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# States of Exception and Unlawful Combatants: Biopolitical Monstrosities or the Return of the Sovereign?

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States of Exception and Unlawful Combatants: Biopolitical Monstrosities or  
the Return of the Sovereign?

By

David Tyler Dunford

A Thesis  
Submitted to the Faculty of Graduate Studies  
through the Department of Sociology, Anthropology, Criminology  
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the Degree of Master of Arts  
at the University of Windsor

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2015

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States of Exception and Unlawful Combatants: Biopolitical Monstrosities or  
the Return of the Sovereign?

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June 16, 2015

## AUTHOR'S DECLARATION OF ORIGINALITY

This thesis includes 1 original paper that has been previously submitted for publication in peer reviewed journals, as follows:

Thesis Chapter	Publication title/full citation	Publication status*
Excerpts taken throughout the thesis	Legal Nominalism and the Constitution of Good and Evil: A Reconceptualization of Post-9/11 Discourse	<i>Submitted</i> – Social and Legal Studies

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## **ABSTRACT**

This thesis analyzes the widespread transgressions of U.S. constitutional, international and military law post-9/11. My aim is to illustrate how the tripartite problematizations of terrorism, national security and increased presidential authority constituted the dual emergence of the medieval sovereign and unlawful combatants as governmental subjects/objects. This thesis uses archaeological and genealogical discourse analysis in illustrating how post-9/11 texts transformed modalities of thought and deployments of executive power against newly constituted threats. I use Giorgio Agamben and Michel Foucault as intellectual reference points in explicating the formation of new political/legal discourses and practices that violate existing legal standards. I argue that although both theorists offer insightful theoretical contributions, they fall short in accounting for the emergence of the “security-sovereign” that is unrestrained by rationalities and logics of security and sovereignty. The result is a new avatar of sovereignty that developed and authorized indefinite detention and torture against the suspected “evil doer”.

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# 1. INTRODUCTION

The purpose of this research project is to analyze the War on Terror and the dual emergence of sovereign power and unlawful combatants as post-9/11 discursive subjects/objects. I draw on Foucauldian genealogical and archaeological critical discourse analysis and its accompanying way of considering power, knowledge and truth. The 9/11 attacks are widely considered as the most devastating attacks on the United States since the Japanese attacks on Pearl Harbor during WWII. The terrorist attacks were met with extraordinary measures by the world's superpower, the United States. President Bush promptly declared a global "War on Terror" against the state of Afghanistan (the Taliban being in *de facto* control of the region) and decentralized terrorist networks operating within and across state boundaries (Cutler, 2005; Henn, 2010).

The 9/11 attacks were met with unfettered (also referred to as sovereign power) U.S. presidential authority. On September 25th 2001, declared the official executive position of the Bush Administration in the *Yoo-Flanigan Memo*:

Military action need not be limited to those individuals, groups, or states that participated in the attacks on the World Trade Center and the Pentagon; the Constitution vests the President with the power to strike terrorist groups or organizations that cannot be demonstrably linked to the September 11 incidents (Yoo, 2001, p. 19).

The *Yoo-Flanigan Memo* paved the way for a juridical-political discourse that facilitated the expansion of presidential authority. Following the memo, President Bush issued the November 13<sup>th</sup>, 2001 *Military Order* that authorized "the indefinite detention and trial by military commissions of noncitizens suspected of involvement in terrorist activity" (Agamben, 2005, p. 3; See also Bush, 2001a, p.1). The *Yoo-Flanigan Memo* and

President Bush's *Military Order* not only established the Administration's official position in dealing with the War on Terror but it also formed the post-9/11 discursive formation that came to dominate both the juridical and scholastic/academic modalities of thought (Evans; 2002; Henn, 2010). This thesis argues that these key texts established specific modalities of thought concerning the dual emergence of increased presidential authority and an enemy outside of existing legal protections.

This study asks the question of whether the classification and treatment of unlawful combatants is representative of the ancient and absolute power over death embodied by the Roman sovereign as one finds in Agamben's depiction of the political sphere, or is illustrative of the emergence of a new sovereign power that problematizes existential threats and enemies that requires extraordinary measures as solutions. This thesis uncovers the power/knowledge (discourse) dynamic posed by post-9/11 problematizations. Thus, the central research questions are: 1) did the *Yoo-Flanigan Memo*, the *Military Order* and the *Executive Order* problematize legal/political discourses, modalities of thought and deployments of power that constituted unlawful combatants as dehumanized governmental subjects/objects? 2) What role does sovereign power over life and death play in the problematization, rationalization and justification of post-9/11 state violence?

In aiming to speak to these research questions, I draw on Foucault's tripartite analysis of "sovereignty, discipline and government" as modalities of power-knowledge, their corresponding technologies of power, and means of rationalization. In doing so, this thesis argues that specific problematizations articulated by high ranking executive

officials (reliant on expert discourse) shaped and facilitated shifting rationalities and logics of how to govern in post-9/11 governance illustrative of paranoia, risk and uncertainty (Valverde, 2010, p. 12). This facilitates the critical analysis of unlawful combatants and subsequent solutions formulated in expert discourse. I argue that the rise of post-9/11 sovereign power is at the core of the problematization of unlawful combatants. The tripartite post-9/11 problematizations of national security, existential threat and terrorism justified extreme discursive deployments of state power. In the present study, I argue that pertinent post-9/11 documents manufactured unlawful combatants and plenary presidential authority as political subjects/objects.

This research also outlines the strengths and weaknesses of Agamben's analysis of Foucault's multi-layered analytics of the political sphere and the War on Terror. Agamben's works, *Homo Sacer* (1998) and the *State of Exception* (2005), use pertinent Foucauldian conceptual analysis of sovereignty and biopolitics in theorizing the rise of plenary presidential power, the designation of "enemy combatants" and the violations of constitutional, international and human rights law. Agamben's theoretical analysis has been extraordinarily influential in academic circles in providing a conceptual tool in explicating post-9/11 American foreign policy (See Mountz, 2013). Despite this, it is crucial to critically inspect it not least since there are significant limitations in them. His claim that the War on Terror and unlawful combatant policy is largely illustrative of roman sovereign power is problematic. Foucault's theoretical and genealogical approaches are explicit: modern governmentality encompasses power-knowledge and with it, technologies of power that operate to dominate every aspect of human life (Foucault, 2007, p. 108; Hunt & Wickham, 1994, pp. 13-14). Agamben's theoretical

conflation of biopower and sovereignty wholly disregards Foucauldian scholarship regarding both concepts (Datta 2010); the biopolitical monstrosity is only resurrected to differentiate between what are deemed to be desirable and undesirable human subspecies (Dean, 2010, pp. 163-164; Foucault, 1978. pp. 137-138) whereas the power to take life or let live is exercised over those who transgress the monarch's law (See Foucault, 1977b, p. 130). Put differently, there are good reasons for being critical about Agamben's appropriations of Foucault's concepts. In summary, this thesis addresses the need for a more careful analysis of the problematizations and practices surrounding the dual problematizations of unlawful combatants and plenary presidential power as subjects/objects and the extent to which Agambenian and Foucauldian analyses of law, sovereignty and power can be used in explicating post-9/11 governance.

## **2. CRIMINOLOGICAL RESEARCH SIGNIFICANCE**

The main focuses of this thesis are longstanding issues in political criminology, the sociology of law, political sociology, constitutional and international law, and human rights. This thesis explores matters that are unfortunately all too often marginal in criminological literature and discussions of criminal justice systems (See Rothe & Freidrichs, 2006; Rothe & Ross, 2008). Criminology and domestic criminal justice systems, on the whole, direct inadequate attention to questioning and explaining the longstanding license of high ranking government officials that violate criminal, constitutional, and international human and legal rights (Iadicola, 2011. p. 123; Kramer & Michaelowski, 2011, p. 112; Rothe, 2011, pp. 199-200). The concept of “state crime” is helpful in this respect. State crimes are “Acts defined by law as criminal and committed by state officials in pursuit of their jobs as representatives of the state” (Chambliss, 1989, p. 184). They can be committed “for ideological purposes” and offenders believe they are following a “higher conscious”- i.e. usually dehumanizing the enemy - (Hagan, 1997, p. 2). State crimes negatively impact the cultural, economic, political and legal environments at the state and international levels (Hoofnagle, 2011; Rothe & Mullins, 2006). While state crime can be measured at the micro (i.e. the individual), meso-levels (organization) and macro level (state), this thesis largely concerns the state-structural analysis of criminality/wrongdoing whereby executive officials systematically institutionalize policies that have the potential to dehumanize, incarcerate and eliminate entire races of people (See Iadicola, 2011; See also Kramer & Michaelowski, 2011). High ranking foreign policy officials post-9/11 are exempt from prosecution and moral condemnation precisely because they constitute and institutionalize discourses and

policies that brand their enemies as evil doers, criminals and/or terrorists while constituting themselves as democratic liberators (See Bush 2001a; 2001b; 2002a). This can be exacerbated by the circumstance that law and criminal justice is articulated, formulated and adjudicated by high level governmental authorities. Criminology fundamentally fails as a discipline if it fails to attend to the illegalities, crimes, wrongdoings and harms committed by state officials and instead narrowly concentrates on individual offenders (see Bassiouni, 2011, pp. 27-28; See also Chambliss, 1989, p. 184). I believe that the suspension of existing legal standards and the widespread regimes of torture are worthy of criminological consideration.

