criminal law aimed at holding individuals accountable for gross abuses. They challenged the human rights violating practices of the Nazis, including their crimes against civilian and military prisoners. More importantly, they provided a model, albeit an imperfect one, for the application of due process standards to accused war criminals. Defendants were permitted access to counsel, were treated humanely, and were able to offer a full defence. As famously stated by Chief Justice Robert Jackson:

That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason… The former high station of these defendants, the notoriety of their acts, and the adaptability of their conduct to provoke retaliation make it hard to distinguish between the demand for a just and measured retribution, and the unthinking cry for vengeance which arises from the anguish of war. It is our task, so far as humbly possible, to, draw the line between the two. We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.55

The Nuremberg trials inspired later ad hoc tribunals for Yugoslavia and Rwanda and the creation of the International Criminal Court. These courts have produced extensive case law that helps clarify the application of humanitarian law in practice, especially in NIACs.

In sum, it is clear that due process is a core value at the heart of both human rights and humanitarian law. What exactly the rules are, however, is not always entirely clear.

4.4 The Persistence of Due Process Denial

By the twentieth century, the United States was party to an increasingly well-developed set of due process standards in a variety of contexts. Yet, many people subject to U.S. law and practice have not enjoyed a full spectrum of due process rights. Because these rights have not always been understood as fundamentally non-derogable human rights, they have been more easily denied. Historical analysis highlights the varying ways in which policy makers with a preference for rights violations have justified withholding

due process protections, ranging from overt racism to more measured claims of national security and military necessity.

4.4.1 Due Process Exceptions for Minorities, Aliens, and Subversives

Once again, the history of due process violations in the West closely mirrors the history of torture in many contexts. Despite the expanding legal and normative edifice governing due process rights, in colonial, totalitarian, and authoritarian polities around the world, countless people have been abused in the name of emergency necessity. This exceptionalism has been legitimated by hatred, fear, and dehumanization of the other.

As Frédéric Mégret explains, the emerging nineteenth century humanitarian law regime was not applied to “savages.” Arguing that only “high contracting parties” could engage in reciprocity, Europeans invoked a profoundly racist imaginary to deem African, Arab, Asian, and indigenous peoples “uncivilized” and incapable of restraint. The result was that means and methods of warfare prohibited amongst Westerners were freely applied in the global South. As German colonialist Heinrich von Treitschke explained, “International law becomes phrases if its standards are also applied to barbaric people. To punish a Negro tribe, villages must be burned, and without setting examples of that kind, nothing can be achieved.” This tendency was increasingly delegitimized by international law and the emerging United Nations by the mid-twentieth century. Nonetheless, Western powers continued to commit numerous human rights violations, including the denial of

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due process rights, in governing their colonial holdings and in combating independence movements.

During the Second World War, grotesque violations of humanitarian norms reemerged within the heart of Europe. The Nazis authorized sweeping abuses, while the German judiciary became an arm of state repression. For instance, the 1941 *Nacht und Nebel Erlaß* or “Night and Fog Decree” authorized the secret detention and transfer of resistance suspects from across Europe to Germany. Political prisoners and prisoners of war were horribly abused, with many dying in custody. The situation was particularly dire on the Eastern Front, where “negative reciprocity” between Germany and the Soviet Union contributed to the gross mistreatment of POWs.\(^{58}\) Needless to say, the Nazi policy of civilian internment and mass murder was blatantly contrary to basic human rights and humanitarian standards. Arbitrary and secret detentions were also common to the Soviet gulag system.\(^{59}\) Stalin and his successors frequently arrested political dissidents, subjecting them to infamous political show trials.

Many other authoritarian regimes around the world have mimicked colonial and totalitarian due process violations. Secret and abusive detention has been common to dozens of countries facing civil strife and revolutionary upheaval in Latin America, Africa, Asia, the Middle East, and Europe, where the omnipresent threat of being “disappeared” has served as a form of terrorizing social control.\(^{60}\)

The development of U.S. due process practice is complex—eschewing blanket rights suspensions in favour of more targeted exclusions. As noted above, due process


\(^{60}\) Ibid., 30-40.
values are central to the American legal tradition. However, this did not prevent the emergence of a variety of exceptions to due process norms. In the military context, racist attitudes and colonial ambitions long fueled the abuse of Native Americans in the United States. From the original encounter between indigenous peoples and colonists to later conflicts fueled by westward settlement expansion, Indian removal policies, and the doctrine of Manifest Destiny, soldiers deviated from reigning human rights and humanitarian norms, committing a variety of abuses from killing prisoners to forcefully relocating civilians.

Indian resistance, Americans believed, was best controlled with violence. As George Washington explained, “Our future security will be in their inability to injure us…and in the terror with which the severity of the chastisement they receive will inspire them.” Defending the execution of two British men, Arbuthnot and Ambrister, accused of helping the Semoline Indians, Andrew Jackson declared that “the execution of these two unprincipled villains will prove an awful example to the world and convince the Government of Great Britain, as well as her subjects, that certain, though slow retribution awaits those unchristian wretches who, by false promises, delude and excite an Indian tribe to all the horrid deeds of savage war.” “I don’t go so far as to think that the only good Indians are dead Indians, but I believe nine out of ten are, and I shouldn’t like to inquire too closely in the case of the tenth,” stated Theodore Roosevelt. Constraining frameworks did not consistently apply to “uncivilized” enemies.

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64 One Indigenous prisoner who was granted POW status was the legendary Apache leader, Geronimo – an ironic fact considering the fate of his codename namesake, Osama Bin Laden.
In the realm of domestic law, non-citizens of the United States have not enjoyed equal access to justice. American authorities, with the approval of the courts, have frequently used plenary power to deny basic due process rights to immigrants and citizens deemed foreign and threatening. The 1798 Alien Enemies Act, which is still on the books to this day, was one of the first pieces of U.S. legislation that explicitly impinged on due process rights. As David Cole explains:

It authorizes the president during a declared war to detain, expel, or otherwise restrict the freedom of any citizen fourteen years or older of the country with which we are at war. It requires no hearing to determine whether the individual is in fact suspicious, disloyal, or dangerous; instead, the Act creates an irrebuttable presumption that enemy aliens are dangerous, based solely on their national identity. It authorizes unilateral executive detention without hearings, and precludes judicial review of a president’s determination that a given alien is dangerous.  

President Madison used the Act against suspected British loyalists in the War of 1812 while President Wilson used it against Germans and Austro-Hungarians during the First World War. In the latter case, 6300 enemy aliens were arrested, 2300 interned.

Perhaps the most famous denial of habeas corpus rights in U.S. history occurred during the Civil War. Concerned about “the enemy in the rear,” President Lincoln ordered the suspension of the writ without seeking Congressional authorization. “Under cover of “Liberty of speech,” “Liberty of the press” and “habeas corpus” they hoped to keep on foot amongst us a most efficient corps of spies, suppliers, and aiders and abettors of their cause in a thousand ways,” he wrote, explaining the need for speedy detentions.

The suspension sparked a legal confrontation with Judge Taney, who rebuked Lincoln’s

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unilateral action.\textsuperscript{68} Eventually, the President did secure legislative acquiescence. Subsequently, the government attempted to try accused Confederate saboteurs by military commission, a move that was eventually rejected by the Supreme Court in situations where normal courts were still open.\textsuperscript{69} Nonetheless, 4271 cases were heard before military commissions during the Civil War. Many involved “bushwhackers” or pro-Confederate irregular gangs, a great deal of whom were summarily tried and executed.\textsuperscript{70} Soldiers who were treated as prisoners of war did not necessarily fare much better, with abysmal mortality rates in both Union and Confederate POW camps. There is no doubt the Civil War was characterized by inhumane conditions for detainees as well as the questionable use of executive power. However, Lincoln’s Civil War actions stand in contrast to many other instances of U.S. due process denial in so far as they were premised on relatively reasonable grounds of military necessity, not overtly racist or nativist sentiment.

One result of the Civil War was the abolition of slavery. However, unfortunately for African Americans, the 1868 Fourteenth Amendment guaranteeing equality before the law did not translate into the realization of rights to fair detention and trial procedures. The persistence of racism in the judicial system meant that blacks were habitually denied habeas rights, the presumption of innocence, access to counsel, and a jury of their peers. As discussed in the previous chapter, the torture-lynching was a common phenomenon. Less well known, were a series of official policies that served to quietly and quite literally, re-enslave African Americans. Arresting blacks on flimsy charges for petty

\begin{itemize}
\item \textsuperscript{68} Ex parte Merryman, 17 F. Cas. 144 (1861).
\item \textsuperscript{69} Ex parte Milligan, 71 U.S. 2 (1866).
\end{itemize}
crimes, U.S. authorities in the South unjustly imprisoned and then sold incarcerated inmates into forced labour. As Douglass A. Blackmon explains in his detailed investigation, at least one hundred thousand people were arrested for “inconsequential charges or for violations of laws specifically written to intimidate blacks—changing employers without permission, vagrancy, riding freight cars without a ticket, engaging in sexual activity—or loud talk-with white women” and then sentenced by “provincial judges, local mayors, and justices of the peace—often men in the employ of white business owners who relied on forced labor produced by judgments.” Fined and subject to peonage, prisoners became part of a “convict leasing system” and were sent to mines, lumber camps, quarries, farms, and factories, many owned by massive corporations like U.S. Steel, where they toiled in horrific conditions, were tortured, and sometimes worked to the death. This systemically institutionalized form of quasi-slavery had far reaching implications, creating an omnipresent threat and halting the prospect of black emancipation for decades. It took the Second World War to eliminate the practice.

African Americans were not the only victims of racial exclusion. The majority of due process exceptionalism in the United States has been linked to ethnic and racial animus towards various groups. The central mechanism has often been immigration and naturalization law. Not surprisingly, this area of law has been habitually characterized by prejudice. In 1882, the first Chinese exclusion laws were enacted, followed by further bans in 1920. After the assassination of President McKinley in 1901, the 1903

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72 Blackmon, *Slavery By Another Name*, 381.
Immigration Act or Anarchist Exclusion Act bared anarchists from entry for political beliefs that Americans could legally hold.\textsuperscript{73}

Double standards and xenophobia would characterize numerous pieces of legislation during the First World War. President Woodrow Wilson, an unrepentant white supremacist despite his liberal internationalism, legitimized the anti-alien frenzy with his public pronouncements. Foreign born persons “poured the poison of disloyalty into the very arteries of our national life”—such “disloyalty…must be crushed,” he declared.\textsuperscript{74} The 1917 Immigration Act further restricted entry based on political beliefs\textsuperscript{75} and excluded migrants from the “Asiatic zone.” The 1918 Immigration Act extended plenary powers, making resident aliens deportable for anarchist beliefs, regardless of their length of residency.\textsuperscript{76} As one commenter at the time explained, the Act was necessary because “these alien enemies of all government show an obstinate reliance upon the Government to protect them from deportation…The anarchists clutch at habeas corpus and exhaust every remedy the courts can offer. Anarchists for others, bourgeoisie and friends of law and order when their own comfort or pleasure is interfered with.”\textsuperscript{77}

Meanwhile, other rights were increasingly curtailed for native and foreign born Americans alike. The Espionage Act of 1917 outlawed information that could interfere with the success of the U.S. armed forces. Labour organizer Eugene Debs was given a ten

\textsuperscript{73} Cole, \textit{Enemy Aliens}, 107.
year prison sentence for praising draft resistance.\(^{78}\) The 1918 Sedition Act criminalized “any disloyal, profane, scurrilous, or abusive language…as regards the form of government of the United States, or the Constitution, or the flag.” As a result, 2000 people were prosecuted, half convicted, for speaking out against the war.\(^{79}\)

The Palmer Raids of 1919-1920 marked the high point of the due process exceptionalism of the first Red Scare. After a series of terrorist bombings targeting prominent Americans, Attorney General Palmer ordered drag net detention and deportation of foreign nationals based on loose political associations. Investigations were led by J. Edgar Hoover, newly appointed to the Department of Justice’s (DOJ) Bureau of Investigation (BI). The raids targeted Russian immigrant anarchists and communists, resulting in 4000 to 10,000 arrests, often without warrants and without provision for access to counsel.\(^{80}\) As Cole explains, “Rather than identify those individuals who actually played a role in the terrorist bombings that sparked the raids, the Justice Department took a broad brush approach and sought to neutralize all persons who it thought might pose a potential future threat.”\(^{81}\) Considering Palmer’s order an egregious violation of rights, Secretary of Labor Louis Freedland Post, who held ultimate authority over the issuance of deportation orders, denounced the raids and reduced deportations to the hundreds.\(^{82}\)

Political and nativist animus also reared its head in domestic trials. For instance, Italian immigrants Ferdinando Nicola Sacco and Bartolomeo Vanzetti, were executed in 1927 for an alleged anarchist inspired murder-robbery after several dubious trials and

\(^{78}\) Cole, *Enemy Aliens*, 111.  
\(^{79}\) Ibid., 112.  
\(^{80}\) Ibid., 120.  
\(^{81}\) Ibid., 126.  
\(^{82}\) Ibid., 122.
failed appeals, widely considered unfair at the time. The atmosphere in which Sacco and Vanzetti were tried was rife with “anti-alien hysteria….Aliens were presumably “Reds” and “Reds” were outside the pale of the law,” explained suffragist Elizabeth Glendower Evans. “Witnesses and court officials and jurymen of Cape Cod were presumably not immune to this mob psychology. Is this suggestion resented? In the days of the witchcraft delusions, did not the godly folk of New England see a witch in every older woman, and believe with the most perfect conviction that they beheld them riding on broomsticks across the sky,” she wrote.  

The Second World War initiated another wave of due process exceptionalism. After the Pearl Harbor attack, President Roosevelt invoked the Alien Enemies Act in targeting Japanese and later Italian and German Americans. Up to 900,000 people were classified as enemy aliens and ordered to comply with registration measures, travel restrictions, and searches without probable cause. Japanese people were particularly targeted, subject to curfew, exclusion from certain areas, and relocation, with 40,000 foreign born and 70,000 American born Japanese eventually interned pursuant to Executive Order 9066 (1942). No interned Japanese person was ever charged or convicted of espionage or sabotage. These discriminatory actions sparked some of the most infamous legal rulings in U.S. history. In what are today considered shameful legal episodes, the Supreme Court upheld race based internment in several key cases. For instance, in Korematsu v. United States (1944), the Court ruled that exclusion of

84 Cole, Enemy Aliens, 93.
86 Cole, Enemy Aliens, 97.
American citizens due solely to their Japanese ancestry was constitutional in light of military necessity.

In order to avoid endorsing blanket detention, the Court interpreted *Korematsu* in a way that “segmented” the issue of exclusion—specifically the exclusion of “all persons of Japanese ancestry, both alien and non-alien,” from the Pacific coast, from the issue of internment, ruling only on the former. However, dissenting judges made clear all understood exactly what was at stake. As Justice Murphy put it:

> Being an obvious racial discrimination, the…order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment. It further deprives these individuals of their constitutional rights to live and work where they will, to establish a home where they choose and to move about freely. In excommunicating them without benefit of hearings, this order also deprives them of all their constitutional rights to procedural due process. Yet no reasonable relation to an "immediate, imminent, and impending" public danger is evident to support this racial restriction, which is one of the most sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of martial law.

As noted by Justice Roberts, “it is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States.”

“Once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order,” wrote Justice Jackson, “the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon,

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ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”91 That the dissenters were able to easily recognize these stark facts suggests the majority was engaged in active collusion with due process exceptionalism.

The immediate post-World War II period saw numerous war crimes trials abroad. Some, like the International Military Tribunal at Nuremberg, while imperfect, represented a genuine attempt to extend due process to accused Nazi War criminals. Other cases, particularly in the Far East, were more questionable. Justice Murphy, writing in dissent to a Supreme Court decision upholding a hastily convened and procedurally questionable military commission, characterized the problem:

Today the lives of Yamashita and Homma, leaders of enemy forces vanquished in the field of battle, are taken without regard to due process of law. There will be few to protest. But tomorrow the precedent here established can be turned against others. A procession of judicial lynchings without due process of law may now follow. No one can foresee the end of this failure of objective thinking and of adherence to our high hopes of a new world. The time for effective vigilance and protest, however, is when the abandonment of legal procedure is first attempted. A nation must not perish because, in the natural frenzy of the aftermath of war, it abandoned its central theme of the dignity of the human personality and due process of law.92

Troubling procedural irregularities also appeared in several German cases, although sentences were often lenient relative to the severity of offenses.93 In general, the United States aspired and succeeded in applying rule of law principles to detainees and POWs during and after the war. However, appeals to necessity were used to rationalize problematic trials in some instances.

In the United States, a second Red Scare characterized the post-war period. Numerous programs and laws that restricted constitutional rights and due process

92 Quoted in Vagts, “Military Commissions,” 43.
93 Ibid., 47.
protections for both citizens and aliens proliferated in the 1940s and 1950s. Fearing Soviet infiltration, the FBI developed several iterations of “custodial detention lists” and “security indexes” over the years, aimed at identifying subversives for possible detention.\(^{94}\) The 1940 Smith Act criminalized subversive speech in peacetime, while the 1947 Taft-Hartley Act required union leaders to swear allegiance and created a federal employee loyalty program. The Internal Security Act of 1950 and the McCarran-Walter Act of 1952 extended preventative detention powers and discriminatory immigration rules aimed at subversives.\(^{95}\)

Loyalty programs were particularly damaging, resulting in blacklisted individuals being denied or fired from employment. As Cole explains, they:

operated by a principle of associational guilt. But their noncriminal character permitted them to be applied en masse to millions of citizens at a time. And because they threatened “only” loss of job or reputational harm, not prison time, the government successfully argued that these procedures, like immigration proceedings, did not need to adhere to criminal safeguards, or even to the basic fairness guarantees of due process.\(^{96}\)

The impact was extensive. Between 1947 and 1957, up to 13.5 million workers were subjected to some variety of loyalty test. Around 11,000 employees were fired from government jobs, 6300 from private ones.\(^{97}\)

The House Un-American Activities Committee (HUAC) and the Permanent Subcommittee on Investigations of the Government Operations Committee of the U.S. Senate under the leadership of Senator Joseph McCarthy became central protagonists in the loyalty testing process. Under Congressional rules, those forced to testify had few options. As one representative explained of HUAC, “The rights you have are the rights


\(^{95}\) Ibid., 131-132.

\(^{96}\) Ibid., 144.

\(^{97}\) Ibid., 149.
given you by this Committee. We will determine what rights you have and what rights you have not got before this Committee."98 Witnesses were confronted with secret evidence, withheld notice of accusations, denied counsel, and barred from cross-examining testimony. “McCarthyism assigns guilt to a group, relies on unproven allegations rather than evidence, and places the burden on the individual to cleanse his or her name,” notes Louis Fisher.99 Because HUAC and the Permanent Subcommittee were not technically criminal or punitive tribunals, the courts rejected constitutional challenges.100 However, when the excesses of McCarthy’s witch-hunts became clearer, he was finally censured in 1954. The hearings progressively lost political legitimacy.

As the pendulum swung back from anti-communist hysteria, the Supreme Court started to overturn legislation like the Smith Act that targeted the rights of American citizens.101 Nonetheless, administrative measures continued to be permitted against non-citizens. Insinuations regarding political associations and secret evidence are still used today to exclude and deport people in immigration proceedings.102 Deportable and inadmissible aliens remain subject to detention while awaiting removal. “Although the scope of governmental authority recognized under the Immigration Law and Wartime Detention Models may have changed over time, both models have long authorized the executive detention of aliens without proof of crime and without the protections of the criminal process.”103

98 Ibid., 149.
100 Cole, Enemy Aliens, 152.
101 Ibid., 143.
102 Ibid., 163-177.
Moreover, a variety of other sites of everyday exceptionalism continue to operate. In addition to the wartime, security, and immigration practices previously discussed, Adam Klein and Benjamin Wittes highlight the statutory legislation that endorses preventative detention—“detention of a person by state or federal authorities that is (1) not pursuant to conviction of a crime and (2) undertaken in order to prevent some future harm”—of multiple categories of people. It is not at all uncommon for prisoners awaiting trial, material witnesses, the mentally ill, recidivist sexual predators, carriers of communicable diseases, intoxicated people, and substance abusers to be detained in the public interest. Accordingly, they take issue with “The civic mythology of preventive detention,” which “contends that American law abhors the practice, or tolerates it only as an exception, in extreme situations, to an otherwise strong norm.” Rather, “The actual place of preventive detention in American law is far more prosaic.”

In sum, American history has been rife with due process exceptionalism. In wartime, appeals to necessity and at times, racial animus, have facilitated procedurally problematic detention and trial policies. In peacetime, non-citizens and Americans, deemed subversive or dangerous, have been excluded and expelled due to race, deported for lawful political associations, detained based on secret evidence, and been barred access to public employment as the result of innuendo. As Cole explains, these actions do not reflect a natural expression of U.S. law:

contrary to widely held assumptions, the Constitution extends fundamental protections of due process, political freedoms, and equal protection to all persons subject to our laws, without regard to citizenship. These rights adhere in the dignity of the human being….The rights to political participation, entry, and abode, by contrast, are rights that may be limited to the citizenry; they are

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104 Klein and Wittes, “Preventative Detention,” 90.
105 Ibid., 86.
106 Cole, Enemy Aliens, 212.
inextricable from a polity’s ability to define itself….By contrast, there are no good reasons specific to the rights of speech, association, or due process that warrant diminished protections for non-nationals.\textsuperscript{107}

It seems that the Supreme Court is gradually accepting this premise as it moves towards extending speech and due process rights to non-citizens.\textsuperscript{108} The type of overt racism that characterized previous bouts of exceptionalism has lost legitimacy. These shifts have made it more difficult for policy makers to get away with the blanket denial of rights that characterized past eras. As will be discussed later, the legal maneuvering required to legally authorize due process violations today is a good deal more complicated than it once was.

\textbf{4.4.2 Covert Due Process Violations}

In addition to overt forms of due process exceptionalism, the Cold War fueled American collusion with allied regimes guilty of extensive due process violations. From Indonesia to Pakistan to South Africa, U.S. officials passively and actively cooperated with human rights abusers. In some cases, American agents directly participated in extra-judicial assassination and coup attempts.\textsuperscript{109} Many of the most troubling cases of active U.S. engagement with covert disappearances and killings occurred in Latin America. As summed up by the United Nations \textit{Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism}:

\begin{itemize}
\item \textsuperscript{107} Ibid., 221-222.
\item \textsuperscript{108} Ibid., 223.
\item \textsuperscript{109} As the Church Committee reports note, the United States was implicated in covert plots to assassinate several national leaders including Patrice Lumumba of the Congo, Fidel Castro of Cuba, Rafael Trujillo of the Dominican Republic, Ngo Dinh Diem of Vietnam, and Rene Schneider of Chile. See U.S. Congress, Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the Church Committee), \textit{Interim Report: Alleged Assassination Plots Involving Foreign Leaders}, 94\textsuperscript{th} Congress, 1st Session, Report No. 94-465 (1975), http://www.aarclibrary.org/publib/church/reports/ir/html/ChurchIR_0001a.htm. It is now well known that the United States also assisted coups against Mohammad Mosaddegh of Iran, Jacobo Árbenz Guzmán of Guatemala, and Salvador Allende of Chile.
\end{itemize}
Latin American Governments justified practices of secret detention, among other exceptional measures, referring to the national security doctrine, which provided fertile ground for the creation of a repressive system by the military in which, in the name of security, human rights and fundamental freedoms were violated on a massive scale, and the rule of law and the democratic system damaged. … Politically, the doctrine was strongly influenced by the bipolar cold war paradigm. It extended the notion of the alleged internal war against communism, which soon acquired a regional dimension. Practices of secret detention were first used against armed movements, later against left-wing groups, Marxist and non-Marxist, and ultimately against all groups suspected of political opposition. The latter were labeled as “subversives,” “terrorists” or “communists.”

Detainees swept up in this process were held incommunicado, frequently tortured, and often murdered.

Operation Condor, the coordinated effort of the Southern Cone dictatorships, targeted dissidents throughout the 1970s. States cooperated to eliminate their enemies, executing “cross-border surveillance, targeting, abduction, torture, and transfer of exiles, working with counterpart intelligence apparatuses or with extreme-right paramilitary networks in member countries.” U.S. intelligence officials provided preparatory, logistical, and direct operational support for Condor activities. Meanwhile, U.S. political leaders provided tacit approval. For instance, in a particularly brazen episode in 1976, Condor agents assassinated Chilean exiled foreign minister Orlando Letelier and his colleague in a Washington D.C. Embassy Row car bombing. Declassified documents suggest that shortly before the attack, Secretary of State Henry Kissinger blocked U.S. officials from issuing a demarche warning Latin American governments against initiating “a series of international murders that could do serious damage to the international status

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112 Ibid., 248.
and reputation of the countries involved.”\textsuperscript{113} Rather he instructed that “no further action be taken on this matter.”\textsuperscript{114}

As Patrice McSherry characterizes it, Condor architects were highly conscious of legal and normative constraints on their activities. Instead of conducting abuses openly, “A vast parallel infrastructure of secret detention centers and clandestine killing machinery enabled the military states to avoid international law and scrutiny, and facilitated their use of disappearance, torture, and assassination out of the public eye.”\textsuperscript{115} These predatory parastatal structures “allowed military and intelligence forces to carry out illegal acts that were visible on the one hand, and deniable on the other” and which further allowed them to maintain “an appearance of moderation and legitimacy, and avoid the damage that accompanied world criticism of widespread, public human rights abuses.”\textsuperscript{116}

Condor was just one example of a Cold War security program that resulted in gross human rights violations, including due process denial. As with many such initiatives, the United States was wary of getting caught and looking bad for its role in supporting human rights violators. Assassination and disappearances were illegal and illegitimate, requiring activities to be conducted covertly. Certain programs in the GWOT echo this approach—notably the secret transnational practice of extraordinary rendition, discussed in the previous chapter.

\textsuperscript{113} “Department of State, Action Memorandum, Ambassador Harry Schlaudeman to Secretary Kissinger, "Operation Condor,"” (August 30, 1976), National Security Archive Electronic Briefing Book No. 312, ed. Peter Kornbluh, http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB312/1_19760830_Operation_Condor.PDF
\textsuperscript{114} U.S. Department of State, “Cable: Actions Taken” (September 16, 1976), http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB312/2_19760916_Actions_Taken.pdf
\textsuperscript{115} McSherry, \textit{Predatory States}, 241-2.
\textsuperscript{116} Ibid., 243-244.
4.4.3 Unofficial Due Process Violations

In some cases, due process violations have been characterized by unofficial policies and practices, which are not premised on overtly promulgated or covert exceptions, but which nonetheless have exceptional effects. This type of due process denial is intricately intertwined with American racial politics. African Americans lack equal access to the justice system. There is no greater evidence of this than the appalling levels of African American incarceration in the United States.

I have already reviewed the re-enslavement of African Americans under the post-Civil War convict leasing system. This practice, along with the broader openly racist institution of Jim Crow declined after World War II with the growth of the Civil Rights Movement in the 1950s and 1960s. However, as Michelle Alexander documents, segregationists quickly moved to link their opposition to civil rights with concerns about “law and order.” As the rules of acceptable discourse changed…segregationists distanced themselves from an explicitly racist agenda. They developed instead the racially sanitized rhetoric of “cracking down on crime”—rhetoric that is now used freely by politicians of every stripe. This theme was embraced by President Nixon and later President Reagan, who eschewed racial terminology while stoking working class white resentment with “racially coded language” ranging from “welfare queens” to “crack babies.”

Under the banner of the “War on Drugs,” the United States experienced an unprecedented increase in its prison population in the 1980s and 1990s. The laws fuelling

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118 Ibid., 42.
119 Ibid., 47-8.
this development were far from neutral. For instance, the 1986 Anti-Drug Abuse Act included “far more severe punishment for distribution of crack-associated with blacks-than powder cocaine, associated with whites.”

This trend continued to accelerate under Presidents Bush and Clinton. In 1980, 300,000 people were incarcerated. By 2000, 2 million people were in jail or prison. Today, half a million people are locked up for drug crimes, even though four out of five drug arrests in 2005 were for possession, not sales. Eighty percent of defendants are too poor to pay a lawyer. Almost all cases are determined through plea bargains, often after defendants are “overcharged” by prosecutors using the threat of mandatory minimum sentences. Once convicted, drug felons may be denied employment, social benefits, student loans, public housing, and the franchise.

In Chicago, 55% of black men are drug felons for life.

The result of these policies has been quite shocking: in 2000, in seven states African Americans made up 80-90% of imprisoned drug offenders. In 15 states, blacks are imprisoned for drug charges at a 25 to 57 times higher rate than whites. While white imprisonment for drug offenses rose 8 fold between 1983 and 2000, black incarceration for the same period increased an astronomical 26 times. This bias is reflected in overall statistics: by the late 1990s, 1 in 3 black men aged 20-29 were under

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120 Ibid., 52.
121 Ibid., 59.
122 Ibid., 59.
123 Ibid., 84.
124 Ibid., 85-87.
125 Ibid., 95.
128 Ibid., 96.
129 Ibid., 96.
criminal justice supervision, while 2 out of 5 had been imprisoned at some point.\textsuperscript{130} In 2006, 1 in 14 black men were incarcerated, 1 in 9 between the ages of 20-35,\textsuperscript{131} while 1 in 15 African American children have a parent locked up.\textsuperscript{132}

This outcome is not explained by crime data. Multiple studies have shown that white students use cocaine, crack, and heroine at much higher rates than black students; that equal percentages use marijuana; that white youth are more likely than black youth to sell drugs; that white youth have higher rates of drug related emergency room admissions; and that “white youth were actually the most likely of any racial or ethnic group to be guilty of illegal drug possession and sales.”\textsuperscript{133} Violent crime rates, which have steadily declined, also fail to account for the staggering increase in incarceration.\textsuperscript{134} Rather, the explanation is quite simple and disconcerting: the formally colour blind justice system discriminates against African Americans. While I cannot fully address this phenomenon here, there are two major factors which contribute to this—the discretion of law enforcement officials whose conscious and unconscious prejudice leads to racial profiling and a legal order which refuses to engage issues of bias that are not associated with overt bigotry.\textsuperscript{135}

Unfortunately, American Latinos are increasingly subject to a similar pattern of racial profiling with the emergence of controversial immigration laws. For instance Arizona’s Senate Bill 1070, passed in 2010, but currently mired in litigation, requires law

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\textsuperscript{130} Drug Policy Alliance, \textit{Drug Courts}, 10.
\textsuperscript{131} Alexander, \textit{The New Jim Crow}, 98.
\textsuperscript{133} Alexander, \textit{The New Jim Crow}, 97.
\textsuperscript{135} Alexander, \textit{The New Jim Crow}, 100-101.
\end{footnotesize}
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enforcement to detain anyone suspected of being in the country illegally and criminalizes failure to carry immigration documents. Critics argue it will lead to the systemic harassment of Hispanics. Legislation passed in March 2011 in Alabama is even more extreme:

It effectively makes it a crime to be an undocumented immigrant in Alabama, by criminalizing working, renting a home and failing to comply with federal registration laws that are largely obsolete. It nullifies any contracts when one party is an undocumented immigrant. It requires the police to check the papers of people they suspect to be here illegally. The new regime does not spare American citizens. Businesses that knowingly employ illegal immigrants will lose their licenses. Public school officials will be required to determine students’ immigration status and report back to the state. Anyone knowingly “concealing, harboring or shielding” an illegal immigrant could be charged with a crime, say for renting someone an apartment or driving her to church or the doctor.

Bracketing the exceptional overt assault on the rights or irregular migrants, it is difficult to imagine how such a law would not result in the profiling of American Latinos.

While non-citizen rights have been somewhat expanded over the years, immigrants still face systemic due process obstacles. As one exposé noted, immigration hearings, 50% of which took place in detention centers in 2009, are often deeply unfair and frequently violate required procedure. Immigrants are denied translators and counsel, given poor legal advice, are judged based on incorrect identifications or faulty evidence, and are deported without being seen by a judge. They “are able to run roughshod over the rights of US residents,” explains Jacqueline Stevens, “because the agency that runs immigration hearings, the pompous and obscurely titled Executive Office of Immigration Review… is a paranoid bureaucratic backwater that shields immigration judges from

accountability. As long as adjudicators process a high volume of cases, the agency will ignore and even cover up serious misconduct, including deportations of US citizens or people who have other avenues of relief.”\textsuperscript{139}

Thus, while changes in the structure of constraint, namely social norms about racial equality, have made open exceptionalism less legitimate than in the past, systemic, unofficial bias continues to plague the contemporary American justice system. “‘Felony’ is the new N-word…Today’s lynching is incarceration…Today’s lynch mobs have a badge…a law degree,” sums up Alexander of the age of “mass incarceration.”\textsuperscript{140}

4.5 9/11 and the Reinvention of the Exclusionary Tradition

The origin of American policy makers’ desire to reduce and deny due process protections for post-9/11 detainees is not hard to identify. Fearful of domestic sleeper cells and desperate to prevent another strike, they felt compelled to act quickly and decisively to identify and neutralize suspected terrorists. Perceiving that due process standards created bureaucratic obstacles to efficient deportations, interrogations, and preventative measures, detention procedures were redesigned by the administration to evade normal criminal and military rules. Trial practices were then modified to accommodate these prior abuses. While comprehensible, it is important to note that these decisions were not inevitable. Oklahoma City bomber Timothy McVeigh was detained, tried, and executed within the normal American justice system. Similarly, conspirators in the 1993 World Trade Center attack were convicted and imprisoned in the civilian system.

\textsuperscript{140} Alexander, \textit{The New Jim Crow}, 159.
Because due process violations have never been entirely absent from American practice, the post-9/11 attempt to deny Arabs and Muslims in America and captured enemy fighters abroad just detention conditions and fair trials represents more of a revival and continuation of tradition than an entirely distinct paradigm. However, the advancements in domestic and international legal rules combined with increased pressure to comply with human rights norms have meant that overtly racial and colonial rationales for exclusion and exception are no longer palatable. While still present in various forms, covert detention and extra-judicial killing, like covert and proxy torture, are difficult practices to sustain in the contemporary monitoring environment.

Reflecting these influences, the post-9/11 reformulation of detention and trial rights has been enacted through a strategy of plausible legality, identified in the previous chapter on torture, which sanitizes rights violations and updates attempts to legally rationalize abusive practices in light of contemporary norms. At the heart of these legal claims is the argument that detention and trial rights are not fundamental or universal human rights, but are jurisdictionally limited. These limitations create different standards for citizens and foreigners and for regular and irregular combatants. They vary for persons detained within the United States, within other countries, and within non-sovereign territories controlled by the United States (e.g. Guantánamo Bay).

Several issues will be examined to illuminate the strategy of plausible legality in this area of security practice. Firstly, soon after the-9/11 attacks, hundreds of Arab and Muslim men were rounded up and detained incommunicado in the United States. While seemingly an act of racial discrimination echoing previous exceptional internments, authorities legitimizied this move under existing immigration and material witness laws.
Secondly, American policy makers invented the category of “unlawful enemy combatant” to hold prisoners outside of Geneva Conventions protections and domestic constitutional standards at places like Guantánamo Bay. However, rather than reject the GCs outright, U.S. officials took pains to rationalize this practice in light of rules governing armed conflict. Finally, policy makers created military commissions to try detainees. While harshly criticized by legal advocates, military commissions have been defended by successive administrations as just, appropriate, and backed by legal precedent. Thus, while violating standard detention and trial rights in all these areas, U.S. authorities have invoked and revived legal arguments which legitimize inconsistent standards for varying subjects—inevitabilities that are unfortunately both historically salient and at a least to some degree, objectively present in the positive law. In this sense, the strategy of plausible legality reflects the structure of constraint.

4.5.1 Immigration Detention, Material Witness Laws, and Watch Lists

The kind of blanket racial profiling and animus that permitted Japanese internment during the Second World War is no longer legitimate. The legislative successes of the Civil Rights Movement and changing normative beliefs about equality have prevented most hard line national security officials from advocating similarly harsh measures against Arabs and Muslims in the wake of 9/11. Indeed, policy pronouncements from the Bush and Obama administrations have been rife with calls for inter-communal cooperation. “[T]he war against terrorism is not a war against Muslims, nor is it a war against Arabs,” declared President Bush in 2001. “Islam is a vibrant faith. Millions of our fellow citizens are Muslim. We respect the faith. We honor its traditions. Our enemy does
not. Our enemy doesn't follow the great traditions of Islam. They've hijacked a great religion,” he said in 2002.\textsuperscript{141}

Yet, in practice, there is no doubt that Arabs and Muslims have been targeted for arrest, detention, and trial. Sometimes this has been achieved through normal criminal procedure. However, in many instances authorities have relied on immigration, material witness, and other plenary and prosecutorial powers compatible with the current structure of constraint to target suspected terrorists and sympathizers based on flimsy evidence. This targeting has often resulted in major due process violations. These violations have not been entirely exceptional or covert. Rather, they have relied on a concerted strategy of stretching and manipulating existing laws to achieve desired results. Much as the officially colour blind “War on Drugs” has led to the mass incarceration of African Americans, and the attempt to deal with illegal immigration has increasingly targeted Latinos, immigration law has been marshaled in the Global War on Terror to target Arabs and Muslims.

As discussed above, full civil rights norms have never been extended to foreigners in America. The structure of constraint governing the detention and trial rights of unnaturalized immigrants is relatively weak. In this sense, not all that much has changed since the days of the Palmer Raids. While overt racism is relatively rare in public discourse, ongoing hostility towards migrants is evidenced by vigilante Minute Men movements, Tea Party scapegoating, hard line state legislation, and Congressional attempts to revoke the naturalized citizenship rights of the children of undocumented aliens guaranteed by the Fourteenth Amendment. This normative structure is

complemented by a discriminatory legal system, which allows a great deal of discretion at the expense of basic fairness. As Saito suggests, “Although legal sanction for racial animus, such as that which fueled Chinese exclusion, is generally presumed to be a thing of the past, the plenary power doctrine that grew out of those cases is alive and well…the doctrine continues to be invoked to exclude those perceived as Other.”