Public discourse, government officials and academics have no issue in declaring the systematic extermination of Jews by Nazi Germany as being criminal and immoral (Friedrichs, 2011, pp. 55-60). Considerable evidence from lasting documents demonstrates the German support for Nazi human experimentation and extermination policies to “effectively address economic and political turmoil [and] to restore law and order” (Friedrichs, 2011, p. 66). German jurisprudence privileged Nazi executive decrees over formal legislative law by declaring that state preservation and necessity undermined constitutional law (Friedrichs, 2011, p. 65; Ott & Buob, 1993). The Nazi party enacted “Article 48” of the *Weimar Constitution* in 1933 and declared a “state of emergency” that lasted until 1945 (Agamben, 2005, p. 6; See also Schmitt, 1985). The enactment of “Article 48” gave the Nazi executive government the authority in suspending all constitutional safeguards and protections (Kennedy, 2011; Schmitt, 1985). In doing so, the executive suspended the existing legal regime, initiated aggressive foreign

occupations and engaged in a systematic biopolitical eugenics program to rid Europe and the world of “parasitic Jews” (See Foucault, 1978).

Academic literature and “western” governments condemn Nazi Germany’s *Final Solution* and aggressive foreign occupations (Friedrichs, 2011, p. 58). Despite this, post-9/11 American foreign policy raises similar legal and moral concerns over the reach of “state power,” its scope, and what laws and democratic checks may constrain it. The U.S. government post-9/11, much like the Nazis, dehumanize the enemy to “produce reactions of apathy, indifference, and passivity” while engaging in aggressive foreign invasions in violation of constitutional and international law (Bassiouni, 2011, p. 6), institutionalized, battle lab torture experiments (See Denbeaux, Hafetz, Denbeaux et al, 2015) and rectal force-feeding practices against purchased human test subjects (See Hutchinson et al, 2013; See also Feinstein, 2014). Moreover, high ranking government officials’ post-9/11 constructed executive memos and authorizations that systematically institutionalized discourses of preemptive war, retaliation and torture against individuals, groups and states irrespective of past “wrongdoing” (Yoo, 2001, p. 1; 2005). To demonstrate, just fourteen days after 9/11, the executive issued the *Yoo-Flanigan Memo* that gave the President the “constitutional authority not only to retaliate against any person, organization, or state suspected of involvement in terrorist attacks on the United States, but also against foreign States suspected of harbouring or supporting such organizations” (Yoo, 2001, p. 1).



### 3. THEORETICAL FRAMEWORK

This thesis applies Foucault's concepts of knowledge, power, law and governmentality to analyze expert post-9/11 discourse. I deploy Foucault's concepts - similarly to how you would use a "box of tools" - (Foucault, 1977a, p. 208) to analyze power relations and the problematizations that rationalize and justify a singularity of statements dealing in "unlawful combatants" (Foucault, 1977a, p. 207; 2002, p. 220). Here problematization means discursive resources, governmental institutions and actors that pose the problem of how to govern while also delimiting frameworks for identifying what counts as an urgent "problem" requiring expert "solutions" (Datta, 2008, p. 182; See also Dean, 2010, pp. 37-38). The problematization of specific objects by high ranking officials actively shapes or directs conduct through regimes of practices (ways of directing the self and others through multiple rationalities and technologies which constitute objects of government), (Dean, 2010, pp. 268-269) truth, forms of knowledge, and "predilection of how to govern" (Gordon, 1991, p. 7). Prisoners captured during the War on Terror are problematized by expert discourse as evil savages that must be detained indefinitely to avoid future terrorist attacks (Bush, 2001a).

The Foucault conceptual toolbox provides the researcher the ability to uncover ruptures, discontinuities, transformations and displacements in the problematization of human existence (Mahon, 1983, p. 105). For the purposes of this thesis, Foucauldian theory is not employed as a singular tool to answer and uncover everything. Rather, it is used as a tool to analyze specificities of discursive practices, problematizations, techniques and apparatuses of power in accordance with new political/legal discourses (Foucault, 2002, p. 135; Veyne, 1997, pp. 8-9). In doing so, this thesis does not seek to

uncover some underlying truth but instead discerns the conditions of possibility, conditions of emergence, the technologies of power, power-knowledge, and discursive materials that provide the researcher a privileged unexamined window (similar to the panopticon tower) into the dual emergence of unfettered presidential power and unlawful combatants (Foucault, 1977b, p. 196; Neal, 2006, p. 35). This “privileged window” into post-9/11 discourse uses the toolbox in uncovering and then revealing power where it is both delimiting and constraining and while at the same time, productive and deemed true (Foucault, 2002, p. 80; Neal, 2006, pp. 34-35). Post-9/11 discourse produced knowledge of unlawful combatants that led policy “solutions” indicative of preemptive military occupation and indefinite detention of a constituted evil and dangerous political subject/object (Foucault, 1994a, p. 185). Foucault’s theoretical toolbox does not aim to develop a model of the “totality” of power in society; rather, it provides an instrument to unravel the specific actualizations of power-knowledge dynamics (Dean, 1994, pp. 158-162). In other words, the Foucauldian conceptual toolbox does not seek to develop a general theory of power but operates to uncover specific, localized sites and operations of knowledge, power and discourse.

Power, knowledge and the subject are at the core of the Foucault’s theoretical toolbox. Post-9/11 discourse is the result of an elaborate set-up, derived, in part by key mechanisms apprehensible by use of Foucauldian concepts (Datta, 2008, p. 83). Power, (the first key Foucauldian concept examined in this thesis) cannot be conceptualized as good, bad, possessed or strictly prohibitory (Clifford, 2001; Veyne, 2010). Contrarily, power has a productive, “micro-physics” element that trains disparate, “useless,” and potentially dangerous bodies into productive forces (Foucault, 1977b, p. 170; 1994b, p.

84). For Foucault, power cannot be described in a general theory but needs to be understood in connection with specific manifestations of the multiplicity of relations of domination, techniques for targeting the constitution of bodies and their capacities and apparatuses of a case under investigation (Foucault, 1977b, p. 219; Foucault, 1994c, pp. xv-xvi). Relations, techniques and apparatus's of power are in part, shaped by rationalities of rule for organizing and coordinating human multiplicities (See Datta, 2007) such as sovereignty, discipline and governmentality.

The “early” genealogical Foucault was primarily concerned with the “micro-physics” and small powers whereas the “middle-later” Foucault in his *Lecture Series* was more concerned with governmentality and the juridico-discursive representation (Jessop, 2007, p. 36). This form of power is productive but is also prohibitory and is concentrated on “nothing more than the statement of the law and operation of taboos” (Foucault, 1978, p. 85). What is important for this study is not the operation of this kind of power being restricted to one model (sovereignty or discipline) but instead to a variety of strategic analyzes, tactical deployments of political technologies, and force relations (See Dupont & Peace, 2001). I do not analyze post-9/11 governance according to “zero sum models of governance” (Valverde, 2010, p. 11) but rather by “diverse authorities... programmes, techniques, apparatuses, documents, and procedures” (Rose & Miller, 1992, p. 175). Diverse and heterogeneous logics and rationalities of governance (e.g. liberal constitutionalism and sovereign power) function at different levels to ensure governance and security (Valverde, 2010, p. 12).

The second concept to be explicated in light of the research is “knowledge.” The Foucauldian approach opposes the enlightenment view that knowledge can only flourish

in the absence of coercive functions of power (Hunt & Wickham, 1994, p. 13). The formation of any body of knowledge involves the "power dimensions within which the knowledge is produced" (Hunt & Wickham, 1994, p. 13). This position is explicated in

*Discipline and Punish:*

We should admit... that power produces knowledge (and not simply encouraging because it serves power or by applying it because it is useful ); that power and knowledge directly imply one another; that there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that not presuppose and constitute at the same time power relations... the subject who knows, the objects to be known and the modalities of knowledge must be regarded as so many effects of these fundamental implications power/knowledge and their historical transformations (Foucault, 1977b, pp. 27-28).

“Enunciative modalities” (which include the right to speak, the institutional sites, style of elaboration and position of subject) within the sites of production privilege and valorize some forms of knowledge while marginalizing and excluding others (Foucault, 1977a; 2002, pp. 50-55). For example, *Yoo-Flanigan* established and then monopolized specific regimes of thinking and practices concerning unlawful combatants.

The third pertinent Foucauldian concept pertains to modalities of subjectivity, “subjectivation” in particular. For the purposes of this thesis, I focus my analysis on Foucault’s concept of subjectivation as found in Foucault’s work on discipline and governmentality. To be clear, subjectivation refers to the “the infra-constituting subject and... [how] subjects become self-reflexive” and “use techniques to cultivate or make, a self” (Datta, 2008, p. 169). The subject “does not pre-exist”, but is constituted, in part, through the constitution of “objects of knowledge”, practices, reflections and techniques (Datta, 2008, p. 169). This research analyzes the political subject/object (the post-9/11

sovereign) alongside external rationalities of power relations through “the antagonism of strategies” (Foucault, 1994d, p. 329). The post-9/11 sovereign (via pertinent texts) problematized terrorism and unlawful combatants as governmental domains and rationalities. I argue that plenary presidential and executive authority, including the unilateral decision to establish military commissions and an enemy without rights (Bush, 2001a; Henn, 2010, pp. 67-79) was partly the result of the problematizations of national security and existential threats posed by terrorism. This thesis analyzes how discursive War on Terror strategies link knowledge, position of authority and qualification. Pertinent post-9/11 texts, via authorities of delimitation in the Bush Administration (experts in unique positions that determine true and false), constrained, delimited and marginalized the political subject by producing knowledge that was then attached to individual subjectivity/identity (Foucault, 1994d, p. 331). The Bush Administration manufactured knowledge of authoritative statements (a detainee is an enemy and an “evil doer”) which was then deemed in discourse and modalities of thought as being true and right – the evil and dangerous evil doer - (See Foucault, 1994d, p. 330).

*I. Governmentality: Security, Discipline and Biopower:*

My point here is not to suggest that apparatuses of sovereignty in the classical era operated without apparatuses of discipline and government. Moreover, this project does not claim that apparatuses of government completely displace discipline and sovereignty in the modern age. Literature on sovereign rule overstates “sovereign hegemony over subjects and territory” (Deukmedjian, 2013, p. 56). As Foucault suggests, techniques of disciplinary power were employed throughout Europe during the plague regulations of the 16<sup>th</sup> century (Foucault, 2007, p. 10). Partitioning grids specified where people could

go, the type of food they could eat and prohibited and produced certain types of acceptable conduct (Foucault, 2007, p. 10). During this period, the science of the police emerged from the problematization of “a multitude of sites” that sought to regulate hygiene, health and deviant behaviour of populations (Foucault, 1994e, p. 92). The science of the police, including the Paris police, operated alongside apparatuses of security and discipline in the 18th century, by way of a centrifugal and centripetal duality of sovereignty (Deukmedjian, 2013). Police emerged equipped to deal with the smallest complaints including injuries, accidents, robberies and the breach of peace (Deukmedjian, 2013; Mildmay, 1763). Furthermore, ministry officials were tasked with spying on the population in local coffee shops to listen for possible high treason and sedition (Deukmedjian, 2013, p. 56; Mildmay, 1763, pp. 50-51).

Apparatuses of discipline and security function in unison with traditional criminal justice and police concerns. Discipline corrects and enforces breaches of codes and undesirable conduct by targeting and individualizing the body and its capacities (Deukmedian, 2013, p. 54; Foucault, 1977b, p. 140). Foucault demonstrated this conceptualization in *Security, Territory, Population*:

we should not see things as the replacement of a society of sovereignty by a society of discipline, and then of a society by a society, say of government. In fact we have a triangle: sovereignty, discipline and government management which has its main target and apparatuses of security as its essential mechanism (2007, pp. 107-108).

Disciplinary policing functions to minimize individual breaches of the law, restore harm and prevent crime (Lentoz & Rose, 2009) in accordance with a retroactive, after-the-fact prosecution. On the other hand, apparatuses of security do not operate to correct minor behaviour or breaches of codes but instead “let[s] things happen” (Deukmedjian, 2013, p. 55) according to constituted threats as deemed important by security agents (Datta, 2011,

pp. 218-219). Security thus functions by measuring the frequency and severity of risks and deploys practices and mechanisms of preemption, containment and elimination when the constituted threshold transgresses an imagined, improved and safe securitized future (Datta, 2011; Deukmedjian, 2013, p. 55). In this way, apparatuses of security operate in the continuous shifting of governmental rationalities according to purported future threats (Deukmedjian, 2013; Lentoz & Rose, 2009).

Apparatuses of security, “a resolutely heterogeneous grouping composing discourses, institutions... policy decisions, laws... moral and philanthropic propositions”, (Rainbow & Rose, 2003, pp. 10-11) functions to disrupt, contain and eliminate (Deukmedjian, 2013, p. 58) potential risks while discipline (anatomy-politics) is deployed to maintain the territory of the sovereign. Similarly, in modern governance, the sovereign’s head has yet to be removed from governmental and political discourse (Foucault, 1994f, p. 122). Rationalities of governmentality operate to secure populations against purported future risks/threats alongside logics and mechanisms of security, discipline and sovereignty.

My concern here is to demonstrate the re-emergence of sovereign power post-9/11 and its unlimited power over the vengeance of the regicide’s body. My aim is to illustrate the emergence of a new avatar of sovereignty, entrenched in logics and tactics of security. While the monarchical sovereign deployed his vengeance over the transgressor, the post-9/11 sovereign operates to displace, contain and eliminate imagined, future existential threats. The formation of unlawful combatants as governmental subject/objects differs from traditional prisoners of war. By way of example, newly constituted “evil doers” are undeserving of traditional legal protections

and are instead subject to indefinite political possibilities against the mind and body, including but not limited to indefinite detention without charge, torture and arbitrary assassination (See Darmer, 2009; See also Dratel, 2005). This thesis aims to explicate how post-9/11 foreign policy, based on imagined risk, fear and uncertainty constituted the emergence of new modalities of thoughts and discursive deployments in fighting the War on Terror.

The Foucauldian conceptual toolbox provides the researcher with the necessary means to uncover discontinuities and ruptures in the problematizations of specific objects. In the case of the present study, I analyze the techniques, mechanisms and tactics deployed by expert post-9/11 discursive governance. High ranking executive officials (via pertinent texts) constructs and designates between true and erroneous games of truth. Unlawful combatants are deemed dangerous subjects/objects that require preemptive, indefinite detention to avoid future terrorist attacks. In this respect, the unlawful combatant designation constitutes the political subject/object outside of existing legal standards. This requires focusing on the construction of unlawful combatant discourse alongside the technologies and apparatuses of power that justify deployments of state power, including the power to differentiate between “what must live and what must die” (Foucault, 2003, p. 254). This thesis does not ask how the unlawful combatant is morally justified but instead analyzes “the constitution of knowledges and domains of objects” (Foucault, 1994f, p. 118) that uncovers ruptures and discontinuities.



## 4. LITERATURE REVIEW

Post-9/11 juridico-political discourse has been the object of extraordinary attention in academic circles including governmentality studies (See Dean, 2007). Drawing from key Foucauldian concepts, Giorgio Agamben explicates his conceptual analysis of sovereignty in the *State of Exception* (2005). For Agamben, unfettered presidential authority in President Bush's *Military Order* resurrected and reasserted the unlimited power of the sovereign. Since his initial formulation, Agamben's conception of "exception" has been used by various academics to explain the perceived lacunae in legal discourse and deployments of state power pertaining to the War on Terror.

Agamben furthered his arguments about "exception" by way of three historical examples. He demonstrated how (in each case), an American President was forced to suspend constitutional law due to internal threats posed by the Civil War and the Great Depression and external threats faced during World Wars I and II. Despite strict constitutional restrictions on presidential power during a state of emergency, Presidents Lincoln, Wilson and Roosevelt issued executive orders to save the Union<sup>1</sup> (Agamben, 2005, pp. 20-22). In each case, the President ("acting" through sovereign power) suspended existing congressional power (Agamben, 2005, pp. 20-22). However, in each case, the President restored constitutional order subsequent to the ceasing of purported existential threats.

In conceptualizing the "exception", Agamben demonstrated the "lawlessness" of the enemy, who are neither afforded POW status as *per* the *Geneva Conventions*, nor the

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<sup>1</sup> The U.S. Constitution does not designate increased presidential authority during times of war.

status of being charged under American criminal law (Agamben, 2005, pp. 3-4). For Agamben, detainees are "the object of pure *de facto* rule" (2005, p. 3). Agamben furthers this argument by claiming that President Bush's "decision to refer to himself as the Commander in Chief" is a direct reference to post-9/11 sovereign powers (2005, p. 22). According to Agamben, the force of law (i.e. executive orders) is a "fictio iuris par excellence which claims to maintain the law in its very suspension" while at the same time initiating violence that "sheds every relation to law" (2005, p. 59). The state of exception is not a state of law but "a space without law" (Agamben, 2005, pp. 50-51). When the power of the executive and legislative are fused into one man and becomes legal norm, the juridico/political system becomes a "killing machine" (Agamben, 2005, p. 86). In short, Agamben contends that the state of exception is a space without law and the political subjects are at the mercy of an all-powerful Leviathan.