This state of affairs has been exploited in the GWOT as authorities moved to detain suspects against whom there was little or no hard evidence of criminal wrongdoing. In the two months following 9/11, 1200 citizens and aliens were detained for questioning by law enforcement nationwide, while 762 aliens were detained as part of the FBI’s Pentagon/Twin Towers Bombing (PENTTBOM) investigation. Between September 2001 and August 2002, the latter were placed on an “INS Custody List” while the FBI attempted to ascertain their relationship to terrorism. This process took an average of 80 days, during which detainees were held on “no bond” orders. Particularly troubling was that people who were tangentially encountered in the investigation, but not suspected of any particular criminal activity, continued to be held by PENTTBOM for immigration violations such as overstaying their visas or entering the country illegally.

Many of those detained complained of due process abuses: “detainees and their attorneys alleged that the detainees were not informed of the charges against them for extended periods of time; were not permitted contact with attorneys, their families, and embassy officials; remained in detention even though they had no involvement in

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144 Ibid., 2.
145 Ibid., 196.
terrorism; or were physically abused, verbally abused, and mistreated in other ways while detained—concerns corroborated by subsequent DOJ investigations. Although most detainees were technically guilty of immigration violations, their immigration status was manipulated as a pretext. In essence, American authorities exploited the low due process standards of immigration law to engage in preventative detention of ethnically and religiously profiled suspects. As Attorney General Ashcroft himself summed up in an October 2001 speech:

Forty years ago, another Attorney General was confronted with a different enemy within our borders. Robert F. Kennedy came to the Department of Justice at a time when organized crime was threatening the very foundations of the Republic...Robert Kennedy’s Justice Department, it is said, would arrest mobsters for “spitting on the sidewalk” if it would help in the battle against organized crime. It has been and will be the policy of this Department of Justice to use the same aggressive arrest and detention tactics in the war on terror. Let the terrorists among us be warned: If you overstay your visa – even by one day – we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible. We will use every available statute. We will seek every prosecutorial advantage. We will use all our weapons within the law and under the Constitution to protect life and enhance security for America.147

Nasser Hussein explains that the resources to do this were already entrenched in U.S. law:

The post-9/11 detentions can be traced back to a pre-9/11 piece of legislation, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, signed into law by President Clinton. The act erased some long-standing distinctions between proceedings to exclude “illegal” immigrants who unsuccessfully sought entry and were subject to immediate detention and the deportation proceedings of permanent residents and others legally in the U.S. on work and other visas; both are now called removal proceedings. The act requires the INS to take foreign nationals into custody for up to ninety days pending deportation but also gives the INS and the attorney general discretionary power to hold people beyond ninety days if they deem it necessary.148

146 Ibid., 2.
147 Ibid., 12.
Post-9/11 authorities played fast and loose with the rules. However, they did not have to abandon the law or initiate a state of exception.

A variety of other initiatives also exploited immigration law. In fall 2001, the State Department put mandatory holds on visa applications by men 18-45 from 26 mainly Arab and Muslim countries, preventing the renewal of student and work visas.\(^{149}\) Subsequently, the Justice Department announced its intent to interview 8000 primarily Arab and Muslim non-immigrant visa holders.\(^{150}\) In January 2002, the Immigration and Naturalization Service accelerated efforts to deport 6000 Middle Eastern “absconders” who had evaded deportation orders.\(^{151}\) In July 2002, the INS began to aggressively enforce rules that required aliens to register changes of address. This was followed by the announcement of a Special Registration program, later dubbed the National Security Entry and Exist Registry System, in fall 2002, which required many Arab and Muslim visitors to register with Homeland Security and undergo further screening. By June 2003, almost 128,000 people had registered at Port of Entry, while almost 83,000 had been “specially registered” through domestic call in, 13,434 of whom were “placed in removal proceedings for visa violations, though none of them was charged with terrorism, terrorist affiliations, or otherwise suspected of terrorist affiliations.”\(^{152}\) There are numerous other examples of programs that targeted Arabs and Muslims using immigration law. While many targets were guilty of immigration violations, the law was clearly selectively enforced. Indeed, Arabs and Muslims constituted only one percent of “out of status” aliens in the United States. The result was that more Arabs and Muslims were removed


\(^{150}\) Ibid, 245.

\(^{151}\) Ibid, 245.

\(^{152}\) Ibid 246.
from United States post-9/11 than aliens were deported after the Palmer Raids.153

In addition to suspicions about Arab and Muslim immigrants, security agents also
became increasingly concerned with domestic sleeper cells and domestic connections to
international terrorism after 9/11. However, it was much more difficult to detain
American citizens than immigrants. While the PATRIOT Act, passed in fall 2001,
allowed for detention of up to seven days without charges for terrorism suspects,
American law did not go as far as the long-term preventative detention legislation passed
in other countries.154 As a result, policy makers had to become more creative if they
wanted to hold suspects of interest who had not committed a crime necessary for a
normal arrest warrant. To do this, they utilized material witness warrants. These warrants
were designed to force witnesses to testify who might otherwise fail to appear. In 2001,
Attorney General Ashcroft authorized their use in terrorism cases to allow the detention
and interrogation of suspects, on the fraudulent pretext that they were required as
witnesses in a prosecution. Detainees subject to material witness warrants had limited
access to counsel, and complained of shackling, strip searches, and other harsh detention
conditions.155

In response, there have been attempts to declare the misuse of material witness
warrants unconstitutional,156 and make former Attorney General Ashcroft liable for

153 Ibid 246.
154 For example, anti-terrorism legislation in Britain has authorized detention without charge for
28 days. See Dominic Casciani, “Q&A: Anti-Terrorism Legislation,” BBC News, January 23, 2008,
155 Human Rights Watch, Witness to Abuse: Human Rights Abuses Under the Material Witness
Law Since September 11, Human Rights Watch 17, no. 2(G) (June 2005),
http://www.aclu.org/FilesPDFs/materialwitnessreport.pdf.
156 Adam Liptak, “Supreme Court to Hear Material Witness Case,” The New York Times,
February 11, 2011,
abuses.\textsuperscript{157} The rationale for doing was explained by several former federal prosecutors in an amicus brief: “Authorizing prosecutors to obtain court orders based on misleading applications would shake the faith…of the public in our system of justice” and would absurdly permit “prosecutors to materially mislead judges in a manner that would undermine general respect for the rule of law.”\textsuperscript{158} Unfortunately, these efforts have been less than successful. In May 2011, the Supreme Court ruled in Ashcroft v. al-Kidd that “The objectively reasonable arrest and detention of a material witness pursuant to a validly obtained warrant cannot be challenged as unconstitutional on the basis of allegations that the arresting authority had an improper motive” and that “Ashcroft did not violate clearly established law and thus is entitled to qualified immunity.”\textsuperscript{159} As a result, the manipulation and misuse of law may remain an attractive option for law enforcement.

Finally, Arab and Muslim foreigners and citizens have found themselves disproportionately targeted by the post-9/11 proliferation of terrorist watch lists. The most prominent example is the No Fly List, which bars listed individuals from airplane travel. Such lists have been rife with errors, with people being erroneously named or people with similar names being removed from flights. According to the American Civil Liberties Union (ACLU), there are over one million people in the FBI run Terrorist Screening Center’s Consolidated Watchlist database, many of whom were included based


\textsuperscript{159} Ashcroft v. al-Kidd, U.S.C No. 10-98 (2011).
on outdated information or without reasonable predicate at all. Because the content of the list remains secret and because rules for listing and unlisting are opaque and inefficient, it is difficult, if not impossible, to be removed from a watch list. As presence on a list poses real consequences for individuals, this has resulted in violation of due process rights to fair contestation and adjudication of alleged wrongs. Like other administrative and bureaucratic programs introduced in the GWOT, the watch list phenomenon erodes rights in a discriminatory fashion, without appealing to overt exceptionalism or bigotry.

4.5.2 Unlawful Enemy Combatants

The law of armed conflict has also been stretched to deny due process to detainees. As explained at the beginning of this chapter, the Geneva Conventions set out clear and universally accepted standards for the treatment of enemy prisoners of war. After 9/11, U.S. policy makers made plain that they believed these rules would restrict their ability to efficiently detain and interrogate suspected terrorists. To get around this problem, they made several major interpretive moves. The first was to deny Geneva protections to Al Qaeda and Taliban fighters on the basis that they were “unlawful enemy combatants.” The second was to deny American constitutional standards to detainees using the rationale that military rather than criminal law applied to terrorism cases. The

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160 American Civil Liberties Union, “Watch Lists,” http://www.aclu.org/technology-and-liberty/watch-lists. Related to concerns about watch lists are complaints that terrorist financing laws are unfair. The Treasury Department has discretion under “material support” rules to shut down charities suspected of aiding terrorists. Like watch lists, the standards for targeting are unclear and evidence is secret and uncontestable. The ACLU suggests that Muslim charities have been harassed and slandered, unduly closed during pending investigations, and that Muslim donors have been deterred from engaging in Islamic charity or zakat. This has resulted in the denial of free speech and religious freedom, reputational harm, and irreversible damage to accused charities and their aid recipients. See American Civil Liberties Union, Blocking Faith, Freezing Charity: Chilling Muslim Charitable Giving in the “War on Terrorism Financing,” June 2009, http://www.aclu.org/files/pdfs/humanrights/blockingfaith.pdf#page=2.
third was to open detention facilities whose geographic location created jurisdictional ambiguity.

Just as U.S. policy makers never sought to suspend the American Constitution, they never rejected or withdrew from the Geneva Conventions either. Rather, as with the case of domestic detention and trial, they exploited alleged jurisdictional gaps in their treaty obligations. In what has been one of the most legally perverse episodes in the GWOT, American officials fervently claimed that true respect for the GCs required they not be applied to terrorism suspects. There have been two dimensions of this claim. First has been that assertion that Geneva does not apply to transnational conflict with non-state entities. According to this view, Common Article 2 covers international armed conflict between high contracting parties, while Common Article 3 covers intrastate war not of an international character or non-international armed conflict in the territory of one contracting party. Neither apply to conflicts occurring across state borders. While the United States had previously applied Geneva rules as a matter of policy in all armed conflicts, regardless of technical legal categories, post-9/11 policy makers moved to suspend this approach.

As with the torture memos, these arguments were articulated in memoranda produced by the Office of Legal Counsel (OLC). The memos recognized that the Geneva Conventions, via the War Crimes Act (WCA) create standards for the treatment of detainees, but contested their applicability in particular circumstances. As Bybee wrote of the Geneva Conventions:

First, the text of the provision refers specifically to an armed Conflict that a) is not of an international character, and b) occurs in the territory of a state party to the Convention. It does not sweep in all armed conflicts, nor does it address a gap left by common article 2 for international armed conflicts that involve non-state entities (such as an international terrorist organization) as parties to the conflict. Further, common article 3 addresses only non-international conflicts that occur within the territory of a single state party, again, like a civil war. This provision would not reach an armed conflict in which one of the parties operated from multiple bases in several different states….It appears that the drafters of the Conventions had in mind only the two forms of armed conflict that were regarded as matters of general international concern at the time: armed conflict between nation-States (subject to article 2), and large-scale civil war within a nation-State (subject to article 3)….Giving due weight to the state practice and doctrinal understanding of the time, the idea of an armed conflict between a nation-State and a transnational terrorist organization (or between a nation-State and a failed State harboring and supporting a transnational terrorist organization) could not have been within the contemplation of the drafters of common article 3. Conflicts of these kinds would have been unforeseen and were not provided for in the Conventions. Further, it is telling that in order to address this unforeseen circumstance, the State parties to the Geneva Conventions did not attempt to distort the terms of common article 3 to apply it to cases that did not fit within its terms. Instead, they drafted two new protocols to adapt the Conventions to the conditions of contemporary hostilities. The United States has not ratified these protocols, and hence cannot be held to the reading of the Geneva Conventions they promote. Thus, the WCA's prohibition on violations of common article 3 would apply only to internal conflicts between a state party and an insurgent group, rather than to all forms of armed conflict not covered by common article 2.162

This argument runs directly contrary to the ICRC and most international lawyer’s reading of the GCs, but has a quasi-legal quality all the same. In other words, it manifests the strategy of plausible legality.

The second prong of the plausibly legal approach to avoiding Geneva rules was to assert that certain categories of combatants were not subject to Geneva protections. The first and uncontestable position taken in this regard was that Al Qaeda was not a high

contracting party to the GCs, and was therefore not subject to the POW protections granted to enemy soldiers in an IAC. It was moreover argued that:

Second, they cannot qualify as volunteer force, militia, or organized resistance force under article 4(A)(2). That article requires that militia or volunteers fulfill four conditions: command by responsible individuals, wearing insignia, carrying arms openly, and obeying the laws of war. Al Qaeda members have clearly demonstrated that they will not follow these basic requirements of lawful warfare. They have attacked purely civilian targets of no military value; they refused to wear uniform or insignia or carry arms openly, but instead hijacked civilian airliners, took hostages, and killed them; and they themselves do not obey the laws of war concerning the protection of the lives of civilians or the means of legitimate combat.163

This limited point is legally correct. More contestable was the suggestion that Taliban fighters were similarly ineligible for POW protections. Until the new Afghan government was created in 2002, the conflict in Afghanistan was an IAC. To address this situation, OLC attorneys suggested that the Taliban constituted a non-state armed gang, not the official forces of a high contracting party.

While denial of POW status was not all that controversial, OLC lawyers went on to make the radical claim that Common Article 3 protections did not apply to Al Qaeda or the Taliban either. While the Afghan war constituted an IAC, their position was that Common Article 3 applied only to NIACs:

Further, if the President were to find that all Taliban prisoners did not enjoy the status of POWs under article 4, they would not be legally entitled to the standards of treatment in common article 3. As the Afghanistan war is international in nature, involving as it does the use of force by state parties—the United States and Great Britain—which are outside of Afghanistan, common article 3 by its very terms would not apply. Common article 3, as we have explained earlier, does not serve as a catch-all provision that applies to all armed conflicts, but rather as a specific complement to common article 2. Further, in reaching the article 4 analysis, the United States would be accepting that Geneva Convention jurisdiction existed over the conflict pursuant to common article 2. Common article 3 by its text would not apply, and therefore any violation of its terms would

163 Ibid., 10.
not constitute a violation of the WCA."¹⁶⁴

The rejection of Common Article 3 applicability continued once the conflict ceased to be an IAC. As previously mentioned, a component of this position was the rather weak assertion that the GCs did not apply at all to state vs. non-state armed conflicts. A second, equally dubious OLC position was that treaties could be suspended with a failed state.¹⁶⁵

“The treaty power is fundamentally an executive power established in Article II of the Constitution, and power over treaty matters post-ratification are within the President's plenary authority,”¹⁶⁶ wrote Bybee. Moreover:

The President can readily find that at the outset of this conflict, when the country was largely in the hands of the Taliban militia, there was no functioning central government in Afghanistan that was capable of providing the most basic services to the Afghan population, of suppressing endemic internal violence, or of maintaining normal relations with other governments. In other words, the Taliban militia would not even qualify as the de facto government of Afghanistan. Rather, it would have the status only of a violent faction or movement contending with other factions for control of Afghanistan's territory, rather than the regular armed forces of an existing state. This would provide sufficient ground for the President to exercise his constitutional power to suspend our Geneva III obligations toward Afghanistan.”¹⁶⁷

While the memo acknowledged that the Vienna Convention prevents withdrawal from humanitarian treaties due to material breaches by the adversary, it suggested this might not apply if a state had essentially disappeared.¹⁶⁸ It also admitted that Geneva must be upheld in “all circumstances,” but averred that “A blanket non-suspension rule makes little sense as a matter of international law and politics. If there were such a rule,

¹⁶⁴ Ibid., 31-32.
¹⁶⁵ Ibid., 11.
¹⁶⁶ Ibid., 12.
¹⁶⁷ Ibid., 22.
¹⁶⁸ Ibid., 23.
international law would leave an injured party effectively remediless if its adversaries committed material breaches of the Geneva Conventions.”

Echoing this last point, the final component of the rejection of Geneva protections rested on the position that the reciprocal responsibilities at the heart of humanitarian law would be undercut if rights were extended to combatants who violate the laws of war. As Vice President Cheney opines, “terrorists intentionally attack civilians, thus putting themselves outside the realm of those whom Geneva is meant to protect.”

Douglas Feith, the former Undersecretary for Policy at the Pentagon during the Bush administration, became one of the most vocal proponents of this view. His record on the matter dates back to the 1980s, when he successfully urged the Reagan administration to reject U.S. ratification of Additional Protocol 1 to the Geneva Conventions, which the United States had signed in 1977. As previously explained, AP 1 had attempted to expand Geneva protections to national liberation groups. Stating that POW status should be given to fighters in “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination,” it reflected Third World aspirations of the 1970s. From Feith’s perspective, Geneva protections provide incentives to follow the laws of war. To grant terrorists any Geneva status would reward them with greater rights, without creating inducements to alter behaviour. This is especially problematic because un-uniformed and concealed fighters endanger civilians and undermine the principle of distinction.

The series of positions described above have come under intense criticism. For

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169 Ibid., 24.
instance, State Department legal advisor William Taft IV warned that:

The President should know that a decision that the Conventions do apply is consistent with the plain language of the Conventions and the unvaried practice of the United States in introducing its forces into conflict over fifty years… If the Conventions do not apply to the conflict, no one involved in it will enjoy the benefit of their protections as a matter of law.\footnote{William H. Taft IV, \textit{Memorandum to Counsel to the President, Re: Comments on Your Paper on the Geneva Convention}, U.S. Department of State, The Legal Advisor (February 2, 2002), 1-2, http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.02%20DOS%20Geneva.pdf.}

In addition to such reciprocity arguments, because the law of armed conflict had been invoked to justify war against Al Qaeda and the Taliban, the dismissal of Geneva standards appeared highly contradictory. The Bush administration adamantly argued that the 9/11 attacks were acts of war triggering defensive \textit{jus ad bellum}, as opposed to criminal law, but simultaneously denied the applicability of the law of armed conflict for the purposes of \textit{jus in bello}.\footnote{Corn, “What Law Applies,” 6.} This attempt has been widely criticized by military lawyers and scholars. As Corn puts it:

allowing the geographic scope of a combat operation or the non-state nature of a transnational enemy to nullify application of the LOAC regulatory framework is itself inconsistent with the intent of the drafters of the Geneva Conventions of 1949…relying on these law triggering provisions as a basis to \textit{deny} applicability of this regulatory framework to a situation of \textit{de facto} armed conflict represents a perversion of the spirit and intent of this fundamental advancement of the law.\footnote{Ibid., 23-24.}

In other words, there simply are no “armed conflicts” in which Geneva does not apply. Every armed conflict is either an IAC or a NIAC. Corn suggests that rules of engagement should be a marker for the application of Geneva. If troops are authorized to engage targets as a hostile force using lethal force as a first resort, as opposed to individuals who pose immediate threats as in the law enforcement paradigm where force is a last resort,
they are operating in the realm of armed conflict and hence the LOAC. The Combat and restraint have to be a package deal—regulation is a practical necessity for war.

Despite legal criticism, many OLC positions were adopted by President Bush, who agreed that Al Qaeda fighters anywhere in the world were not subject to the Geneva Conventions because they were non-state actors in an international armed conflict; that neither Al Qaeda nor Taliban prisoners would be covered by Common Article 3 protections; that Afghanistan was a Geneva theatre, but that the Taliban did not qualify for POW status; and that “as a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.” While accepting the OLC argument that he had the authority to formally suspend the Geneva Conventions, President Bush declined to do so. His advisory decision was rife with references to the advice of the OLC and Attorney General and claimed that “Our nation has been and will continue to be a strong supporter of Geneva and its principles.”

To classify individuals that would not be eligible for Geneva protections under this interpretation, the Bush administration came up with the category of “unlawful enemy combatant.” According to the Military Commissions Act of 2006, this is defined as “a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not

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175 Ibid., 28.
176 George W. Bush, *Humane Treatment of Taliban and al Qaeda Detainees—Memorandum for: the Vice President, the Secretary of State, the Secretary of Defense, the Attorney General, Chief of Staff to the President, Director of Central Intelligence, Assistant to the President for National Security Affairs, and Chairman of the Joint Chiefs of Staff*, The White House (February 7, 2002), 2, http://www.pepc.us/archive/White_House/bush_memo_20020207_ed.pdf.
a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces).” In contrast, a lawful enemy combatant is:

(A) a member of the regular forces of a State party engaged in hostilities against the United States;

(B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or

(C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.

As non-civilians, unlawful enemy combatants not hors de combat would be potentially subject to the use of lethal force and preventative detention. The United States initially conducted no or highly unsatisfactory review hearings to determine the individual status of detainees captured in Afghanistan. As a result, prisoners were subject to blanket designations based on assumptions about what combatant group they belonged to rather than a personalized assessment to determine their status as a legal, illegal, or non-combatant. Contrary to the Geneva requirements discussed earlier in the chapter, no serious effort was made, at least early on, to distinguish between civilians, civilians loosely associated in some way with belligerency, and irregular fighters who had a continuous combat function. Once labeled an unlawful enemy combatant, detainees were subject to indefinite detention without being charged with a crime and without access to lawyers or courts. They were denied the due process rights of both POWs and criminals.

The Bush administration’s position was made additionally problematic by its assertion that the Global War on Terror extended not just to Afghanistan—an active theatre of armed conflict—but everywhere in the world. As Mary Ellen O’Connell emphasizes, choice of law between criminal and humanitarian doctrines should be
premised on the actual situation—i.e. the presence or absence of an armed conflict. By deeming the GWOT borderless, the administration created a scenario in which “Detention would be based on a person’s associations, not on his actions or the factual situation in which he found himself.”  

Not only was geography stretched, but the temporal borders of the war were declared boundless. With no clear way to gage the end of the GWOT, detention was hypothetically forever.

In addition to designating suspected captured foreign Al Qaeda operatives as unlawful enemy combatants, the United States took the extraordinary measure of applying this designation to its own citizens. For example, Jose Padilla, an American citizen captured within the United States, not on a battlefield, was first held on a material witness warrant and then designated an unlawful enemy combatant and held without charge in a military brig for several years. He was eventually criminally charged and sent to civilian court, but only after years of criticism and multiple habeas cases. As Richard Fallon Jr. and Daniel Meltzer note, “the line between seizures on and off the battle-field will not always be easy to draw. But the line seems important enough, and the alternative—treating every square inch of the United States as equivalent to a battlefield, perhaps forever—seems sufficiently troublesome to merit accepting the inevitable line-drawing problems.” Defining the limits of the GWOT may be difficult, but is absolutely necessary. Otherwise, the law of armed conflict becomes practically meaningless.

180 See Rumsfeld v. Padilla, 542 U.S. 426, 430–32 (2004). In this case, the Supreme Court relied on jurisdictional arguments to avoid substantively ruling of the merits of Padilla’s detention.
Although the Bush administration’s efforts to expand the scope of legal action were clearly manipulative, there are some genuine instabilities in the law. “The law-of-war treaties do not provide a clear definition of who should be treated as a combatant for the purposes of detention.” Anyone eligible for POW status “may be interned under the conditions specified in the GPW [GCIII], even if not committing a combatant act at the time detained, provided the detention is in connection with an international armed conflict,” notes James Schoettler. “However there is no guidance in the treaties with respect to persons who fall outside…and in particular, members of terror networks who may have committed or are planning terrorist acts.” While strenuously challenged by most human rights organizations, the Bush administration’s claim that Geneva is unsuited to address all of the challenges of the GWOT has met with some sympathy from non-partisan sources. For instance, while criticizing the Bush administration’s attempt to unilaterally reinterpret the GCs, Charli Carpenter suggests the need to negotiate new additional protocols that clarify and update rules on the ground. Contemporary conflict realities no longer reflect the assumptions that the current framework is premised on.

“The contemporary problem—for both governments and transnational rights advocates—is that neither sovereignty nor battle space is what it used to be. The solution is neither to blindly promote adherence to the letter of the law nor to continue to willfully flout its spirit,” she writes. While this contentious point cannot be adequately adjudicated here, it does point to the fact that the legal maneuverings of the Bush administration were invoked in a context of ambiguity.

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In any event, it is clear that after 9/11, the United States could not simply disregard the Geneva Conventions without providing legal rationalizations. Unlike arguments offered in favour of torture, which required the convoluted redefinition of the crime, the structure of the law of armed conflict allowed policy makers to rest their case on the jurisdictional exclusion of certain categories of combatants. This was made all the more problematic by efforts to leave the void created by the non-application of humanitarian law vacant. For while Geneva was argued not to apply, international human rights law was also excluded:

By using this war paradigm, the United States purported to limit the applicable legal framework of the law of war (international humanitarian law) and exclude any application of human rights law. Even if and when human rights law were to apply, the Government was of the view that it was not bound by human rights law outside the territory of the United States. Therefore, by establishing detention centres in Guantanamo Bay and other places around the world, the United States was of the view that human rights law would not be applicable there.\textsuperscript{184}

I discuss the peculiar development of Guantánamo below.

\textbf{4.5.3 Guantánamo Bay}

Guantánamo Bay is 45 square mile area on the coast of Cuba that was initially used for coaling and shipping. The current unique status of Guantánamo Bay as an American military base is intricately bound to the history of American imperialism in Cuba.\textsuperscript{185} After the Spanish-American War of 1898, the United States acquired some of Spain’s former colonies including Guam, Puerto Rico, and the Philippines and occupied Cuba. Subsequently, the U.S. Senate passed the Platt Amendment (1901), which restricted Cuba’s foreign relations with other countries, secured a semi-colonial role for


\textsuperscript{185} Amy Kaplan, “Where is Guantanamo?,” \textit{American Quarterly} 57, no. 3 (2005): 831-832.
the United States in Cuban affairs, and required the lease of land (i.e. Guantánamo Bay) to the Americans. The Amendment was accepted by Cuba in 1902 and further formalized in the Cuban-American Treaty, granting Cuba self-government in 1903. According to this unusual agreement, the United States controls Guantánamo Bay, while Cuba retains technical sovereignty. As The Cuban American Treaty states:

While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas.186

In 1934, the Treaty of Relations between the countries abrogated the Platt Amendment, but reaffirmed the lease of Guantánamo, stating that as “long as the United States of America shall not abandon the said naval station of Guantanamo or the two Governments shall not agree to a modification of its present limits, the station shall continue to have the territorial area that it now has, with the limits that it has on the date of the signature of the present Treaty.187 To the displeasure of Cuba’s government since the 1959 revolution, the United States has been unwilling to break the lease.

Interestingly, the GWOT is not the first instance in which Guantánamo Bay’s ambiguous status has been exploited to avoid the reach of human rights law. Prior to 1991, citizens and aliens at the base were offered full American constitutional protections.188 After the 1991 coup against Haitian President Jean-Bertrand Aristide, Haitian refugees fled for their lives, hoping to reach the Florida coast in makeshift boats.

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Instead, they were interdicted by the U.S. Coast Guard and brought to Guantánamo Bay. By 1992, thousands of refugees were held at Guantánamo where they were subject to screening procedures to determine the eligibility of their asylum requests. Those deemed ineligible were repatriated to Haiti, never having had access to a lawyer or normal American legal procedure. U.S. authorities at Guantánamo actively urged people to return home, insisting it was safe and provided inaccurate legal advice to detainees. The situation became all the more dire when U.S. authorities declared their intention to detain HIV positive asylum seekers, whose refugee claims were found to be legitimate, at Guantánamo. Before being closed in 1993, this “HIV prison camp” was surrounded by barbed wire and provided inadequate health and living standards. In 1994, the base was revamped as a permanent “safe haven” for Cuban boat people by the Clinton administration, although migrants were eventually allowed into the United States or returned to Cuba.

In response to this legal situation, U.S. lawyers sought to provide legal advice and representation to migrants at the base. However, American courts rejected their attempts:

The Eleventh Circuit reinforced the U.S. government's ability to control access to both legal advice and news by concluding that Haitians at Guantanamo had no constitutional rights whatever. The court accepted the stark argument that the Bill of Rights does not bind the federal government in its dealings with aliens at Guantánamo. To the court, the Florida lawyers' claim of a right to advise the refugees was therefore "nonsensical." With little analysis, the court concluded that Guantanamo was "outside of the United States" and rejected the argument that aliens there have extraterritorial constitutional rights.

As Harold Koh explains, “Read literally, the panel's holding would permit American officials deliberately to starve the alien detainees, to subject them to forced sterilizations,

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189 Ibid., 1198-1199.
190 Ibid., 1232
191 Ibid., 1200. See Cuban Am. Bar Ass'n, Inc. v. Christopher, 43 F.3d 1412, 1426 (11th Cir. 1995).
or to discriminate against them on the basis of their religion or skin color.”

Today, there are only a few dozen refugees left at Guantánamo’s Migrant Operations Center, who are classified as “protected migrants,” but are barred from seeking asylum in the United States. However, the precedent is clearly significant. For Gerald Neuman, these developments resulted in the creation of a troubling rights-free zone. “Guantanamo may then be seen as an example of what I will call an "anomalous zone," a geographical area in which certain legal rules, otherwise regarded as embodying fundamental policies of the larger legal system, are locally suspended,” he writes.

Guantánamo became one of the primary symbols of the Global War on Terror when captives were first brought there in January 2002. Since then, 779 prisoners have been held at the base for varying amounts of time. It is widely accepted that detainees, like the Haitians and Cubans before them, were brought to Guantánamo to keep them out of reach of the American domestic justice system. Ironically, because sovereignty infers certain legal obligations, the base’s status increased its utility: “The government’s argument that the United States lacks sovereignty over the territory of Guantánamo has long facilitated rather than limited the actual implementation of sovereign power in the region.”

In making an argument for the extraterritorial non-applicability of U.S. due

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193 Sonia R. Farber, “Forgotten at Guantánamo: The Boumediene Decision and Its Implications for Refugees at the Base Under the Obama Administration,” California Law Review 98 (2010): 993. Farber notes that Supreme Court rulings that have enhanced rights for “unlawful enemy combatants” since 9/11 have not extended to civilian refugees at the base.
194 Neuman, “Anomalous Zones,” 1201. Neuman cites a variety of anomalous zones including the historical Storyville in New Orleans where prostitution was legal, and voting rights restrictions for residents of the District of Columbia.
process rights to Guantánamo prisoners post-9/11, the OLC frequently referenced the World War II case of *Johnson v. Eisentrager* (1950):

> The basis for denying jurisdiction to entertain a habeas petition filed by an alien held at GBC rests on *Johnson v. Eisentrager*, 339 U.S. 763 (1950). In that case, the Supreme Court held that federal courts did not have authority to entertain an application for habeas relief filed by an enemy alien who had been seized and held at all relevant times outside the territory of the United States…Eisentrager involved several German soldiers who had continued to aid the Japanese in China after Germany had surrendered in April 1945. They were seized, tried by military commission in Nanking, China and subsequently imprisoned in Germany. From there, they filed an application for habeas corpus in the District Court for the District of Columbia, naming as respondents the Secretary of Defense, Secretary of the Army, and the Joint Chiefs of Staff…The Court concluded that the federal courts were without power to grant habeas relief because the plaintiffs were beyond the territorial sovereignty of the United States and outside the territorial jurisdiction of any U.S. court.  

Invoking Guantánamo’s status under *de jure* Cuban sovereignty and the absence of any explicitly constructed federal court jurisdiction over the base, John Yoo and Patrick Philbin made the case that habeas rights did not apply. They did, however, caution that a “detainee could make a non-frivolous argument that jurisdiction does exist” and that there “remains some litigation risk.” More telling is their clear explanation of why the issue mattered:

> You have also asked us about the potential legal exposure if a detainee successfully convinces a federal district court to exercise habeas jurisdiction. There is little doubt that such a result could interfere with the operation of the system that has been developed to address the detainment and trial of enemy aliens. First, a habeas petition would allow a detainee to challenge the legality of his status and treatment under international treaties, such as the Geneva Conventions and the International Covenant on Civil and Political Rights….Thus, a court could review, in part, the question whether and what international law norms may or may not apply to the conduct of the war in Afghanistan, both by the United States and its enemies. Second, a detainee could

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198 Ibid., 1.
challenge the use of military commissions and the validity of any charges brought as violation of the laws of war under both international and domestic law... Third, although the Supreme Court in Ex parte Quirin, 317 U.S. 1 (1942) foreclosed habeas review of the procedures used by military commissions, a petitioner could argue that subsequent developments in the law of habeas corpus require the federal courts to review the constitutionality of military commission procedures today. Fourth, a petitioner might even be able to question the constitutional authority of the President to use force in Afghanistan and the legality of Congress's statutory authorization in place of a declaration of war.

Finally, you have asked about the rights that an enemy alien habeas petitioner would enjoy as a litigant in federal court, assuming that the court has found jurisdiction to exist. We are aware of no basis on which a federal court would grant different litigant rights to a habeas petitioner simply because he is an enemy alien, other than to deny him habeas jurisdiction in the first place.

For the foregoing reasons, we conclude that a district court cannot properly entertain an application for a writ of habeas corpus by an enemy alien detained at Guantanamo Bay Naval Base, Cuba. Because the issue has not yet been definitively resolved by the courts, however, we caution that there is some possibility that a district court would entertain such an application.199

However, in the absence of a successful legal challenge, the Guantánamo prison remained outside domestic U.S. jurisdiction, creating what many critics labeled a “legal black hole.”200

Nevertheless, as argued in the previous chapter, there were limits on the exceptional security practices authorized by the Bush administration. The universal, non-derogable nature of the anti-torture regime does not provide a Guantánamo loophole. It is as illegal and normatively illegitimate to torture Guantánamo detainees as prisoners held anywhere else—hence the attempt to redefine torture that lies at the heart of the strategy of plausible legality as applied to that issue area. Lawyers exploited Guantánamo’s extraterritoriality in attempting to rationalize cruel, inhuman, and degrading treatment, but were unwilling to justify all out torture. Unfortunately, the same hesitation has not

199 Ibid., 8-9.
applied to due process rights. Guantánamo detainees have been denied access to habeas corpus and legal counsel and have been subject to an indefinite detention regime without fair trials. Without access to POW protections or constitutional privileges, detainees have indeed been cast into a zone lacking any normal due process standards.

Despite this apparent lawlessness, American policy makers claimed and continue to claim that detention at the base is lawful. To achieve this, they have not needed to formally suspend previously operational law to a dramatic degree. Rather, they have been able to exploit jurisdictional exclusions to firstly, remove Geneva requirements and secondly, as with the case of the Haitian and Cuban refugees, utilize Guantánamo’s ambiguous status to evade domestic protections. These moves have not required the declaration or creation of entirely new law. There were enough exclusions within the existing regime to facilitate abusive practices. This Guantánamo strategy has also been extended to other prisons around the world where the United States holds detainees, but lacks formal sovereignty. For example, prisoners at the American controlled Bagram airbase in Afghanistan, known as “the Hangar,” have faced similar obstacles.201

4.5.4 Military Commissions

The lack of substantive due process rights for “unlawful enemy combatants” detained at Guantánamo and elsewhere is evident in the character of the tribunals established to try them—military commissions (MCs). Not to be confused with military courts-martial used in the regular military justice system to uphold the UCMJ, military commissions have historically lacked clear legal procedure. As Harold Koh explained in 2002, before endorsing military commissions under the Obama administration, “However

detailed its rules and procedures may be, a military commission is not an independent court, and its commissioners are not genuinely independent decision makers….Commissioners are not independent judges, but usually military officers who are ultimately answerable to the secretary of defense and the president, who prosecute the cases.” In contrast, supporters of MCs note that the much hallowed Nuremberg tribunals were, in fact, mixed military commissions.

During the Second World War, President Roosevelt tried suspected saboteurs by military commission. Eight German agents were captured off the coast of Long Island in 1942, and subsequently tried and convicted. In ordering military commissions, President Roosevelt declared that saboteurs and spies “shall be subject to the law of war and to the jurisdiction of military tribunals,” and that:

such persons shall not be privileged to seek any remedy or maintain any proceeding directly or indirectly, or to have any such remedy or proceedings bought on their behalf, in the courts of the United States, or of its States, territories, and possessions, except under such regulations as the Attorney General, with the approval of the Secretary of War, may from time to time prescribe.

In *ex parte Quirin*, lawyers attempted to argue that the commission was an illegitimate trial mechanism. They failed—the saboteurs were found guilty and executed.

On November 13, 2001, President Bush authorized military commissions via military order. The decision was made without consultation with the State Department or the National Security Advisor. While not objecting to its substance, Condoleeza Rice

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205 *Ex parte Quirin*, 317 U.S. 1 (1942).
categorically notes that the urgency to establish a legal framework for detainees did “not excuse...what happened next” – namely, contravention of normal interagency review. 206

Several categories of people were subject to the newly instantiated MCs:

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

   (1) there is reason to believe that such individual, at the relevant times, (i) is or was a member of the organization known as al Qaida; (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and

   (2) it is in the interest of the United States that such individual be subject to this order. 207

Military commissions were designed to allow the U.S. government to prosecute unlawful enemy combatants using rules that protect national security information and which allow evidence and procedures not generally permitted in a normal trial. As President Bush’s order stated:

(f) Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts. 208

Defendants subject to these procedures would have no recourse:

(2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding

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206 Condoleezza Rice, No Higher Honor: A Memoir of My Years in Washington (New York: Crown Publishing, 2011), 105. Rice notes that the State Department, Military, and Attorney General found themselves “outflanked on occasion” by Vice President Cheney, his counsel David Addington, and OLC attorneys who were “determined to push the boundaries of executive authority.” (Ibid.)