### *I. Agamben and Biopolitics:*

The designation of bare life produced by the biopolitical sovereign decision is the central argument found throughout Agamben's conceptual works of *Homo Sacer* (1998) and *The State of Exception* (2005). According to Agamben, the production of a biopolitical body designates between those included and excluded from the polity. This biopolitical relationship constitutes "the original activity of sovereign power" and dates back to Ancient Roman practices whereby those excluded from the city were reduced to the status of *homo sacer* (or sacred man) (Agamben, 1998, pp. 6-7). The *homo sacer* is removed from the protections of public life and is thus entirely stripped of his/her highest good (Datta, 2010, p. 170). However, the *homo sacer* is not geographically removed from public life; s/he remains within the polity and can be killed by a citizen without fear of

punishment (Agamben, 1998, p. 139). In this way, s/he is both inside and outside the law and is placed in a zone of indistinction, between the “human *creature*” (another word to describe bare life) and political existence (Agamben, 1998, p. 9; 2004aC, p. 12; Durantaye, 2009, p. 202).

The sovereign-biopolitical relationship is “the original structure in which law encompasses living beings by means of its own suspension” (Agamben, 2005, p. 3). The *Patriot Act* and President Bush’s *Military Order* authorized the creation of two subjects/objects not contained within the existing legal classificatory system. Newly constituted presidential powers authorized extraordinary deployments of power, including the indefinite detention of unlawful combatants outside of existing constitutional, military and international law (Agamben, 2005, p. 3). Agamben compares the treatment of unlawful combatants to the legal lacunae experienced by Jewish prisoners in Nazi death and concentration camps who lost both their identity and citizenship (Agamben, 1998, p. 68; 2005). For him, the classification of detainees (as unlawful combatants) established an enemy fundamentally outside of legal-political domains (Agamben, 2005). In this respect, the problematization of enemy combatants is akin to that surrounding an infection that “would conduct attacks on civilized people not in the form of sovereign states but by shadowy networks” (Dean, 2007, p. 171). Post-9/11 expert political/legal discourse justified the space of exception to institutionalize torture, export torture to undeveloped countries, and use advanced psychological and medical expertise to extract vital information (See Dean, 2007; See also Denbeaux et. al, 2015).

## *II. State Crime:*

In recuperating the analysis of state crime in criminological research, one must take note of a lacuna in its discursive formations and the discipline as a whole. Criminological discourse largely concerns itself with individual offenders while neglecting the actions/interests of the powerful. This is problematic for several reasons. First, the traditional “street criminal” usually only harms a handful of victims whereas the state wages war against entire geopolitical territories, sometimes killing millions in the process (Barak, 1991, pp. 4-6; Bassiouni, 2011, p. 15; See also Michaelowski, Chambliss & Kramer, 2010). The issue of harm is central to this argument; state law concerning individual offenders has increasingly become more punitive in recent years, whereas laws regarding powerful interests (both the state and corporate elites) have largely been repealed or neglected (Snider, 2006, p. 180). Arguably, this is reflected in post-9/11 American governance; the executive branch killed hundreds of thousands of people, has indefinitely detained up to 70 000 persons without *habeas corpus* relief, and has institutionalized torture (Dean, 2007, p. 168; Hagopian et al, 2013, p. 1).

Post-9/11 discourse and criminology in particular have generally neglected institutionalized practices of torture and extra-judicial killings (See Iadicola, 2011, p. 123). Indeed, since the attacks on 9/11, U.S. politicians and high ranking officials “euphemized painful interrogation practices, neutralized prohibitions on torture, isolated troubling incidents from policy decisions and built on racist and nationalistic discourses to deny victims of torture” (Rosso, 2014, p. 383). The sexual assault of female and male juvenile suspects at Abu Ghraib highlights the most egregious systematic human rights abuses and instances of state violence (Hooks & Mosher, 2005, p. 1629). These and other examples are indicative of the pervasive torture-killing reality that has occurred in

combating “evil doers” (Rosso, 2014). In this light, American foreign policy must be seen as fundamentally criminal and analyzed through a state crime perspective for its systematic, intentional practices that produce significant foreseeable harms. The United States established alternative legal codes and justice systems in violation of existing domestic, military and international human rights law. These policies are responsible for the deployment of practices that tortured innocent people and directly and/or indirectly killed hundreds of thousands of people while claiming to fight a moral crusade of righteousness (See Bush, 2002b).

As critical criminologists have noted for more than a generation, all crimes are political manifestations reflecting power struggles in society that in turn affect legislatures and subsequent legal discourse in determining what counts as harmful and illegal (See Chambliss & Seidman, 1971; See also Quinney, 1970). Therefore, codified and state sanctioned public wrongs exist only insofar as the designations, classifications, and administrations making explicit reference to legal codes. This circumstance parallels those of medieval absolutism whereby all crimes were classified as offenses against the sovereign (See Foucault, 1977b). To illustrate, prior to 9/11 terrorism was considered an American domestic crime and was subject to FBI jurisdiction and due process (Staff Statement, 2004, p. 1). However, pertinent post-9/11 executive documents problematized terrorism as an act of war against American national security (i.e. against the sovereign) and established alternative justice systems to deal with the newly constituted unlawful combatant designation (Bush, 2001, pp. 1-2; Bush, 2002a; Henn, 2010). In accordance with the *Military Order* (pp. 1-2), all non-U.S. citizens are deemed potential threats and can be indefinitely detained without trial. Therefore, it is more apt to theorize post-9/11

state crime as “sovereign state crime” and/or “sovereign injustice”. Military commissions (constituted by the *Military Order*) suspended existing legal discourses, practices, congressional and judicial powers while constituting existing criminal acts (terrorism) as existential threats to U.S. national security (Bush, 2001a, pp. 1-2). Detainees since have been subjects/objects to indefinite detention without *habeas corpus* relief, been victims of corporal punishment (similar to the revenge of the sovereign against the regicide as one finds in *Discipline and Punish*) by executive officials and remain outside of American domestic or international legal jurisdiction (Bush, 2001a; Cutler, 2005, pp. 187-190). These acts never have been considered criminal and/or harmful by international courts (e.g. International Criminal Court) precisely due to the United States position in international relations as a “hard power” (See Nye, 2009).

Criminology fails as a discipline if it does not consider post-9/11 foreign policy as criminal and/or harmful. Sovereign states have unique power-knowledge dynamics whereby expert discourses are tactically deployed to problematize and transform criminal, constitutional, military and international law, and modalities of thought concerning terrorism, torture and sovereignty. Sovereign states for instance, advance discourses and rationalities of state self-determination<sup>2</sup> (witness the Bush Administration’s occupation of both Afghanistan and Iraq) prior to and during aggressive foreign invasions (Weber, 1995, p. 125, 8). The Bush Administration could not justify its actions by appealing to the protection of either Afghanistan or Iraq sovereignty but instead appealed to protecting the people’s right to self-determination (Delcourt, 2006, p. 51). This doctrine is troublesome insofar as the dominant and/or occupying state

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<sup>2</sup> The argument of state self-determination can be traced back to President Wilson in 1917 (Weber, 1995, p. 125)

constitutes both the designation of who the people are and their decisions. While the Bush Administration claimed to support a government for and by the Iraqi people, the Bush Administration established an Iraqi government friendly to American interests, as opposed to an Iraqi government for the Iraqi people (Delcourt, 2006, p. 52).

The *Yoo-Flanigan Memo* established the institutional bases (in Foucault's terms, the "surfaces of emergence") that have since justified numerous foreign invasions, the dismantling of the Iraqi state and other governments, controversial interrogation methods, and extra-judicial assassination (Hudson, Owens & Flannes, 2011; Kretzmer, 2005; Passavant, 2010). Conventional criminology has neglected these issues despite egregious acts of this kind causing remarkably high levels of harm, including the overthrow of existing regimes and the complete destabilization (e.g. the emergence of the Islamic "State") of geopolitical territories (Michaelowski, Chambliss & Kramer, 2010; See also Thibos, 2014). Despite the chaos and harm caused by the overthrow of existing regimes in the early years after 9/11, the U.S. executive continues to engage in regime changes (e.g. Kaddafi in Libya) and other "sovereign state crimes" including torture, extraordinary rendition (in violation of Article 49, clause 1 of the *Geneva Convention Relation to Civilian Persons*), and rectal force-feeding practices (Feinstein, 2014, p. 64; Hutchinson et al, 2013, p. 16). Perhaps most troubling is the recodification and conceptualization of torture in the now infamous *Torture Papers* whereby a group of high ranking lawyers in the Justice Department legalized previously illegal torture methods such as waterboarding (See Darmer, 2009; See also Dratel, 2005). The *Torture Papers* contributed to the institutionalization of physical torture on suspected terrorists to extract vital information (Henn, 2010, p. 25). All the aforementioned instances of state crimes

are not isolated incidents or solely illustrative of the Bush Administration. President Obama continues many of the same practices, including extraordinary rendition and detainee force-feeding, despite being highly critical of the Bush Administration while serving as a U.S. Senator (Hutchinson et al, 2013, p. 201).

One aim of this thesis, then, is to address the gap in criminology and post-9/11 knowledge by looking at how specific texts problematized and then rationalized state crime, discourses of self-determination, and policies that justified sovereign injustice including the systematic institutionalization of indefinite detention, torture and extra-legal killing. The emergence of sovereign state crime post-9/11 established instances of wrongdoing that have largely been ignored by criminal justice systems. Therefore, it is up to the social researcher to affix the stamp of criminality on the state.



## 5. METHODOLOGY

The methodology for this research is rooted in Foucauldian discourse analysis, developed in the 1960's, during Foucault's archaeological phase which later extended into his genealogical approach to assemblages of discourse, power and contingency (see Jessop, 2007). The fundamental methodological reference point (in this thesis) is the *Archaeology of Knowledge* (2002). This text establishes the methodological principle of discrediting "secret origins" in accounting for the "already said" (Foucault, 2002, pp. 27-28). It uncovers historical ruptures within orders of discourse, while restoring the statement to discursive and frequently ideological specificity (Foucault, 2002, p. 204). What is deemed and deployed as "true" manifests a will and claim to power; domains of knowledge only exist within an accepted enunciative field (See Foucault, 1994b, p. 13; 2002, p. 234).

### *I. Data Sources:*

This project conducts an archaeological and genealogical examination of the *Yoo-Flanigan Memo*, President Bush's November 13<sup>th</sup> *Military Order*, and the February 7<sup>th</sup>, 2002 *Executive Order*. These pertinent texts were not randomly selected but were purposely targeted. *Yoo-Flanigan* constituted the surfaces of emergence for a juridico-political discourse of unfettered presidential jurisdiction that violated the *U.S. Constitution*, military and international law (See Henn, 2010, p. 30). By way of example, *Yoo-Flanigan's* claim of presidential plenary authority as Commander-in-Chief was used in justifying enhanced interrogation methods employed during the War on Terror (Clarke, 2008, p. 18; Passavant, p. 564; Rumsfeld, 2003a, p. 68).

President Bush's *Military Order* institutionalized new discourses and practices for captured prisoners. The constitution of military commission contravened existing constitutional, military and international law (Meyer, 2007, p. 49). To demonstrate, court proceedings, including pre-trial detention, pre-trial procedure, post-trial procedure and appeals are determined at the discretion of the Secretary of Defense despite it being congressional (Article 1, S.9, Cl. 8 and 9) and judicial (Article 3, S. 2 and 3) vested powers pursuant to the *U.S. Constitution* (Cutler, 2005, p. 59; Henn, 2010, p. 77). Moreover, the February 7<sup>th</sup>, 2002 *Executive Order* authorized the unilateral executive suspension of the *Geneva Conventions* and in doing so, eliminated existing provisions against torture. The *Executive Order* established discourses and policies that denied international human right protections against torture. Those discourses are indicative of discontinuities and ruptures that then manufactured new discursive regimes and practices (See Shaub, 2011).

The formation of enunciative modalities and rules of formation determine which statements are made and considered to be “true” or “effective” within the order of discourse. The power/knowledge dynamic of post-9/11 discourse concerning “unlawful combatants” are indicators of institutional sites and position of speakers (i.e. the President within the Oval Office). It considers how categorical subjects emerge as a result of contingent battles for domination which in turn reflect law as a dominant discursive formation (see Datta 2007). In response to the 9/11 attacks, enunciative modalities problematized the emergence a new enemy (i.e. unlawful combatant) and the sovereign-subject.

## *II. Archaeology, Genealogy and Foucauldian Methodology:*

In undertaking a Foucauldian discourse analysis, I am also attentive to the differences between Foucault's archaeological and genealogical approach. In a rare instance, Foucault addressed the relationship between the two in a 1983 interview. According to Foucault, the main difference consists of “method and goal” (Mahon, 1983, p. 105). Archaeology is the methodological framework for research whereas genealogy is the “reason and target of analyzing discursive events... our knowledge, our societies, our type of rationality, our relations to ourselves and to others” (Mahon, 1983, p. 105). The genealogical method exposes the contingent historical conditions in which veridical discourses are tactically deployed rather than simply repeating the discursive unity and “empty sameness throughout the course of history” (Foucault, 1994f, p. 118). The archaeologist uncovers the discursive rules for discursive and object formation (Datta, 2008, p. 241). I attend to both the archaeological and genealogical sensibilities.

A discursive formation is a collection of similar statements with respect to the same object of knowledge, independent of form and time (Foucault, 2002, p. 31). To clarify, a statement reflects a “complex web of rules” that establishes which expressions are discursively meaningful and taken to be “true” (Foucault, 2002, p. 110). A precondition for a statement is its connection to an enunciative field, between the relations of a statement and spaces of differentiation (Foucault, 2002, p. 182). It must have substance, support and a place (Foucault, 2002). Post-9/11 discourses concerning unlawful combatants are regarded as a series of finite and limited statements pertaining to pre-emption, risk and uncertainty. President Bush’s (2001a, p. 1) statement (in his *Military Order*) that “it is not practicable to apply in military commissions ... the principles of law and the rules of evidence generally recognized in the trial of criminal

cases” established post-9/11 legal/political discourses of pre-emption, indefinite detention and a new military justice system in violation of the *Uniform Code of Military Justice* (Cutler, 2005, p. 57; Henn, 2010, p. 32; Meyer, 2007, p. 49). The post-9/11 discursive formation marginalized traditional modes of liberal protections such as due process while producing a series of statements concerning risk, containment and preemption.

A discursive formation depends in part on the formation of a specific “object,” (i.e., the objectification of some specific socio-historical facet of human existence). Surfaces of emergence describe the first condition of this formation and describe fields prior to the emergence of the object (Foucault, 2002, p. 44). The objective of an archaeological undertaking should not be the object itself but the overlaps, discontinuities, and tensions that exist prior to the emergence of an object within the field of “knowledge.” A detainee in the War on Terror, for example, was only classified an unlawful enemy combatant subsequent to object formation.

Next, the “authorities of delimitation” are specific classes of subjects that authorize, delimit, designate, name and define the object (Foucault, 2002, p. 42). These authorities (which include legal, executive and medical experts) designate what can and cannot be said within a discourse, functioning as agents for what counts as “true. For the purposes of this study, the operational definition of a 9/11 authority of delimitation is a legal or political expert engaged in the formation of expert discourse about state conduct. In the case of unlawful combatant political/legal discourse, executive authorities create “discourses of truth” (Hunt and Wickham, 1994b, p. 42) whereby systems of legal rules determine objects, subjects, and designations of true and false. These planes/grids of specification classify, divide and contrast objects within the discourse (Foucault, 2002, p.

42). In the case of 9/11 discourse, the planes differentiate between national security, due process and war.

The formation of concepts is determined by three elementary levels: succession, coexistence and intervention (Foucault, 2002, pp. 56-58). The first elementary level establishes a set of rules in the schemata which allow recurring elements to constitute conceptual validity (Foucault, 2002, p. 60). Forms of coexistence include: the field of presence (all valid statements within the discursive formation); concomitance (valid statements outside the particular discursive formation); and the field of memory (statements that no longer have validity) which functions to permit and exclude concepts (Foucault, 2002, p. 60). Last, procedures of intervention operate by defining the rules and techniques by which the discourse may rewrite, translate and systemize statements and differ according to the particular discourse (Foucault, 2002, pp. 58-59). These elementary levels coexist in defining a system of conceptual formation. An analysis of these levels does not provide an understanding of the conceptual system but provides an insight into the rules of discursive regularities (Foucault, 2002, p. 191). It enables the researcher to discover how a statement may reappear or no longer remain relevant in the singularity.

The formation of enunciative modalities and strategies also contribute to the formation of statements. These include the right to speak, the institutional sites and position of subjects contributing to the institutionalized production of truth (Foucault, 2002, p. 108). Legal statements are made by lawyers and judges within specific institutional sites such as the Department of Justice or Department of Defense. The sovereign representative or academic are in a unique position of overlooking the population and statements. In doing so, the position of the subject shapes and oversees

the objectivized human subject(s) rendered visible and being observed. Investigating the strategies of discursive formations and problematizations contributes to the analysis of why certain concepts and objects form and attain discursive significance whilst other do not (Foucault, 2002, p. 110). When two competing incompatible theories or themes emerge with similar surfaces of emergence, why does one legitimately establish itself while the others fail?

The Foucauldian method approaches normative claims of truth and good/bad with a sceptical gaze. Foucault was a devoted sceptic of both knowledge and universalism; he believed universal claims were tied to the unsubstantiated Enlightenment doctrine of humanism (Gutting, 2005, p. 149). Contrarily, normative and veridical claims of truth are the product of the discursive constitution of objects, concepts, strategies and enunciative modalities that guide the production of the truth (Foucault, 2002, p. 186). The archaeological aim is to ask how a particular knowledge was constituted, deployed and with what consequences or “effects” (Foucault, 2002, p. 163). The Foucauldian method is not concerned with what makes a discourse “legitimate, or makes it intelligible, or allows it to serve in communication” (Gordon, 1991, p. 59). It does not explain why a subject is good or bad but consists in asking how the assumptions, notions and practices were established (Foucault, 2002); to wit, the “righteousness” post-9/11 torture programs and the suspension of due process are irrelevant. Instead, the goal is to uncover how post-9/11 discursive deployments concerning the formation of unlawful combatants devoid of rights and plenary presidential power were formulated, deployed and with what effects. This methodology describes and analyzes ruptures and discontinuities in the statements surrounding its origin and truth claim. This study analyses novel configurations of power

and domination, meanings and actions indicated by texts within 9/11 discourse (See Veyne, 2010, pp. 12-14).