208 Ibid.
sought on the individual’s behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.

(c) This order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable at law or equity by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person. 209

Yet, military commissions were not tribunals lacking any rules:

(c) Orders and regulations issued under subsection (b) of this section shall include, but not be limited to, rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys, which shall at a minimum provide for—

(1) military commissions to sit at any time and any place, consistent with such guidance regarding time and place as the Secretary of Defense may provide;
(2) a full and fair trial, with the military commission sitting as the triers of both fact and law;
(3) admission of such evidence as would, in the opinion of the presiding officer of the military commission (or instead, if any other member of the commission so requests at the time the presiding officer renders that opinion, the opinion of the commission rendered at that time by a majority of the commission), have probative value to a reasonable person;
(4) in a manner consistent with the protection of information classified or classifiable under Executive Order 12958 of April 17, 1995, as amended, or any successor Executive Order, protected by statute or rule from unauthorized disclosure, or otherwise protected by law, (A) the handling of, admission into evidence of, and access to materials and information, and
(B) the conduct, closure of, and access to proceedings;
(5) conduct of the prosecution by one or more attorneys designated by the Secretary of Defense and conduct of the defense by attorneys for the individual subject to this order;
(6) conviction only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present;
(7) sentencing only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present; and
(8) submission of the record of the trial, including any conviction or sentence, for review and final decision by me or by the Secretary of Defense if so designated by me for that purpose.

In 2002, the Secretary of Defense elaborated on these guidelines. 210

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209 Ibid.
210 Department of Defense, Military Commissions Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, March 21, 2002,
Military commissions have been subject to a tremendous amount of criticism over the years. As summed up by Karen Greenberg, “The Bush Order failed to take into consideration the fact that much had changed in international law since FDR’s order, including new, post-1949 Geneva Conventions and a new U.S. Uniform Code of Military Justice (UCMJ), not to mention the major developments in human rights law and civil rights law.”²¹¹ Giorgio Agamben goes further, claiming that the November 13, 2001 executive order marked a radical break:

President Bush’s order …radically erases any legal status of the individual, thus producing a legally unnamable and unclassifiable being…Neither prisoners nor persons accused, but simply “detainees,” they are the object of pure de facto rule, of a detention that is indefinite not only in the temporal sense but in its very nature as well, since it is entirely removed from the law and from judicial oversight. The only thing to which it could possibly be compared is the legal situation of the Jews in the Nazi Lager [camps], who, along with their citizenship, had lost every legal identity, but at least retained their identity as Jews.²¹²

There is no doubt that military commissions as originally envisioned by the Bush administration lacked normal due process. It is, moreover fair to argue that the exploitation of jurisdictional gaps and ambiguities left prisoners with few substantive rights. However, Agamben’s analogy is sociologically inaccurate. For all their efforts to evade legal restrictions on detention and trial procedures, the Bush administration was not able to erase or suspend the law—to do away with the structure of constraint. Indeed, in the years following 9/11, lawyers for detainees engaged in a flurry of litigation on behalf of their clients—cases that forced U.S. authorities to continually amend their policies.

4.5.5 Habeas Litigation, the Supreme Court, and the Military Commissions Act

Numerous habeas cases have been brought on behalf of Guantánamo detainees over the years. The resulting court rulings have checked, but not entirely undermined the government’s logic. Between 2004 and 2006, several Supreme Court rulings challenged the paradigm established by the unlawful enemy combatant designation, the Guantánamo detention paradigm, and the original formulation of military commissions.

In *Hamdi v. Rumsfeld* (2004), the Court ruled on whether the detention of Yaser Hamdi, an American citizen seized in Afghanistan and held at Guantánamo and later at a military brig as an unlawful enemy combatant, was appropriate. It decided that while the Authorization to Use Military Force (2001) granted the executive the implicit power of detention without criminal trial that accompanies the authorization to fight, American citizens, even if captured in combat overseas, must be subject to a basic, fair procedure to determine the legality of their detention.

In *Rasul v. Bush* (2004), the Supreme Court further ruled that alien detainees at the Guantánamo base did in fact have the right to challenge the legality of their detention in U.S. federal court. In response, the Bush administration initiated Combatant Status Review Tribunals (CSRTs) to determine the appropriate status of detainees. As Robert Chesney explains:

CSRT rules permit the detainee to participate in the proceedings as a default matter, but the tribunal may exclude the detainee during the presentation of classified information. The detainee, in theory, may summon witnesses and offer

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213 Habeas lawyers attempting to assist Guantánamo prisoners have been subject to a barrage of political and personal attacks. The lobby group Keep America Safe and its founders, Vice President Cheney’s daughter Elizabeth Cheney and former Project for a New American Century founder William Kristol, have been particularly vocal critics. *The Weekly Standard* has hosted multiple attacks on the Guantánamo bar.


other evidence, but only subject to the tribunal's determination that such persons or items are reasonably available. The detainee may not have the assistance of counsel. Though CSRT proceedings have, in fact, resulted in the release of a number of detainees, the majority of CSRTs have affirmed the detainees' categorization as enemy combatants.\textsuperscript{217}

Unsatisfied with the Court’s ruling, policy makers opted to change the law. In 2005, Congress passed the Detainee Treatment Act, which stripped federal courts of habeas jurisdiction over unlawful enemy combatants.\textsuperscript{218}

In \textit{Hamdan v. Rumsfeld} (2006),\textsuperscript{219} the Supreme Court rejected the Bush administration’s contention that there are categories of state vs. non-state armed conflict that are not subject to Geneva rules. Rather, it ruled that Common Article 3 operates relative and in “contrafistungtion” to Article 2, thus closing the alleged gap between IACs and NIACs.\textsuperscript{220} Therefore, any “armed conflict” immediately triggered the basic obligations of humane treatment. Furthermore, while agreeing that Al Qaeda prisoners were not entitled to prisoner of war status, the Court ruled that lawful military commissions required conformity with Common Article 3 of the Geneva Conventions. Common Article 3 prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” To comply with this requirement, the Court ruled that military commissions, contrary to the practices authorized by President Bush, must be conducted in uniformity with regular courts martial and in conformity with the “barest” fair trial procedures found in

\textsuperscript{218} Farber, “Forgotten at Guantanamo,” 1006.
international customary law. Finally, the decision invalidated the denial of habeas rights to Guantánamo inmates with pending claims that predated the DTA.

This ruling forced the Bush administration to amend its policies to a limited degree. As President Bush writes in his memoirs:

I disagreed strongly with the Court’s decision, which I considered an example of judicial activism. But I accepted the role of the Supreme Court in our constitutional democracy. I did not intend to repeat the example of President Andrew Jackson, who said, “John Marshall has made his decision, now let him enforce it!” Whether presidents like them or not, the Court’s decisions are the law of the land.

After Hamdam, the “high value” detainees held at “black sites” in CIA custody were transferred to DOD control at Guantánamo. However, the Supreme Court left a loophole for the President. The concurrence with Hamdam stated that: “Nothing prevents the President from returning to Congress to seek the authority he believes necessary.”

Despite its apparent challenge to the Bush administration, the Court did not place substantive limits on military commissions. Rather, it decided that Congressional authorization via a modification of the War Crimes Act was necessary to authorize them.

In response to the Supreme Court’s ruling, Congress passed the Military Commissions Act of 2006. The law granted limited rights for detainees, in essence legislating what the Bush administration had attempted to achieve through executive decree. “It contained everything we asked for,” states Bush. The MCA claimed to be “declarative of existing law.” Like the Bush administration, supporters of the Act averred

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222 Farber, “Forgotten at Guantánamo,” 1006.


it complied with the requirements of the Geneva Conventions. As articulated by legal advisor John Bellinger, MCs “provide full and fair trials that are very much similar to all of the protections that we have both in our federal criminal trials and in our [military] courts-martial.”\(^{227}\)

Nonetheless, the MCA included numerous controversial deviations from international norms. All commissions established under the MCA were declared to automatically comply with Geneva standards by definition. Hearsay evidence was permitted. While information gleaned from torture was prohibited, evidence based on CID treatment was only bared retroactive to the December 2005 Detainee Treatment Act. Like the DTA, the MCA provided retroactive immunity for rights violations conducted by American personnel based on the legal opinions of the OLC and other government attorneys. The President was authorized to authoritatively interpret the “meaning and application” of the Geneva Conventions, creating room for abusive interrogation practices to be used. The MCA amended the War Crimes Act of 1996 so that only “grave breaches” of Geneva were outlawed under U.S. law.\(^{228}\) Previously, any violation of Common Article 3 had been illegal. Instead, only nine acts were listed including: torture; cruel treatment; performing biological experiments; murder; mutilation or maiming; intentionally causing serious bodily injury; rape; sexual assault or abuse; and taking hostages. Failure to comply with the Common Article 3 requirement to try suspects in a “regularly constituted court” was omitted.


The MCA institutionalized the category of unlawful enemy combatant and the CSRT process of determination. The legal definition of this status included those alleged to be engaging in “material support” of terrorism, a rather vague and undefined concept that could range from fundraising to ideological support. As Beard notes, this fundamentally eroded the traditional law of war distinction between combatants and non-combatants, potentially threatening the bedrock concept of non-combatant immunity.\footnote{Ibid., 60.}

The MCA furthermore invented new categories of crimes like “murder in violation of the laws of war”—as opposed to normal murder, which is dealt with in criminal procedure. This was necessary in order to try unlawful enemy combatants for attacking U.S. troops—a rather odd construction considering killing the enemy is the nature of war. As explained by Beard, “a common criminal offense such as murder, for which an unlawful enemy combatant may be tried under ordinary domestic law, may be difficult to characterize as a war crime in the context of an attack on military personnel because combatants who are engaged in hostilities are not generally protected from attack under the law of war.”\footnote{Ibid., 61.}

Finally, the MCA denied recourse to the GCs as a source of rights and revoked the right of federal courts to hear habeas petitions from alien detainees: “No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.”\footnote{Military Commissions Act of 2006, § 948b (g).} Moreover, “No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant
or is awaiting such determination.”

However, Carlos Manuel Vazquez notes that “Neither this provision nor any other portion of the MCA prohibits the invocation of other treaties, such as the Convention Against Torture, or the customary laws of war. Many of the provisions of the Geneva Conventions have achieved the status of customary international law.” Moreover, “The section purports to bar the invocation of the Geneva Conventions by alien unlawful enemy combatants only as a source of rights. The Conventions may be invoked by the government as a source of power to punish. Indeed, several of the provisions of the MCA defining the crimes for which such aliens are punishable incorporate the laws of war and even the Geneva Conventions.”

This provision of the MCA was partially checked in 2008 with *Boumediene v. Bush* (2008), which ruled that alien Guantánamo detainees could claim habeas rights in U.S. courts. Finding that the United States had “practical” and “de facto” sovereignty and continuous “plenary control” over the base, it rejected the government’s argument premised on extra-territoriality. CSRTs were deemed an inadequate substitute for habeas review, therefore violating the Suspension Clause of the Constitution. Because it was practical to conduct habeas review for Guantánamo detainees, other mechanisms were unnecessary. However, the Court did not decide whether there is a long-term preventative detention authority when it comes to non-combatants, defined as those who have not taken direct part in hostilities.

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232 Ibid., Section 7 e 1.
234 Ibid., 84
236 Farber, “Forgotten at Guantánamo,” 1007-1008.
Indeed, no clear rules have emerged to govern ongoing detentions. The United States continues to claim the right to preventatively hold non-POWs, yet there are few guidelines to govern this process. Some observers argue that in the absence of centralized leadership, habeas litigation is leading to a new law of non-criminal detention forming incrementally through court rulings: “The Supreme Court, in deciding that the federal courts have jurisdiction over habeas corpus cases from Guantánamo, gave only the barest sketch of what such proceedings should look like, leaving a raft of questions open for the district and appellate court judges,” write Wittes et al. Many questions remain:

Who bears the burden of proof in these cases, and what is that burden—which is to say, who has to prove what? What are the boundaries of the President’s detention power—that is, assuming the government can prove that the detainee is who it claims him to be, what sort of person is it lawful to detain under the laws of war? What sort of evidence can the government use? And how should the courts handle hearsay and evidence that may have been given involuntarily? None of these questions, and many others besides, has clear answers emanating from either Congress or the Supreme Court. On all of them, the lower federal court judges are making the law.238

This piecemeal approach suggests a process other than top down sovereign decisionism.

Moreover, it has not been resolved whether the Boumediene principles extend to detention sites beyond Guantánamo.239 In 2009, Judge Bates ruled that detention review at the Bagram military base in Afghanistan lacked sufficient safeguards.240 However, his decision was reversed on appeal. Amongst the appeal court’s findings was that “In Bagram, while the United States has options as to duration of the lease agreement, there is no indication of any intent to occupy the base with permanence, nor is there hostility on the part of the "host" country….While it is certainly realistic to assert that the United

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States has *de facto* sovereignty over Guantánamo, the same simply is not true with respect to Bagram. Litigation to extend habeas rights abroad is ongoing, however rights advocates are not hopeful. As Fallon Jr. and Meltzer note, there are some major obstacles to extending habeas jurisdiction overseas:

if habeas were available to noncitizens worldwide, it could in theory (if not always in practice) be pressed both in conventional wars, in which there might be thousands of alien captives, and with respect to such sensitive activities as foreign espionage. Moreover, efforts even to entertain petitions by aliens abroad would present practical problems. We [the United States] have no constituted courts (other than military tribunals) that sit abroad. Notwithstanding modern transportation and communications, there could be considerable difficulties in litigating, in the United States, claims pertaining to detentions in distant areas over which American control rests on a temporary and possibly fragile military balance.

The extension of habeas jurisdiction would leave detention in the GWOT largely untenable, making it unlikely to be granted by any but the most bold judges.

### 4.6 The Obama Administration

Upon taking office, one of President Obama’s most notable policy promises was to close the Guantánamo prison within a year. Towards this end, he appointed a Presidential task force to review the cases of the remaining prisoners. However, to the glee of Republicans, not only did it fail in this timeline, the Obama administration has all but embraced the reality of a permanent prison at the base. This is partly due to Congressional intransigence. Despite early talk of establishing a “Guantánamo North,” legislators have blocked the transfer of Guantánamo detainees to the United States.

Yet, a deeper problem remains. The Obama administration has professed the view that

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there are prisoners who cannot be tried or released. Whether held at Guantánamo or a new, less symbolic location, the implication remains the same—potentially indefinite detention.\footnote{245}{The White House, Office of the Press Secretary, “Remarks by the President on National Security,” National Archives, May 21, 2009, http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/. According to the Guantanamo Review Task Force, there are 48 prisoners who cannot be released or prosecuted.}

Moreover, the Obama administration continues to apply the war paradigm outside of traditional theatres of war. While avoiding Article II arguments about Presidential authority emphasized by the Bush administration, it has cited the AUMF, informed by international law, as the source of its non-criminal detention powers. Although rejecting the expansive language of the GWOT, it has made clear that the United States has a transnational right of self-defence against Al Qaeda.\footnote{246}{Harold Koh, “The Obama Administration and International Law,” Annual Meeting of the American Society of International Law, Washington, D.C. (March 25, 2010), http://www.state.gov/s/l/releases/remarks/139119.htm.}

For O’Connell, not much has really changed:

[These statements indicate the same basic argument to justify killings and detention far from battlefields used by the Bush administration. The Obama administration has clearly changed the name of the conflict, dropping the reference to the global war against terrorism, but it has not, to date, provided a different legal rationale for why it is lawful to kill or detain persons who had no role in the Afghanistan hostilities or any other hostilities.]\footnote{247}{O’Connell, “The Choice of Law,” 357. O’Connell goes on to note that self-defense is not “for responding to the violent criminal actions of individuals or small groups,” and that based on the UN Charter and numerous ICJ ruling that “it is clear that force in self-defense may only be carried out on the territory of a state responsible for a significant armed attack ordered by the state or by a state-controlled group that carried it out.” (Ibid., 358-359)}

A paradigm shift has not occurred.

Nonetheless, President Obama and Attorney General Holder have attempted to improve trial conditions in the military commissions systems. They advocated reform of the Military Commissions Act to increase certain procedural safeguards, such as a
prohibition on statements obtained through cruel, inhuman, and degrading treatment. In 2009, the MCA was successfully amended. However, some changes were largely cosmetic. For instance, “unlawful enemy combatants” were renamed “unprivileged enemy belligerents.” The revised MCA did not prevent the controversial trial of Omar Khadr, who was charged with “murder in violation of the law of war,” for acts committed at the age of fifteen, a tenuous offense in international law as previously discussed. Khadr eventually entered a plea bargain that will see him returned to Canada after serving several years. In addition to his young age, critics note that Khadr was abused after capture and kept in unlawful detention conditions, which fundamentally undermined the fairness of his trial and the adequacy of the evidence against him. Khadr’s case is one of only six cases to be concluded by military commission over the ten years since 9/11.

In other cases, the Obama administration has attempted to funnel captured terrorists into the domestic legal system. In a highly symbolic move, Attorney General Holder announced in fall 2009 that 9/11 mastermind Khalid Sheik Mohammed would be tried in civilian court in New York City. The political backlash was powerful and immediate. Congressional Republicans introduced legislation that would permanently bar the transfer of any detainee to the United States. In May 2011, military prosecutors refilled charges against Mohammed for trial by military commission, quashing any hope for a civilian trial.

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In addition to continuity in detention and trial policy, the Obama administration has accelerated a program of targeted killings. Unmanned aerial drones flying over the tribal regions of Pakistan as well as Yemen and Somalia have targeted an unknown number of people. The United States claims that these are lawful acts of war against enemy combatants. In spring 2010, State Department legal advisor Harold Koh defended the practice, arguing that “al-Qaeda has not abandoned its intent to attack the United States, and indeed continues to attack us. Thus, in this ongoing armed conflict, the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks.”

While advocating careful case-by-case assessments of legitimate targets, Koh did not address the core question of where legitimate targeting may occur.

The ambiguity of targeting standards has been evident in several instances. While not an aerial strike, the targeted killing of Osama Bin Laden in May 2011 by a U.S. Navy Seal team followed the logic of the drone program. As an enemy combatant, Bin Laden was subject to lethal attack anywhere in the world. The battlefield followed him. Presuming that he did not surrender and was not wounded or incapacitated at the time he was shot, his killing was lawful under this paradigm. As with detention and trial policy, it is a target’s identity as an unlawful combatant, rather than their particular activities at any given time that determines their fate from this perspective.

Even more controversial is that American policy makers have claimed the right to kill enemy U.S. citizens without trying or convicting them of a crime. The U.S. born Yemeni cleric Anwar al-Awlaki was subject to such targeting. Attempt to legally

\[251\] Harold Koh, “The Obama Administration and International Law.”
challenge this position as a fundamental violation of due process rights failed. Awlaki was killed along with several associates by a U.S. drone fired missile on September 30, 2011. Prior to the strike, the Obama administration felt compelled to seek approval from the Office of Legal Counsel, which offered a still classified decision.

Human rights activists have had a hard time developing a coherent response to the drone and targeted killing programs. While some critics have labeled targeted killings illegal assassinations in the spirit of the Cold War, major human rights NGOs have not generally taken a specific stance in opposition to drone strikes per se, but have instead asked for clarification on the administration’s policies for distinguishing between lawful and unlawful attacks. In addition to raising concerns over civilian casualties, Phillip Alston, the former UN Special Rapporteur on Extrajudicial Killings, has suggested that CIA agents who virtually direct the raids from the United States do not have a combatant’s privilege and may not be immune from prosecution for murder.

The most troubling development in the evolution of these policies has been Congressional efforts to formally codify due process violations. In December 2011, bipartisan legislators overwhelmingly endorsed the ambiguously worded National Defense Authorization Act (NDAA), which mandates indefinite military detention of non-citizen Al Qaeda or Taliban suspects and “associated forces,” without recourse to

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civilian justice. While the bill allows accused Americans to be tried in the criminal
system, such allowances are based on Presidential discretion. In essence, the legislation
limits civilian law enforcement’s control over processing terror charges. By reducing the
FBI’s jurisdiction in favour of the military, Congress not only cemented in place the
dubious system of parallel justice outlined throughout this chapter, but potentially
disabled the very investigators and prosecutors who have been responsible for the vast
majority of post-9/11 terrorism interdictions and convictions.256 Under pressure to ensure
adequate DOD appropriations, President Obama quietly signed the bill on New Year’s
Eve. While issuing a signing statement promising to uphold the rights of Americans, his
acquiescence ushered in one of the most exceptional pieces of legislation of the
GWOT.257

In sum, the Obama administration has tried to distance itself from some Bush
administration policies, but has generally failed to do so: “Barack Obama campaigned
and began his presidency with a pledge to shut down Guantánamo, support federal trials
for terrorism suspects, respect human rights and restore the rule of law,” notes the Center
for Constitutional Rights. However, “Guantánamo and the military tribunal system are no
longer an inheritance from the Bush administration – they will be President Obama’s
legacy.”258

bill.html.
258 Center for Constitutional Rights, “CCR Condemns President Obama’s Lifting of Stay in
obama’s-lifting-of-stay-military-tribunals.
4.7 Conclusion

Due process violations are not a new phenomenon in the United States. While Americans have placed the right to fair detention and trial conditions at the centre of their legal system, U.S. history is rife with due process exceptionalism, covert violations, and unofficial suspensions. The dualism does not improve in the military context, where the laws of war have not always been reflected in practice. Yet, despite the perennial nature of due process violations, changing trends can be observed. The overt racism and political demonology that one legitimated human rights and humanitarian abuses have become increasingly illegitimate. That is not to say such sentiments do not underlie current practice, but they are insufficient rationales for officially authorizing policy in the post-9/11 period. Rather, as with the case of torture, policy makers have been compelled to pursue a strategy of plausible legality to avoid explicit law breaking.

As I have documented, this strategy has included the manipulation of immigration and material witness rules; extensive reinterpretations of the applicability of the Geneva Conventions; the reframing of detainees as “unlawful enemy combatants”; detention at extraterritorial prisons to avoid American jurisdiction; the creation of military commissions; the revision of domestic legislation; and contemporary efforts to extend the battlefield to facilitate extrajudicial killing. There is no doubt that the cumulative impact of these policies has been to strip many detainees and targets of the GWOT of almost all due process rights.

However, the most troubling aspect of this story has not been the sovereign suspension of the law or a realist embrace of realpolitik. Instead, it is the apparent vulnerability of due process norms to manipulation and revision. Arguing that rules are
unclear or inapplicable to the changing conflict environment, policy makers exploited ambiguities and jurisdictional loopholes to justify abuses. Former U.S. Department of State Legal advisor John Bellinger III, sums up this posture:

Common Article 3 and other applicable legal rules do not answer important questions related to both the initiation and termination of detention in armed conflict with transnational terrorist groups…It is very easy for all to agree that the fight against transnational terrorism must be conducted in accordance with the rule of law, but it is much harder to say what the law exactly is, and how it should be applied in this context.259

The challenge thus becomes less the suspension of the rule of law and more a complex struggle over its meaning and application.

In contrast to the case of torture, there has been little serious discussion of prosecuting politicians or lawyers for detention and trial related civil rights violations and war crimes. Rather, ongoing debate concerns whether such policies should be limited or expanded. Notwithstanding the Obama administration’s rejection of many Bush era policies, similar detention and trial practices persist. The courts have checked government policy on occasion, imposing significant constraints, but policy makers have continued to adapt. The legalistic maneuvering that has characterized detention and trial practice since 9/11 seems likely to continue.

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CHAPTER 5
SURVEILLANCE

5.1 Introduction

In contrast to prohibitions on torture and norms governing due process, the regulation of intelligence surveillance in America has been relatively limited. While the concept of individual privacy is central to liberal thought, it is not considered an inviolable human right. There is nothing inherently illegal or normatively transgressive about intelligence surveillance per se. Rather, only unjustified surveillance is considered problematic within the liberal tradition. As with torture and due process, surveillance norms, laws, and practices, and the relationship between them, have shifted over time. What does and does not constitute a justifiable infringement of privacy has changed historically.

The following chapter traces these shifts in the meaning of legitimate and illegitimate surveillance from the historical practice of generally unconstrained surveillance to the limited restraints that define the current surveillance regime in the United States. It demonstrates that while laws and norms have developed to restrict surveillance, the practice remains subject to a highly dualistic ethics. This duality is evident in contemporary counterterrorism debates, which typically employ a distinction between an aggressive and militaristic war paradigm with few limits on conduct and a criminal justice paradigm that demands security measures in line with constitutional protections. This dichotomy has long been central to the regulation of surveillance in democracies, where foreign intelligence has been subject to highly permissive rules akin
to the former, while domestic spying has been curtailed or prohibited in line with the latter. Domestic surveillance requires a warrant, but foreign surveillance does not.

While flirting with exceptional derogations from this structure of constraint, I argue that post-9/11 American policy makers have also attempted to employ the strategy of plausible legality in order to reconstruct the boundary between foreign and domestic intelligence targets. Instead of rejecting the “wall” between these two spheres, the Bush and Obama administrations have expanded the meaning of the foreign, a move predicated on this existence of this foundational dichotomy. This process has been facilitated by the changing nature of new communications technologies, which objectively render the boundary between foreign and domestic tenuous as well as a pre-existing “third party disclosure” doctrine, which limits privacy regarding increasingly common forms of data. While similar to the jurisdictional exclusion arguments used to rationalize the withholding of due process rights, this approach to surveillance has met with significantly less resistance. I suggest that plausible legality has been most successful in this area of security practice because the preexisting rules limiting surveillance were weak to begin with. Moreover, their primarily domestic character made them easier to modify.

5.1.1 A Note on Privacy and Surveillance

Before delving into violations of privacy and the regulation and practice of surveillance, it is important to understand key terms. Privacy International identifies several different dimensions of privacy:

Information privacy, which involves the establishment of rules governing the collection and handling of personal data such as credit information, and medical and government records. It is also known as "data protection"; Bodily privacy, which concerns the protection of people's physical selves against invasive procedures such as genetic tests, drug testing and cavity searches; Privacy of
communications, which covers the security and privacy of mail, telephones, e-mail and other forms of communication; and Territorial privacy, which concerns the setting of limits on intrusion into the domestic and other environments such as the workplace or public space. This includes searches, video surveillance and ID checks.¹

There are similarly myriad contexts in which surveillance may occur. As mentioned above, there is domestic surveillance, generally associated with criminal law enforcement, and foreign oriented surveillance, including military and intelligence surveillance. Intelligence surveillance may be directed to gain information about one’s adversary, but is also an important component of counterintelligence, or efforts to disrupt surveillance or espionage directed against one’s self. Surveillance methods include human intelligence (HUMINT), whereby infiltrators or informers engage in surveillance, as well as signals intelligence (SIGINT), whereby interception of communication technologies is the primary means of conducting intelligence gathering. SIGINT may take the form of communications intelligence (COMINT) that captures voice communications or electronic intelligence (ELINT) that utilizes sensors. There are also a variety of other technologically dependent phenomenon such as imagery intelligence (IMINT) and measurement and signature intelligence (MASINT), often used by the military. Finally, it is possible to differentiate between government surveillance conducted by state security and policing agencies, government data collection for non-security purposes, and corporate surveillance that occurs in the context of business transactions or private security. Various dimensions of this complex landscape of surveillance become more important than others at different times and will be emphasized accordingly.

5.2 Evolving Legal Surveillance Practice

The operational details of surveillance tactics throughout history have usually been kept hidden from their respective targets and the greater population. However, that states practice surveillance and the parameters of that practice have often been publically known. A brief survey of surveillance over time suggests that there were few restraints on either foreign or domestic surveillance until relatively recently. Surveillance was a normal and legal component of governance and statecraft.

5.2.1 England

Where people are tortured and lack due process rights, they are unlikely to enjoy privacy from state surveillance. This was clearly the case throughout much of pre-Enlightenment Europe. These trends have been reviewed in previous chapters. It is unnecessary to again rehash this unfortunate history. However, the English case merits some attention insofar as it lays the groundwork for the American privacy regime. While kings exercised their prerogative power to stamp out treason, some minimal rules governed surveillance in early modern England. For instance, in 1604 jurist Sir Edward Coke ruled, “the house of everyone is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose….if thieves come to a man's house to rob him, or murder, and the owner or his servants kill any of the thieves in defence of himself and his house it is not felony.” However, he also ruled:

[I]n all cases when the King is party, the sheriff (if the doors be not open) may break [into] the party's house, either to arrest him or to do other execution of the King's process, if otherwise he cannot enter. But before he breaks [into] it, he ought to signify the cause of his coming and to make request to open the doors….for the law without a default in the owner abhors the destruction or breaking [into] of any house (which is for the habitation and safety of man) by which great damage and inconvenience might ensue to the party when no default
is in him; for perhaps he did not know of the process of which, if he had notice, it is to be presumed that he would obey it.²

In other words, the King could order violations of privacy, but they should proceed with decorum. Notions of just cause were vaguely defined. To conduct searches, English authorities increasingly utilized “general warrants,” which were open-ended and non-specific. Indeed, in 1634 the Privy Council ordered a search of none other than Coke’s home and law chambers as he lay dying, resulting in the seizure of his writings and personal valuables.³

5.2.2 The United States

General warrants travelled to the British colonies. As Leonard Levy explains, “warrants in America tended to give their enforcers every discretion.”⁴ Searches were permitted upon any suspicion, without procedure to ensure just cause. Mail communications were insecure. For instance, Thomas Jefferson and Benjamin Franklin worried their letters would be intercepted by the British.⁵ However, it was search and seizure related to tax collection that created a lightening rod in the colonies. Concerned over declining revenues, England imposed a variety of measures that allowed customs officers to utilize the “writ of assistance,” a general warrant that demanded peace officers and subjects assist in the execution of the writ. “The writ, once issued, lasted for the life of the sovereign and therefore constituted a long-term hunting license for customs officers on the lookout for smugglers and articles imported in violation of the customs

⁴ Ibid., 82.
After the death of King George II in October 1760, customs officers petitioned the court in *Paxton’s Case* (1761) to have the writ extended. A group of American merchants led by James Otis Jr. strenuously objected. Although they eventually lost the challenge, the incident inspired John Adams: “Otis was a flame of fire!...Then and there was the first scene of the first Act of Opposition to the arbitrary claims of Great Britain.” Over the next several decades, British attempts to expand the writ met with increasing popular hostility, often resulting in physical confrontations. Colonial hatred of general warrants would inspire later efforts to explicitly limit search and seizure powers in the Constitution.

While hostility mounted towards British practices and the Fourth Amendment, which I discuss below, eventually outlawed general warrants, it is essential to understand that privacy violations in the context of military spying remained a normal part of combat in the emergent United States, as it remains today. In the early years of the union, military surveillance occurred in the context of revolutionary and civil strife. George Washington took a particular interest in intelligence during the Revolutionary War, requesting funds for continued intelligence activities in his first State of the Union message, which were granted under the Secret Service Fund. Years later, President Lincoln, reflecting concern over the “enemy at the rear,” encouraged growing surveillance as did generals on both sides of the Civil War. As explained by Allan Pinkerton, Union General McClennen’s intelligence chief in Washington:

> In operating my detective force I shall endeavor to test all suspected persons in various ways. I shall seek access to their houses, clubs, and places of resort,

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7 Ibid. 85.
managing that among the members of my force shall be ostensible representatives of every grade of society, from the highest to the most menial. Some shall have the *entrée* to the gilded saloon of the suspected aristocratic traitors, and be their honored guests, while others will act in the capacity of valets, or domestics of various kinds, and try the efficacy of such relations with the household to gain evidence.⁹

In addition to HUMINT, Lincoln became an enthusiast of telegraph surveillance and early overhead reconnaissance using hot air balloons.¹⁰

After the Civil War, interest in military surveillance faded. Pinkerton and his detectives returned to domestic infiltration of the labour movement, worker intimidation, and strike breaking. In contrast to Europe, where states were continually strengthening their foreign intelligence gathering capacity, America neglected this security practice. As explained by Christopher Andrew, “On the eve of the First World War…the intelligence system of the United States was more backward than that of any other major power. Most Americans, however, preferred it that way…They regarded peacetime espionage, if they thought of it at all, as a corrupt outgrowth of Old World diplomacy, alien to the open and upright American way.”¹¹

American foreign intelligence would continue to be haphazardly organized throughout the First World War. It took until 1919 for the Cipher Bureau or “Black Chamber,” headed by the eccentric cryptologist Herbert O. Yardley, to be established. However, it failed to gain widespread acceptance within political circles. “Gentlemen do not read each other’s mail,” opined President Coolidge’s Secretary of State, Henry

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⁹ Ibid., 17.
¹⁰ Ibid., 19-20.
¹¹ Ibid., 29.
Stimson. Deeming interception of foreign diplomatic communications “highly unethical,” he quickly moved to disband the Black Chamber in 1929.

The Second World War created a new and urgent demand for foreign intelligence. The military scrambled to establish intelligence capacity. The Office of Strategic Services (OSS) led by “Wild Bill” Donovan formed to pursue HUMINT in occupied Europe. Meanwhile, America’s cryptanalysts reassembled to conduct SIGINT, forming the Army’s Signal Security Agency (SSA) and the Naval Communications Intelligence Organization (OP-20-G). The resulting intelligence intercepts and decrypts were crucial to America’s defeat of the Japanese in the Battle of Midway. Meanwhile, the British Ultra program captured a German Enigma machine, facilitating priceless information that helped save the Allied war effort in the Atlantic.

While the intelligence community would be reorganized several times over the subsequent years, by the end of the Second World War, the cultural norms and technological naïveté that had fuelled American reticence towards foreign intelligence in previous decades disappeared. As discussed below, foreign intelligence surveillance, which had been frowned upon but not considered illegal, was finally institutionalized as a central dimension of the emerging national security state.

5.3 An Uneven Surveillance Regime

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The following section reviews the laws and norms that governed domestic and foreign surveillance for much of American history. Most domestic spying is explicitly prohibited in American law. However, foreign intelligence is perfectly legal.

### 5.3.1 Domestic Law

As previously noted, the British use of abusive search and seizure during the eighteenth century was a major rallying point for the American colonists. Not only did it offend the Founding Fathers’ opposition to political tyranny, it challenged the liberal value of private property. Indeed, as Orin Kerr notes, the parameters of constitutional privacy rights are closely linked to property rights.\(^{15}\) Several early British and American cases laid the groundwork for American surveillance law. In 1762, Englishmen John Entick’s home was forcibly raided and his papers seized by the King’s messengers, who had been sent to hunt down the author of a seditious pamphlet. In the precedent setting case, *Entick v. Carrington* (1765), the English court ruled that:

> The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by private law, are various. Distresses, executions, forfeitures, taxes etc are all of this description; wherein every man by common consent gives up that right, for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no excuse can be found or

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produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment.\textsuperscript{16}

In other words, invasions of privacy were only warranted where there was a just cause.

These sentiments were adopted by the new American Bill of Rights, specifically the Fourth Amendment: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”\textsuperscript{17}

The Fourth Amendment did not prohibit surveillance. Instead, it hitched its legitimacy to authorization by a neutral court based on evidence of criminal wrongdoing. Not surprisingly, however, the meaning of “unreasonable” and “probable cause” have not always been obvious. Numerous court cases and legislation have interpreted the Fourth Amendment, granting more and less weight to government and individual interests. For example, important historical cases include 	extit{Ex Parte Jackson} (1878),\textsuperscript{18} which required a warrant for the government to open first class mail and 	extit{Boyd v. United States} (1886),\textsuperscript{19} which ruled that authorities could not compel production of private papers to establish a criminal charge.\textsuperscript{20} In 	extit{Olmstead v. The United States} (1928),\textsuperscript{21} the Supreme Court took a more permissive stance, deciding that warrantless wiretapping of a prohibition era bootlegger was legal because there was no physical trespass.\textsuperscript{22}

As will be discussed later, evolving technologies and surveillance scandals prompted a flurry of new legislation in

\begin{footnotesize}
\begin{enumerate}
\item Entick v. Carrington & Ors, EWHC KB J98 (1765).
\item United States Constitution, Amendment IV (1791).
\item Ex Parte Jackson, 96 U.S. 727, 733.; Landau, Surveillance or Security, 66.
\item Boyd v. United States, 116 U.S. 616 (1886).
\item Olmstead v. United States, 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928).
\item Justice Brandeis dissented, arguing “As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wiretapping.” (Landau, Surveillance or Security, 67).
\end{enumerate}
\end{footnotesize}
the late 1960s and 1970s that altered and added numerous rules to the surveillance regime.

5.3.2 International Law

International law addresses surveillance in two ways—as a violation of the privacy rights of individuals and as a violation of state sovereignty. Regarding the former, there are some prohibitions on surveillance as a human rights violation. For example, Article 12 of the Universal Declaration of Human Rights states “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.” Article 12 of the International Covenant on Civil and Political Rights (ICCPR) has almost identical wording. However, unlike prohibitions on torture, derogations to these privacy rights are permitted by the ICCPR. Article 8 of the European Convention on Human Rights similarly emphasizes privacy, but allows for several major exceptions:

1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

What exactly constitutes a justified, non-arbitrary violation of privacy is not at all clear.