A Foucauldian approach uncovers the conditions that exist in uncovering the claim to true and false (Veyne, 2010, p. 74). The production of truth is controlled, prearranged, and circulated (Foucault, 2002, p. 216) alongside “multiple forms of constraint” (Foucault, 1994f, p. 131). Statements only gain legitimacy and are deemed as actualized discourse, after specific conditions and qualifications are met (Foucault, 2002, p. 225). The production of truth is linked to structures of power relations that declare alternate truth as lies, errors and absurd irrationalities (Foucault, 1994b, pp. 11-12; Weir, 2008, p. 376). This “will to truth” is intricately linked to “systems of exclusion” and delimitation (Foucault, 2002, p. 219). Therefore, the truth is nothing more than a game whereby systems of domination manufacture the correct way of thinking, feeling and acting in accordance with its production (Foucault, 2010, pp. 386-388). In doing so, valid and repeated truths are the result of systems of dominations that then produce and attach personal significance (techniques of the self) and value to its formation.

Post-9/11 discourses can be understood as particular instances of problematizations since they involve the “domain of acts, practices, and thoughts that...pose a problem for politics” (Foucault, 2010b, p. 384). The Foucauldian approach is concerned with the games and regimes of truth, relations of power and forms of that relation to others. This approach does not seek to invalidate the fact that a certain group of individuals attacked the Twin Towers and the Pentagon. Instead, it aims to address the dual problematizations of unlawful combatants and plenary presidential power, articulated and constituted through post-9/11 discourse. It seeks to understand how the

surfaces of the 9/11 truth game created the conditions of unlawful enemy combatants, the emergence of the power over life and death and lawful indefinite detention.

### *III: Immanent Critique*

This work is also anchored in a productive and critical engagement with works that are at times very theoretical in nature. The nature of theoretical work of this kind itself warrants methodological reflection. Here, I articulate my genealogical hermeneutics and demonstrate how I understand and aim to evaluate texts and theory on their own terms. To be clear, I employ an immanent critique, or critique of knowledge, in understanding and explicating Foucauldian genealogical and archaeological sensibilities in accordance with a discursive analysis of post-9/11 texts. Generally, an immanent critique is concerned with uncovering frames of references that establish conditions or fields of knowledge and claims of truth (Habermas, 1972, p. 7). At the same time, an immanent critique is normative because it produces arbitrary alternatives to a given reality and in doing so, accepts a normative conception of truth and/or the good (Antonio, 1981, p. 333). The problem of subjecting knowledge to doubt finds its origins in Kantian and Hegelian theoretical traditions and this thesis shares in that critical spirit (See Habermas, 1972; See also Pearce, 2013). Foucault himself, drawing on the Nietzschean radicalization of critique, holds that “we need a critique of all moral values” (Nietzsche, 1956, p. 155) and that discursive formations produces “the light” (Datta, 2008, p. 60) or “things said” from which subsequent statements are made (Foucault, 2002, p. 234). The genealogical method records historical events outside of singular finalities or aims (Foucault, 1977c, p. 76) whereas archaeological sensibilities “illuminate” the connections between knowledge, practices and discursive objects (e.g. unlawful combatant). The



archaeological and genealogical critique is crucial in forming and implementing my own hermeneutics in interpreting Foucauldian and Agambenian texts and post-9/11 executive orders.

I employ my hermeneutics to analyze key texts on their own terms rather than impose universalizing judgements of right/wrong and good/bad. Therefore, my thesis employs both Foucauldian analytical tools and an immanent critique. My thesis uncovers normative abuses of U.S. state power and its claims of good/evil but I do not provide an alternative set of principles for governing the world. That is not to say that I do not have normative scruples, I do, but I try to analyze texts according to their own coherence and use of concepts (Pearce 2013). I do not assume to know the truth nor presume that origins are moments of “greatest perfection” (Foucault, 2010c, p. 79). Instead, I use my hermeneutics to critically inspect the logics, limits and gaps in Foucauldian and Agambenian theoretical systems. I argue that the internal logics of Foucault’s and Agamben’s theoretical toolboxes are inadequate in critically explicating and understanding the “darkest” deployments of state power at Guantanamo Bay. By way of example, I illustrate how discourses and logics of liberal governmentality and biopolitical sovereignty fail to properly explain instances of rectal force-feeding and battle lab experimentation on detainees. I understand that existing theoretical scholarship cannot account for all actualizations of state power. Instead, I advance and develop my hermeneutics in developing my conceptual analysis of the “security-sovereign” to partly explicate the emergence of post-9/11 governmental logics and practices.

## 6. FOUCAULT CONTRA AGAMBEN

### *I. Introduction*

This chapter provides a critical theoretical assessment of Agamben's and Foucault's models of power as a basis for analysing and explaining the relation obtaining between the sovereign and unlawful combatants. Agamben's book *Homo Sacer: Sovereign Power and Bare Life* (1998) and the *State of Exception* (2005) draw heavily on Foucauldian concepts, including sovereign power and biopolitics. These books have been exceptionally influential in academia as conceptual models for critical analyses of American responses to the 9/11 attacks (Mountz, 2013). While Agamben's uses of Foucauldian concepts have been reviewed and assessed (both positively and negatively), this chapter undertakes its own critical exploration of Agambenian theory. This chapter also examines Foucault's multi-dimensional analysis of modern power, from medieval deployments of sovereign power to modern assemblages, apparatuses, mechanisms, and tactics illustrative of "liberal governmentality" that guides the conduct of conduct. This section uses concepts by both thinkers to develop a theoretical foundation for analysing and explaining the increase of presidential powers and the deployment of controversial interrogation methods used by American authorities while fighting the War on Terror.

My aim in this chapter is to demonstrate how the juridical sovereign functions alongside a binary rationality; the sovereign established an elaborate system for prohibiting conduct but also constituted the production, authentication and validation of regimes and discourses of truth (Foucault, 1994b; 2003). I also discuss the transformation from sovereign, monarchical power to a new art of government: "the reason of state." By art of government, I do not mean how governors govern, but the "different objects,

general rules, and overall objectives of a government rationality” (Foucault, 2008, p. 3). By rationality, I refer to the discourses, means, objectives and instruments guiding state governance (Dean, 2010, pp. 119-120). It is particularly important to examine how specific problematizations of state strength and populations produced three great assemblages that secured and enhanced a network of force relations (i.e., “security assemblages”). Third, I discuss the emergence of liberal governmentality and its associated tactics and logics of governance. Of particular importance is the operation of security apparatuses, namely, the deployment of practices of pre-emption, containment and elimination (Deukmedjian, 2013, p. 55). Fourth, I assess Agamben’s conceptual analysis of biopolitics and sovereignty. In doing so, I argue that Agamben’s conception of the political sphere largely stems from his theoretical analysis of the case of the Roman *homo sacer* and the sovereign decision over “bare life” (Agamben, 1998; Gratton, 2006). Last, I discuss the limitations of Agamben’s analyzes of biopolitics and sovereignty. At issue are his theoretical conflation of biopolitics and sovereignty, and his totalizing analysis of the re-emergence of the Leviathan.

*A. Foucault and Agamben: A Brief Explication:*

The central argument advanced by Agamben (1998, p. 6) is the production of the biopolitical body that is constituted by both the ancient and now modern biopolitical sovereign. The main aim of the sovereign is to designate between those included (political subjects) and excluded (sacred man) from the polity. For Agamben, this “zone of indistinction” is the “original activity” and aim of sovereignty (Agamben, 1998, p. 6). In this sense, sovereignty and biopolitics are not separate deployments of power but operate alongside one another in designating between bare life and biopolitical tactics of

“taking life” or “letting live.” Agamben’s theoretical contributions diverge from Foucault’s analytics of power (especially work from his middle period) that places the productive “micro physics of power” and tactical deployments of discursive power as his central theoretical arguments (Foucault, 1977b, p. 34; See also Gratton, 2006). However, Foucault’s later works, particularly his *Lecture Series on Security, Territory, Population* (2007), concerns new political rationalities illustrative of a new “series of knowledge” and “governmental apparatuses” (Foucault, 2007, p. 144; Jessop, 2007). The governmentalized state, together with the emerging form for problematizing political rationality in the 16<sup>th</sup> century, is an “ensemble formed by institutions, procedures, analyzes and reflections, calculations and tactics” that allow for specific deployments and rationalizations of power (Foucault, 2007, p. 144). In the later, genealogical part of his career, Foucault shifted his focus from the analysis of discursive formations and how they shape experience and existence, to discourses, practices, bodies and power shaping action (Datta, 2008; Dupont & Pearce, 2001; Jessop 2007).