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Regarding foreign intelligence surveillance, commentators disagree over the extent to which it is in fact prohibited under international law. Intelligence does violate sovereignty norms, but is also commonly practiced by most states. For some, this means that intelligence remains illegal, despite its widespread practice. For others, the extent of intelligence violations by multiple countries suggests that intelligence has become a customary lawful practice. Either way, there are no clear international rules specifically governing, let alone forbidding intelligence surveillance.26

Simon Chesterman notes the ambiguous rules regarding wartime spying articulated in a range of historical laws from the Lieber Code to the Hague Conventions to the Geneva Conventions and their Additional Protocols. On the one hand, the law of armed conflict has permitted “ruses of war” necessary to gain information about the enemy, but on the other, it has not allowed individuals to act clandestinely to obtain it. It is not a crime for states to seek secret information, but individuals caught spying are subject to arrest, trial, and even execution if convicted.27

These contradictions extend to peacetime foreign intelligence gathering. Once again, spying violates sovereignty as articulated in the 1927 Permanent Court of International Justice Lotus ruling, which stated that: “the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another state.”28 This sovereign exclusion extends to states’ airspace, restricting aerial

27 Ibid., 1081.
28 Ibid., 1082.
However, space based satellites are not restricted. The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space states that space is not subject to national appropriation. The Vienna Convention on Diplomatic Relations forbids spying by and on diplomats and instructs against violating the privacy of diplomatic communications, yet diplomatic spying has been a long-standing feature of normal statecraft. As the November 2010 Wikileaks dump revealed, the United States continues to instruct its diplomatic staff to collect intelligence information as a matter of course. Such intelligence gathering was a habitual feature of the Cold War, when norms of reciprocity governed relations between the United States and Soviet Union. This game was and continues to be epitomized by the exchange of captured secret agents, the most notable recent case being the 2010 Russia-United States spy exchange.

Perhaps most interesting is the role of intelligence surveillance in arms control treaties. The Strategic Arms Limitation Talks resulted in agreements that called for “national technical means of verification,” in other words, surveillance monitoring. They not only authorized intelligence to ensure compliance with treaty terms, but forbid states from enacting countermeasures to block this surveillance. Subsequent arms control

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29 Ibid., 1083.
30 Ibid., 1085.
31 Ibid., 1088.
33 Chesterman, “The Spy Who Came In From the Cold War,” 1097.
agreements have included similar provisions.\textsuperscript{36} Beyond treaty based monitoring, states have assumed the legitimacy of surveillance of other states’ military capacities. The United States publicly announced that U2 spy planes had identified missiles in Cuba in 1962. Forty years later, Colin Powell based allegations that Iraq had weapons of mass destruction on U.S. intelligence sources in his presentation to the United Nations Security Council. Within the United Nations context, secret intelligence continues to be used to implement UN financial sanctions and to prosecute international war crimes trials.\textsuperscript{37}

The result of these developments is ambiguous, even contradictory law. The international surveillance regime evolved as much to authorize as to constrain intelligence gathering. Certainly, spies may be accused of crimes when caught in the act in a target country, but their activity is part of the tolerable “organized hypocrisy”\textsuperscript{38} that makes up the state system. Chesterman sums up the situation:

The laws of war allow intelligence gathering but also severely punish its practitioners. The norm of nonintervention limits the activities of one state in the territory of another but has failed to keep pace with technological advancements that render traditional territorial limits irrelevant. Diplomacy has long tolerated intelligence but includes established guidelines for limiting its intrusiveness. Arms control regimes effectively establish a right to collect specific intelligence necessary to the success of a specific agreement. In each case, intelligence collection is recognized as a necessary evil, something to be mitigated rather than prohibited. The remedies for violation of these norms also reflect this balance: spies in war may be punished without the sending state incurring responsibility; violations of the norm of nonintervention are limited to traditional conceptions of territorial sovereignty; diplomatic impropriety is addressed through removal of diplomatic status; interference in intelligence collection undertaken as part of an arms control regime would undermine the main intended result of that regime—trust.\textsuperscript{39}

\textsuperscript{36} Chesterman, “The Spy Who Came In From the Cold War,” 1091.
\textsuperscript{37} Ibid., 1112-1121.
\textsuperscript{39} Chesterman, “The Spy Who Came in From the Cold War,” 1098.
Considering this state of affairs, it fair to suggest that while international human rights laws caution states against spying on their citizens, and while sovereignty norms prohibit states from human and technical intelligence gathering in other states, the laws of war and arms control treaties recognize that states do spy on each other as a normal, legitimate practice.

5.3.3 Institutionalization of Foreign Surveillance in U.S. Domestic Law

Foreign intelligence surveillance became permanently institutionalized in the United States after the Second World War. Reflecting strategic demands and the legal and normative acceptability of foreign intelligence gathering, surveillance duties were officially assigned to newly created organizations. In the tradition of the 1878 Posse Comitatus Act, which forbade the military from engaging in domestic law enforcement activities, the new intelligence community was outwardly oriented. The Central Intelligence Agency was mandated to organize peacetime HUMINT collection abroad in the 1947 National Security Act, while foreign SIGINT was initially delegated to the Armed Forces Security Agency, established in 1949. The latter was followed in 1952 with the National Security Agency, headquartered at Fort Meade, Maryland. The CIA’s mandate explicitly prohibits domestic spying. The National Security Act makes clear that “the Agency shall have no police, subpoena, law-enforcement powers, or other internal-security functions.” The NSA was originally authorized by executive order, which mandated it “provide an effective, unified organization and control of the

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41 National Security Act of 1947 (P.L. 80-235, 61 Stat 496), Section 102 d (3).
communications intelligence activities of the United States conducted against foreign
governments.\textsuperscript{42}

The CIA and NSA were complemented by an emerging alphabet soup of
surveillance agencies focusing on various aspects of military and technical intelligence.
In addition, intelligence sharing between allied intelligence services was institutionalized
after the war via the 1946 British-United States Communication Intelligence Agreement
(BRUSA), subsequently the 1954 United Kingdom-United States (UKUSA) Agreement
or the so called “five eyes” agreement, which added Canada, Australia, and New Zealand
to the arrangement. The resultant partnership required the respective Anglo-American
COMINT agencies to exchange all non-exempt intelligence “products.”\textsuperscript{43}

None of this intelligence gathering was illegal. While specific spying methods
were kept secret, the existence of spies was a well-known fact. Foreign spying was and
continues to be considered a heroic profession by many, celebrated in books and films.

5.4 Intrusive Surveillance Practices

Following the aforementioned logic, the vast majority of clearly illegal
surveillance has occurred in the domestic context. For it is primarily within these bounds
that some intelligence surveillance has been unambiguously outlawed. The following
section examines this illegal surveillance in the context of exceptional, covert, and
unauthorized practice.

\textsuperscript{42} Memorandum from President Harry S. Truman to the Secretary of State, the Secretary of
Defense, Subject: Communications Intelligence Activities (October 24, 1952), 2 (b),
Security Agency Act, Pub. L. 86-36, May 29, 1959, 73 Stat. 63, which made the NSA the agency
responsible for signals intelligence.

\textsuperscript{43} Aid, The Secret Sentry, 12.
5.4.1 Exceptional Surveillance

Publicly promulgated exceptions to torture and due process rights have tended to be connected with racial and ideological hatreds and open assertions of undemocratic power. This is also true in the case of surveillance. For instance, dictatorial states are simultaneously surveillance states. They exercise their power to monitor citizens for subversion, even apparently innocuous digressions from state ideology, at all times. As depicted in films like the *Lives of Others*, the chilling account of omnipresent surveillance in the German Democratic Republic, surveillance penetrates every aspect of social life in such contexts.

There have been some instances of exceptional surveillance, or surveillance beyond the law openly endorsed by authorities, targeted at alleged subversives in the United States. Throughout the late nineteenth and early twentieth centuries, the labour movement was frequently subject to surveillance and harassment. As previously discussed in the chapter on due process rights, the Justice Department’s Bureau of Investigation (BI), which would become the Federal Bureau of Investigation (FBI) in 1935, was engaged in an aggressive campaign of counter-subversion during and immediately after the First World War that included extensive surveillance and warrantless search and seizure. For instance, an understaffed BI allowed the American Protective League, a corps of 250,000 volunteer spies, to conduct a vigilante campaign of harassment against suspected opponents of the war. They increasingly concentrated their efforts on “slacker raids” aimed at rounding up draft dodgers. On several occasions in 1918, police, soldiers, and volunteers swept into American cities, demanding proof of draft status from every man they encountered. In one July 1918 round up:

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44 Andrew, *For the President’s Eyes Only*, 54-57.
over a hundred and fifty thousand men were stopped and summoned to show their registration cards. Ball games and motion picture shows, bathing beaches and cabarets, saloons and factories, were visited and searched. On the streets, at the gates of railroad stations, on the platforms of the elevated roads, at steamboat landings, in the theaters and in motor cars men were stopped and some twenty thousand who could not give satisfactory replies were hurried to the Municipal Pier, to the Bureau of Investigation, to court rooms, jails and vacant store-rooms for further examination and fourteen held for service.  

While acknowledging that “excess of zeal for the public good” had unfortunately led to the illegal use of soldiers and volunteers to conduct search and seizures, Attorney General Gregory declared that “some such dragnet process is necessary.” The enforcement of constitutional standards was clearly not a priority.

Following a series of anarchist bombings in 1919, the BI’s Radical Division stepped up efforts to identify dissidents. Declaring that the bombings were “connected to Russian Bolshevism, aided by Hun money,” the division, led by a young J. Edgar Hoover, accumulated records of over 700,000 cases, which were organized into a massive index card depository. As Regin Schmidt explains, “since no attempt at verifying the information was apparently made, this meant that any person who had been mentioned in Bureau reports, whether on the basis of rumors, by informers, as a participant in a public meeting, or as a subscriber to a radical paper, was carefully indexed.” By 1921, 450,000 index cards had been compiled. Other ventures included extensive cooperation between private American communications companies and the previously mentioned Cipher Bureau to surveil suspected dissidents throughout the 1920s.

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46 McMaster, *The United States in the World War*, 48; Andrew, *For the President’s Eyes Only*, 56.
48 Ibid., 162.
49 Ibid., 163.
In 1924, Attorney General Harlan Fiske Stone moved to check the intelligence abuses of the first Red Scare, introducing the Stone Line “mandating that the FBI not be concerned with the opinions of individuals, political or otherwise, but—only with their conduct and then only with such conduct as is forbidden by the laws of the United States.”\textsuperscript{50} Contemporaneously, however, Hoover was appointed to head the FBI. Rejecting the Stone Line, he authorized agents to abandon the criminal standard and utilize all possible sources of information in monitoring subversives.\textsuperscript{51}

Although the Federal Communications Act of 1934 ordered that “no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communications,” the outbreak of World War II generated increased demand for information, including domestic intelligence.\textsuperscript{52} Military censors were authorized to screen all telegraph traffic.\textsuperscript{53} President Roosevelt granted Hoover explicit permission to conduct national security surveillance, directed “insofar as possible” at aliens.\textsuperscript{54} According to Daniel Solove, “During World War II, the FBI received profoundly expanded authority to engage in wiretapping and to investigate national security threats…Hoover…lavishly ordered wiretapping of hundreds of people, including political enemies, dissidents, Supreme Court Justices, professors, celebrities, writers, and

\textsuperscript{51} Ibid., 601.
\textsuperscript{54} Landau, \textit{Surveillance or Security}, 68.
Exceptional surveillance continued to be practiced during the anti-communist hysteria of the McCarthy period, discussed in Chapter 4. However, the witch-hunts of the second Red Scare did little to catch actual spies. As revealed in the Venona decrypts, which successfully intercepted Soviet communications, 206 Soviet agents were identified in the United States, only 15 of whom were ever prosecuted—largely due to fears that legal proceedings would alert the Russians to America’s ability to break their codes.\textsuperscript{56}

\subsection*{5.4.2 Covert Illegal Surveillance}

Notwithstanding the above instances where U.S. authorities flirted with the politics of exception, Americans have been wary of surveillance. Unlike authoritarian countries, the United States has not generally utilized the apparatus of a surveillance state as a means of social control. This has meant that the majority of illegal surveillance has been conducted covertly. Covertness has served the practical purpose of hiding surveillance from potential targets, but has also been fueled by the blatantly undemocratic and illegitimate nature of many surveillance activities. While exceptional surveillance against alleged foreign subversives could be somewhat rationalized in the climate of the Red Scares, spying on political rivals, civil rights activists, and American citizens was not so easily legitimized. In this context, plausible deniability served to hide evidence of political responsibility for intelligence agency wrongdoing.

The findings of the United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, better known as the Church Committee after its chairman, Senator Frank Church of Idaho, provides the most comprehensive documentary record of illegal, covert activity. It conducted investigations

\textsuperscript{55} Quoted in Solove, Rotenberg, and Schwartz, \textit{Privacy}, 84.
\textsuperscript{56} Aid, \textit{The Secret Sentry}, 23.
in 1975-1976 in the wake of the intelligence scandals that rocked the United States in the early 1970s. Presidents had long utilized surveillance to pursue their political agendas, but the Nixon White House’s abuse of intelligence power took illegality to reckless new heights. In 1971, a small circle of Nixon insiders formed the so-called “Plumbers” unit. Led by former CIA agent Howard Hunt, they planned to use unlawful surveillance, searches, and leaks to attack the President’s political opponents. Amongst their attempted activities was the theft of Daniel Ellsberg’s medical records from his psychiatrist’s office in an effort to discredit the Pentagon Papers leaker. Ellsberg was eventually acquitted due to government misconduct.

In 1972, a group of conspirators acting under the auspices of the Committee to Re-elect the President organized a botched robbery of the Democratic National Committee headquarters office at the Watergate Hotel complex in Washington D.C. Washington Post journalists Bob Woodward and Carl Bernstein eventually uncovered the links between the Watergate burglary, the subsequent cover up, and the Nixon White House—revelations that led to Congressional investigations, multiple indictments, and the resignation of the President in 1974. Interestingly, the Watergate burglary was not unprecedented. In 1930, President Nixon’s eighth cousin once removed, President Herbert Hoover, had similarly ordered agents to break into Democratic offices to obtain political intelligence.57

The Church Committee was mandated to investigate intelligence agency misconduct. The final reports document extensive abuses by the FBI, CIA, NSA, and military intelligence including covert action and domestic spying. The numbers are staggering. The FBI held over 500,000 domestic intelligence files and a list of 26,000

57 Andrew, For the President’s Eyes Only, 74.
people subject to round up in an emergency; the NSA obtained copies of every international cable sent out of the United States between 1947 and 1975; the Army investigated 100,000 Americans for political reasons throughout the 1960s and early 1970s; and the CIA’s illegal mail opening created a database of 1.5 million people.\textsuperscript{58} According to former Attorney General Edward Levi, from 1940-1974, 8350 warrantless domestic wiretaps and 2450 warrantless microphone installations were authorized by federal agencies.\textsuperscript{59} By the early 1970s, nearly 250,000 Americans were under active surveillance.\textsuperscript{60}

The seven volumes and six books published by the Church Committee run several thousand pages long and describe in great detail the dangers posed by unaccountable intelligence activities. \textit{Volume 2: Huston Plan} documents President Nixon’s plan to authorize extensive FBI, CIA, and military intelligence surveillance of anti-Vietnam war protesters in 1970. “Did any person, other than Mr. Hoover in the footnotes, suggest or argue that the activities being proposed ought not to be done because they were either unconstitutional or illegal?” asked counsel Frederick A. O. Schwarz Jr. “No” answered White House aid Tom Huston in his committee testimony.\textsuperscript{61} The men involved seemed much more concerned with getting caught than violating the law. As CIA Director Helms wrote to Henry Kissinger concerning a domestic intelligence dossier: “In an effort to round-out our discussion of this subject [student unrest], we have included a section on

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\textsuperscript{58} Frederick A.O. Schwarz Jr., “The Church Committee and a New Era of Intelligence Oversight,” \textit{Intelligence and National Security} 22, no. 2 (2007): 281.
American students. This is an area not within the charter of this Agency, so I need not emphasize how extremely sensitive this makes the paper. Should anyone learn of its existence it would prove most embarrassing for all concerned.”\textsuperscript{62} In the end, the Huston Plan was so controversial that Nixon felt compelled to revoke his authorization five days after giving it. Nonetheless, many of the illegal surveillance activities it proposed carried on anyways.\textsuperscript{63}

*Volume 3: Internal Revenue Service* describes the role of the IRS in gathering financial and personal data on political activists. A Special Service Staff (SSS) was created specifically for the task. Amongst its 8000 individual and 3000 organizational targets were the American Civil Liberties Union, the American Library Association, the Conservative Book Club, the Ford Foundation, the National Association for the Advancement of Colored People, The Lawyers Committee for Civil Rights Under Law, the National Urban League, and the University of North Carolina.\textsuperscript{64} According to Church Committee testimony, the SSS used aggressive tax enforcement to single out and punish perceived dissidents as well as to pass on intelligence data to other agencies, especially the FBI: “Tax return confidentiality has eroded to the point where our Federal Government has turned these supposedly private documents into instruments of harassment used against citizens for political reasons.”\textsuperscript{65}

Similar concerns continue to be echoed in *Volume 4: Mail Opening*, which covers the extensive interception of Americans’ mail under Project HTLINGUAL. Starting in

\textsuperscript{62} Ibid., 401, exhibit 65.

\textsuperscript{63} Ibid., 2.


\textsuperscript{65} Ibid., 2.
1952, the CIA systematically screened over 28 million pieces of mail destined to and from the Soviet Union and other suspect destinations, secretly opening 215,820 envelopes. The mail opening continued for two decades despite the fact that it was clearly illegal. As Senator Tower explained: “There has never been any serious question regarding the legality of indiscriminate mail openings. Most of those associated with these invasions of privacy have flatly acknowledged the illegality of their actions. The closest we have come to justification for these mail openings is that they proved to be an invaluable source of national security information.” Once again, the men involved were primarily concerned with avoiding publicity. According to CIA Inspector General Glennon: “we assumed that everyone realized it was illegal. The very point we were trying to make was the Agency would be in deep embarrassment if they were caught in this activity.” The CIA IGs seemed more preoccupied with the risk of “flap potential,” than ensuring legal compliance. Of additional concern to the Church Committee was the lack of centralized responsibility and documentation for the program, which some senators interpreted as an attempt at establishing “plausible deniability.”

*Volume 5: The National Security Agency and Fourth Amendment Rights* discusses the role of the NSA in monitoring citizens’ electronic communications under Project MINARET. The head of the NSA, Lt. General Allen testified that “our communications intelligence activities are solely for the purpose of obtaining foreign intelligence in accordance with the authorities delegated by the President stemming from his

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67 Ibid., 2.
68 Ibid., 7.
69 Ibid., 22.
70 Ibid., 17-18.
constitutional power to conduct foreign intelligence.” Yet, he also admitted that the NSA monitored communications of U.S. citizens based on “watch lists.” Between 1967 and 1973, the NSA intercepted communications of Americans thought to be associated with drug trafficking, terrorism, threats to the President, and civil disturbances such as the anti-war movement. According to the NSA, there were 450 Americans on the narcotics watch list and 1200 on other watch lists compiled by the FBI, the CIA, the DIA, the Secret Service, and related agencies. Surveilled communications included at least one foreign participant. Allen testified that due to the ambiguous definition of “foreign intelligence,” he did not believe this surveillance was clearly legally prohibited, an argument that would reemerge thirty years later in the Global War on Terror. However, he eventually agreed that it was possible as Senator Schweiker put it, that there could have “been some concern that this was a questionable legal area and that therefore dissemination of who was doing it and how they were doing it might also have been injurious to the agency.” He averred that concerns about legality eventually led to the termination of the program, further admitting there was no way for the NSA to gauge the legitimacy of other agencies’ requests.

Revelations concerning project SHAMROCK were considerably more shocking. The operation stretched from the 1940s to the 1970s, during which time the NSA and its predecessor agencies received copies of every international telegram transmitted via the United States from three telegraph companies—RCA Global, ITT World

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72 Ibid., 10.
73 Ibid., 11.
74 Ibid., 12.
75 Ibid., 30.
76 Ibid., 31.
77 Ibid., 37.
Communications, and Western Union International. The companies were assured of their immunity in 1947, and again in 1949. Neither the government nor the companies kept documentary records of their operational arrangements.\(^78\) While originally focused on foreign intelligence, U.S. citizens’ communications were increasingly targeted. The NSA selected 150,000 messages a month from the vast volume of incoming data for analysis.\(^79\) As summed up by Senator Hart, SHAMROCK “resulted in companies betraying the trust of their paying customers who had a right to expect that the messages would be handled confidentially. It was undertaken without the companies first ascertaining its legality. It was not disclosed to the Congress until this year. Finally, it continued without interruption for nearly 30 years, even though apparently no express approval of the project was obtained from any President, Attorney General, or Secretary of Defense after 1949.”\(^80\) In so doing, the NSA blatantly violated the Fourth Amendment. The conduct of both MINARET and SHAMROCK suggest the NSA had little concern for legality for several decades. These secret programs largely ignored the law. Only when faced with political scrutiny were they reviewed and cancelled.

Operation CHAOS was the CIA’s domestic spying program, conducted in direct defiance to its statutory role as laid out in the 1947 National Security Act. Initiated by President Johnson in 1967 to seek out foreign influence over the anti-war, black power, and new left movements, CHAOS infiltrated domestic organizations with undercover agents and cooperated with the NSA’s illegal surveillance. Lasting almost seven years,

\(^{78}\) Ibid., 59.  
\(^{79}\) Ibid., 60.  
\(^{80}\) Ibid., 62.
the operation created a CIA database of 300,000 names with extensive files on 7200 citizens.\footnote{Tim Weiner, *Legacy of Ashes: The History of the CIA* (New York: Anchor Books, 2008), 330.}

Perhaps the most infamous of all the illegal Cold War projects was the FBI’s Counterintelligence Program (COINTELPRO), which is discussed in *Volume 6: Federal Bureau of Investigation*. Throughout the 1960s and early 1970s, the FBI surveilled, harassed, sabotaged, and engaged in counter-intelligence operations against peace and civil rights campaigners, developing 500,000 intelligence dossiers.\footnote{U.S. Congress, Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the Church Committee), *Hearings*, Vol. 6: Federal Bureau of Investigation, 94\textsuperscript{th} Cong., 1st Sess (1975), 8, \url{http://www.aarclibrary.org/publib/contents/church/contents_church_reports_vol6.htm}.} Methods included about 100 warrantless wiretaps a year, mail opening, break-ins, and the extensive use of informants.\footnote{Ibid., 16.} The FBI was particularly preoccupied with Dr. Martin Luther King and the Southern Christian Leadership Conference, which it labeled a “black hate group.” Hoover bugged King’s home and office in order to dig up dirt on the civil rights leader.\footnote{Cole, *Enemy Aliens*, 157.} Other targets included the anti-war movement, the student movement, the new left, communist groups and right wing organizations like the Ku Klux Klan. A considerable volume of this illegal surveillance appeared to have little to do with national security. For example, Schwarz Jr. described the amusingly bizarre attention devoted to the nascent women’s movement:

As the next example of how the FBI seeks out information scarcely relevant to subjects that we had thought the Bureau was concerned with, as in the area of Women’s Liberation, there is report after report about meetings of women who got together to talk about their problems. Now, how the Bureau got this information is not entirely clear, but it is apparently by informants. So we have informants running all over the country checking up about what housewives are talking about in their efforts to decide whether women should have a different role in this society; reports on particular women who said why they had come to the
meeting and how they felt oppressed sexually or otherwise; reports on such important matters as the release of white mice by women at a protest demonstration; reports on such other important matters as the interest of the Women’s Liberation movement in zapping the Miss America Pageant in Atlantic City by protesting the standards and whatever else they protested in Atlantic City.85

Other activities were more pernicious, including blatant political spying and:

examples of the use of what is called misinformation to prevent dissenters from meeting or engaging in protest activity, examples of efforts to neutralize people by breaking up their marriages or ruining their jobs, examples of where decisions have been made to risk the death of suspect individuals by intentionally exacerbating tensions between groups known to be violence prone and known to have a desire to injure each other, where there were intentional acts taken by the Bureau, with full authority, to exacerbate that tension.86

While the FBI did have some legitimate intelligence gathering powers, there is substantial evidence that it understood COINTELPRO was unlawful. Its primary aim was to avoid public scrutiny. As Cole explains, “because COINTELPRO was almost entirely illegal, it required a whole new level of secrecy, not so much to protect national security as to protect the Bureau itself from embarrassing disclosures.”87 For instance, after Hoover’s death, the Bureau destroyed the majority of his personal files, which included “do not file” and “black bag job” documents.88 It seems that the FBI provided minimal information to the government about many of their activities, and only moved to curtail them once they became public.89

The Church Committee’s conclusions regarding domestic abuses are described in Book II: Intelligence Activities and the Rights of Americans and Book III: Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans. Together

85 Church Committee, Federal Bureau of Investigation, 15.
86 Ibid., 6.
87 Cole, Enemy Aliens, 155.
88 Church Committee, Federal Bureau of Investigation, 13.
89 Ibid., 29-30.
the reports paint a disturbing picture of the political abuse of intelligence, the failure of accountability mechanisms, and a “vacuum cleaner” approach that indiscriminately monitored lawful activity. This vacuum cleaner, notes Schwarz Jr., is evident by the sheer volume of spying. Unwillingness to take legality seriously or consider it at all, excessive secrecy, the avoidance of any outside scrutiny, and attempts to sanitize dirty tricks rhetorically all contributed to these practices. However, he emphasizes, they were not merely the product of perverse “rogue elephant” intelligence agencies. Presidents were responsible through both acts of omission and commission, ordering them at worst or ignoring them at best.

These illegal practices had profoundly harmful consequences, including the destruction of personal and professional lives, the distortion of public policy, and most basically, “the values of privacy and freedom which our constitution seeks to protect.” These observations foreshadow debates and fears that continue today over intelligence power, particularly in regards to electronic surveillance: “In an era where the technological capability of Government relentlessly increases, we must be wary about the drift toward “big brother government.” The potential for abuse is awesome and requires special attention to fashioning restraints which not only cure past problems, but which anticipate and prevent the future misuse of technology.”

5.4.3 Unauthorized Unlawful Surveillance

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91 Ibid., 292.
93 Ibid., 289.
Exceptional and covert surveillance have not been the only sources of unlawful privacy violations. As every viewer of *Law & Order* or *The Wire* knows, American police must obtain search warrants in order to legally obtain evidence. Thousands of court cases are held up or thrown out every year because law enforcement failed to follow proper procedure. In some cases, police can engage in “Terry stops” that allow them to perform on the spot frisks if they reasonably suspect wrongdoing. However, critics have noted the systematic racial profiling that contributes to search decisions.94 Numerous studies have shown that minorities, particularly African Americans and Latinos, are subject to markedly higher levels of surveillance and searches than other citizens.

“Driving while black,” argue activists, has become a virtual crime in certain neighborhoods.95 Like other unofficial human rights abuses such as police torture, the government and the courts rhetorically denounce such practices. Racial profiling is definitively politically incorrect. However, it continues to be a feature of the contemporary law enforcement landscape.

The paradox of officially condemned, yet widely practiced racial profiling has spilled over into the counterterrorism sector. The illegitimacy of overtly discriminatory surveillance has pushed policy makers towards advocating intelligence methodologies that at least on their face, are racially and religiously neutral. There is no doubt that American Muslims are the primary target of the GWOT in the United States, just as blacks have been disproportionately subject to the “War on Drugs” as outlined in Chapter

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95 Studies have repeatedly shown that African Americans are pulled over and searched at highly disproportionate rates. The same statistical bias is found in pedestrian stops (Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2010), 131-132). For instance, in New York City, 84% of police “stop and frisk” actions in 2009 were targeted at African Americans or Latinos, while these groups make up 53% of the general population. Ironically, white targets were more likely to be found with contraband. See Center for Constitutional Rights, “NYPD Stop and Frisk Statistics 2009-2010,” http://ccrjustice.org/files/CCR_Stop_and_Frisk_Fact_Sheet.pdf.
4, however, policy makers’ unwillingness to openly declare this fact speaks to the interesting ways in which domestic anti-discrimination norms continue to influence counterterrorism.

In sum, historical investigation sheds light on the varying ways in which public authorities have gone about engaging in search, seizure, and surveillance. The dualistic structure of constraint in the United States has meant that foreign surveillance has long been conducted legally, albeit secretly for operational security reasons. In contrast, domestic surveillance has been subject to restrictions. In the face of these limitations, authorities have at times opted to ignore the law in the name of emergency necessity, targeting foreigners and alleged subversives for intrusive monitoring. In other cases, concerns about charges of illegality have pushed surveillance practices underground, resulting in eventual scandal. Finally, abusive surveillance sometimes occurs on a systematic, but unauthorized basis, reflecting societal prejudices. The approach taken to post-9/11 surveillance practices has similarities with some aspects of these precedents, but also differences.

5.5 Evolving Laws and New Technologies

In order to understand the current approach to controversial surveillance practices, it is necessary to review contemporary constraints. Several important judicial rulings improved privacy protections in a wide range of issue areas over the years. For instance, in *National Association for the Advancement of Colored People v. Alabama*, the Supreme Court ruled that the organization did not have to disclose its membership list to state authorities and that “Immunity from state scrutiny of petitioner's membership lists is here
so related to the right of petitioner's members to pursue their lawful private interests privately and to associate freely with others.\textsuperscript{96} In \textit{Griswold v. Connecticut}, the Supreme Court held that a state prohibition on the use of contraceptives violated “the right to marital privacy.” While a general right to privacy is not explicitly mentioned in the Constitution, “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”\textsuperscript{97} Today, debates over reproductive and sexual freedom continue to be parsed through the legal discourse of privacy.\textsuperscript{98}

In the criminal justice and security realm, technological developments, which rendered prior regulations increasingly obsolete, along with the political scandals of the Nixon era, prompted a variety of changes in the laws governing surveillance practice. Two important legal cases helped shape the emerging surveillance jurisprudence. In \textit{Katz v. United States}, Katz challenged his federal gambling conviction on the ground that information had been obtained by the unwarranted wiretapping of a phone booth in contravention of his Fourth Amendment rights. In its 1967 ruling, the Supreme Court decided in his favour, arguing contrary to previous precedent that privacy attached to people, not places. The fact that federal agents did not engage in physical trespass to gain access to Katz’s call did not mean that he had no expectation of privacy. As the Court stated:

\begin{quote}
The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth, and thus constituted a "search and seizure" within the meaning of the Fourth Amendment. The fact that the electronic device employed
\end{quote}

\textsuperscript{96} \textit{National Association for the Advancement of Colored People v. Alabama}, 357 U.S. 449 (1958).
\textsuperscript{97} \textit{Griswold v. Connecticut}, 381 U.S. 479 (1965).
\textsuperscript{98} The right to privacy formed an important cornerstone of \textit{Roe v. Wade}, 410 U.S. 113 (1973), which decriminalized abortion and \textit{Lawrence v. Texas}, 539 U.S. 558 (2003), which decriminalized sodomy.
to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.  

Subsequently, new legislation helped codify eavesdropping rules. Title III of the Omnibus Crime Control and Safe Streets Act of 1968 specified that interception of “any wire, oral, or electronic communication” is only permitted in cases of certain serious crimes.  

While Katz ensured that changes in communications technologies could not be used to evade constitutional protections, the 1972 Keith decision, named for District Judge Keith who made the initial ruling against the government, clarified that unwarranted surveillance could not be used against domestic subversion. Underlying the case was Attorney General authorization of warrantless surveillance of individuals suspected of planning to destroy government property, one of whom actually firebombed a CIA office in Ann Arbor, Michigan. The government argued that the aforementioned Title III explicitly did not infringe on the President’s constitutional powers to protect national security. The Supreme Court disagreed, finding that there was no grant to engage in warrantless domestic surveillance, that the Fourth amendment did in fact apply to domestic security targets, and that “The freedoms of the Fourth Amendment cannot properly be guaranteed if domestic security surveillances are conducted solely within the

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101 Title III, 18 U.S.C. 2511 (3) states that “Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government.”
discretion of the Executive Branch without the detached judgment of a neutral magistrate.”¹⁰² It furthermore recognized the dangers of political intelligence gathering:

History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect "domestic security." Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent.

In other words, while foreign intelligence surveillance was legal and legitimate, domestic targets retained their rights, even when alleged violent subversion was at stake.¹⁰³

The scandals of the Nixon White House also resulted in several new laws. The Privacy Act of 1974 introduced new rules for handling public and private data.¹⁰⁴ In 1975, the Freedom of Information Act was updated (FOIA),¹⁰⁵ permitting greater access to government documents. FOIA rules made at least some aspects of government wrongdoing more difficult to conceal. The Church Committee findings contributed to several major changes to American intelligence governance. In 1976, Attorney General Levi issued the first set of Attorney General Guidelines aimed at directing the surveillance activity of the FBI. The Guidelines prohibited the FBI from investigating and disrupting the activities of Americans solely on the basis of their political beliefs, as long as they did not advocate violence. They further required the FBI to initiate investigations only on the basis of “specific and articulable facts.”¹⁰⁶ In 1983, Attorney General Smith shifted the

¹⁰² United States v. United States District Court (Keith), 407 U.S. 297 (1972).
¹⁰³ Ibid.
standard to a “reasonable indication” of criminality and permitted “limited preliminary inquiries.”

On the foreign intelligence front, permanent Congressional oversight in the form of the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence was initiated to monitor intelligence conduct. To untangle the problem of domestic and foreign intelligence surveillance, the Foreign Intelligence Surveillance Act (FISA) was established in 1978.

FISA supplemented Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which had required warrants for criminal investigations, but had permitted unconstrained electronic surveillance for foreign intelligence purposes. It helped balance the legacy of Keith, which had placed tight restrictions on domestic surveillance, but had also suggested Congress act to clarify rules surrounding foreign intelligence surveillance in the domestic context. The objective of FISA was to clearly distinguish foreign and domestic information gathering by restricting criminal surveillance to law enforcement agencies and the strict probable cause requirements of domestic legal due process while allowing for the special dispensation of warrants under less strenuous standards by the newly created Foreign Intelligence Surveillance Court (FISC) for surveillance related to foreign intelligence conducted within the United States. In order for a FISC warrant to be granted under the framework, a judge had to find that:

- there is probable cause to believe that the target of the surveillance is a foreign power or an agent of a foreign power; the place at which the surveillance is directed is being used or about to be used by that foreign power or agent;
- minimization procedures to be followed are reasonably designed to minimize the acquisition and retention of information relating to Americans that is not foreign

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107 Ibid.
intelligence information; Executive certification that the information sought is foreign intelligence information which cannot be reasonably obtained by normal investigative techniques; and if the target of the surveillance is a United States person, such certification is not clearly erroneous.\footnote{109}

A “United States person” is defined as “a citizen of the United States, an alien lawfully admitted for permanent residence….an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power.”\footnote{110} Under FISA, a U.S. person can be considered an “agent of a foreign power” for the purposes of surveillance.

In addition, later constraints such as President Reagan’s 1981 Executive Order 12,333 restricted surveillance of U.S. persons outside of the United States, instructing that the least intrusive techniques available be utilized in such cases.\footnote{111} The 1993 United States Signals Intelligence Directive 18, “Legal Compliance and Minimization Procedures” used for training agents on the laws covering signals intelligence demonstrates how FISA restrictions were enacted from an operational point of view. It required that anyone in the United States whose identity is unknown be considered a U.S. person if no evidence to the contrary is available, but if outside the United States, or in an unknown location, that the opposite assumption prevail.\footnote{112}


\footnote{110} Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801 (i).

\footnote{111} Bedan, “Echelon’s Effect,” 431.

The 1990s saw further changes. After the passage of FISA, FBI agents and federal prosecutors informally shared information from FISA surveillance with an understanding that it would not be inappropriately exploited in criminal proceedings. In 1994, the trial of Soviet spy Aldrich Ames ignited concerns at the DOJ Office of Intelligence Policy and Review (OIPR) that previous FBI-prosecutor consultation could be deemed an abuse of process, thereby undermining the case. As a result, OIPR began to act as the sole gatekeeper between the FBI and prosecutors. In 1995, Attorney General Janet Reno issued guidelines that regulated information sharing between FBI agents and criminal prosecutors that were increasingly referred to as the “wall.” However, as The 9/11 Commission Report makes clear, there was no legal barrier to criminal and intelligence agents sharing information, including FISA surveillance. Rather, top echelons of the FBI perpetuated a misunderstanding of the rules that built up unnecessary and ultimately destructive barriers to information exchange.

Despite increasing regulation, significant gaps in the surveillance regime persisted—gaps that would be later exploited by the Bush Administration. For instance, information transferred to third parties is not covered by Fourth Amendment protections. This includes information obtained by wired undercover informants. The government, moreover, has warrantless access to third party data such as telephone, accounting, and banking records shared with third parties. This was confirmed in Smith v. Maryland (1979), in which the Supreme Court ruled that pen resisters and trap and trace records,

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114 Ibid., 79.
which detail incoming and outgoing phone numbers, were available without a warrant because the data had been voluntarily shared with a telephone company, thereby undermining any reasonable expectation of privacy.\(^{117}\)

The 1986 Pen Register and Trap and Trace Devices Statute\(^ {118}\) subsequently required a court order to allow law enforcement access to data, but on the permissive basis of investigator certification of its likely relevance to an ongoing criminal case. The Stored Communications Act (1986) further allowed access to communications such as email from an Internet Service Provider (ISP) with less than Fourth Amendment standards.\(^ {119}\) Similar laws have emerged to provide moderate restrictions on access to other forms of data, but as Raskoff explains, “data mining of third-party records exposes … [a] serious doctrinal limitation in contemporary intelligence governance: there is no current law regulating the extent to which or the manner in which the government can permissibly analyze data legally obtained from third parties.”\(^ {120}\) As summed up by Cole, the consequences are striking: “people have no expectation of privacy when they dial phone numbers, surf the Web, make a credit card purchase, put out their garbage, or talk to people they think are their friends but are in fact informants.”\(^ {121}\)

Other significant gaps in the privacy regime include phenomena such as the “border search exception.” As anyone who has gone through customs knows, border agents have the authority to conduct searches without a warrant. “In a long series of Supreme Court rulings in the 1970s, the approximately 200,000 miles of the Mexico/U.S.

\(^{117}\) Swire, “Katz Is Dead,” 908.
\(^{118}\) Pen Registers and Trap and Trace Devices, 18 U.S.C., §§ 3121-27.
\(^{120}\) Raskoff, “Domesticating Intelligence,” 592.
borderlands were deemed exceptional with regard both to warrants and probable cause, thus permitting the U.S. Border Patrol to stop automobiles in random car stops and at checkpoints searching for undocumented aliens—under a doctrine of suspicion that Chicano activists have long called “‘DWM’” (“Driving While Mexican”).”\textsuperscript{122} Nativist legislation like the 2010 Arizona search law (SB 1070), discussed in Chapter 4, that mandates police to demand documentation from suspected illegal aliens threatens to expand this paradigm and create an informal, ethnically defined internal border, which if allowed to stand by the courts seriously risks instantiating a state of exception when it comes to Fourth Amendment rights for Latino American citizens. Prisons, public schools, government offices, and international mail are also subject to various forms of legal warrantless searches.

There are further weaknesses in the intelligence oversight system. Senate and House oversight committees were designed to be primarily reactive, rather than proactive. They do not engage in up to date monitoring of agencies—instead they tend to be whistle blower driven. Likewise, executive oversight via agency Inspectors General is often scandal centered.\textsuperscript{123} Politicians have been generally unwilling to challenge intelligence agencies. Fears of intelligence failure have often trumped concerns about propriety.

Nonetheless, the controversies of the 1970s combined with a thickened, yet still imperfect, legal regime led to a decline, at least as far as we know, in warrantless domestic surveillance. A chastened intelligence community became increasingly concerned with legality. While technically unauthorized racial profiling practices

\textsuperscript{122} Scott Michaelsen and Scott Cutler Shershow, “Is Nothing Secret?” \textit{Discourse} 27.2 & 27.3 (Spring and Fall 2005): 129.
\textsuperscript{123} Mary De Rosa, “Privacy in the Age of Terror,” \textit{The Washington Quarterly} 26, no. 3 (Summer 2003): 35.
persisted in law enforcement, the systematic political spying of the pre-Church Committee era was greatly curtailed. As the Cold War wound down, there was less demand for political intelligence.

Yet, new concerns with domestic legality did not mark an end to surveillance. Foreign intelligence surveillance continued unabated. FISA had created relatively permissive standards for monitoring U.S. persons suspected of links to foreign threats. Changes in technology created new sources of data for domestic surveillance. While court ruling and legislation attempted to keep up with these shifts, constitutional protections ultimately did not extend to all aspects of high tech communications. On the eve on 9/11, there were no laws that prevented either foreign intelligence agencies or domestic law enforcement from spying on suspected Al Qaeda terrorists in the United States or abroad.

5.6 Post-9/11 Surveillance

The 9/11 attacks initiated renewed interest in the problem of intelligence failure. Of particular concern was the inability of intelligence officials to “connect the dots” between the disparate bits of information held by various intelligence and law enforcement agencies that might have helped detect and preempt the hijackers. Policy makers and pundits became increasingly preoccupied with the alleged “wall” between domestic and foreign intelligence gathering. As a result, FISA restrictions on domestic spying came under attack. Efforts to relax restrictions and alter the legal landscape to permit better foreign-domestic intelligence sharing and collection ensued.

The first act in the post-9/11 move to expand U.S. intelligence surveillance capacity came in the form of changes to domestic law, most notably the adoption of the
PATRIOT Act, a piece of legislation which eroded prohibitions on several dimensions of domestic surveillance. The second was a secret surveillance program dubbed the “Terrorist Surveillance Program” (TSP) by the Bush administration. The TSP authorized the NSA to surveil Americans without a FISC warrant in certain circumstances. At first glance, it seems that the TSP was a blatantly illegal program in the vein of previous covert actions. However, executive lawyers did attempt to construct a legal basis for it, posited on the dichotomy between foreign and domestic targets. The TSP was eventually given an ex post facto legislative rubber stamp. The third dimension of expanded surveillance power derives from the implications of changing communications technologies. The nature of these technologies complicate adherence to surveillance laws by blurring the line between foreign and domestic and by undermining the targeted intelligence paradigm.

The following section traces each of these processes in detail. It suggests that the legal regime that developed in the late 1970s and onwards, concerns about prosecution, and the difficulty of effectively concealing intelligence programs incentivized authorities to adopt a strategy of plausible legality in the surveillance realm. Despite initial controversy, the weakness of certain privacy norms and the dualism of the surveillance regime helped facilitate acceptance of these rationalizations by American lawmakers.

5.6.1 The PATRIOT Act

Major changes to the FISA framework emerged in the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, better known as the PATRIOT Act, passed by the Congress in the immediate aftermath of the 9/11 attacks. Despite extensively expanding surveillance
powers, the law did not suspend constitutional rights or usher in a state of exception.

Interestingly, it explicitly denounced identity based targeting. Reflecting the illegitimacy of open racial and ethnic discrimination in the current period, Section 102 clearly stated that:

(1) Arab Americans, Muslim Americans, and Americans from South Asia play a vital role in our Nation and are entitled to nothing less than the full rights of every American.
(2) The acts of violence that have been taken against Arab and Muslim Americans since the September 11, 2001, attacks against the United States should be and are condemned by all Americans who value freedom.
(3) The concept of individual responsibility for wrongdoing is sacrosanct in American society, and applies equally to all religious, racial, and ethnic groups.
(4) When American citizens commit acts of violence against those who are, or are perceived to be, of Arab or Muslim descent, they should be punished to the full extent of the law.
(5) Muslim Americans have become so fearful of harassment that many Muslim women are changing the way they dress to avoid becoming targets.
(6) Many Arab Americans and Muslim Americans have acted heroically during the attacks on the United States, including Mohammed Salman Hamdani, a 23-year-old New Yorker of Pakistani descent, who is believed to have gone to the World Trade Center to offer rescue assistance and is now missing.

(b) SENSE OF CONGRESS.—It is the sense of Congress that—
(1) the civil rights and civil liberties of all Americans, including Arab Americans, Muslim Americans, and Americans from South Asia, must be protected, and that every effort must be taken to preserve their safety;
(2) any acts of violence or discrimination against any Americans be condemned; and
(3) the Nation is called upon to recognize the patriotism of fellow citizens from all ethnic, racial, and religious backgrounds.  

Unlike previous security crises where surveillance efforts explicitly targeted specific communities, the PATRIOT Act extended its reach, at least rhetorically, to all Americans equally. Indeed, the potential for intrusion into the lives of “innocent” people (i.e. not ethnically profiled terrorists) proved one of the major popular objections to the Act.

One focus of the PATRIOT Act was to improve cooperation between domestic and foreign intelligence gathering. While no law actually prohibited surveillance of Al Qaeda in the lead up to 9/11, supporters of the PATRIOT Act have frequently argued over the years since its passing that the wall between domestic and foreign intelligence agencies prevented a timely investigation of 9/11 conspirator Zacarias Moussaoui. They further point to the case of Khalid al-Mihdhar and Nawaz al-Hamzi, in which the CIA failed to pass on important information to the FBI about two U.S. bound 9/11 hijackers whose communications they had intercepted. The 9/11 Commission reiterated these concerns. As will be discussed later, the aforementioned intelligence failures were more bureaucratic than legal, however there was a feeling in the intelligence community that certain forms of information sharing were limited.

To address the apparent wall between agencies, measures permitting consultation and information sharing between intelligence agents and federal law enforcement officers were strengthened by the PATRIOT Act. Section 203 clarified that:

Any investigative or law enforcement officer, or attorney for the Government, who by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived there from, may disclose such contents to any other Federal law enforcement, intelligence, protective, immigration, national defense, or national security official to the extent that such contents include foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 401a)), or foreign intelligence information (as defined in subsection (19) of section 2510 of this title), to assist the official who is to receive that information in the performance of his official duties.126

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126 USA PATRIOT Act of 2001, §203.
Rather than having to be “the purpose” of all FISA investigations, Section 218 of the Act allowed that foreign intelligence gathering be a “significant purpose” of surveillance.\textsuperscript{127} It required the FBI and Department of Justice to turn over information regarding Americans’ contacts or activities with any foreign government, organization, or individual to the CIA, regardless of its relevance to terrorism.\textsuperscript{128} It permitted evidence gathered through foreign intelligence surveillance to be used in domestic criminal trials.\textsuperscript{129}

The majority of PATRIOT Act provisions focused on loosening restrictions on domestic surveillance. Section 505 expanded the use of National Security Letters, essentially secret subpoenas for telephone, credit, and financial records without judicial oversight. Section 215 permitted warrants for “the production of tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information,” for instance library and bookstore records.\textsuperscript{130} Section 213 authorized delayed notice of searches, permitting so-called “sneak and peak” investigations.\textsuperscript{131} Email searches, previously requiring a warrant from the jurisdiction in which an ISP was based, were allowed to be issued from anywhere in the United States.\textsuperscript{132} The Act created “roving wiretaps” that attached to suspects rather than physical locations. Previously warrants were issued for single telephone numbers or email accounts, requiring new warrants for each, but the ease and speed with which suspects

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\textsuperscript{128} Kate Martin, “Domestic Intelligence and Civil Liberties,” \textit{SAIS Review} 24, no. 1 (2004): 15.

\textsuperscript{129} Breglio, “Leaving FISA Behind,” 203.

\textsuperscript{130} Kyl, “Why You Should Like the PATRIOT Act,” 146.

\textsuperscript{131} Ibid., 150.

\textsuperscript{132} Ibid., 154.
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change numbers and accounts necessitated reform according to proponents. Moreover, several aspects of the PATRIOT Act expanded the third party doctrine.

In addition to the initial PATRIOT Act, other legislation altered surveillance law. In 2004, the Intelligence Reform and Terrorist Prevention Act extended FISA, instantiating a “lone wolf” provision that allowed suspects thought to be planning terrorist attacks to be considered “agents of a foreign power” for the purposes of obtaining a FISC warrant. The basic tenets of the PATRIOT Act and reformed FISA framework were reauthorized via the PATRIOT Act II of 2003, the PATRIOT Improvement and Reauthorization Act of 2005, and its renewal in 2006. Three provisions of the PATRIOT Act were once again renewed in 2010. On top of this legislation, Attorney General Ashcroft introduced new AG Guidelines in 2002 to expand the domestic surveillance capacity of the FBI. These powers were further extended in 2008. As Raskoff explains, “The most notable change the guidelines ushered in was the authorization of FBI agents to engage in proactive intelligence gathering in a manner not limited to investigation in a narrow sense, with an eye to providing critical information needed for broader analytic and intelligence purposes.” There is no doubt that these reforms lifted legal barriers and restrictions on surveillance, facilitating greater ease of collection for intelligence agencies. Taken together, the thrust of these changes was to increasingly introduce the logic of open ended, preemptive foreign intelligence surveillance into domestic surveillance.

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133 Yoo, “War By Other Means,” 79.
135 Raskoff, “Domesticating Intelligence,” 599.
While only one senator, Russ Feingold, voted against the initial PATRIOT Act, it eventually proved to be a highly controversial piece of legislation. Civil liberties organizations widely condemned its powers. For instance, the broad definition of “domestic terrorism” found in the PATRIOT Act raised the possibility that any foreign link held by an individual could be invoked to justify the use of permissive FISA warrants in investigations of political activists. According to opponents, ambiguous rules made abuses more likely. As one activist put it, “because now we have the capability of gathering an extraordinary amount of information and holding onto it and sharing it, through the internet and through other means, we really have this 1970s problem amped up on steroids, twenty-first-century-style.” This risked a chilling effect on free speech and a self-censorship culture. In addition, loose surveillance laws could spillover, corrupting other areas of the legal system. For instance, the PATRIOT Act allowed FISA warrants into criminal proceedings, challenging domestic legal safeguards. As a 2002 FISC ruling by Judge Kollar-Kotelly confirmed, prosecutors in criminal investigations exploited lax FISA standards to gather information unrelated to terrorism or security. Perhaps most insidiously, notes Cole, “many of the Patriot Act’s

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most controversial provisions involve investigative powers that are by definition secret, making it literally impossible for abuses to be uncovered.”

However, despite the controversy, the PATRIOT Act was a legitimately enacted law. The U.S. Congress publically and democratically adopted it. It did not provide the state with limitless power. It did not demonize ethnic or religious minorities, nor did it strip American citizens of their existing constitutional rights. Rather, building on previous precedent, the PATRIOT Act exploited the long-standing third party exception to privacy rights, expanded the definition of foreign intelligence to include terrorists, and made new technologies easier to surveil. In doing so, it arguably overreached, but it did not fundamentally alter the existing legal paradigm governing intelligence surveillance. The PATRIOT Act was clearly ill advised from a civil liberties standpoint, but unlike past approaches to abusive surveillance, it did not suspend rights and usher in a state of exception, nor was it an act of covert illegality. Its content reflected the foreign/domestic dualism and weak restrictions on certain forms of surveillance that already constituted the surveillance regime.

5.6.2 The “Terrorist Surveillance Program”

In addition to the PATRIOT Act, the Bush administration instituted warrantless surveillance under the so-called “Terrorist Surveillance Program” (TSP). This program

141 Cole, Justice At War, 67.
142 The terminology of the TSP was invented by the Bush administration, undoubtedly to draw attention to the threat of terrorism. New York Times reporters Eric Lichtblau and James Risen broke the story in 2005. It was but one of several domestic operations. Along with still undisclosed “Other Intelligence Activities,” it has been re-titled the President’s Surveillance Program or PSP in the process of Inspectors General review and Congressional investigation (Offices of the Inspectors General of the Department of Defense, Department of Justice, Central Intelligence Agency, National Security Agency, and Office of the Director of National Intelligence, Unclassified Report on the President’s Surveillance Program, July 10, 2009, http://www.fas.org/irp/eprint/psp.pdf, 10). According to Aid, the NSA runs 10-12
mandated the NSA, usually confined solely to foreign intelligence gathering, to collect information on Americans suspected of foreign terrorist ties without obtaining a FISA warrant. Under the new rules, only one party to a communication was required to be a non-U.S. person.¹⁴³ Targets of the program could be chosen by the “operational workforce” and approved by shift supervisors.¹⁴⁴ To facilitate this surveillance, the NSA was authorized by the administration to enter the “trapdoors” in the American telecommunications switching system, providing potential access to all domestic communication.¹⁴⁵ Like SHAMROCK years before, this required extensive cooperation from private telecommunications firms, who own the fiber optic cables through which the vast majority of communications travel. As AT&T technician Mark Klein revealed, the NSA established a secret room at the company’s San Francisco facility. Communications traffic was “split,” with one signal travelling to the room. Latching on to this “peering point,” a hub through which a variety of regional communications passed, “meant that many purely domestic calls were likely to get caught in the snare.”¹⁴⁶ Other aspects of the program also engaged domestic communications. For instance, it solicited millions of Call Detail Records from telecom companies AT&T, BellSouth, Verizon, and Quest, only the latter of whom refused to cooperate, in order to search for calling patterns.¹⁴⁷

¹⁴⁴ Wong, “Recent Developments,” 519.
¹⁴⁶ Landau, Surveillance or Security, 90.
¹⁴⁷ Ibid., 88-89.
There have doubtlessly been strong echoes of both exception and covertness in the conduct of the TSP. Unlike the PATRIOT Act, the program was a carefully guarded secret. This was the case for both tactical and political reasons. Concerning the latter, it clearly violated FISA restrictions and would be cause for scandal once revealed. However, despite the political risks associated with the TSP, there is evidence that at least some key members of the Bush administration thought it legal. Similar to arguments posited about torture and due process rights, administration lawyers concocted legal rationalizations for warrantless spying that suggested the practice was perfectly legitimate. No less so than other areas of highly questionable security practice, constructing this legal rationale required convoluted argument.

The most extraordinary dimension of the Bush administration’s position was its assertion that FISA legislation was trumped by the President’s Commander in Chief entitlements in war, supplemented by the Authorization for Use of Military Force (AUMF) that was enacted by Congress in the wake of 9/11. Moreover, it insisted, the Fourth Amendment requirement of reasonableness did not infer a warrant, only the belief, unvetted by a court, that surveillance was targeted in some dimension at a foreign person or agent in the interests of national security.

While these arguments were first publically promulgated after the TSP had been publicized, the underlying concepts had been incubating for years. According to the “war

148 Alberto R. Gonzales, “Intercepting Al Qaeda: A Lawful and Necessary Tool for Protecting America,” Georgetown University Law Center, Washington, D.C., January 24, 2006, 6, http://www.law.georgetown.edu/news/documents/Gonzalespeech-1.pdf; Wong, “Recent Developments,” 522. According to the Offices of the Inspectors General report, this argument was first systematically articulated in a still unavailable November 2, 2001 memo, written by John Yoo after the program had already been initiated. It is unknown how Yoo came to have apparently exclusive control of drafting OLC’s initial opinions on the TSP or why he was the only OLC attorney “read into” the program between 2001 and 2003, precluding the standard process of peer review (Offices of the Inspectors General, “Unclassified Report,” 14-18). Despite being tasked with ensuring the legality of surveillance, the NSA’s Office of General Counsel was also excluded from access to the OLC’s legal memos (Aid, The Secret Sentry, 289).
paradigm,” the 9/11 attacks had been an act of war, thereby activating the President’s Article II constitutional powers. This war was fundamentally transnational, traversing the borders of the United States. As stated in a striking 2001 Office of Legal Counsel memorandum by John Yoo and Robert Delahunty, the President was fully permitted to use all necessary force to defend the country in war against both foreign and domestic adversaries. The Constitution, they argued, allowed the President to define emergency and the appropriate level of force to be deployed\textsuperscript{149}: “Indeed, we do not believe that the Constitution articulates specific factors that the President must follow in determining whether an attack has occurred, and what response to take.”\textsuperscript{150} Appropriate military actions in the face of war included “making arrests, seizing documents or other property, searching persons or places or keeping them under surveillance, intercepting electronic or wireless communications, setting up roadblocks, interviewing witnesses, and searching for suspects.”\textsuperscript{151} Following the threat, such actions could extend across national boundaries:

While, no doubt, these terrorists pose a direct military threat to the national security, their methods of infiltration and their surprise attacks on civilian and governmental facilities make it difficult to identify any front line. Unfortunately, the terrorist attacks of September 11 have created a situation in which the battlefield has occurred, and may occur, at dispersed locations and intervals within the American homeland itself. As a result, efforts to fight terrorism may require not only the usual wartime regulations of domestic affairs, but also military actions that have normally occurred abroad.\textsuperscript{152}

Because the Fourth Amendment had never been applied to military actions overseas, it could not apply to domestic military actions, according to Yoo and Delahunty:

\textsuperscript{150} Ibid., 13.
\textsuperscript{151} Ibid., 18.
\textsuperscript{152} Ibid., 25.
Both political leaders and military commanders would be severely constrained if they were required to assess the "reasonableness" of any military operation beforehand, and the effectiveness of our forces would be drastically impaired. To apply the Fourth Amendment to overseas military operations would represent an extreme over-judicialization of warfare that would interfere with military effectiveness and the President's constitutional duty to prosecute a war successfully. Our forces must be free to "seize" enemy personnel or "search" enemy quarters, papers and messages without having to show "probable cause" before a neutral magistrate, and even without having to demonstrate that their actions were constitutionally "reasonable." They must be free to use any means necessary to defeat the enemy's forces, even if their efforts might cause collateral damage to United States persons. Although their conduct might be governed by the laws of war, including laws for the protection of noncombatants, the Fourth Amendment would no more apply than if those operations occurred in a foreign theater of war.153

In other words, in a state of war, the President should be free to use all necessary means to defend the nation. When the enemy is present domestically, the use of military force and associated military tasks including warrantless surveillance usually applied in foreign contexts become perfectly legal.

While considered a patently unconstitutional position by many, the Department of Justice echoed this logic exactly in publicly defending the TSP once exposed, arguing that in skipping the FISC process, the President simply authorized the use of signals intelligence in war as permitted and indeed demanded by the Constitution.154 Deterrence and prevention of terrorism, it claimed, required different strategies than post-hoc investigations around which the criminal law is conventionally based. Measures like the TSP were necessary, insisted Attorney General Gonzales, because:

Consistent with the wartime intelligence nature of this program, the optimal way to achieve the necessary speed and agility is to leave the decisions about particular intercepts to the judgment of professional intelligence officers, based on the best available intelligence information. They can make that call quickly. If, however,

those same intelligence officers had to navigate through the FISA process for each of these intercepts, that would necessarily introduce a significant factor of DELAY, and there would be critical holes in our early warning system.\textsuperscript{155} That the FISC actually impeded intelligence gathering, thus requiring it be avoided for practical reasons, is far from obvious. FISC proceedings are “non-adversarial and entirely ex-parte,” meaning Department of Justice lawyers have exclusive access to judges.\textsuperscript{156} The executive may bring cases to the FISC up to 72 hours after surveillance has already been undertaken if necessary. FISC judges are forbidden from scrutinizing the facts presented by the government. There is no appeal procedure for targets, only for the state. Finally, the FISC has hardly rejected any applications.\textsuperscript{157} As of 2006, only 5 out of approximately 19,000 requests had been turned down.\textsuperscript{158} Risen suggests the FISC could even be a useful instrumental tool for the administration, with FISA warrant applications being used to cover up prior and ongoing NSA surveillance.\textsuperscript{159} Indeed, “The President’s completely warrantless program thus apparently circumvents a system that had already accorded the executive a virtual carte blanche when it comes to the gathering of foreign intelligence through wiretapping.”\textsuperscript{160}

The aforementioned legal arguments in favour of warrantless surveillance were contentious within the Bush administration, highlighting their incredibly weak legal foundations. Even highly conservative lawyers involved in the TSP authorization process were extremely wary of the program. Insider critic and former head of the OLC Jack Goldsmith, who withdrew several of Yoo’s memos, sums up his view: “top officials in

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\textsuperscript{156} Bedan, “Echelon’s Effect,” 432.  
\textsuperscript{157} Ibid., 432; Breglio, “Leaving FISA Behind,” 189.  
\textsuperscript{159} Risen, \textit{State of War}, 54.  
\textsuperscript{160} Michaelson and Shershow, “Is Nothing Secret?,” 130.
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the administration dealt with FISA the way they dealt with other laws they didn’t like: they blew through them in secret based on flimsy legal opinions that they guarded closely so no one could question the legal basis of their operations.\textsuperscript{161}

The internal conflict exploded in 2004 when the White House demanded Attorney General reauthorization of the TSP. Acting Attorney General James Comey declined to overrule then medically incapacitated Attorney General John Ashcroft’s reluctance to do so. This prompted a now infamous hospital showdown between Comey, Goldsmith, Associate Deputy Attorney General Patrick Philbin, and FBI Director Robert Mueller on one side and senior White House officials Andrew Card and Alberto Gonzales on the other. Determined to have the program legally rubber stamped, the latter rushed to the seriously ill Ashcroft’s bedside in a last ditch attempt to secure his sign off. They failed. Nonetheless, the program was renewed anyways without the standard practice of DOJ authorization. The TSP was eventually moderately modified after multiple threats of resignation by dissenting administration officials. The activities covered by the TSP were eventually brought under the FISC process by 2007.\textsuperscript{162}

If the legal rationalization for the TSP had stopped with Article II arguments, it would be fair to conclude that the Bush administration had authorized the program on the basis of a simple assertion of the executive’s sovereign power to declare and act on a state of exception (in this case, exception defined as war). This decisionistic theme echoed strongly throughout several related legal memoranda, especially those written by John Yoo. Yet, executive power arguments were not the sole basis for the plausible legality of the warrantless surveillance program. The thrust of a great deal of the

\textsuperscript{162} Offices of the Inspectors General, “Unclassified Report,” 30.
administration’s position was to redefine foreign surveillance as a communication involving at least one suspected foreign terrorist threat. There is some precedent for this position. For instance, FISA had in fact permitted warrantless wiretapping of radio communication when only one party was outside the United States, as long as the exemption was not exploited to intentionally target a U.S. person. The TSP, as characterized by the Bush administration, extended this exemption to new technologies.\textsuperscript{163}

Despite the wildly permissive OLC memos, both the administration and the NSA insisted that they never targeted solely domestic communications, that they continued to use minimization procedures to avoid such collection, and that the program was focused and circumscribed. The highly secretive nature of surveillance activities makes it extremely difficult to gage the truth of these assertions, but it is fair to suggest that the TSP was no Huston Plan, SHAMROCK, or COINTELPRO. Like the PATRIOT Act, it tied its substantive legitimacy not simply to Presidential prerogative, but to the preexisting normative acceptability of foreign surveillance, just in an expanded form. It is likely that many of the communications it allegedly targeted could have easily obtained FISC authorization had the administration and its lawyers been less ideologically opposed to FISA.

Congress did in fact legislate many aspects of the TSP several years after it went public. As revelations forced the surveillance debate into the public eye, Congress found itself tasked with addressing the dilemmas raised by these emerging trends. They could embrace the Bush paradigm or defend the traditions of the FISA. Eventually, they passed the Protect America Act of 2007, which temporarily legitimated warrantless wiretapping

\textsuperscript{163} Landau, \textit{Surveillance or Security}, 87.
when one party to a communication was foreign. The Act’s expiration prompted an
extended debate on the question of retroactive immunity for telecommunications firms
that had provided private information about their customers to the NSA without a
warrant, throughout which the Bush administration insisted that removing the threat of
prosecution was key to private sector intelligence gathering cooperation.\footnote{164}

In the end, Congress bowed to pressure, passing the FISA Amendments Act
(FAA) in July 2008, which protected third parties working on behalf of the state from
lawsuits. Moreover, wiretaps of communications involving one party outside the United
States would no longer be subject to individual FISA applications.\footnote{165} “This legislation
gave the government even broader authority to intercept international communications
than did the provisions of the Presidential Authorizations governing the activities that the
President acknowledged in December 2005 as the Terrorist Surveillance Program,” notes
the PSP IG Group.\footnote{166} As former Democratic Senator Russ Feingold argued at the time,
the changes to FISA:

do not just authorize the unfettered surveillance of people outside the United
States communicating with each other. They also permit the government to
acquire those foreigners’ communications with Americans inside the United
States, regardless of whether anyone involved in the communication is under any
suspicion of wrongdoing. There is no requirement that the foreign targets of this
surveillance be terrorists, spies or other types of criminals. The only requirements
are that the foreigners are outside the country, and that the purpose is to obtain
foreign intelligence information, a term that has an extremely broad definition. No
court reviews these targets individually. Only the executive branch decides who
fits these criteria. The result is that many law-abiding Americans who
communicate with completely innocent people overseas will be swept up in this
new form of surveillance, with virtually no judicial involvement.\footnote{167}

\footnote{164} J.M. McConnell and Michael Mukasey, “Letter to Chairman Reyes, House Permanent Select
Committee on Intelligence,” February 28, 2008, www.lifeandliberty.gov/docs/ag-dni-letter-to-chairman-
reyes.pdf.
\footnote{165} Landau, \textit{Surveillance or Security}, 93.
\footnote{166} Offices of the Inspectors General, “Unclassified Report,” 35.
\footnote{167} Russ Feingold, “Statement of U.S. Senator Russ Feingold: In Opposition to the Flawed FISA
Many other politicians echoed similar sentiments, although Congress declined to cut off funding for the NSA program. Interestingly, however, the FAA improved protections for U.S. persons abroad, who became subject to the FISA warrant process, once again highlighting the critical role of the foreign/domestic dichotomy in conceptualizations of legitimate surveillance.

While rejecting the outlandish legal executive power and war paradigm arguments of the OLC lawyers, Congress delivered at least partially similar policy outcomes. Not much changed on the surveillance front with the election of Barack Obama. To the great disappointment of many of its supports, the Obama administration has invoked sovereign immunity claims and the “State Secrets Privilege” to block investigations of and challenges to domestic surveillance. Lawsuits have alleged that an “illegal and unconstitutional program of dragnet communications surveillance…continues to this day.” Considering legislative acquiescence to some aspects of warrantless wiretapping, this would not be particularly surprising.

At first glance, the TSP appears to represent a combination of an exceptional suspension of the law and a revival of the lawless covert rule evasion identified by the Church Committee. Yet, closer scrutiny reveals that there was, perhaps, more smoke than fire. In contrast to the Cold War era, the post-9/11 NSA was extremely reluctant to cross any legal lines without official authorization. This authorization was undoubtedly framed within the language of decisionistic executive prerogative. However, the surveillance

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168 Yoo, War By Other Means, 126.
practices that were ultimately permitted were far less radical than this language suggests. At the end of the day, the TSP channeled the predominant structure of constraint, including the dualistic approach to foreign and domestic surveillance and the ambiguous line between the two. The TSP was more an assault on the constitutional separation of powers than a fundamental rejection of the underlying dichotomy at the heart of the surveillance regime.

5.6.3 New Technologies and Sources of Surveillance

The third change in the post-9/11 surveillance landscape comes in the form of technological developments. While policy makers have conceptually expanded the definition of foreign in situating questionable programs within the foreign/domestic dichotomy, this strategic and rhetorical move has been accompanied by objective changes. Today, new technologies and new sources of intelligence create the potential for extensive accidental and inadvertent domestic surveillance. The degree to which this is occurring is hard to say. What is clear is that these developments strain the surveillance regime. The role of legality in shaping surveillance outcomes is thus at least partially contingent on the “good faith” application of constraining norms to the use of these new technologies and sources. To gage whether this is happening, the line between legal incidental and intentionally unlawful surveillance requires close examination.

While the legal arguments of the Bush team have been severely criticized, both supporters and detractors acknowledge that new forms of networked technology have created a very different context from the one in which FISA was originally designed.\(^{171}\) It is now much more difficult than in 1978 to distinguish foreign from domestic

\(^{171}\) Sloan, “ECHELON,” 1502.
communications. The anonymity of the Internet, the ability to mask one’s identity, makes distinguishing U.S. and non-U.S. persons difficult.\textsuperscript{172} The location of the physical interception of communications does not clarify whether a communication is protected or not. With the global shift to fiber optic based communications, 80\% of international traffic travels on sub-sea cables routed through a few dozen major switching stations, many of which are on American soil.\textsuperscript{173} Foreign communications “transit traffic” often passes through these U.S. servers and switches.\textsuperscript{174} Computers seeking the most uncongested networks randomly route transmissions.\textsuperscript{175} Foreign and domestic communications may, moreover, travel through the same media concurrently. Data packets can be broken up and sent through different channels, compounding routing and switching ambiguity.\textsuperscript{176} Therefore, foreign communications physically pass through the United States and vice versa. As Susan Landau explains the situation:

> [C]onnections between Europe and Asia, between South America and Europe, and even between South America and South America, or Asia and Asia, went through the United States. There are any number of reasons for this geographic oddity. One was that U.S. providers underbid overpriced regional carriers…A second cause was politics: sometimes communications could not travel between two nations, but could go through a third party (…Taiwan and China). A third reason was technology. The United States is home to many of the world’s email servers (Yahoo Mail, Hotmail, Gmail). Thus email between two people in Quetta and Kabul…may travel via server in Oregon. If any of those communications had gone by satellite, the NSA would simply have been able to pluck the signal out of the air.\textsuperscript{177}

The growth of fiber optics thus presents an inherent technological challenge to maintaining the traditional foreign/domestic model. Although the FAA allowed

\begin{footnotes}
\item \textsuperscript{172} Ibid., 1508.
\item \textsuperscript{173} James Bamford, \textit{The Shadow Factory: The Ultra-Secret NSA from 9/11 to the Eavesdropping on America} (New York: Doubleday, 2008), 175.
\item \textsuperscript{174} Risen, \textit{State of War}, 49.
\item \textsuperscript{175} Ibid., 50; Diffie and Landau, \textit{Privacy on the Line}, 302.
\item \textsuperscript{176} Bamford, \textit{The Shadow Factory}, 161.
\item \textsuperscript{177} Landau, \textit{Surveillance or Security}, 87.
\end{footnotes}
warrantless access to purely foreign communications stored on U.S. servers, isolating such communications is not always simple.

This challenge is seen in developments in intelligence gathering technologies and capacities. Because wired fiber optic hardware cannot be selectively monitored in the same way as airborne radio traffic, intelligence agencies must often latch on to entire networks. This is what the TSP authorized. The NSA literally put clamps on the world’s busiest cables, providing unfettered access to trillions of communications. Splitters installed on peering links at Internet exchange points, the hubs shared by multiple telecom firms, allowed data to be copied directly to the NSA. Some domestic collection is inevitable in this context.

Other, older SIGINT interception technologies also continue to risk a vacuum cleaner approach to intelligence. The massive joint U.S., British, Canadian, Australian, and New Zealand surveillance initiative, codenamed ECHELON, emerged out of the 1947 UKUSA agreement. It has major stations around the world, notably Menwith Hill England—“A space-age base, standing out cinematically against the sweep and sky of the Yorkshire countryside.” Europeans have suspected its use in economic espionage, prompting investigations by the European Parliament, while civil rights groups fear its role in monitoring American citizens. The massive capacity of ECHELON to swallow and decrypt data means it could incidentally suck up a great deal of world communications, including protected domestic communications.

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178 Bamford, The Shadow Factory, 186.
FISA prohibitions are further strained by intelligence sharing and outsourcing. The “five eyes” agreement created a framework for intelligence exchange, whereby one agency could volunteer information on another’s nationals, as long as it was not specifically requested, thus contributing to incidental collection. Corporate partnerships have become even more significant. The NSA employs a vast array of private contractors to develop and manage surveillance technologies. With few restrictions imposed, these partnerships are a key feature of contemporary surveillance practice. Corporations have amassed massive computer data banks on their customers. Recognizing this, the 1994 Communications Assistance for Law Enforcement Act (CALEA), required digital telephone networks to have built-in wiretapping capabilities. Private telecommunications companies own the world’s fiber optic cables, requiring their assistance as in the case of the TSP. CALEA was extended to cover broadband Internet and VoIP technology in 2005. Cell phone companies can trace the location, movement, and interaction of all handsets, creating the potential for a vast amount of private information to be gathered without even engaging in surveillance per se. While the third party doctrine itself is nothing new, the volume of information held by third parties is unprecedented. These partnerships with arms length third parties risk increasing the likelihood of unauthorized interception of private communications, particularly as new technologies outpace appropriate regulations.

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New post-9/11 approaches to cooperation among U.S. law enforcement and intelligence agencies also strain the surveillance regime. Fusion Centers are multi-jurisdictional hubs that collect information on suspected security threats from federal and local authorities. As of June 2010, there were at least 72 centers across the United States. The FBI’s Joint Terrorism Task Force similarly coordinates intelligence. In this context, the distinct mandates of military, intelligence, and law enforcement agencies are increasingly unclear. Even Homeland Security Secretary Janet Napolitano has been confused—stating in 2009 that “that fusion centers were not intended to have a military presence, and that she was not aware of ones that did,” even though the ACLU had extensive documentation of such military presence at many Fusion Centers. Fusion Centers have produced numerous problematic analyses, which appear to have little to do with genuine terrorism threats. In one example cited by the ACLU, “A Texas fusion center released an intelligence bulletin that described a purported conspiracy between Muslim civil rights organizations, lobbying groups, the anti-war movement, a former U.S. Congresswoman, the U.S. Treasury Department and hip hop bands to spread Sharia law in the U.S.” In 2010, the DHS moved to implement more standardized guidelines to regulate Fusion Centers and protect citizens’ privacy.

Targeted intelligence is also more challenging in the current technological era. Al Qaeda mobilizes through a diffuse electronic network, constantly shifting channels of communication. New and extremely complex VoIP technologies make wiretapping the

188 American Civil Liberties Union, “More About Fusion Centers.”
right person at the right time and location almost impossible. Because of this, intelligence agencies have turned to “data mining.” Data mining uses computers to scan and identify patterns in communications. So called “dictionary computers” search names, keywords, addresses and telephone numbers. This type of surveillance “tends to be divorced from the identity and location of the parties to a communication. There is no known wire linked to a known person with known characteristics.”

There have been several controversies surrounding data mining programs over the years. In the late 1990s, the Information Dominance Center at Fort Belvoir, Virginia developed a program to detect Chinese espionage by analyzing patterns in news stories, web pages, cable traffic, and intelligence reports. As a result, analysts increasingly harvested vast amounts of information about American citizens. This prompted concerns about DOD Regulation 5240.1-R, which required “DoD intelligence components to carry out their authorized functions while ensuring their activities that affect U.S. persons are carried out in a manner that protects the constitutional rights and privacy of such persons.” Nonetheless, the emergent technology was put to work in the service of Able Danger, a pre-9/11 Special Operations mission to detect and dismantle Al Qaeda. This time the legal critiques grew stronger. DOD ordered the analysts to delete all data on protected U.S. persons or, as one lawyer put it, “you guys will go to jail.” The data was destroyed.

189 Diffie and Landau, Privacy on the Line, 295-301.
190 Sloan, “ECHELON,” 1481.
193 Ibid., 110.
194 Ibid., 130.
The macabre sounding Total Information Awareness (TIA) program designed by the Defense Advanced Research Projects Agency (DARPA) followed Able Danger. Headed by Iran Contra conspirator John Poindexter, its slogan ominously declared that “science is power” along with a graphic logo of an all-seeing eye atop a pyramid. Derided by civil liberties experts, TIA eventually caught the eye of conservative New York Times columnist William Saffire, who publicly denounced it. Congress subsequently quashed TIA’s budget. However, the program did not disappear—it was eventually quietly transferred to the NSA.

The FBI had its own unfortunately titled Carnivore system, aimed at intercepting packets of Internet communication fitting pre-determined patterns. Despite the huge costs involved in its production, Carnivore was rarely used and abandoned in favour of commercial filtering soon after 9/11. In 2009, Wired.com documented a massive FBI National Security Branch Analysis Center (NSAC), which collected more than 1.5 billion pieces of government and private sector information about Americans including hotel, car rental, credit card, financial, and travel records.