While there are gaps in Agamben’s and Foucault’s conceptions of power (as with any theoretical endeavour), they nonetheless provide critical tools useful for analyzing deployments of state power. This chapter provides an important theoretical examination and account of the numerous knowledges, technologies, and tactics of American foreign policy post-9/11. While Agamben’s analysis concerning the re-emergence of sovereign power post-9/11 has been unfairly criticized in my view, it remains important to inspect his work. I argue that Agamben provides a compelling and critical conceptual contribution to the understanding of sovereign power, one worthy of theoretical and methodological consideration.

## *II. Foucault:*

Foucault's position on power is multi-faceted and complex. He rejected a general theory of power, *a priori* assumptions and hidden unities (Dupont & Pearce, 2001; Jessop, 2007, p. 36). To be clear, he rejects a macro, substantive theory of power whereby all power relations stem from the state (Power, 2011). Instead, his analytics of power function in accordance (Power, 2011) with a "multiplicity of force relations" and the formation of complex chains and systems (Foucault, 1978, p. 92). Modern power does not consist of "homogenous domination" (Foucault, 2003, p. 29) illustrative of a single sovereign or dominant class over others but functions alongside "multiple bodies, forces, energies, matters, desires, thoughts, and so on," constituted through unrelenting forms of domination and subjugation (Foucault, 2003, p. 28). In this sense, power is distributed throughout the social body and social relations (Foucault, 1978, p. 93) and should be methodologically apprehended in accordance with a "nominalist analytics of power" (Jessop, 2007, p. 35; Datta 2007). Power cannot be specifically situated in specific institutions or structures but is moulded in localized ways by intersecting and connected tactics, formed neither by particular persons, classes nor organizational bodies (Foucault, 1978, pp. 94-99). Power is administered via techniques, technologies, strategies and mechanisms of domination (Deukmedjian, 2013, Hunt & Wickham, 1994). Most importantly, power is de-centered and circulates through networks of relations (Foucault, 1977, p. 220 Jessop, 2007, p. 34). It transforms "useless" and disparate bodies into productive forces (Foucault, 1977, p. 148; Jessop, 2007, p. 35).

Foucault is critical of the positivist approach to law in which it is treated as being representative of "rules backed by sanctions". He instead focuses on the authentication,

transmission and production of truth illustrative of the sovereign/judicial institution (Hunt & Wickham, 1994, p. 41). The main reference point for Foucault is sovereign power as it emerged in the middle ages and was extended into what he calls the “Classical Age,” that corresponds to the rise of Absolutist Monarchs.

The medieval monarchy in Western Europe emerged during an era of instability and heterogeneous claims to power as “agencies of regulation, arbitration, and demarcation” in constituting order and centralization (Foucault, 1978, pp. 86-87). The medieval sovereign functioned in accordance with a twofold system of power; the sovereign monopolized the power over life and death and established a discursive regime of right, violence and law (Foucault, 1978, p. 89). In doing so, the juridical sovereign manufactured classifications of wrongs (acts committed against the state and especially his/her person and capacity to rule), designated themselves as injured parties and demanded compensation for offences against juridico/political sovereign (Foucault, 1994b, p. 43). It also established a complex system (i.e. the “inquiry”) for determining polemic, strategic and linguistic “facts” (Foucault, 1994b, p. 3). In constituting the “inquiry,” the juridical sovereign constituted complex regimes for determining truth, error, right and wrong (Foucault, 1994b, p. 5). The inquiry established itself as a “form of power management and exercise that, through the judicial institution, became, in Western culture, a way of authenticating truth, of acquiring and transmitting things that would be regarded as true” (Foucault, 1994b, p. 52). Acts deemed as being wrong and illegal by the medieval sovereign were placed in a “position of hatred, contempt, or fear” (Foucault, 1994b, pp. 11-12). In this sense, medieval monarchies did not solely function as

centralized systems of unfettered violence (often associated with the medieval sovereign) but also operated alongside discourses of truth.

The discursive system of sovereign right introduced above not only prohibits conduct (thou shall not) but also engages in the production of truthful statements (Foucault, 1978, pp. 88-89; Hunt & Wickham, 1994, p. 44). While the modern exercise of power is administered in mechanisms, techniques, technologies and tactics fundamentally in opposition to the sovereign model, the sovereign system of right (Foucault, 1978, p. 89) has yet to be removed from public discourse (Foucault, 2003, p. xvii). That is to say, the medieval system of right has been transferred to the modern juridical sovereign (I conceptualize this classification as a high ranking executive, legislative and judicial official in the liberal state). Instead, the sovereign system of right (near absolute “right” to rule over his/her principality) has been transferred to liberal constitutionalism in “the establishment of an explicit, coded and formally egalitarian juridical framework, made possible by the organisation of a parliamentary, representative regime” (Foucault, 1977, p. 222). The constitutional system, representative of governmental restraints against the citizen and the rule of law, produces a false consciousness of entrenched individual rights (Hunt & Wickham, 1994, p. 63) while disguising the deployment of “micro physics of power” (Foucault, 1977b, p. 34) and all-out liberal wars and abhorrent genocides (See Foucault, 1978. p. 135; Dean, 2010, pp. 166-168). Individual legal rights are used as tactics for public argument while disguising new forms of juridical sovereign rights and biopolitical domination over the population (Foucault, 1980, p. 108; Foucault, 2003, p. 28).

Sovereign power has not been completely displaced from public discourse and governance. The sovereign spectacle is merely one of many rationalities, tactics, and technologies of power. Liberal constitutionalism and the rule of law do not eliminate the violent right of the sovereign; instead, expert political/legal discourse manufactures the legality, subsequent discourses and techniques of institutionalized killings and legal and/or civilized torture (Rosso, 2014, p. 386). The sovereign right to rule his/her territory has been transferred to the legitimacy of the liberal state to use extraordinary measures against purported existential threats to secure state sovereignty (Foucault, 1977b; 2007). What this suggests is that sovereign deployments of power do not operate at the margins of liberal rule but are instead delegated to politicians, judges, lawyers and executive officials. Authorities of delimitation within the legal/political enunciative field constitute true discourses concerning unlawful combatant that then rationalize and authorize violent exercises of state power against those deemed to be evil doers or security threats.

*A. Sovereignty and Raison D'état:*

Sovereign power dominated medieval Europe until roughly the sixteenth century. Sovereign power was largely deployed as “a means of deduction” - taking things away - (Foucault, 1978, p. 136) and was exercised over a clearly defined territory (Dupont & Pearce, 2001, p. 128). Sovereign power concerned itself with a right over the seizure of things, including time, bodies and life (Foucault, 1977b; 1978, p. 136). The threat or deployment of the public sword signified the sovereign’s “right to kill” and its right to refrain (Foucault, 1978, p. 136). Sovereign power functioned as an “exercise of terror” and the offender’s body embodied the symbol of unrestrained royal violence (Foucault, 1977b, p. 49). The sovereign right justified the deployment of violence over his/her



enemies, both domestically and abroad (Foucault, 1977b, p. 48). Despite this, the deployment of sovereign power was restricted to defending the monarchical crown and his/her territory (Foucault, 1978, p. 135), legal codes, and constitutions (Foucault, 2003; 2008).

Sovereign power is often discussed in governmentality studies in association with the “spectacle of the scaffold” (Foucault, 1977b, p. 32; Lippert, 2005, p. 68). Despite this trend, this point also associates sovereign power to the suspension of law (Lippert, 2005, p. 68). Foucault states that, “[the] sovereign was present at the execution not only as the power exacting the vengeance of the law, but as the power that could suspend both law and vengeance” (1977b, pp. 53). In this regard, the sovereign wielded his/her monopoly to punish the aspiring regicide or suspend the sentence (Foucault, 1977b, pp. 53-55). Classic sovereign power can thus be regarded as being both the monopoly over violence and the means to deploy the exception (Dean, 1994, p. 123; Lippert, 2005, pp. 69-70; Schmitt, 1985, p. 5). That is to say, the sovereign right over vengeance includes not only his/her right to kill but also the right to suspend the law. Therefore, the medieval sovereign ruled both by decree and by the suspension of the law. I argue that the basis for both juridical application and suspension has been transferred to liberal state power.

In the fifteenth and sixteenth centuries, sovereign power slowly shifted and transformed into disciplinary regulation and normalization that problematized the conduct of unproductive persons (Foucault, 1994g, p. 215; 2007). During the sixteenth century, the concept and practices of *raison d'état* emerged to deal with problematizations of state strength, statistics and police/policy science (Dupont & Pearce, 2001; Foucault, 2008, p. 5). The concept of *raison d'état* regarded continued expansion of state resources,

populations and self-pervations as its highest priorities (Foucault, 2007, p. 288). Of particular importance was the state's ability to actualize the force of law to protect itself (Foucault, 2007, p. 263). In the event of a purported existential threat to itself, the state deploys extraordinary measures to ensure its continued existence (Foucault, 2007, p. 261). *Coup d'état* and the state's suspension or transgression of existing legal codes establishes the reason of the state (Foucault, 2007, p. 263).