These data mining programs are but a few examples of the numerous projects—some classified, some public, run by the alphabet soup of security agencies and affiliated private contractors. Reminiscent of the vacuum cleaner identified by the Church Committee, such methods put mass surveillance before specific suspicions in an attempt to find the proverbial needle in the haystack, contrary to the traditional probable cause model whereby specific suspicions must justify intrusions of privacy. The prohibition on

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195 Yoo, War By Other Means, 110.
196 Diffie and Landau, Privacy on the Line, 269-270.
intentional targeting of U.S. persons is weakened by these new approaches. Indeed, the whole concept of minimization rests on the assumption of targeted intelligence.

Unlike torture practices, detention decisions, or even standard wiretapping procedures, it is very difficult to gage the role of legal constraint in shaping surveillance practice in this context. Most of the relevant technologies were invented to increase international flows and transit efficiency, not sort communications according to their national and individual origin. Just because technology allows massive domestic surveillance via the same media as foreign surveillance does not necessarily mean that it is being abused. However, the secrecy surrounding surveillance programs means we can only really speculate.

Often such speculation comes down to assertions about good faith. For instance, John Yoo argues that abuses of intelligence in America are less likely than in the past, insisting major cultural changes in political and intelligence circles have occurred:

At the risk of seeming Pollyannaish, it is worth noting that our career government officials are, by and large, keenly respectful of law and the bill of rights—notwithstanding bad-cop stereotypes that stir media excitement. It is hard to imagine any President ordering the surveillance of political opponents today without numerous government officials reporting it to the press and to Congress.

Richard Posner agrees that intelligence is highly professional, less susceptible to dirty dealings than critics allege. “One reason people don’t much mind having their bodies examined by doctors is that they know that doctors’ interest in bodies is professional rather than prurient; and we can hope that the same is true of intelligence professionals,”

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200 Yoo, War By Other Means, 75.
he opines. Moreover, argue defenders, computers do the majority of surveillance scanning, but lack the agency for political abuse. Posner even makes the rather striking claim that as computers are not sentient beings, they cannot invade privacy.

There may be some validity to these points, but there is also emerging evidence of the abuse of surveillance intelligence. With the explosion of surveillance programs, the rules governing surveillance have become increasingly unclear or inadequate in the face of new technologies. As Landau notes, “when surveillance mechanisms are easy to turn on, the chance of misuse is high.” For instance, it was revealed that John Bolton, then UN Ambassador, requested and received multiple NSA transcripts on American citizens working for the government in 2004-2005. He could hardly have been hunting Al Qaeda. Former SIGINT operators have reported widespread eavesdropping on innocent Americans abroad in contravention of USSID 18 standards. Adrienne Kinne, an Arabic linguist working on Middle East satellite cuts reported that “we could listen to all the NGOs, humanitarian aid organizations, and frigging journalists in the area—continue to even after they were identified and we knew who they were and that they weren’t terrorists or terrorists affiliated.”

Others have claimed the personal conversations of Americans in the Baghdad Green Zone were constantly monitored. In April 2009, The New York Times revealed that the NSA had engaged in unintentional, but systematic “overcollection” of Americans’ data. “[T]he issue appears focused in part on technical

202 Yoo, War By Other Means, 111.
204 Landau, Surveillance or Security, 256.
207 Ibid., 133.
problems in the N.S.A.’s ability at times to distinguish between communications inside the United States and those overseas as it uses its access to American telecommunications companies’ fiber-optic lines and its own spy satellites to intercept millions of calls and e-mail messages.”

NGOs like the American Civil Liberties Union, The Electronic Frontier Foundation, and the Electronic Privacy Information Center have expressed concern that domestic political spying is on the rise. The Justice Department’s inspector general found thousands of potentially illegal National Security Letter requests. In 2009, it was revealed that the military was engaged in infiltration of anti-war groups in the Pacific Northwest in defiance of restrictions on such activity.

At a more general level, critics are concerned with the potential for the emergence of a surveillance society. In a report replete with a “Surveillance Society Clock” reminiscent of the “Doomsday Clock” of the Bulletin of Atomic Scientists, the ACLU cites numerous evolving invasions of privacy from video monitoring to biometrics to DNA banks. It ominously warns:

The false security of a surveillance society threatens to turn our society into a place where individuals are constantly susceptible to being trapped by data errors or misinterpretations, illegal use of information by rogue government workers, abuses by political leaders—or perhaps most insidiously expanded legal uses of informational for all sorts of new purposes.

While the dystopian rhetoric is often sensational, the campaign highlights the fear held by many Americans that increased surveillance is not really about security, but more malevolent Orwellian motives. Such concerns go beyond intelligence agencies, extending to policing, CCTV, consumer databases, and medical records.\textsuperscript{212} A growing field of surveillance studies has developed to analyze these wider trends.\textsuperscript{213} The concept of Bentham’s panoptical prison, popularized by Foucault, where there is no escape from eye of the central watchtower, is an oft-cited metaphor for this growing surveillance state.

It is impossible to trace in detail the exact impact of legal considerations on the adoption and use of emergent surveillance technologies. The field is enormous and highly secretive. There is little evidence that policy makers have systemically exploited technology to evade legal restrictions on domestic surveillance. American intelligence agencies have expressed their intent to respect the law, regardless of their expanding technological power. Yet, there are enough examples of incidental collection of domestic communications to be of concern. Legal lines are fuzzy and evolving. What is clear is that privacy advocates will have to carefully monitor and even work with authorities to adapt legal norms to this rapidly changing technological environment.

\subsection*{5.7 Surveillance Efficacy in the GWOT}

There is no doubt that the distinction between surveillance for the purposes of criminal investigation/prosecution and intelligence gathering/prevention is necessary and appropriate. Moreover, the Bush administration’s insistence that the PATRIOT Act reforms and NSA program have improved intelligence collection capacity is intuitively
true. The fewer legal controls there are on the acquisition of information, the easier the job of intelligence agencies. However, ease and quantity of collection do not necessarily mean greater quality of intelligence. While the effectiveness of intelligence practices is not the subject of this dissertation, it is interesting to note that the growth of intelligence surveillance has not clearly improved security.

Despite claims to the contrary, it is not apparent that the expansive evolution of SIGINT or relaxed rules regarding surveillance increases public security. The efficacy of sweeping signals intelligence is often exaggerated. First, the problem of “noise” or too much information has been a long cited cause of intelligence failure from Pearl Harbor to 9/11. Often, good intelligence is lost in data overload. Relevant pieces of intelligence are patched together only after the fact. The decline of targeted surveillance in favour of the mass volumes of information associated with data mining risks seriously compounding this obstacle. As Matthew Aid explains, the NSA is struggling with an “ever increasing backlog” and a terrible “gold to garbage” ratio with only one percent of collected data actually generating reports. It is true that new approaches to “network analysis” clearly point to the inadequacy of traditional intelligence assumptions based on “secrecy, compartmentalization, and command-and-control structures.” Change in traditional security paradigms is needed, but “smart targeted” security is preferable to unfocused broad surveillance powers and “blanket security” measures.

The value of SIGINT collection has, moreover, been inflated relative to analysis. Signals intelligence is often incapable of deciphering chatter. Communication may be

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214 Aid, The Secret Sentry, 304.
encrypted. Surveillance targets tend to speak in code. They also speak in languages like Arabic, Urdu, Farsi, Pashto, and Dari in which Western intelligence agencies lack expertise. The NSA’s translation capacity prior to 9/11 was poor. “Even if the system could pick up and process all the critical communications, most of it would go unread for days or weeks, if at all,” notes James Bamford. It continues to lag, a problem compounded by the difficulty faced by first generation immigrant linguists in gaining security clearance. The major point is that SIGINT is only helpful in so far as its contents can be accurately analyzed, its meaning understood. Patrick Keefe sums up the problem:

This is the Achilles’ heel of Echelon and the whole leviathan of global electronic eavesdropping: conversation is such a mutable, ambiguous thing, so laden with deception and doublespeak, flattery and obfuscation, that one can only see the world by listening in only as through a glass darkly...Even assuming...that a conversation is intercepted, punctually translated, understood at the level of literal meaning, and disseminated to the appropriate parties—sifting through conversations for indications of future events seems as arbitrary and uncertain as sifting through tea leaves.

Therefore, Whitfield Diffie and Susan Landau suggest traffic analysis that establishes networks between known targets, rather than data mining content analysis should be emphasized. Indeed, traffic mapping helped investigators discover the location of Khalid Sheikh Mohammed. Perhaps most important is the point that while communication between foreign intelligence and law enforcement agencies is necessary and desirable, relaxing legal barriers does not guarantee better cooperation between them, nor have such barriers

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216 Diffie and Landau, Privacy on the Line, 309.
218 Aid, The Secret Sentry, 306.
219 Keefe, Chatter, 215.
220 Diffie and Landau, Privacy on the Line, 309.
221 Landau, Surveillance or Security, 98.
always been culpable for past errors. Kate Martin argues it was not the “wall” or legal restrictions on surveillance that contributed to 9/11, but bureaucratic bungling that prevented the CIA from communicating effectively with the FBI and the latter’s subsequent slow follow up on leads.\textsuperscript{222} For example, interagency rivalry and human error, not legal restrictions, preceded the failure of the CIA to tell the FBI that 9/11 hijackers Khalid al-Mihdhar and Nawaf al-Hamzi had traveled to America using real passports after a conspiratorial terrorist meeting in Kuala Lampur that had been monitored by the NSA.\textsuperscript{223} As one agent put it, “They didn’t want the bureau meddling in their business—that’s why they didn’t tell the FBI.”\textsuperscript{224} As the men were never put on any watch list, they were able to freely enter the United States. Throughout 2000, technological, not legal limitations prevented the NSA from pinpointing Mihdhar’s location in San Diego.\textsuperscript{225}

It is true that in critical months leading up to 9/11 that FBI and CIA agents failed to share relevant information that linked Mihdhar to the U.S.S. Cole attack because of perceived legal barriers to mixing intelligence and criminal investigations. This unfortunately slowed investigators, contributing to their inability to grasp the significance of Mihdhar and Hamzi’s presence in the United States until it was too late.\textsuperscript{226} However, as the 9/11 Commission put it:

It is now clear that everyone involved was confused about the rules governing the sharing and use of information gathered in intelligence channels. Because Mihdhar was being sought for his possible connection to or knowledge of the \textit{Cole} bombing, he could be investigated or tracked under the existing \textit{Cole} criminal case…And as NSA had approved the passage of its information to the

\begin{footnotes}
\item[222] Martin, “Domestic Intelligence,” 12.
\item[223] Bamford, \textit{The Shadow Factory}, 18-21.
\item[224] Ibid., 20.
\item[225] Aid, \textit{The Secret Sentry}, 212.
\end{footnotes}
criminal agent, he could have conducted a search using all available information.\textsuperscript{227}

It is also correct to note that FBI agents were unable to gain approval for a FISA warrant for 9/11 conspirator Zacarias Moussaoui in August 2001, despite the fact they believed he was a radical Islamist intent on hijacking airplanes, because they could not produce sufficient evidence to convince FBI headquarters that he was an agent of a foreign power.\textsuperscript{228} Once again, however, it appears the law was misinterpreted. As FBI agent and legal advisor Colleen Rowley reports, even after French intelligence provided more than adequate evidence of Moussaoui’s connections to jihadists linked to Osama Bin Laden, FBI headquarters not only ignored and failed to communicate relevant information, it actively undermined the warrant effort. Rowley blames FBI culture:

Why would an FBI agent(s) deliberately sabotage a case?…Our best real guess…is that, in most cases avoidance of all "unnecessary" actions/decisions by FBIHQ managers (and maybe to some extent field managers as well) has, in recent years, been seen as the safest FBI career course. Numerous high-ranking FBI officials who have made decisions or have taken actions which, in hindsight, turned out to be mistaken or just turned out badly (i.e. Ruby Ridge, Waco, etc.) have seen their careers plummet and end. This has in turn resulted in a climate of fear which has chilled aggressive FBI law enforcement action/decisions. In a large hierarchal bureaucracy such as the FBI, with the requirement for numerous superiors approvals/oversight, the premium on career-enhancement, and interjecting a chilling factor brought on by recent extreme public and congressional criticism/oversight, and I think you will see at least the makings of the most likely explanation.\textsuperscript{229}

It is not at all obvious that the law per se was to blame for the disastrous handling of the file.

Other organizational pathologies also hindered intelligence gathering. Bamford notes 68 different email systems were used by the NSA’s 38,000 employees prior to

\begin{footnotes}
\item[227] Ibid., 271.
\item[228] Ibid., 274.
\end{footnotes}
9/11.\textsuperscript{230} The obsessive culture of secrecy,\textsuperscript{231} what Matthew Aid and Cees Weibes call the “green door syndrome,”\textsuperscript{232} within the SIGINT community presents further obstacles to greater coordination. Other agencies, especially the FBI, continue to complain of lack of cooperation from the NSA.\textsuperscript{233} Ignoring or reforming FISA cannot solve such problems. According to the Inspectors General review of the PSP, lack of information sharing and analysis persisted even when legal checks were removed: “the highly compartmented nature of the PSP created obstacles for the FBI's process for handling program-derived information and understandably frustrated FBI agents responsible for investigating the information.”\textsuperscript{234} For the CIA, “the tight control over access to the PSP prevented some officers who could have made effective use of the program reporting from being read in…Officials also stated that much of the PSP reporting was vague or without context, which led analysts and targeting officers to rely more heavily on other information sources and analytic tools, which were more easily accessed and timely than the PSP.”\textsuperscript{235} Without proper training and guidance, warrantless surveillance was at best one tool of many. Indeed, “Most IC officials interviewed by the PSP IG Group had difficulty citing specific instances where PSP reporting had directly contributed to counterterrorism successes.”\textsuperscript{236} Bureaucratic politics, inertia, and secrecy are a running theme in intelligence failures. Once again, they are not about ease of collection, but the dynamics of institutional cultures.

\footnotesize{\begin{itemize}
\item Bamford, \textit{Body of Secrets}, 648.
\item Keefe, \textit{Chatter}, 237.
\item Aid, \textit{The Secret Sentry}, 302.
\item Ibid., 38.
\item Ibid., 40.
\end{itemize}}
Finally, some argue that the security rationales offered by the Bush administration were based on a narrow, terror-obsessed concept of threat and that preoccupation with the Global War on Terror detracted from NSA efforts to monitor key targets like the former Soviet Union, China, North Korea, Bosnia, and illicit trafficking. While vast resources have been poured into dragnet surveillance, the NSA is increasingly spread thin and often suffers staffing, morale, and equipment problems in the field. Moreover, Landau argues that the technological changes the government is introducing to monitor terrorists—standardized communications systems with backdoors to facilitate surveillance, reduces communication privacy and online security for everyone. “In enabling eavesdropping mechanisms in the very fabric of our lives, we are building tools to catch one set of enemies. Other antagonists may well be poised to turn these tools against us... Rather than increasing our security, we may well be imperiling it.” The question of the efficacy of mass surveillance therefore requires reflection on the meaning of threat, success, and failure.

Combating terrorism through good surveillance and preemption practices is certainly preferable to other methods that have been employed in the GWOT from invading other countries to torturing suspects. There is no doubt that greater ease of collection has been facilitated by post-9/11 policies. Surveillance, however, is not a panacea. Noise, problems of chatter analysis, bureaucratic politics, and threat conceptualization dynamics all make extensive surveillance a questionable tool.

5.8 Conclusion

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237 Aid, “Prometheus Embattled,” 998.
Americans have always been wary of unwarranted surveillance in the domestic political sphere. This concern is deeply entrenched in American law. However, the same reticence does not apply to foreign intelligence surveillance, which is considered normal, necessary, and legitimate. Reflecting this state of affairs, the history of American surveillance practice has been uneven. Authorities have been able to freely engage in military and foreign intelligence, and have institutionalized a massive intelligence bureaucracy to do so. However, criminal and domestic surveillance have either required a warrant or other maneuvers to get around legal restrictions. Regarding the latter, the Red Scares and World Wars were accompanied by a degree of surveillance exceptionalism as foreigners and alleged subversives were targeted for monitoring. As the depth, scope, and reach of such efforts expanded during the Cold War, their blatantly illegal nature required a turn to covertness. The Church Committee revealed the staggering extent of secret, illegal surveillance programs during this period. Along with the need to keep up with changing technologies, these revelations prompted additional laws and oversight reforms to regulate intelligence activity.

After 9/11, there was increasing demand for intelligence surveillance and a growing perception that existing rules contributed to intelligence failure. In order to expand surveillance capacity, authorities introduced legislative reforms like the PATRIOT Act and initiated secret programs like the TSP. While undoubtedly accompanied by the language of sovereign decisionism, I have suggested that these initiatives were not quite as exceptional as they may initially seem. Rather, they reproduced and expanded the dualistic dichotomy between foreign and domestic already entrenched at the heart of the surveillance regime. They exploited loopholes regarding
third party data. While considerably more ex post facto than in other areas of security practice, the strategy of plausible legality is evident in efforts to justify policies.

At the core of these arguments has been the expansion of the meaning of foreign, and hence legitimate targets for surveillance. This shift has been motivated by a strategic desire to evade legal restrictions, but it also embedded in a rapidly changing technological and intelligence source environment. These changes objectively require adaptations in the interpretation of existing law. Whether this erodes constraints depends, at least somewhat, on the degree of “good faith” that authorities bring to the exercise of intelligence power.

Have authorities succeeded in reformulating the structure of constraint to facilitate greater intrusions of privacy? I argued in previous chapters that plausible legality has enjoyed only moderate success in the cases of torture and due process rights. Regarding the former, the strategy has helped immunize policy makers and those that followed legal advice from prosecution. It has not necessarily legitimized torture. Likewise, denial of due process rights has been partly normalized, but major controversy and opposition continues regarding the future of Guantánamo, of military commissions, and of overseas detention and targeting procedures. In contrast, there has been widespread acceptance of expanded surveillance powers. Certainly, the Bush administration came under fire for its outlandish executive power arguments offered in defence of the TSP. However, outrage, save amongst a few true civil libertarians who have continued to bring lawsuits against the government, was hardly long lasting. Telecoms were granted immunity and surveillance powers were legally expanded. What this suggests is that firstly, post-9/11 surveillance policy, as opposed to torture policy, was not so aberrant as to cause an
extensive backlash and that secondly, understandings of constraining norms and laws were not so entrenched as to preempt modification. In contrast to these other practice areas, only a few pieces of Congressional legislation had to be altered.

The result of the changing surveillance landscape has been the expansion of intelligence collection capacity and the reduction in legal obstacles to information sharing. However, these shifts have not overcome a variety of pathologies that lead to intelligence failure. In this sense, the liberty-security debate is in many ways misleading. While the same could be argued of torture and due process violations, this is an especially important point to make in the context of surveillance practice. Insofar as freedom from foreign intelligence surveillance in not considered an inviolable human right, efforts to limit its reach may ultimately come down to efficacy, not law.
CHAPTER 6
THE IMPACT OF LAW ON HUMAN RIGHTS ABUSES

6.1 Introduction

The previous three chapters have traced the evolution of several disturbing practices—torture and cruel, inhuman, and degrading (CID) treatment, detention and trial procedures lacking due process, and problematic intrusions into privacy that often accompany warrantless surveillance. Varying beliefs and interests have motivated these human rights and civil liberties violations. The dehumanization of the other, religious and racial hatreds, colonial attitudes, attempts to discipline and punish populations, plots to undermine political rivals, and the desire to maintain law, order, and security have, at different times, inspired states and individuals to abuse human beings.

The central arguments developed in this dissertation are not, however, primarily about why people commit cruel acts. Rather, this project is about how and why people with a preference for engaging in human rights abuses go about doing their dirty work in light of predominant societal norms and governing laws. That said, motives cannot be considered entirely exogenous to approaches to practice. For instance, torturing the excluded racial other has been associated with states of exception, where targets of animus are removed from any sort of rights protections. The same sentiments that motivate abuse permit its open practice in racist societies. When this motivating rationale loses its popular legitimacy, new justifications for and approaches to human rights violations emerge. These alterations both inspire and are produced by changes in law and norms. In this sense, motives, practices, and constraints interact symbiotically, forming contextually contingent constellations.
6.2 *The Impact of Laws and Norms on Practice: The Empirical Evidence*

In the previous chapters, I discussed several constellations in detail that help illuminate the answer to the first question posed by the dissertation: What impact do changes in the structure of legal and normative constraint over time have on state approaches to human rights violating security practices? The historical evidence suggests that there are recognizable patterns in the relationship between these phenomena. There have been periods of open practice in which there was no contradiction between human rights abuses and the law. While specific dates vary in each case, the further one goes back in history, the more likely one is to find torture, indefinite detention and unfair trials, and intrusive surveillance being publically practiced by state and religious authorities. Monarchical prerogative and church edicts allowed early European inquisitors to commit abuses with impunity. In the nascent United States, the institution of chattel slavery meant that a substantial portion of the population was considered things, not people. In these contexts, contemporary conceptualizations of human rights simply did not exist. Rights were not suspended or ignored, for they had yet to develop. There was therefore no major contradiction between constraints and practice.

The emergence of Enlightenment principles progressively altered this state of affairs. Torture was increasingly considered barbaric and uncivilized. People began to demand due process rights. War was incrementally subject to regulation. Subjects became citizens entitled to privacy. Racially subordinate minorities were grudgingly acknowledged as human beings. These shifts were reflected in broad normative changes and specific laws, culminating in the post-World War II humanitarian and human rights regime. From international covenants that instantiated universal protections such as the
Geneva Conventions, the United Nations Declaration of Human Rights, and the Convention Against Torture, to more focused domestic American legislation such as the Foreign Intelligence Surveillance Act (FISA) and the War Crimes Act, security practices became subject to ever thicker restrictions.

However, the invention of human rights did not result in their universal application. Colonial regimes, authoritarian and fascist polities, and racist laws guaranteed that human rights violations continued. They facilitated the emergence of spaces of exception—where norms and laws are *de jure* or *de facto* suspended. Such suspensions have been characterized by the unleashing of extreme violence—the concentration camp being the ultimate manifestation. In other cases, exceptions have been more subtle—exclusionary immigration rules or double standards for foreign and domestic subjects. By definition, the exception supposes the norm, requiring that rights violations be justified. The removal of targeted subjects from rights standards has usually been accomplished through a mix of appeals to necessity. For instance, authorities may claim that derogations are required to protect against a security threat and demonize victims as existential others who are uncivilized, degenerate, and evil. Because rights violations are officially authorized by the open instantiation of exception, perpetrators of abuse are not only immunized from consequences, but are valorized for their actions. Such outcomes suggest that law in itself is an ineffective constraint on practice when those with power decide to violate it.

While states of exception, particularly in their colonial, fascist, and racist manifestations, infer a public suspension of the normative order, there are other modalities of rule evasion. Because the protection of human rights and civil liberties form
a core part of the identity of contemporary liberal democratic polities, such states have often been hesitant to admit rights violations. Moreover, insofar as the rule of law as a societal value is present, policy makers may be unwilling to engage in blatantly extra-legal action. Accordingly, one way such states reconcile their desire to engage in abusive practices with their public commitment to rights and legality is to deny their actions. This approach was favoured by the United States throughout the Cold War. During this period, policy makers repeatedly expressed concern that public exposure of controversial activities risked embarrassment and blowback. As manifested in the strategic doctrine of plausible deniability, practices that were illegal or unsavoury were pursued covertly with the aim of evading justification and responsibility. Proxies were frequently employed or supported to commit abusive acts. Unlike a state of exception in which rule violation is embraced, covert strategies do not openly challenge normative constraints. As a result, when rights violations are uncovered, scandal and recrimination ensues. In contrast to the decisionistic politics of exception, this approach to human rights violations suggests that legal and normative constraints do affect practice. They may not substantively prevent abuses, but they do structure approaches to conduct.

This apparently constraining impact of legal and normative rules is further evidenced by the last and most contemporary constellation identified in this study—that of plausible legality. This denotes the strategic attempt to redefine human rights violations and the laws that govern them in ways that permit human rights abuses without overtly violating rules. Resort to plausible legality is explained by several factors. First, the same desire to maintain a public liberal democratic image that motivated plausible deniability persists today. Indeed, arguably, it has deepened. An explosion of human
rights and humanitarian rhetoric characterized the post-Cold War decade. Throughout the 1990s, the democratization of the Soviet bloc, the growth of peace building initiatives, the collapse of Apartheid, the emergence of humanitarian interventions, the creation of ad hoc truth commissions and war crimes tribunals, and the extension of universal legal jurisdiction for grave human rights abuses combined to consolidate the place of human rights discourse and practice at the centre of state claims to legitimate action. The United States was at the forefront of this movement, particularly as it rationalized its intervention in Kosovo. As a result, the open endorsement of torture, show trials, and privacy violations, even after the shock of 9/11, was not a particularly palatable option.

In addition to the role of human rights law and norms, other factors conspired to constrain U.S. policy. Unlike the days of the Cold War, the post-9/11 world is host to numerous monitoring mechanisms that make it almost impossible for policy makers to reliably conceal illegal and controversial behaviour. These monitoring mechanisms include the media, international and domestic non-governmental organizations, and the U.S. government itself through Congress and various agencies. As evidenced by most contemporary scandals, the practice of leaking is ubiquitous. Finally, in the post-Watergate period, public authorities have become increasingly sensitive to the potential for investigation and prosecution. Policy makers and politicians cannot presume impunity for illegal acts. For the aforementioned normative and rational reasons, the adoption of abusive practices is constrained. Those desiring to authorize human rights violations must find a way of doing so that feigns legal compliance. Once again, law and norms do not function as entirely substantive constraints, but they do influence practice.
In sum, the historical evidence suggests that structures of constraint do shape state approaches to engaging in human rights abuses. In particular, they influence policy makers’ willingness to openly embrace violations and their approaches to public rationalization and justification. Combined with the impact of monitoring in the contemporary period, this has resulted in a notable attempt to legalize human rights abuses through convoluted and evasive argument. The nature of the rationalizations posited by plausible legality strategists points to some interesting characteristics of legal regimes. This helps answer the second question posed by the dissertation: To what extent, and if so how do specific rule structures in the contemporary period shape state approaches to human rights violating security practices?

It appears that the specific character of laws and norms does shape plausibly legal arguments and delimit their parameters, albeit partially. Previously, three dimensions of legal regime variation were noted—source, jurisdiction, and scope. Regarding the source of law, there is no clear evidence that the international or domestic grounding of legal prohibitions has a major overall impact on compliance. This is somewhat difficult to trace in the American case as the development of domestic and international rules regarding torture, due process, and surveillance occurred in relative harmony. Moreover, because the relevant international laws have been domesticated into U.S. law, there is not a significant international-municipal conflict of laws to investigate. One possible exception is the American rejection of the Additional Protocols to the Geneva Conventions. Nonetheless, Americans have not rejected international law in favour of national standards. The two are largely collinear.
However, lawyers have cited Congressional reservations in efforts to narrow the applicability of international treaties. This is seen, for instance, in the move to limit the definition of cruel, inhuman, and degrading treatment to the provisions of the Fifth, Eighth, and Fourteenth Amendments of the Constitution. In addition, policy makers have been more concerned about the consequences of breaking enforceable domestic laws such as the War Crimes Act than unenforceable international standards such as the Geneva Conventions, which require states to execute their provisions. Yet, there is no evidence that the primarily domestic prohibitions on domestic intelligence surveillance have garnered more compliance than international rules. On the contrary, this practice area has been the closest to being subject to exceptional suspensions and reformulations of the law. Domestic law is easier to enforce, but also easier to change. In this sense, domestic institutionalization might be a necessary, but not a sufficient condition for compliance.

More significant for the cases at hand is the degree of regime jurisdictional universality and applicable scope. Because prohibitions on torture are universal, inclusive, and non-derogable, it is by definition impossible to engage in legal torture. All torture is illegal. Accordingly, the legalization of abusive practices that most reasonable analysts would label torture requires redefining them otherwise. This is turn necessitates the employment of torture practices that may not obviously appear to be torture—practices that cause extreme physical and psychological pain, but which are not particularly bloody or violent. In this perverse way, the specific character of anti-torture rules is discernable in their violation.
In contrast, there are no universal due process standards or absolute prohibitions on detaining and trying people. Rather, detention and trial rules are jurisdictionally layered and partially exclusionary. This is the case for humanitarian and domestic law, which have both played a role in the GWOT. On the humanitarian side, the law of armed conflict grants more rights to prisoners of war than to other captives. While the latter must be treated humanely, very few regulations govern their status. American policy makers initially attempted to leverage gaps and ambiguities in the Geneva Conventions to evade all rules regarding those deemed “unlawful enemy combatants,” however, court challenges ultimately made this impossible. They therefore resorted to making arguments that acknowledged minimal Geneva guidelines, but which permitted indefinite detention and trial by unfair military commissions. In this version of plausible legality, the status of targets was used to exclude them from as many rights protections as possible. A similar approach can be seen in the case of domestic detention and trial. Authorities were able to employ the powers of administrative immigration and witness laws to deny access to due process rights normally enjoyed by Americans. The result has been that different people have experienced the law in very different ways, depending on their combatant or citizenship identity. The uneven nature of the body of detention and trial rules is directly reflected in the due process practices American policy makers have adopted. For some, this had led to calls to close the gaps or otherwise reformulate this complex set of rules.

Finally, and perhaps less intuitively, the specific structure of law governing surveillance is evident in post-9/11 American practice. There is credence to the claim that warrantless surveillance of U.S. persons is totally prohibited by the Foreign Intelligence Surveillance Act and is thus unlegalizable. Indeed, most readings of the warrantless
surveillance program define it extra-legally. Yet, my analysis has suggested that despite waging an overt assault on the constitutional separation of powers, policy makers did attempt to structure the so-called Terrorist Surveillance Program (TSP), along with other questionable practices, in light of the foundational concepts at the heart of American surveillance law. Under this paradigm, warrantless spying abroad is fully acceptable, while such monitoring of Americans is illegal. Strategists of plausible legality hitched their arguments to this exclusionary framework by claiming that communications with one foreign participant should be fair game for interception. Despite the initial outcry over the clandestine nature of the program and the blatant and illegal violation of FISA requirements, Congress eventually gave its legislative stamp to many elements of this perspective. Legislation ranging from the PATRIOT Act to the FISA Amendments Act has greatly expanded surveillance power, while claiming to respect the distinction between foreign and domestic. The core significance of the foreign/domestic dichotomy is thus evident in the post-9/11 approach to surveillance.

Analysis of the above cases once again confirms, as did the previous discussion of the impact of changing historical constraints, that law and norms have not substantively prevented human rights abuses from occurring. Rather, they have structured how they are conducted and rationalized. The strategy of plausible legality is both a product of law’s efficacy and evidence of its failure. Its impact on the future of law is difficult to gage. While pushback against the strategy of plausible legality could help reaffirm normative commitment, it is also possible that the more legal ambiguities and gaps are exploited and manipulated to facilitate abuse, the weaker the underlying legal and normative frameworks will become. These implications will be discussed in the concluding chapter.
6.3 Interpreting Plausible Legality: The Role of Law in Post-9/11 Policy

Having identified several contextually contingent state approaches to human rights violations, the question becomes how can we explain these outcomes in reference to theorizations of the role of law and norms in shaping state practice found in International Relations and International Law literature. In Chapter 2 of the dissertation, two generalized answers to this question were outlined. On one side of the spectrum is law as permit—a vision of legality as a tool of statecraft, subordinate to the prerogatives of political power. On the other is an alternative construction of law as constraint—as a check on power for rationalist or normative reasons.

The empirics suggest the answer cannot be entirely abstract and theoretical. Rather, it must be historically and contextually grounded. There is no question that there have been periods in the evolution of human rights abuses where law has served as a permit—as something either shaped by the whims of the powerful to dominate the powerless, or, as something easily suspended and ignored. In other cases, however, law and norms have imposed constraints—at some times eliciting compliance and at others—forcing practices underground or necessitating resort to convoluted legal rationalizations. In this sense, it is impossible to theorize the impact of law outside of the sociology of power in a given political ecosystem. Legal and normative constraints are not variables that produce a consistent outcome of state or individual behaviour exogenous to time or place. There is simply no evidence that states shape law solely in their cynical interest or that they always ignore or suspend law when it interferes with their agenda. Nor is there evidence that states always comply with law to rationally enhance their multilateral
power or because they have internalized norms that have altered their identity. The world is simply too messy and complex for such generalizations to be true.

However, just because we cannot impose a-historical paradigms on reality does not mean that we cannot attempt to use theoretical propositions to explain events. We could attempt to do this for any of the constellations identified above, however, the explanandum of this study is post-9/11 American counterterrorism policy. In the following pages, I will thus sketch out a reading of plausible legality as “law as permit” and an alternative reading of “law as constraint.” Finding both inadequate, I will then propose that this particular constellation demands a paradoxical reading of law as a permissive constraint and discuss the implications for our understanding of reality and theory.

6.3.1 Law as Permit

Post-9/11 counterterrorism policy can be read as a vindication of both realist and decisionistic perspectives. The ontological superiority of power over law was central to the ideology of many leading actors in the Bush administration. There is ample evidence that decision makers disregarded and suspended the law for a variety of reasons: genuine fear of another terrorist attack necessitated resort to human rights violations; “unitary executive” theory justified Presidential prerogative; American primacy undercut the need to conform to international law; and mistrust and dislike of Muslims facilitated their exclusion from rights protections. These views were bolstered by several structural,

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1 To clarify, those that describe and interpret the Bush administration’s behaviour in these terms are not necessarily advocates of realism or decisionism as prescriptive guides to action. Indeed, most are not, particularly in regards to the latter school of thought.
material factors: the anarchy of international legal interpretation; America’s unipolar power; and the need to appease a frightened electorate.

As numerous observers have noted, the Bush administration expressed a particularly virulent form of American exceptionalism:

The Bush administration’s unilateralism abroad and double standards at home are two sides of the same coin; they both reflect an attitude that the United States need not be governed by the same standards and rules that apply to everyone else. In foreign affairs, we eschew international treaties and international law whenever it is in our interest to do so, even as we maintain that others must be bound by such obligations. So, too, in matters of individual rights, we deny to other nations’ citizens the very protections that we insist upon for ourselves. This exceptionalism feeds the view that the United States exploits its status as the world’s most powerful nation with arrogance and self-interest.²

The United States, in other words, is a hypocritical, imperial bully.

This attitude can be understood as having material roots. While the Bush Doctrine adopted a distinctly neoconservative preoccupation with democracy promotion and preventative war, its approach to international cooperation was essentially realist. As characterized by Robert Jervis, this outcome was not just ideologically, but structurally driven:

Even without terrorism, both internal and structural factors predisposed the United States to assert its dominance. I think structural factors are more important, but it is almost a truism of the history of American foreign relations that the United States rarely if ever engages in deeply cooperative ventures with equals. … It would be an exaggeration to say that unilateralism is the American way of foreign policy, but there certainly is a strong pull in this direction. More importantly, the United States may be acting like a normal state that has gained a position of dominance. There are four facets to this argument. First and most general is the core of the Realist outlook that power is checked most effectively and often only by counterbalancing power.³

In light of this reality, it is reasonable to conclude that the United States has not been

constrained by international law or considerations of international reputation.

This lack of constraint is reflected in the adoption of numerous human rights violating policies that I have discussed throughout the dissertation—the use of torture, CID treatment, and rendition in interrogations; disavowal of Geneva protections in favour of indefinite detention and unfair military commissions; and employment of warrantless domestic wiretapping in the service of surveillance. As we have seen, however, American authorities embraced legalistic arguments to justify their actions. Realism can shed some light on this, particularly if we conceptualize these justifications as lies. For instance, John Mearsheimer notes that while lying is considered unacceptable in domestic politics, strategic lying about foreign policy and national security is normal: “[L]eaders and their publics understand that states operate in a self-help world where they have to do whatever is necessary to provide for their own security. If that means lying and cheating, so be it.”

More charitably, legal rationalizations could be considered “spinning” rather than flat out lying—“when a person telling a story emphasizes certain facts and links them together in ways that play to his advantage, while, at the same time, downplaying or ignoring inconvenient facts.” In either case, legal rationalizations constitute a form of rational, strategically oriented statecraft aimed at concealing the true nature of security practices.

The “torture memos” can be read as a sophisticated version of this logic. Justifications were necessary to appease public discomfort with human rights abuses. Policy makers told lawyers what they wanted to do and the latter rubber stamped it. As Shirley Scott notes, it is precisely because of the myth that law is autonomous from politics that legal approval provides a value added to political decisions. Lawyers cannot

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5 Ibid., 16.
rationalize anything and are “constrained in their political agency by the fact that international legal argument is not wholly indeterminate.”\textsuperscript{6} However, insofar as they can come up with justifications, they lend legitimacy to policy. From this perspective, law does not serve as a constraint on political action. Instead, it facilitates it.

The realist approach is compatible with a decisionistic reading. The latter optic is compelling in light of the essentially decisionistic arguments posited by the Bush administration about its unmitigated war powers. Lawyers seemed to authorize a carte blanch for executive prerogative, for the sovereign decider to do whatever he desired. As summed up by Richard Nixon over thirty years ago, “When the president does it, that means it’s not illegal.”\textsuperscript{7} In this tradition, the post-9/11 invocation of “unitary executive” theory rationalized an “imperial presidency.” Arguing that Article II of the Constitution granted the President exclusive control of defence, proponents exempted the executive from Congressional oversight or judicial scrutiny. Echoing the language of exception, John Yoo defended the absolute monopoly to decide: “The Framers…created an executive with its own independent powers to manage foreign affairs and address emergencies which, almost by definition, cannot be addressed by existing laws.”\textsuperscript{8}

This aggressive assertion of executive power was evident in the huge number of Executive Orders and “Presidential signing statements” issued by the administration. For example, the McCain Amendment to the Defense Appropriations Bill of 2005 attempted to prohibit CID treatment of prisoners. Upon signing, President Bush essentially declared


the law not binding: “The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief.”

The legal rationales underlying warrantless surveillance further illustrate this paradigm. In authorizing the National Security Agency (NSA) to spy domestically on Americans without a Foreign Intelligence Surveillance Court (FISC) warrant, the administration simply ignored FISA. To justify this apparently illegal order, the Department of Justice claimed Presidential prerogative in matters of war: “The NSA activities are supported by the President’s well-recognized inherent constitutional authority as Commander in Chief and sole organ for the Nation in foreign affairs to conduct warrantless surveillance of enemy forces for intelligence purposes to detect and disrupt armed attacks on the United States.”

Such apparent suspensions of existing rules have prompted many to interpret the Bush administration’s actions in decisionistic terms. According to Sanford Levinson, “the true eminence grise of the administration, particularly with regard to issues surrounding the possible propriety of torture, is Schmitt.” The Bush legal team, he argues, posited a vision that “if accepted, would transform the United States into at least a soft version of 1984, where our own version of Big Brother will declare to us who is our enemy du jour and asset his own version of a “triumph of the will” to do everything and anything —

including torture—in order to prevail.”\textsuperscript{12} Scott Horton argues that “Schmitt’s thinking and analysis—the weakness of liberalism, the utility of “law-free” zones, the demonization of adversaries, the subordination of justice to politics” have been reflected in the Bush administration’s “war on the rule of law.”\textsuperscript{13} For Damian Cox et al., “There has been an unprecedented…. suspension of the usual constitutional limitations and checks and balances. Here we appear to be witnessing the aggressive reassertion of the Schmittian sovereign, with an expansion of state power and the retreat of the law.”\textsuperscript{14}

This move has had severe consequences for human rights. Indefinite detention and attacks on habeas corpus protections at Guantánamo produced a lawless zone or “legal black hole” where detainees have no rights except those designated by the state.\textsuperscript{15}

As elaborated by William Scheuerman:

In the spirit of Carl Schmitt, influential voices in the administration interpret the executive branch’s authority to determine the fate of accused terrorists along the lines of a legal black hole in which unmitigated discretionary power necessarily holds sway. For the Bush Administration, as for Schmitt, the weaknesses of the existing legal regime for terrorism are not simply a lamentable reminder of the limits of statutory law, or reason for reforming international law in order to make it better suited to the challenges of terrorism. It interprets the existing legal lacunae instead as evidence for the necessity of a fundamental norm-less realm of decision making in which the executive possesses full discretionary authority.\textsuperscript{16}

In this context, the law is not only ignored, but suspended for certain categories of people.

\textsuperscript{14} Damian Cox, Michael P. Levine, Saul Newman, \textit{Politics Most Unusual: Violence, Sovereignty and Democracy in the 'War on Terror,'} (United Kingdom: Palgrave Macmillan, 2009), 72.
According to Giorgio Agamben, America’s post-9/11 policy reproduces the legal form of concentration camp:

[T]he prisoners in Guantánamo, and their situation is legally-speaking actually comparable with those in the Nazi camps. The detainees of Guantánamo do not have the status of Prisoners of War, they have absolutely no legal status. They are subject now only to raw power; they have no legal existence. In the Nazi camps, the Jews had to be first fully “denationalised” and stripped of all the citizenship rights remaining after Nuremberg, after which they were also erased as legal subjects.\(^1\)

The radical erasure of rights subjects prisoners to “pure de facto rule, of a detention that is indefinite not only in its temporal sense but in its very nature as well, since it is entirely removed from the law and from judicial oversight…in the detainee at Guantánamo, bare life reaches its maximum indeterminacy.”\(^2\)

The theme of racialized exclusion is emphasized by Sherene Razack, who argues that security practices based on “race thinking” cast out Muslims from humanity, and hence the law:

[T]he eviction of Muslims from political community is a racial \textit{process} that begins with Muslims being marked as a different level of humanity and being assigned a separate and unequal place in the law…Race thinking structures the exception since it is invoked as a measure of self-defence against those whose inherent difference threatens the nation…whenever the exception is invoked, we can expect to see that it is undergirded by the notion that there are two levels of humanity…when the notion of two levels of humanity is invoked, the legal exception is not far behind.\(^3\)

This process takes place through the construction of “monster terrorists,” but also through more ordinary bureaucratic immigration proceedings and cultural discourses about secularism and women’s rights.


\(^{19}\) Sherene H. Razack, \textit{Casting Out: The Eviction of Muslims from Western Law and Politics} (Toronto: University of Toronto Press, 2008), 176.
From the perspective of the decisionistic reading, law does not disappear in the exception. Rather law is invoked in its own suspension. As Cox et al. note, “law is used to suspend and weaken itself…rather than law imposing constraints on sovereignty, the law increasingly operates as its instrument or its weapon…the exception is both inside and outside the law simultaneously.”

Derek Gregory further suggests, “the law is not outside violence...the “war on terror” twists their embrace into ever more frenzied and furtive coupling.” According to Judith Butler, “The law is not that to which the state is subject nor that which distinguishes between lawful state action and unlawful, but is now expressly understood as an instrument, an instrumentality of power, one that can be applied and suspended at will. Sovereignty consists now in the variable application, contortion, and suspension of the law; it is, in its current form, a relation to law: exploitative, instrumental, disdainful, preemptory, arbitrary.”

Yet, for all the similarities between the realist/exceptional reading and post-9/11 move to legalize abuse, there are also anomalies. For starters, the shear number of and detail contained within the torture memos and related legal rationalizations seem to suggest a more extensive concern with legality than realists would predict. Lawyers were far more involved in constructing the parameters of security policy than realpolitik would normally dictate. Realism, moreover, provides few tools to explain the novelty of the post-9/11 legalization of abuse. During the Cold War, American intelligence agents engaged in all sorts of shady practices, without, as far as we know, the need for thousands of pages of justificatory memoranda. Why the sudden preoccupation with legal

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20 Cox, Levine, and Newman, Politics Most Unusual, 72-73.
rationalizations or legal lies? While realists recognize the useful rhetoric of law, they do not necessarily anticipate a close link between law and practice. “Cheap talk” has little practical effect. American policy makers, on the other hand, designed practices that mirrored limitations contained in Office of Legal Counsel and other government lawyer directives.

The Schmittian reading also has intuitive appeal, but risks giving too much weight to the decisionistic pronouncements of Bush administration ideologues. Although they may have truly believed that the President had authority to do whatever he wanted in the name of national security, lawyers took pains to construct a variety of other exculpatory rationales to justify abusive policies. They did not suspend the Constitution, reject the entire corpus of international law, dismiss court rulings, endorse open racism, or cast domestic minorities as existential enemies. Instead, they selectively reinterpreted constraining provisions to facilitate controversial policies. In this sense, it appears the administration was not eager to openly declare a state of exception or justify a turn to emergency powers. Memos recast rather than embraced human rights abuses. Rules did not disappear, but proliferated. This is not to say that targets of GWOT policy have not suffered gross human rights violations or been placed in situations where they lacked substantive protections. However, these exceptions to the rules cannot be understood through a straightforward process of sovereign decisionism.

The decisionistic perspective does not adequately acknowledge the extensive role of legal arguments in structuring policy. As Frédéric Mégret notes, in denying prisoner of war status, “the US authorities’ case is often not a case to simply violate or do away with the law, as much as it is a characteristically strict, almost legalistic interpretation of the
Similarly, Fleur Johns argues that Guantánamo is “less an outcome of law’s suspension or evisceration than of elaborate regulatory efforts by a range of legal authorities. The detention camps at Guantánamo are above all works of legal representation and classification. They are spaces where law and legal institutionalism speak and operate in excess.”

Far from a lawless void, Guantánamo is a highly regulated, procedural space “dedicated to producing experiences of having no option, no doubt, and no responsibility.”

Instead of pure “black holes” in the rule of law (although black holes are clearly present in regard to practices such as extraordinary rendition), policy makers created a series of “grey holes.” In these grey holes, people have no doubt been subject to terrible abuses, but not anything is possible. What is possible, in the interrogation chamber for instance, has been listed in detail, described in minutiae and rationalized in reference to law. How long a prisoner can be left standing, deprived of sleep, denied food, etc. have been painstakingly defined. That is not to say grey holes are an improvement on black holes. Indeed, as David Dyzenhaus notes, they can be “in effect worse because they give to official lawlessness the façade of legality.”

Rather than an extralegal void, the GWOT has been a period of prolific law making. Ranging from the introduction of the PATRIOT Act to the Military

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25 Ibid., 615.

26 David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006), 42. Dyzenhaus characterizes a grey hole as “a legal space in which there are some legal constraints on executive action – it is not a lawless void – but the constraints are so insubstantial that they pretty much permit government to do as it pleases.”

27 Ibid., 207.
Commissions Act to changing immigration regulations, legalism has abounded, not receded. To understand the exceptional dimension of this “jurisgenerative” period, Kim Lane Scheppele argues for attention to legal content.\textsuperscript{28} Instead of “hard emergency,” clearly and openly declared, American policy has been characterized by “soft emergency.” This creeping, partial state of exception is found in the substance of legislation rather than the form of decision-making. “If we think about law not as a purely legitimating force or as the sincerely believed normative order of a state,” she argues, “but simply as \textit{the way the state talks to itself}, it is not surprising that emergencies are accompanied by a tremendous proliferation of law that pays careful attention to its own warrant, its own authority, its own pedigrees.”\textsuperscript{29} From this optic, law and emergency are necessarily intertwined for practical, functional reasons. “Law does not just express moral positions, or public values, or the basic working structures of the state. Public law, in particular, provides direction to state officials, who need to be told what to do equally in times of normalcy and times of crisis.”\textsuperscript{30} This reading helps fill the gap between theoretical models of exception and real world practice, but remains skeptical of law as a substantive constraint.

However one understands the immediate functions of the strategy of plausible legality, it calls into question the decisionistic reading. As Nasser Hussein writes:

\begin{quote}
It is empirically the case that what one witnesses in contemporary emergency is a proliferation of new laws and regulations passed in an ad hoc or tactical manner, administrative procedures, and the use of older laws and cases tweaked and transformed for newer purposes. But given this almost hyperlegality, does it then make any sense to continue to use the analytic idiom of the state of exception?
\end{quote}

\textsuperscript{29} Ibid., 49.
\textsuperscript{30} Ibid., 50.
After all, that category invokes a very specific idiom and imagery: one of exclusion or outsideness, abeyance or suspension, and of course decision. It is at the very least inadequate to explain the use of bureaucratic regulations and administrative classifications…When the mechanisms that produced Guantánamo and justified the practices that occur there are used abundantly in the immigration service or correctional agencies, when the rationale of these mechanisms seems of a different degree rather than of a different kind, it is not clear what it could mean to say they are not quite law… Notice how difficult it is to reconcile the “spitting on the sidewalk” strategy with the state of exception. That is because such a strategy does not rely on any extraordinary measure, which could be identified as belonging to an exception/emergency regime, but rather accelerates the application of preexisting, often mundane regulations.  

This process has been deeply troubling, but it is not the logic of the camp.

Rather than suspend law or collapse power and norms, the Bush administration was highly preoccupied with obtaining legal cover. The resultant legal authorizations were deeply cynical, but they were not just rhetorical—they dictated policy. This raises the question—can we understand legalized abuse in light of, not just in spite of the law?

6.3.2 Law as Constraint

The realist/exceptional reading of legalized abuse suggests moral and legal rhetoric is a useful cover, a distraction from true political motives, and a mechanism to facilitate policy. Nevertheless, realists have a hard time explaining why the United States would go to such lengths to claim conformity with the positive law and why policy would so closely cleave to legal authorizations. Decisionistic models overstate the sovereign

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32 As Takayoshi notes, Agamben’s tendency to collapse all forms of exception and rule derogation into the conceptual archetype of the camp produces factually inaccurate interpretations and flawed ethical lessons: “The fact that Agamben can envision equivalency between Auschwitz-Birkenau and French international airports implies that his ruminations are not as innocent as they appear, entailing implications for the ethics of academic knowledge. Agamben constructs a compelling narrative with breathtaking stringency, but at those revealing moments where Agamben draws analogies on a ‘historico-philosophical level’ not only between the atrocities committed under the Nazi regime and other forms of violence but also between National Socialism and other forms of governance and representation such as liberal democracy, his philosophic narrative becomes oddly offensive.” (Ichiro Takayoshi, “Can Philosophy Explain Nazi Violence? Giorgio Agamben and the Problem of the ‘Historico-Philosophical’ Method,” *Journal of Genocide Research* 13, no. 1-2 (2011): 63).
suspension and reconstitution of law. These anomalies demand renewed attention to the role of law as a constraint. Although contrary to the majority of interpretations of post-9/11 policy, it is entirely possible to read law as limiting American counterterrorism practice. Many leading protagonists in the events in question were lawyers with an ingrained legalistic worldview. While arguably skeptical of, and even hostile to international law, American conservatives have a strong attachment to constitutional principles. Moreover, several structural and environmental factors incentivize at least some level of legal compliance—the importance of international rules for multilateral image management, increased human rights monitoring and media scrutiny that make denial difficult to maintain, and a normative context in which extra-legal action and human rights abuses lack legitimacy.

From the perspective of neoliberal institutionalism, the United States risked substantial reputational costs if caught violating human rights and humanitarian law with impunity after 9/11. Having actively promoted itself as a human rights advocate around the world, its credibility was at stake. Although the Bush administration was not particularly sensitive to the value of soft power, even it understood that Americans would not benefit from acquiring a reputation for torture or other blatant human rights abuses. As President Bush has acknowledged, “we could neither lead the free world nor recruit new allies to our cause if we did not practice what we preached.”33 While normative and legal prohibitions did not succeed in substantively preventing problematic practices, they had to be considered in designing policy. In this sense, the torture memos and related rationalizations could be understood as an attempt to deflect the worst of international criticism, as a manifestation of the significance of law for international standing, and as a

recognition that overt extra-legalism is an unpalatable option in the contemporary world. As Charles Dunlap notes, “The rise of globalized commerce with its insistence on legally binding arrangements—not to mention an ever-expanding number of international legal forums to resolve disputes—all serve to normalize law as a feature in international affairs to an unprecedented degree.”

Furthermore, as Kenneth Abbot et al. write, “Although actors may disagree about the interpretation or applicability of a set of rules, discussion of issues purely in terms of interests or power is no longer legitimate. Legalization of rules implies a discourse primarily in terms of the text, purpose, and history of the rules, their interpretation, admissible exceptions, applicability to classes of situations, and particular facts.”

In this context, states that ignore these constraints risk what Kelly Greenhill calls “hypocrisy costs”—a form of reputational or audience costs—“those symbolic political costs that can be imposed when there exists a real (or perceived) disparity between a professed commitment to liberal values and norms, and demonstrated actions that contravene such commitments.”

While there does not appear to be a terribly strong link between a high degree of legalization and substantive compliance in this case as neoliberals traditionally assume, the highly legalized nature of human rights treaties made non-compliance more difficult than it might otherwise have been.

However, there is not much empirical evidence to actually sustain an argument that the Bush administration’s approach to human rights abuses was primarily motivated by multilateral reputational or cooperative concerns. Instead, it appeared more

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preoccupied with domestic constraints. Unlike the old days of the Cold War, American authorities could not override or ignore law without setting off alarms and generating significant domestic political and legal backlash. Journalists and human rights NGOs have amassed the capacity to uncover an extraordinary amount of information about security and intelligence practices. It is difficult, if not impossible, to sustain a policy of secrecy and plausible deniability. Post-Watergate reforms vastly increased oversight and created new restrictions on security practices such as the Foreign Intelligence Surveillance Act. While international law may continue to hold little sway in right wing American policy circles, the provisions of treaties like the Convention Against Torture have been thoroughly integrated into domestic codes. These changing conditions generated rational fears of prosecution for authorizing illegal human rights abuses. Intelligence agencies were unwilling to act aggressively without legal cover. The sanctioning capacity of the positive law created incentives for the construction of legal rationalizations. In this sense, attempts to legalize abuse were not evidence of law’s ultimate existential subordination to power, but a perverse indicator of law’s independent influence. If law was meaningless or epiphenomenal to material power, there would be no reason to hide behind it or lie about it.

In additional to such rational constraints, it is also possible to read law as a normative constraint. As Ellen Lutz and Kathryn Sikkink note, legal and political norms reinforce each other, limiting “political pathways.” Even authoritarian leaders care somewhat about social sanction:

Leaders increasingly seek or care about international legitimation because it can help to enhance or to undermine the domestic legitimacy and survival of their regime. But the reasons go even deeper than the need for domestic legitimacy. Human rights pressures operate not only at the pragmatic level by imposing
material costs or jeopardizing domestic legitimacy but also at the social level by creating ostracized “out-groups” of norm breakers. As Thomas Franck argues, the pull of legal legitimacy need not always be synonymous with substantive compliance:

[An] important, but hidden indicator of a law’s legitimacy [is] that those who violate its strictures invariably claim not to be doing so. We tend to overlook the tribute claimed by scofflaws to the law they are breaking. If violators defend their actions either by distorting the law’s meaning, or by lying about the facts of their violation, that strategy of denial tells us something. Perhaps it tells us that even if the violators think that there is some life-some bite-left in those rules...But why should the world’s sole superpower care whether it is perceived as acting illegally? Why defend a “rational choice” in tortured legal terms?....It does seem that somewhere, deep in the recesses of their reasoning process, leaders in Washington harbor a grudging awareness that the rest of the world still regards the rules, however egregiously violated by a few powerful scofflaws, as legitimate and binding.

The language of legality holds normative power. In this context, legal justification is not just consequentially efficacious, but a standard of appropriateness. As Ian Hurd notes, “States (and people) appear to find it irresistible to provide a justification for their behaviour, and this generally takes the form of showing how the behaviour is covered by existing social norms. Rule-breakers find it useful to portray their actions as consistent with the basic rules of society.”

The normative hold of and habitual resort to specifically legal forms of justification have roots in the domestic American context. As Alexis de Tocqueville famously observed, “[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question. Hence all parties are obliged to

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borrow, in their daily controversies, the ideas, and even the language, peculiar to judicial proceedings. As most public men are or have been legal practitioners, they introduce the customs and technicalities of their profession into the management of public affairs. Peter Maguire suggests that strategic legalism has been a long-standing feature of American political culture and practice:

As the United States became a global power, a two-sided relationship with international law developed, and what began as the simple hypocrisy of the age grew into a more profound and lasting duality. There was a tension between the ethical and legal principles that American leaders espoused and the actual conduct of American foreign policy. At moments of crisis and contradiction, American leaders attempted to rephrase complex moral questions into apolitical disputes that required only the application of law to a set of facts.

Indeed, it is possible to drill down even further. The small group of elite political and legal protagonists who initiated the strategy of plausible legality hailed from an ideologically conservative milieu with very distinct views about Presidential power, constitutional interpretation, and the appropriate role of international law. Their particular approach to legal argument was generated by a unique American subculture. Rational and normative international and domestic constraints were refracted through the agenda of this interest group as suggested by pluralist liberal and organizational culture approaches. Law as constraint is thus observable at several levels of analysis.

As previously discussed, there are convincing reasons to read the phenomenon of plausible legality as a continuation of age-old politics, as a reflection of law’s subordination to power. However, this reading on its own fails to satisfactorily fully

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42 For instance, the Federalist Society (http://www.fed-soc.org/) and the American Enterprise Institute (http://www.aei.org/) are home to this ideological subculture.
account for the unprecedented extent and convoluted complexity of the strategy of legalized abuse. By drawing attention to the significance of reputation, immunity, and legitimacy, liberal and constructivist perspectives help shed light on how law and norms, at least to a limited extent, structured and constrained abuse. Read through these lenses, legality is not something that can be turned on and off. Rather, the contemporary environment is deeply structured by law. For rational and normative reasons, it must be taken seriously. In this sense, plausible legality reflects calculations of the costs of open non-compliance, the reality of increased monitoring, and concerns about future accountability. Legal authorizations actually shaped practice, barring behaviours that were not legalizable within the dense and specific guidelines posited by human rights and humanitarian law. These insights do not entirely negate the realist/exceptional reading, but help provide a richer picture of why law matters, of why legalizing abuse was a necessary prerequisite for committing it.

Despite these observations, it is empirically and theoretically unconvincing to suggest that the strategy of plausible legality truly conforms to the traditional expectations of liberal or constructivist scholarship. At a certain point, neoliberals assume that states have an interest in substantive legal compliance. An analysis that suggests policy makers merely feign compliance to avoid sanctions adds little to the realist perspective. Moreover, while the constructivist emphasis on legal legitimacy helps account for why actors would choose this mode of justification, it is not clear what work norms are really doing. Internalized norms should alter identity and behaviour, not merely be invoked to get away with rule breaking. If the torture prohibition, due process, and privacy norms exist, as I have argued they do, presumably they should prevent policy
makers who have openly embraced such norms from violating them. In an advanced liberal democratic country such as the United States, which has not only internalized, but also helped create human rights standards, the type of failed norm cycle arguments, or domestic cultural explanations that might account for derogation in other contexts seem not to apply.

The perspective of law as permit explains why actors would break, ignore, or suspend the law, but not why they would concoct convoluted legal rationales that try to downplay exceptionalism. The perspective of law as constraint explains why actors would feel compelled to claim conformity with law, but does not really account for how law can be binding and not binding at the same time. To understand the problem we have to recognize the contradictory, even paradoxical nature of legal constraint.

6.4 The Paradox of Permissive Constraint

The paradoxical, contradictory nature of legal constraint is evident in a variety of accounts. While theorists emphasize different causal mechanisms, many recognize the tension between interests or preferences and normative limitations on behaviour. For instance, in probing why leaders might feel the need to deceive their publics about the legality of their actions, Mearsheimer offers an interesting, but quite un-realist explanation centered on the impact of liberal democratic norms. He notes that expectations of transparency mean that democratic leaders find it “hard to hide a controversial policy without lying.” Moreover, not anything goes after all, even when national security is at stake:

There is a well-developed body of norms that prescribe acceptable forms of state behavior and proscribe unacceptable conduct in both peacetime and wartime.

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These norms are closely linked to just-war theory and liberal ideology more generally, and many of them are codified in international law. Most statesmen claim that they accept these liberal norms and invariably emphasize their commitment to the rule of law. Nevertheless, leaders sometimes conclude that their national interest compels them to act in ways that contradict these rules. When states act in ways that run counter to liberal norms or international law, their leaders often invent false stories that are designed to mask what they are doing.\(^{44}\)

These false stories and whitewashes are necessary because liberal publics want to believe that their countries are acting justly. Moreover, “leaders themselves are often moved to lie because they want to portray themselves as responsible and law-abiding members of the international community, and sometimes because they fear being brought to trial down the road . . . leaders tell liberal lies to gain legitimacy abroad.”\(^{45}\) But, when hard headed realist and idealistic liberal norms are at odds, “elites will usually act like realists and talk like liberals.”\(^{46}\) This is most likely to succeed when audiences have ideological or strategic interests in accepting these falsehoods. While Mearsheimer is clear that from his perspective, “the causal arrow runs from foreign policy behavior to liberal rhetoric, not the other way around”\(^{47}\) it impossible to explain why lying or other varieties of spinning, denial, and deception take place without recognizing the impact of material and normative constraints on actors.

Even in a realist world, sovereign power alone cannot dictate policy. Argument underlies strategic action. As constructivist Neta Crawford explains:

Hegemons must persuade their citizens to pay taxes, send their children off to war, and to back the economic and military policies of states. Even leviathans and hegemons cannot crack the whip all the time, against everyone and in all situations. Because world politics is not only the strategic interaction of unitary actors, but rather nearly always involves the mobilization of one’s own political

\(^{44}\) Ibid., 77-78.
\(^{45}\) Ibid., 80-81.
\(^{46}\) Ibid., 82.
\(^{47}\) Ibid., 97.
group and sometimes the mobilization of other groups, it is argument (and, potentially, persuasion) nearly all the way down.\textsuperscript{48}

While my historical investigation suggests that publics are not always liberal, hence facilitating open exceptions, today’s normative environment demands liberal lying—or justificatory arguments about human rights abuses.

Hurd further explicates the tension between interests and norms from a constructivist perspective, suggesting that states must pursue their interests via appeals to legitimacy, which in turn restrict their freedom of action. States “construct their legitimating justifications from these communal resources and are limited in their actions by the availability of plausible justifications. This allows for more agency on the part of states than does the view that they must comply with existing norms to remain legitimate but it reveals the ‘social’ limits to that agency.”\textsuperscript{49} For him, legitimation strategies are both evidence of constraint and carriers of agency:

This approach makes it possible to make sense of the dual dynamic in the use of norms by states, where states are constituted to seek legitimacy for their actions by associating them with existing norms while also behaving strategically to reconstruct the norms in ways that they believe will serve their interests. Norms are both constraining and enabling for states, and states are both socialized to norms and strategic calculators that manipulate them. The choice faced by the US is not between following the rules or not following them, or between being inside the society or outside of it. It is not enough to treat American ‘agency’ as distinct from the ‘structure’ of international norms. Rather, American behaviour necessarily takes place within the existing international normative context and simultaneously contributes to refashioning it.”\textsuperscript{50}

The pursuit of interest must be pursued within a normative context.

These observations underlie what I call the paradox of permissive constraint. Legal and normative structures form the context in which strategic action occurs. The

\textsuperscript{49} Hurd, “Breaking and Making Norms,” 206.
\textsuperscript{50} Ibid., 209.
structure of constraint cannot be ignored or suspended, but at the same time, it cannot fully dictate behaviour or automatically generate substantive compliance. This perspective allows us to reconcile, to a degree, the competing assumptions of law as permit and law as constraint. Yet, as I argue below, I do not think this stands as a sufficient conclusion.

While the perspective of liberal lying rightfully acknowledges that interests and norms exist in tension, and that the former will not necessarily be summarily cast off in favour of the latter, it does not really account for why actors would be attached to and not attached to liberal norms at the same time. Because it explains elements of non-compliance as anti-normative and strategic (e.g. authorizing practices that a reasonable person would understand as torture) and elements of compliance (e.g. concocting pained arguments that such practices are not torture) as reflecting normative constraints, it perpetuates a rather unsatisfying conceptual dualism between rational agents and normative structures, which neglects to account for how these seemingly contradictory phenomena ontologically coexist. Constructivist insights about the necessity of enacting interests within a normative context, and the limits this context places on the pursuit of interest are compelling and help add conceptual depth to the tension between the two, however, the lacuna persists. How can the same norms that constrain actors—in our case human rights and humanitarian norms—be transformed to rationalize seemingly contrary actions? At a literal level, I have argued this is accomplished through a strategy of plausible legality. However, theoretically speaking, how is this possible? Clearly, preferences/interests may run contrary to norms, but if actors must always proceed through a normative terrain, why do norms not halt the march of interest? If we accept
that law is more than just cheap talk and that legal argument is more than just an
exculpatory tactic, then we must be able to more coherently account for how rules can
simultaneously be permissive and constraining.

Recent constructivist legal scholarship helps illuminate this problem by
highlighting the internal characteristics of rules, specifically legal rules, that enable and
limit their efficacy. Jutta Brunnée and Stephen Toope argue that positivistic
conceptualizations of law, which form the basis of realist, liberal rationalist, and even
some constructivist scholarship, have failed to recognize the internal qualities of law that
generate a sense of obligation among actors. Actors do not comply with law primarily
because of its formalistic qualities, because of sovereign enforcement and sanction, or
because of rational incentives. While these factors may influence compliance decisions,
they cannot explain how legal rules generate widespread, ongoing, voluntary adherence,
especially in the realm of international law where centralized authority is absent. Brunnée
and Toope alternatively suggest that law engenders fidelity or an internalized
commitment via several characteristics of the law itself and through social interaction in
communities of practice. Regarding the former, what they call “interactional law”
manifests Lon Fuller’s eight criteria for the “internal morality of law”:

Legal norms must be general, prohibiting, requiring or permitting certain conduct.
They must also be promulgated, and therefore accessible to the public, enabling
citizens to know what the law requires. Law should not be retroactive, but
prospective, enabling citizens to take the law into account in their decision-
making. Citizens must also be able to understand what is permitted, prohibited or
required by law—the law must be clear: law should avoid contradiction, not
requiring or permitting and prohibiting at the same time; law must be realistic and
not demand the impossible; its requirements of citizens must remain relatively
constant; finally, there should be congruence between legal norms and the actions
of officials operating under the law.51

51 Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An
Law that embodies these qualities will more likely be perceived by actors as legitimate, and hence obligatory—“law will tend to attract its own adherence.”\textsuperscript{52}

Of these eight criteria, the last is particularly significant. In order for a legal norm to succeed, there must be shared social understandings about the meaning and application of a rule. Such understandings are created through general processes of social learning, but also, and more specifically, through the ongoing efforts of actors to behave in ways congruent with a norm. This creates a practice of legality—“inclusive practice that adheres to the criteria of legality.”\textsuperscript{53} It includes both “deeds and rhetoric.”\textsuperscript{54} Contrary to constructivist norm models in which “law and legalisation are the end stages of evolution…both evidence and a guarantee of norm internalisation,”\textsuperscript{55} such practice is a living phenomenon, and must be maintained through “hard work.” When a consistent practice of legality is lacking, law is internally unstable and even a high degree of formal legalization will not guarantee anything. “The underlying proposition—that norms are

\textsuperscript{52} Ibid., 27. Reus-Smit critiques this criteria, suggesting that it naturalizes a contingent understanding of legal legitimacy—“Rather, my position is that these are always historically and contextually contingent – there are no historically transcendental, universal criteria of legality on which a general theory of international legal obligation can be constructed.” (Christian Reus-Smit, “Obligation Through Practice,” \textit{International Theory} 3, no. 2 (2011): 346). Brunnée and Toope actually largely agree—“We accept the critique of Reus-Smit that the theory we propose is historically, and therefore conceptually, time bound. We do not contend that our understanding of legal obligation, of what makes it possible, is true for all time…We describe the criteria that Fuller proposed, and that we adopt, as ‘largely uncontroversial’ in the context of an analysis that is grounded in the shared understandings of the early twenty-first century, we readily admit that our criteria of legality are connected to a set of weak liberal commitments.” (Jutta Brunnée and Stephen J. Toope, “History, Mystery, and Mastery,” \textit{International Theory} 3, no. 2 (2011): 348–49) The issue is relevant because in some of the contexts I have examined, for instance highly racist colonial and fascist orders, Fullerian criteria is hardly a source of obligation, hence the legitimacy of the exceptional derogation. That said, I think it fair to suggest that current international and American law is embedded in a relatively liberal value system, and therefore the criteria is a sensible way to get at contemporary legal legitimacy. Positivists are correct that law need not have moral characteristics to be defined as law, but that does not mean that such characteristics will not be considered important standards in certain social and political contexts.

\textsuperscript{53} Brunnée and Toope, \textit{Legitimacy and Legality}, 54.

\textsuperscript{54} Ibid., 284.

constituted by practice and practices are shaped by norms—does not imply that there can never be relatively stable norms. It merely highlights the fact that such stability too is the product of, and contingent upon, practice.”

This focus on the important work done by practice is rooted in the “practice turn” in constructivist IR theory. As defined by Emanuel Adler and Vincent Pouliot, “Practices are competent performances. More precisely, practices are socially meaningful patterns of action, which, in being performed more or less competently, simultaneously embody, act out, and possibly reify background knowledge and discourse in and on the material world.” By examining the meditative quality of practices, they can help elucidate the relationship between agents and structures. In particular, practices have the capacity to “stabilize social structures and fix ideas and subjectivities in people’s minds (or determine the dominant ideas that corporate actors focus on at a given point in time), thus constructing agents and agency….practices structure and congeal thought and language into regular patterns of performance and turn contexts or structures into (individual and corporate) agents’ dispositions and expectations.” If practices act as focal points for shared understandings, as a source of stability, then absent, inchoate, or contested practice will open up space for instability and conflict. Practice is thus central to giving content to norms. Norms, do not unidirectionally shape practice.

Of course, not all legal rules live up to Brunnée and Toope’s interactional law in reality. Many, if not most positive laws do not. When law fails to manifest Fuller’s criteria, non-compliance based on interest or other considerations is more likely. When

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56 Brunnée and Toope, Legitimacy and Legality, 65.
58 Ibid., 20.
parties sign on to a norm, but fail to enact it, hypocrisy will undermine others’ sense of obligation.\textsuperscript{59} When a consistent practice of legality is missing, norms may be subject to contestation, reinterpretation, and revision. In such cases, a rule may have power as a social norm or as a formal law, but will be internally unstable. Indeed, a dualistic situation may emerge in which a rule has normative pull but does not shape practice. Such a “rule is rhetorically strong, but practically weak.”\textsuperscript{60} By looking at the nature of a rule itself in an interactional context, this conceptualization helps us more coherently understand how a rule could bind and not bind actors at the same time. The internal quality of law, not merely external influences, contributes to rule following and rule breaking. “In standard accounts of international law, it has been too easy to argue that a rule exists despite widespread failure to uphold it simply because states try to justify their breaches or keep them secret. These actions are said to show that the rule has real power despite its failure to shape behaviour,” note Brunnée and Toope. “In our view, this type of argument has always been an unsatisfying attempt to gloss over weaknesses in the law.”\textsuperscript{61}

Brunnée and Toope apply this perspective to the case of post-9/11 American torture. There is no doubt, they note, that the torture prohibition is an extremely strong social norm and a clearly articulated formal law—it meets most of Fuller’s criteria. However, it lacks total clarity in terms of what constitutes torture and has not been consistently applied. The unfortunate fact is that torture is very common around the world: “Torture is practised in all regions of the globe, and it is sanctioned even by western democracies. Were this conclusion to stand unvarnished, a further implication

\textsuperscript{59} Brunnée and Toope, \textit{Legitimacy and Legality}, 73.
\textsuperscript{60} Ibid., 269.
\textsuperscript{61} Ibid., 260.
would be that this last criteria of legality, that official action must mesh with a purported rule of law, would not be met.” ⁶² From this perspective, an interactional environment lacking a practice of legality facilitates non-compliance. “Legal obligation can exist even in the face of contrary practice. However, a widespread failure to uphold the law as formally enunciated leads to a sense of hypocrisy which undermines fidelity to law, and may ultimately destroy the posited rule.” ⁶³ In the case of torture, the absence of a consistent practice of legality has been significant in two ways. Firstly, it undermined genuine commitment to the torture prohibition. Indeed, Brunnée and Toope suggest that by 9/11, “One might go so far as to say that the real shared understanding was that torture was wrong, but sometimes necessary, and would be tacitly supported by state authorities, especially if the torture could be kept secret.” ⁶⁴ Secondly, while all agreed that torture was illegal under the positive law, there was little consensus about what acts actually constituted torture. Without a list of torture methods clearly enunciated in anti-torture law, such understandings could only be forged through practice.

To be clear, I do not think this approach is able to explain actors’ preference for rule evasion and hypocrisy, which remains at least somewhat exogenous. It cannot fully reconcile the interest/norm dualism that I previously identified. For instance, it would be inaccurate to suggest that shared understandings of the anti-torture norm were so weak in post-9/11 America that it generated no sense of obligation. Indeed the approach taken by OLC attorneys was anomalous and contrary to many pre-existing understandings of what torture is. Accordingly, it generated significant criticism. In this sense, Brunnée and Toope are somewhat overly pessimistic about the interactional grounding of the torture

⁶² Ibid., 265-266.
⁶³ Ibid., 232.
⁶⁴ Ibid., 233.
prohibition. Even the most ironclad interactional law may not prevent determined, deviant actors from rule breaking. Interactional law as a sophisticated approach to managerialism would not necessarily be capable of inducing recalcitrant actors to feel obligation. Nonetheless, there certainly were enough instabilities within the rule to facilitate, if not cause, the authorization of human rights abuses. Read in this context, plausible legality as a strategy geared towards reconciling strong norms with seemingly contrary actions becomes more theoretically intelligible. Legal form and normative substance are not necessarily synonymous in the absence of a practice of legality. This explains how law could be both permissive and constraining at the same time.

More than just a cover up or whitewash of norm violation, legal rationalizations of human rights abuses became possible because the instability of legal norms themselves made them vulnerable to exploitation. In the absence of this instability, the strategy of plausible legality and the appeal to “good faith” interpretation may not have been possible, forcing actors with a preference for human rights abuses to engage in either decisionistic or covert derogations. It would have made the legal legitimation of human rights abuses more difficult. As I have suggested, decisionism is incompatible with the generally legalistic contemporary normative environment, while plausible deniability is risky and unfeasible in the current context. Accordingly, more stable norms may have limited abuses not only through creating a deeper sense of obligation as Brunnée and

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65 Interestingly, Dunoff objects to Brunnée and Toope’s theory in that “As a result, practice that diverges from a formal rule can be understood less as a case of non-compliance than as evidence that the purported rule is not supported by a community of practice and should not properly be considered law. Hence, [Brunnée and Toope’s] account may provide alleged lawbreakers with a powerful argument that the norm being violated is not law at all, and hence of undermining the normative power of a claim of illegality.” (Jeffrey L. Dunoff, “What is the Purpose of International Law,” *International Theory* 3, no. 2 (2011): 334) Dunoff’s concern is quite valid, however, the problem is not jurisprudential theory, but how the law works in reality, as evidenced by the strategy of plausible legality. As discussed in Chapter 7, the antidote is not to ignore instability in legal norms, but to do the “hard work” of consolidating a human rights respecting interpretation of legal rules.
Toope would suggest, but also through limiting the capacity of plausible legality to function as a means of getting away with human rights abuses.

The concept of interactional law further helps to theoretically illuminate my observation that the specific structure of legal regimes informs approaches to rationalizing abuse. In the case of torture, despite being a highly legalized rule, it suffered from internal instability rooted in a vague definition of torture. As Brunnée and Toope note, and as I have demonstrated at length, the otherwise ironclad nature of the torture prohibition ensured that redefinitions of torture were central to OLC arguments. Such vulnerability also extends to due process norms and surveillance law. Like the torture prohibition, they have been victim to a lack of congruent practice. In these cases, significant ambiguities and gaps in the formal law make them even more vulnerable to manipulation. There has not been a consistent practice of legality in granting due process rights to non-citizens and those considered security threats in the United States. While this situation has improved over time, there is not a shared understanding about how such rights should apply to terrorism cases. There is even less consensus over the practical application of the Geneva Conventions and humanitarian rules to unconventional transnational conflicts. In the case of surveillance, new threats and new technologies have generated confusion over the application of rules. This context of normative instability facilitates the legal rationalization of human rights and civil liberties violations.

The advocates of plausible legality latched on to a kernel of truth—the line between torture and not torture is not always clear, foreigners are excluded from some aspects of due process, and almost totally from surveillance regulation. Lawyers did not concoct their arguments entirely out of thin air. In light of these findings, human rights
advocates need to seek ways to improve the practice of legality—to fill the shell of legal rules with rights respecting content, but also consider the adequacy of the positive law. Is it right that foreigners are denied rights? Are the Geneva Conventions sufficiently comprehensive? Is the FISA framework sustainable?

To sum up, I have argued that changes in the structure of constraint, including thickening social norms and a growing body of positive formal law, make open derogation unlikely for rationalist and normative reasons. While secrecy and denial are an alternative mechanism of rule evasion, they are difficult to sustain. As a result, legalistic justification, or what I have termed the strategy of plausible legality is an attractive way for authorities to implement abusive practices. At a basic level, we can interpret this as a way for actors to address the tension between their policy preferences and constraining rules—as a sophisticated form of liberal lying—or in more constructivist parlance, an approach to legal legitimation.

The perspective of interactional law allows us to further understand how law can simultaneously be both permissive and constraining. Plausible legality was made possible by an inconsistent record of practice and ambiguities and loopholes in the law, internal vulnerabilities that facilitated the manipulation of rules. In this sense, the strategy of plausible legality embodies the success and failure of the evolution of human rights and humanitarian law. Contrary to traditional realist and decisionistic assumptions, power cannot simply trump or reformulate law at will. However, at odds with neoliberal and some constructivist perspectives, the acceptance of positive law and social norms does not necessarily generate substantive compliance. Examining the empirical practice of non-compliance thus sheds light not only on the ability of law to generate compliance,
but also on underlying theoretical conceptualizations of the law itself. It is neither some external thing out there, which successfully or unsuccessfully imposes its command on actors. Nor is it something that actors internalize and automatically comply with for all time. Rather, law acts as a permissive constraint—as a restraining framework that functions through and is contested by human agency.

6.5 Conclusion

In light of the disjuncture between American human rights rhetoric and human rights practice in the Global War on Terror, this dissertation set out to explore the impact of legal and normative constraints on U.S. policy makers in the post-9/11 period. Instead of focusing on explaining resort to human rights violations, which have been a repetitive feature of state behaviour from time immemorial, I was drawn to the puzzle of why American authorities would seek to legally rationalize torture, due process violations, and warrantless surveillance. This led me to ask two empirical questions: What impact do changes in the structure of legal and normative constraint over time have on state approaches to these three human rights violating security practices? And: To what extent, and if so how have specific rule structures in the contemporary period shaped the American approach to post-9/11 human rights abuses? These were followed by one theoretical question: How can we account for these empirical outcomes in light of International Relations and International Law theory?

I found that changes in the structure of constraint have encouraged the resort to a strategy of plausible legality in the current period. I moreover found that the structure of legal regimes shape the contours of plausibly legal argument. The case studies on torture, due process, and surveillance suggest that law is not a sufficient constraint to prevent
actors with a preference for policies that violate human rights from authorizing them. However, law does make a difference in the current context insofar as it forces actors with a preference for abuse to seek legal cover and to limit their explicit authorizations to practices that they can make at least strained legal arguments about. Accounting for these observations in light of theoretical expectations about the impact of constraints on practice is not easy. Paradigms by their nature are not falsifiable. At first glance, quite radically different theories can provide a convincing explanation of the same phenomena. Nevertheless, ultimately some approaches prove more helpful than others.

Realist and decisionistic perspectives conceptualize compliance and non-compliance as something ontologically external to the rule. Derogation is normless and outside the law—an act of sovereign power based on interest or necessity. In this drama, law is a plaything. As a result, they cannot explain why policy makers would feel compelled to engage in extensive legal rationalizations for human rights violations. While they may superficially acknowledge the role of normative constraint in times of normalcy, their theoretical toolkit is not equipped to understand the independent impact or law or norms in times of crisis. Liberals and constructivists are better able to explain the pull of compliance. Yet, neoliberal positivism has trouble explaining how valid, formal law can be transformed to facilitate human rights abuses. While it can explain law as an independent constraint, constructivism also struggles with partial compliance. If norms matter, if they have been internalized, they should matter all the time. How norms can exist but not work is unclear. In the political ecology of twenty-first century American politics, legality is the legitimate language of authorization. Accounts that treat law as a purely instrumental tool fail to acknowledge the essential legitimating role law
plays. On the other hand, an emphasis on legal constraint often confuses form with substance, the medium with the message.

I have tried to examine how divergent understandings of law’s impact on states might be reconciled to provide a fuller account of the phenomenon in question. A paradoxical picture emerges. American policy makers cynically marshaled law to obscure their controversial practices, but needed to do so precisely because there are substantial costs to ignoring law. Intelligence agencies sought immunity in legal opinions because law does have bite. Despite a strong proclivity for unmitigated executive power, policy makers hid behind legalistic rather than purely political arguments. In this sense, law as a predominant currency of contemporary legitimacy perversely shaped the logic of human rights violations. Against its intended purpose, it permitted abuse, but limited the resort to pure lawlessness.

Yet, the story does not end there. Following contemporary constructivist legal scholarship, I have suggested the paradox of law as permissive constraint is not merely present in the tension between interests/preferences and norms, but within legal regimes themselves. Anti-torture, due process, and surveillance norms are powerful influences. However, lacking a consistent practice of legality, and in some cases, containing conceptual ambiguities and gaps, laws designed to protect human rights are strong on paper, but vulnerable to exploitation in reality. Understanding law as a living entity helps overcome the ontological dualism that portrays rule following and rule breaking in disparate ways. How successful actors have been in not only manipulating, but also reconfiguring legal prohibitions by means of plausible legality is the subject of the concluding chapter.
CHAPTER 7
THE IMPACT OF HUMAN RIGHTS ABUSES ON LAW

7.1 Introduction

In the previous chapters, I closely examined the impact of structures of constraint on approaches to human rights abuses, finding that the advent of legal and normative prohibitions on torture, unfair detention and trials, and warrantless surveillance did not result in the elimination of these practices. Rather, actors with a preference for human rights abuses have pursued them via exceptional derogations, covert activities, and most recently in the case of post-9/11 America, legal rationalizations. Chapter 6 analyzed these rationalizations in light of International Relations and International Law theory, suggesting that legal and normative rules function as a permissive constraint—permissive insofar as they cannot on their own prevent substantive violations, but constraining in that policy makers must consider them. The strategy of plausible legality highlights the tension between interests and norms, but also the instability within norms themselves. Drawing from conceptualizations of interactional law, I suggested that plausible legality as a strategy aimed at reconciling human rights and humanitarian law with human rights abuses was made possible by gaps, ambiguities, and a lack of a consistent practice regarding constraining rules.

The identification of strategic legalism as a major component of rights violations in the Global War on Terror raises a variety of questions. Most significantly—has plausible legality been successful? In the following pages, I explore this issue through several lenses. Firstly, a clear goal of the strategy was to immunize actors and deter prosecution. In this regard, I argue that it has, unfortunately, largely succeeded. Perhaps
more troubling in the long term is its impact on legal and normative understandings of appropriate behaviour. To address this problem, I explore the issue of norm revisionism, finding conflicting evidence. In many ways it appears that plausible legality has failed to consolidate its often perverse interpretation of rules, especially among legal and policy circles. Yet, attention to emergent state practice points to ways in which abusive policies continue to be enacted under legal logics. The chapter concludes with a reflection on the possible pathways available for challenging human rights abuses. A renewed human rights politics and practice must accompany efforts to impose human rights law so that the latter is able to fulfill its proper purpose.

7.2 Immunity and Impunity

Plausible legality is, in its crudest form, an attempt to immunize actors from prosecution for human rights abuses. As discussed at greater length in the case studies, there is ample evidence that it has succeeded in this regard. Save the convictions of a handful of low level soldiers caught on camera torturing detainees at Abu Ghraib, there have been few successful prosecutions regarding state authorized torture in the GWOT.\(^1\) The threat of universal jurisdiction cases and civil lawsuits may prove a nuisance to the architects of legalized torture, but it is difficult to envision the initiation of any more comprehensive prosecutions.\(^2\) Detention, trial, and surveillance policy are even less likely

\(^1\) Human Rights Watch reports that, “The US record on criminal accountability for detainee abuse has been abysmal. In 2007, Human Rights Watch collected information on some 350 cases of alleged abuse involving more than 600 US personnel. Despite numerous and systematic abuses, few military personnel had been punished and not a single CIA official held accountable. The highest ranking officer prosecuted for the abuse of prisoners was a lieutenant colonel, Steven Jordan, court-martialed in 2006 for his role in the Abu Ghraib scandal, but acquitted in 2007.” (Reed Brody, *Getting Away with Torture: The Bush Administration and Mistreatment of Detainees* (New York: Human Rights Watch, July 2011), 6, www.hrw.org/sites/default/files/reports/us0711webccover.pdf).

\(^2\) Human Rights Watch recommends investigation and potential prosecution of President George W. Bush, Vice President Dick Cheney, Defense Secretary Donald Rumsfeld, CIA Director George Tenet,
to elicit sanction. The Obama administration has largely maintained Bush administration policy in these areas. In a few cases where there was widely acknowledged illegality, legislators have stepped in, as in the case of telecom immunity for warrantless wiretapping, to preclude potential prosecution.

The failure to prosecute has been enabled by the strategy of plausible legality. Because law serves as a permissive constraint and not merely as a permit, it would be extremely difficult, if not impossible for political and legal authorities to decline to address exceptional legal derogations and openly practiced, unjustified (as in un-legally rationalized) human rights violations. It has further been facilitated by the same gaps, ambiguities, and inconsistent practice that allowed lawyers to concoct legal rationalizations for human rights abuses in the first place. Undoubtedly, a variety of political calculations have influenced prosecutorial decisions, but they might not be possible without the cover of plausible legality.

The absence of prosecutions is significant in two regards. Firstly, it suggests the efficacy of plausibly legality as an exculpatory strategy, making it an attractive option for human rights abusers to pursue. Allowing legal advice to shield officials from liability risks “validating a legal strategy that seeks to negate criminal liability for wrongdoing by preemptively constructing a legal defense. If such a strategy is seen to have worked, future administrations contemplating illegal actions will also be more likely to employ it,” notes Reed Brody.3 Secondly, the absence of legal accountability contributes to

“National Security Advisor Condoleezza Rice and Attorney General John Ashcroft, as well as the lawyers who crafted the legal “justifications” for torture, including Alberto Gonzales (counsel to the president and later attorney general), Jay Bybee (head of the Justice Department’s Office of Legal Counsel (OLC)), John Rizzo (acting CIA general counsel), David Addington (counsel to the vice president), William J. Haynes II (Department of Defense general counsel), and John Yoo (deputy assistant attorney general in the OLC).” (Brody, *Getting away With Torture*, 2) 3 Brody, *Getting away With Torture*, 8.
undermining what interactional law theory calls the practice of legality. If legal obligation is upheld through practice, it is essential to identify and sanction incongruent behaviour. This is not merely because sanction serves as a rational deterrent, although it may in some cases, but because it gives life and content to positive law. Indeed, as theorists of transitional law and war crimes trials have noted, prosecution can serve an important didactic and transformational purpose. While failure to prosecute may not in itself legitimize human rights abuses, it contributes to weakening the practice of legality. In this sense, addressing past wrongs is a necessary component of moving forward. As Human Rights Watch argues, “The US cannot convincingly claim to have rejected these egregious human rights violations until they are treated as crimes rather than as “policy options.”

7.3 Norm Revisionism

Beyond establishing immunity for human rights abuses, it is possible to interpret the strategy of plausible legality as an attempt to revise human rights norms, to alter understandings of the content and implications of legal constraints. In this sense, the torture memos tried to revise definitions of torture; detention and trial policy sought to extend jurisdictional gaps; and surveillance authorizations attempted to shift the border between foreign and domestic.

There is some disagreement among scholars over the extent to which the Bush administration’s legal rationalization of human rights abuses should be understood as a form of norm entrepreneurship. For instance, Ian Hurd suggests that while the United States did engage in revisionism surrounding preemptive force norms in the lead up to the

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5 Brody, *Getting away With Torture*, 5.
2003 invasion of Iraq, the authorization of human rights violations in the GWOT has been different:

[O]n human rights, including on kidnapping, secret detention, and detention without trial, the US has since 2001 sharply diverged from the existing rules but it has attempted to keep its policies secret rather than justify them with norms…The justifications supplied by the US have been at the most general level, as when a CIA spokesperson said that the US always acts ‘in accordance with its laws and treaty obligations’…In this area, the US has not acted as a norm entrepreneur or sought to use power productively. It has instead operated in the ‘denial’ stage of the ‘spiral model’ from Thomas Risse and Kathryn Sikkink (1999, 23), ‘refus[ing] to accept the validity of international human rights norms themselves and oppos[ing] the suggestion that its national practices in this area are subject to international jurisdiction’. By operating in secret and by attempting to avoid the entire process of legitimation politics around human rights norms, the US has placed itself in the position of being a rule-breaker without a compensating normative justification. The effect on human rights norms is therefore different than are the effects of US behaviour on preemption norms. On human rights, the most immediate crisis arises in the legitimacy of American power rather than in the legitimacy of the norms themselves; the gap between US behaviour and the international norms is wide and unbridged.⁶

While plausible legality as an exculpatory tactic may work at this surreptitious level, normative advocacy and subsequent normative transformation require public outreach, campaigning, and lobbying.

At a certain point, the issue comes down to a question of interpretation of the empirics of the situation. Thus, for other scholars, legal arguments did aspire to norm revisionism. For instance, Ryder McKeown analyzes OLC efforts as a form of norm entrepreneurship that has resulted in a legitimacy crisis for the relevant human rights norms:

I suggest that the tactics of the Bush administration and their supporters, strangely enough, have much in common with the transnational campaign to ban landmines, only in this case they have essentially re-framed a humanitarian issue as a security one to bring what I consider torture back within the purview of the state. While President Bush never explicitly endorsed a policy of torture, the important role of

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his administration in re-shaping the normative framework within the United States through inflammatory discourse, the obvious links between senior members of the administration and US interrogation policy, and the continued public defence of extreme interrogation in the War on Terror, confirm his administration as norm revisionists. Not only might this show an effort by a powerful state to reassert its dominance over such policies, but it also suggests that cherished national identities – as a liberal state that does not abuse human rights, for instance – may prove fragile in the face of crisis.

McKeown goes on to theorize a norm “death series” as a reverse of its life cycle:

This death series also consists of three parts, only it begins where Finnemore and Sikkink’s model ends: norm internalization. Here, certain norm revisionists (members of the state who actively seek to re-shape understandings of their country’s relationship to the norm through changes in policy, practice and/or discourse) pose some sort of challenge to the heretofore taken-for-granted, and highly salient, norm. Their challenge does not need to be a direct public statement questioning the norm – indeed, there was no such statement from the Bush administration justifying torture outright – but can also consist of quiet changes in policy away from compliance with the norm. The challenge can be in discourse, policy and/or practice or any combination thereof. However, if it is only a secretive change in practice, unaccompanied by any legitimating discourse, it will leave the prescriptive status of the norm intact, and the challenge will likely soon die out. Depending on the strength and circumstances of the challenge and the receptivity of the relevant audience, or the challenge resonance, the norm may experience a reverse cascade; that is, the norm revisionists’ challenge so resonates with the relevant audience that the norm loses salience. The reverse cascade itself has two parts. In the first, the norm loses salience domestically. This is a highly contested stage, where defenders of the norm seek to resist the new interpretation of the revisionists and their accomplices (non-governmental actors who spread and justify this revisionism in the public realm) in a discursive battle over the appropriateness/acceptableness of the discourse/policies/practices making up the challenge. This battle may occur both in public discourse and within government institutions such as Congress and the courts. The prize of victory is not only the direction of policy, but also the opinions of the relevant audience; that is, the section of the public/media/government who are not actively engaged in either norm revisionism or defence.

From this perspective, norm entrepreneurs can successfully undo a norm if norm defenders fail to protect it. The struggle between the two creates a legitimacy crisis.

Both agreeing and disagreeing with McKeown, Adriana Sinclair argues that while

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8 Ibid., 11.
there is evidence of norm regress in post-9/11 America, it cannot be explained as reversed norm evolution. A small group secretly made decisions to authorize human rights abuses. Policy was not the result of an argumentative process or change in identity. There was no reverse cascade. Sinclair suggests the difficulty of accounting for norm regress from a constructivist perspective stems from its teleological focus on “good norms.” This becomes especially problematic when dealing with law because constructivist approaches have traditionally considered legalization synonymous with internalization and treat it as a “black box…as a sort of finish line that norms cross.” Because law is often seen as a “good” counterweight to “bad” politics, there is little recognition that law is “fluid enough to justify that which it prohibited.” From this optic, it is conceptually nonsensical to theorize norm regress.

How to resolve the tension between these assessments? My perspective cuts through the middle. Throughout the dissertation, I have argued that American policy makers have not relied on crude denial of human rights violations. The extensive efforts made by the Bush administration to create plausibly legal justifications for human rights abuses does point to a strategy of norm revisionism, but only of a narrow kind. Rather than broad, publicly directed norm entrepreneurship generally associated with social movements and transnational advocacy networks, this legal revisionism was primarily directed at a hypothetical Special Prosecutor. As Sinclair notes, this strategy did not progress through a process of norm devolution, comparable to norm evolution. Actors did not directly challenge the human rights and humanitarian law regimes in a manner that

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10 Ibid., 160.
11 Ibid., 167-168.
12 Ibid., 168-169.
signaled a “legitimacy crisis”—threatening their “immanent possibility of death, collapse, demise, disempowerment, or decline into irrelevance.”\(^\text{13}\) Instead, as I argued in Chapter 6, interactional law theory highlights the ways in which practice gives content to formal rules. In this sense, normative understandings can be subject to revision without a process of all out norm contestation or rejection. Norms can be quietly destabilized without a reverse norm cascade.

The larger question is whether such efforts have succeeded. In this regard, the record is mixed. On the one hand, the continued practice of post-9/11 torture undermined the torture prohibition. On the other hand, however, administration arguments were met by significant pushback from the human rights and policy communities, challenges that highlight the ways in which “Rules are constructed, buttressed or destroyed through the continuing practice of states and other international actors. In the case of human rights norms, like the anti-torture rule, the work of non-state actors, particularly NGOs and the media, is particularly necessary and powerful.”\(^\text{14}\) OLC arguments did not succeed in legitimizing an alternative definition of torture, even within the domestic sphere. President Obama’s withdrawal of torture authorizations marked the failure of this strand of norm entrepreneurship. While ambiguities and incongruent practices served to destabilize the torture norm, there was enough consensus among human rights advocates

\(^{13}\) Christian Reus-Smit, “International Crises of Legitimacy,” *International Politics* 44 (2007): 166. Reus-Smit suggests “An actor or institution experiences a crisis of legitimacy…when the level of social recognition that its identity, interests, practices, norms, or procedures are rightful declines to the point where it must either adapt (by reconstituting or recalibrating the social bases of its legitimacy, or by investing more heavily in material practices of coercion or bribery) or face disempowerment.” (Ibid., 157)

and political and legal elites to undercut the plausibility of the torture memos.

As legal scholars have moreover noted, while positive law can authorize torture in a literal sense, torture cannot attain contemporary legal legitimacy or meet Fuller’s criteria of legality.15 Jeremy Waldron invokes the notion of background norms that inform the legal system. Not any norm can function as a legal norm. Certain archetypal conditions have become associated with liberal democratic principles:

The rule against torture is archetypal of a certain policy having to do with the relation between law and force, and the force with which law rules. The prohibition on torture is expressive of an important underlying policy of the law, which we might try to capture in the following way: Law is not brutal in its operation. Law is not savage. Law does not rule through abject fear and terror, or by breaking the will of those whom it confronts. If law is forceful or coercive, it gets its way by nonbrutal methods which respect rather than mutilate the dignity and agency of those who are its subjects. The idea is that even where law has to operate force-fully, there will not be the connection that has existed in other times or places between law and brutality. People may fear and be deterred by legal sanctions; they may dread lawsuits; they may even on occasion be forced by legal means or legally empowered officials to do things or go places against their will. But even when this happens, they will not be herded like cattle or broken like horses; they will not be beaten like dumb animals or treated as bodies to be manipulated. Instead, there will be an enduring connection between the spirit of law and respect for human dignity—respect for human dignity even in extremis, where law is at its most forceful and its subjects at their most vulnerable. I think the rule against torture functions as an archetype of this very general policy. It is vividly emblematic of our determination to sever the link between law and brutality, between law and terror, and between law and the enterprise of breaking a person's will.16

Revising the legal norm against torture in a way that generates an alternative shared understanding is inherently difficult in this context.

The bad news is, however, that successful norm revisionism is not necessary to make a norm malfunction. As highlighted in the above discussion of prosecution, continuing impunity for human rights abusers undermines the practice of legality. The

15 Ibid., 269.
record is even more problematic when it comes to due process rights and surveillance. While there has been a backlash against attempts to legally rationalize due process violations and warrantless surveillance, they have been less successful than in the case of torture. Norm entrepreneurs have been able to change understandings of human rights and humanitarian law. The following sections gage the effects of norm revisionism in terms of altered understandings and practice.

### 7.4 Domestic and International Reverberations

Developments in domestic American politics point to the continuing impact of norm contestation. As discussed in the case study chapters, the Bush administration did succeed in gaining legislative approval for reinterpretations of the Geneva Conventions, extra-judicial detention, and military commissions, as well as telecom immunity and authorization for the practices associated with warrantless wiretapping. Despite pushback from the courts, which forced the administration to revise its policies on several occasions, plausible legality did alter understandings of core legal concepts. Norm revisionism not only facilitated deviant practice, but also changed the positive law.

This has implications for domestic rights protections. As David Cole observes, human rights and civil liberties violations targeted at foreigners have a tendency to spillover and affect everyone.\(^{17}\) This is particularly evident in the case of surveillance—legitimate targets for warrantless surveillance have incrementally expanded to include a variety of U.S. persons. Privacy protections continue to erode, a problem that is likely to become progressively worse as new technologies blur the line between foreign and domestic and increase opportunities for surveillance. It is moreover apparent in emerging

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due process standards found in the ambiguously worded National Defense Authorization Act for Fiscal Year 2012, which opens the door to the preventative detention of American citizens.

Along with the changing line between foreign and domestic, the distinction between crime and war has been successfully eroded. As John Parry notes:

[War has changed in its functions, to become more like policing, but also…policing too has changed, to become more like war. To accompany this blurring of functions, legal structures for controlling violent state actions seem less likely to make distinctions between the two---or at least they have made it easier for state actors to move from crime to war and back again in their efforts to maintain social order. As these activities have converged, the question of what is a police action and what is a military action has become more difficult to answer.]

This shifting terrain underlies policies such as the expansion of off-battlefield drone attacks. While the Obama administration may have rejected the rhetoric of the Global War on Terror, it enacts the GWOT paradigm every time it expands the theatre of war to target terrorists in countries that it is not at war with like Pakistan and Yemen and when it reserves the right to extra-judicially kill belligerent American citizens. Such continuity is present in other policy areas. While I have argued that Presidential prerogative was not the sole basis for post-9/11 policy, there is no doubt that such claims were a core component of Bush administration arguments. Although seemingly initially rejected by President Obama, they have subsisted. Despite receiving a UN Security Council mandate, the President’s failure to seek Congressional authorization

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for American participation in NATO’s Libya campaign, “Operation Unified Protector,” as required by the Vietnam-era War Powers Resolution has met with significant criticism and generated comparisons with the previous administration. As Bruce Ackerman notes, “The players are different this time around, but the dynamic is the same.” Even worse, “Although Mr. Yoo’s memos made a mockery of the applicable law, they at least had the approval of the Office of Legal Counsel. In contrast, Mr. Obama’s decision to disregard that office’s opinion and embrace the White House counsel’s view is undermining a key legal check on arbitrary presidential power.”

Instead, President Obama relied on the opinion of lawyers such as Harold Koh, who characterized the mission as something less than “hostilities.”

Norm revisionism has also had implications on the international stage. According to the International Commission of Jurists, U.S. actions have emboldened human rights abusers around the world. In the wake of 9/11, numerous countries, including ones with poor human rights records, enacted anti-terrorism legislation with little or no debate. Much of this legislation defines terrorism extremely broadly, reduces procedural safeguards on law enforcement, and enhances preventative detention powers. These trends are at least partly attributable to the influence of the United States, which has urged others to adopt measures similar to the PATRIOT Act.

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24 Ibid., 1022.
have utilized emerging laws for nefarious purposes, states such as China, Russia, Egypt, Syria, Malaysia, Eritrea, and Zimbabwe have employed counterterrorist rationales for repression. As Beth Whitaker notes, “the adoption of anti-terrorism legislation in the Third World provides governments with the tools they need to justify antidemocratic practices. In more than a few countries, as has been documented extensively by human rights groups, the new laws have been used to silence critics and punish political opponents.” ²⁵

In addition to direct U.S. influence, UN and multilateral efforts have encouraged the development of more aggressive counterterrorism around the world through an emerging set of international rules that Daniel Moeckli characterizes as a “special regime.” The UN Security Council has enacted multiple resolutions addressing terrorist financing (particularly Resolution 1373²⁶), watch lists, sanctions, border control, and requirements for domestic legislation. The Counter-Terrorism Committee, a highly influential entity with no mandate to scrutinize human rights compliance, monitors implementation.²⁷ Regional instruments adopted by the EU, OAS, AU, and ASEAN have accompanied these measures. Yet, it is not clear that the challenge of contemporary terrorism requires this proliferation of special rules. Rather, it appears that the United States and allies have exerted intense pressure to:

create an international anti-terrorism regime that mirrors the special regimes they have established at the national level – regimes that provide for exceptional powers to deal with conduct defined as terrorism, in deviance from the general criminal law. By claiming that the international anti-terrorism regime embodies

²⁵ Ibid., 1028.
the interests of the "international community", they attempt to formulate their particular interests in universal terms and to have their special interests identified with the general interest." Thereby, they not only give their domestic counter-terrorism policies a global reach, but also imbue them with international legitimacy.\textsuperscript{28}

Insofar as these emerging rules limit due process standards and other rights available to alleged terrorists under existing law, they actively contribute to undermining human rights protections.

These developments have had significant implications in several respects. For instance, privacy protections have eroded around the world. As the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism has observed, “Human rights standards have been tested, stretched and breached through the use of stop-and-searches; the compilation of lists and databases; the increased surveillance of financial, communications and travel data; the use of profiling to identify potential suspects; and the accumulation of ever larger databases to calculate the probability of suspicious activities and identify individuals seen as worthy of further scrutiny.”\textsuperscript{29} Accordingly, practices once associated with exceptional surveillance have become customary:

First, States no longer limit exceptional surveillance schemes to combating terrorism and instead make these surveillance powers available for all purposes. Second, surveillance is now engrained in policymaking. Critics of unwarranted surveillance proposals must now argue why additional information must not be collected, rather than the burden of proof residing with the State to argue why the interference is necessary. Third, the quality and effectiveness of nearly all legal protections and safeguards are reduced. This is occurring even as technological change allows for greater and more pervasive surveillance powers. Most worrying, however, is that these technologies and policies are being exported to

\textsuperscript{28} Ibid., 177.
other countries and often lose even the most basic protections in the process.\textsuperscript{30} In the absence of a stronger international privacy consensus, these problems will be continually compounded by the growth in global intelligence information sharing and private third-party partnerships.

In the realm of humanitarian law, many commentators have noted that American hostility towards the Geneva Conventions may have destabilized rules governing armed conflict. As Jim Whitman writes:

Recent US actions are clearly deleterious to more general normative adherence to the Geneva Conventions. As a consequence, other more familiar kinds of violations of IHL are likely to accrue more normative impact than they would otherwise have had. And in much the same way that under ordinary conditions, laws and norms are mutually reinforcing, law-breaking and open contempt for legal norms could produce a downward spiral.\textsuperscript{31}

Moreover, the American posture in the GWOT is potentially detrimental to its ability to make credible commitments, uphold reciprocity, and protect its own soldiers. According to Jack Beard, to the extent that the Military Commissions Act is “perceived at unilaterally revising key obligations in the Geneva Conventions and providing the president with the discretion to issue further reinterpretations, it undermines the credible commitment of the United States to other states in the international community.” Other countries are likely to let their own commitments slip in turn. These revisions may “impede or estop the United States from taking legal positions that it had previously relied on to support its operations and protect its personnel from violations of the laws of

\textsuperscript{30} Ibid., 20.
war.” Finally, the United States may have offered its adversaries “a legal model for future conflicts, with attendant negative consequences for U.S. operations.”

Other possible shifts in interpretations of the law of the armed conflict include increasingly lax thresholds for war initiation and the invocation of self-defence, confused standards for attributing state responsibility, looser definitions of combatants and belligerency, and an expanding status for non-state actors. These changes may have the unintended effect of giving terrorist organizations international legal personality, and hence increased international legitimacy. “The terrorists have now moved up a rung in the hierarchy of actors under international law. They can now better challenge the state,” argues Mary Ellen O’Connell. Moreover, as Eric Heinze notes, insofar as international law is itself partially constituted through state practice, “if groups such as Al-Qaeda are said to be subjects of the law, then it follows that their actions and beliefs are relevant in customary law formation.” This has troubling implications. “The idea that customary international law is in any way constituted by the actions and beliefs of actors whose entire reason for existing is illegitimate and whose legal personality is based solely [on] the ability to inflict violence substantially undercuts the legitimacy the law.” While such hypothetical developments have yet to be realized, they point to the unpredictable directions reopening humanitarian law could lead.

34 O’Connell, “Enhancing the Status of Non-State Actors,” 457.
In sum, despite the failure of norm revisionism in the case of torture, there is evidence of success regarding due process, surveillance, and humanitarian norms. While the legitimacy of these efforts remain contested, unstable, and open to change, the more they are enacted in practice, the more likely they are to permanently alter shared understandings.

7.5 Reestablishing Constraint?

As observed throughout the dissertation and analyzed in Chapter 6, the existence of legal constraints does not automatically generate substantive compliance. For some observers, this has confirmed that law is at best a failed constraint and at worst, a permit for abuse. The argument I have put forward rejects such conclusions. I have instead suggested that the current structure of constraint encourages actors to feign adherence to law for both rationalist and normative reasons and that unstable rules are vulnerable to the type of manipulation and norm revisionism evident in the strategy of plausible legality.

Recognizing that law acts as a permissive constraint requires acknowledging its strengths and weaknesses and locating where its constraining capacity fails. Brunnée and Toope’s interactional model locates such failures in practice:

Stating a norm, even through formal means like treaty or custom, may be a step in creating law: but without the mutual engagement of social actors in a community of practice, the formal norm will not exert social influence. The prohibition on torture, for example, is contained in one of the most widely ratified treaties in the human rights domain. But the norm is constantly challenged through contrary practice and attempts at redefinition. The need for basic congruence between norms and social understandings helps explain why ambitious international regimes often founder: they have no social grounding.36

This raises the critical question of how norms can achieve “social grounding.” Clearly,

36 Brunnée and Toope, *Legitimacy and Legality*, 351.
the above discussion indicates that the traditional, unidirectional constructivist norm cycle is an inadequate model. Norm internalization and institutionalization cannot be the end of the story.

At the most basic level, such social grounding when it comes to issues of national security requires actors to accept that law is in fact capable of addressing emergency situations. There is little consensus on this issue. In the face of the terrorist threat, a variety of prominent scholars have attempted to construct scenarios that accommodate various forms of extra-legal action. For example, Bruce Ackerman has proposed an “emergency constitution” that would allow short-term, but prohibit permanent extraordinary measures in the wake of an attack.37 Oren Gross and Fionnuala Ní Aoláin alternatively suggest an “extra-legal measures” model that would require an ex post facto accountability process for the authorization of illegal exceptional practices.38 These approaches attempt to uphold human rights norms insofar as they seek to temporarily suspend or limit constraints rather than revise the content of norms. Indeed, they have been proposed precisely in order to mitigate the damage to legal norms wrought by counterterrorism. Yet, at the same time, they cut against the idea that law can both protect human rights and meet the requirements of crisis. In contrast, David Dyzenhaus proposes an aspirational, Fullerian view of law. Rejecting both lawless legal black holes and procedural positivistic legality or what he calls “rule by law,” he suggests that there are “moral resources” in the law available to deal with crises without producing exceptions.39

37 Bruce Ackerman, Before the Next Attack: Preserving Liberties in an Age of Terrorism (New Haven: Yale University Press, 2006).
Bracketing the extensive policy and theoretical debates that underlie these perspectives, it does seem necessary to adopt a general version of the latter position—that law is capable of balancing liberty-security challenges—as a prelude to a project of generating socially grounded shared understanding about what legal norms mean in practice in times of crisis.

Another component of this social grounding is continued advocacy by human rights NGOS, lawyers, politicians, and ordinary people on behalf of a substantive vision of human rights protections. Rules do not speak for themselves, but must be constantly promoted. Court judgments can play a particularly important role in reinforcing shared understandings. As Jerry Kang notes, precedents like the now rejected history of Japanese internment do not automatically influence decisions—the lessons of history are not naturally learned. Rather, “It is only through constant vigilance that the internment can remain a lighthouse that helps us navigate the rocky shores triangulated by freedom, equality, and security. We can never presume "never again." And as judges watch over, case-by-case, how our rights survive in a climate of anger and fear, I hope they receive guidance from the internment, as precedent and parable, without naïveté.” Such vigilance is especially challenging when innovation is required. It is not easy to forge shared understandings when emergent threats like transnational terrorism or novel challenges related to technological developments present themselves. Human rights advocates must adapt to address changing circumstances in order to remain relevant.

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40 See Austin Sarat, ed. Sovereignty, Emergency, Legality (Cambridge: Cambridge University Press, 2010) for an anthology addressing these issues.

None of this is to say that law alone provides some sort of antidote to the abuses of the powerful. Political and social advocacy are also extremely significant. As Beth Simmons notes in her comprehensive study of the relationship between international treaty ratification and state human rights practice, law cannot ameliorate all evils. Rather, “authoritative principles are a crucial element in empowering individuals to imagine, articulate, and mobilize as rights holders.”

Civil society protest, legal advocacy, and strategic litigation are all crucial elements that mediate the impact of international law. This dynamic relationship between law and other forms of social action has been historically evident in the domestic American context. For instance, the American Civil Rights Movement combined various forms of struggle to revise discriminatory policies. Writing about that context, Stuart Scheingold argues that the “myth of rights” should be supplanted with a “politics of rights” in which “rights are treated as contingent resources which impact on public policy indirectly—in the measure, that is, that they can aid the altering balance of the political forces.” In this view, law is a resource in a larger political process that takes place not only in the courts, but also through various channels of social action. Such arguments by “cause lawyers” provide insight into how shared understandings change.

In sum, reestablishing law as a substantive constraint is a multi-dimensional task, centered on stabilizing shared understandings of legal rules. This requires consistent efforts by a range of actors to interpret, apply, and conform to the law. The social

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42 Beth A. Simmons, Mobilizing for Human Rights: International Law in Domestic Politics (Cambridge: Cambridge University Press, 2009), 351.
44 Austin Sarat and Stuart A. Scheingold, eds., Cause Lawyers and Social Movements (Stanford, CA: Stanford University Press, 2006).
grounding of law is embedded in broader struggles, which can be leveraged to promote human rights.

7.6 Conclusion

This dissertation has examined the role of law in shaping state security practice. By tracing the impact of legal and normative constraints on state behaviour over time and across issue areas, I found that rules do affect conduct, but do not always result in substantive compliance. Rather, a variety of contextual conditions including the social acceptability of human rights derogations and extra-legalism, the monitoring environment, and the legitimacy of international human rights principles have influenced approaches to practice. Reflecting these conditions, states have at times instantiated de facto and de jure states exception, engaged in covert human rights violations, or, as in the case of the United States in the contemporary GWOT, resorted to convoluted legal rationalizations for abusive policies. I have characterized this latter approach as a strategy of plausible legality aimed at evading accountability for and increasing the legitimacy of human rights violating practices. The emergence of this strategy points to the role of law as a permissive constraint, which structures, but does not fully determine outcomes—which in the absence of a consistent practice of legality gives form, but not entirely clear content to policy.

Only time will tell if the tension inherent in the paradox of permissive constraint between adherence to and revision of law will be resolved in the direction of one pole or the other. I have suggested the greatest risk to human rights in the current context lies less in law’s suspension than in the incremental erosion of standards. The laws and norms that prohibit torture, unfair detention and trials, and warrantless surveillance have evolved
slowly and gradually through time. They could eventually be undone, not through the exercise of unmitigated sovereign power, but through a quiet unexceptional process of reinterpretation. Throughout the Global War on Terror, American policy makers manipulated law to permit what it should constrain. A sustained challenge to this logic is imperative if human rights considerations are to check national security practices in the future.
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423


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