The rationality of *raison d'état* concerns the "art of governing states" grounded in a new political rationality (Foucault, 1994h, p. 314). The political rationality of *raison d'état* is based on principles and logics of preserving, maintaining, and developing a "dynamic of forces" for the sake of inter and intra-state competition (Foucault, 2007, p. 296). For Foucault, the preservation of a dynamic of forces can be traced to specific historically contingent conditions. First, the *sovereign* was concerned with increasing his/her wealth, resources, and territory for the sake of the realm whereas the *state* sought to increase its intrinsic wealth and potential power (Foucault, 2007, p. 294). Second, sovereign confrontations were fought in the name of the monarch with "blood [as] a reality with a symbolic function" (Foucault, 1978, p. 147). In securing relations of force, the military and police, two great security assemblages, developed to maintain and increase state influence and power (Foucault, 2007, p. 296). Military and police assemblages produced and deployed "political arithmetic" (Foucault, 1994i, p. 408) to "increase combine, and develop forces...that will make it possible to identify what each state's forces comprise and their possibilities of development" (Foucault, 2007, p. 315). Political arithmetic (or statistics) advanced the state's knowledge of itself; police and military assemblages developed internal, external and statistical data from other states

(Foucault, 1994h, p. 317; Foucault, 2007, p. 315). In doing so, the police and military assemblages constituted the emergence of a political rationality of force relations.

The military assemblage consists of two inner-state permanent organizations: military diplomatic relations and the organization of a professional army (Foucault, 2007, p. 312). While diplomatic relations were deployed to ensure the balance of power among European states, the professional military operated to thwart foreign invasions and increase state influence beyond its borders (Foucault, 2007, p. 311). While the military assemblage functions to secure equilibrium outside the state's borders, the emergence of the second assemblage, the science of the police, aimed to facilitate the proper internal functioning of the state.

The problematization of police concerned “everything, anything, and everyone within a jurisdiction” (Datta, 2008, p. 194; See also Foucault, 2007, p. 319) to ensure the order, maintenance and his subject's well-being (Gordon, 1991, pp. 9-10). During the seventeenth and eighteenth centuries, the police administered the following: education and proper determination of employment; directed the “dregs of society”, which encompassed the poor, the unemployed and the old; the proper functioning of the state economy which included the control of markets, trading and commodities; and territorial space (Foucault, 1994h, p. 318). Law, order and public safety were only considered secondary mechanisms of a new political power to supply the state with “a little extra strength” and equilibrium (Foucault, 1994h, p. 319). Man only existed insofar as his utility to the state; the state willed him to work, eat, produce and die (Foucault, 1994h). The entirety of existence for individuals, populations and the state was its political relationship to the state.

## *B. Liberalism and Governmentality:*

While the reason of the state and its political rationality focused on increased state strength, which dominated political discourse from the latter half of the sixteenth to the eighteenth century, an emerging art of government developed to criticize and oppose it. The rise of liberal rationality emerged from the problematization of government and how best to “economize” the exercising of power (Foucault, 1997, p. 44). Liberal rationality sought to limit the size and scope of government intervention and establish clear limits of governing. Modern liberal governance sought to govern less but not “too little, and thus failing to establish the conditions of civility” (Rose, 1999, p. 71). In doing so, liberal governance established new institutional bases (i.e. surfaces of emergence) of objects of rule, targets of intervention and discourses that were incompatible with the model of state interference found in *raison d'état* (Foucault, 1994d). Newly constituted economic rationality played a significant role in the development of governmentalized societies based on the contingent and heterogeneous factors involving:

the history of pastoral power, 16<sup>th</sup> century anti- Machiavellian treatises on government, the formation of late 16<sup>th</sup> and early 17<sup>th</sup> century art of government... doctrine of reason of the state and its associated political rationalities/knowledges, including the technology of police.... the emerging object of population, its subsequent articulation as a political problem, and corresponding associations with disciplinary, political economy, biopolitics and biopower; liberalism, and its associated mechanisms of self-regulation and apparatuses of security (Dupont and Pearce, 2001, p. 126).

Liberal governmentality functions “as a group of relations of power and techniques which allow these relations of power to be exercised” (Foucault, 1996, p. 410). It does not only refer to political rationality and management but also directs and leads individual and collective action (Foucault, 1994g; Rose, 1999, p. 70). Its basic functioning can be summarized in three interconnecting types of government: “The art of self-government, connected with morality; the art of properly governing a family, which belongs to an economy; and finally, the science of ruling the state, which concerns politics” (Foucault, 1994g, p. 206). In this sense, the proper functioning of a state includes individual self-care, self-reflection and self-examination, the proper functioning of political economy

and the practices and principles of a good government (Dean, 1994, p. 177; Foucault, 1994g, p. 207). It functions as a “mode of action upon the actions of others” (Foucault, 1994d, p. 341) by directing the potential conduct of children, families, schools, police and political economy among other institutional domains. Foucault’s concept of governmentality attends to systems of thinking about the world and (Gordon, 1991, p. 3) specific “organized ways of doing things” (Dean, 2010, p. 18) with the overall aim to guide or effect individual and collective conduct (Gordon, 1991, pp. 2-4).

Foucault’s concept of governmentality is primarily concerned with considering “the right disposition of things” (Foucault, 1994g, p. 208). Liberal governmental rationality is concerned with the objects it directs and manages; it aims to develop and foster a knowledge of the potential of things in relation to the population (Dean, 2010). It fundamentally differs from those of sovereign power and reason of the state due to the atypical connection with securing and developing populations. Above all else, population and liberal political economy becomes the “ultimate end of government” (Foucault, 1994g, p. 216). To clarify, Foucault does not conceptualize political economy as the creation or production of wealth and resources but the organization and distribution of a “self-limitation of governmental reason” (Foucault, 2008, p. 13). Political economy developed against the rationality of *raison d’état* and in favour of governing less. Most importantly, economic rationality is concerned with success and failure and the effects of governmental intervention into the disposition of things (Foucault, 2008, pp. 13-16). The possibility for the optimal economic disposition of economic problematizations, things and populations is made possible by the development and analysis of statistics administered by the science of the police (Foucault, 1994g, pp. 212-215). The police functions to shape the happiness, health, birth and death rates of the population (Dean, 1994; Foucault, 1994g; 1994h) while simultaneously problematizing governmental intervention.

The governance of populations is primarily administered by apparatuses of security that regulate behaviour through ranges of tolerances rather than targeting and correcting minor behaviour (Deukmedjian, 2013, p. 54; Hunt & Wickham, 1994, p. 54). Apparatuses of security function by limiting deployments of governmental intervention in private life, the family and the economy. It guides rather than determines individual conduct by acknowledging the need to “not govern quite so much” (Foucault, 1997, p. 29). At the same time, when the risk threshold becomes intolerable, apparatuses of security are deployed “through practices of pre-emption... containment, displacement and elimination” (Deukmedjian, 2013, p. 55). Apparatuses of security operate similarly to warfare in pre-empting, containing and eliminating potential risks (Deukmedjian, 2013, p. 55). Therefore, security discourse resembles sensibilities found in both the *laissez faire* governing of liberal governmentality and sovereignty; it does not seek to disrupt or correct minor behaviour but employs extraordinary measures, including the right to take life, in eliminating purported risks. While the mentality of governing over a territory has been displaced to that of governing things and conduct of conduct, the head of the sovereign has yet to cut off (Datta, 2008, p. 222). Instead, the tactics or “*telos* of governmentality has been partially filled by the concern with security” as a sovereign value (Datta, 2008, p. 222).

### *C. Foucault on Biopolitics:*

During the latter half of the eighteenth and beginning of nineteenth century, a biopolitical technology and rationality of power emerged alongside new government rationalities. It developed out of the classical period and combined rationalities and techniques of sovereignty, administrative discipline, governmentality and security (Dean, 2010, pp.

119-125). The primary purpose, finality and function of biopolitics is to ensure the proliferation of life at the level of human subjects and populations (Foucault, 1978, pp. 136-144). It objectivizes, improves, prolongs and enhances human life (Foucault, 2003, pp. 243-249). In problematizing population and life as its object and primary purpose, biopolitics reserves the right to deploy the ancient sovereign power to “foster life or disallow it” (Foucault, 1978, p. 136).

The power over life developed from two distinct forms. First, biopower power sought to enhance and optimize the individual body; mechanisms and techniques of biopower are deployed to harvest productive and docile bodies into efficient economic units (Foucault, 1978, p. 139). This “anatomy-politics,” “centered on the body as a machine: its disciplining, the optimization of its capabilities... the parallel increase of its usefulness... and its integration into systems of efficient and economic controls” characterizes discipline (Foucault, 1978, p. 139). Disciplinary institutions including schools, armies, prisons, and hospitals target and correct undesirable conduct to manufacture a disciplined mass that obeys as if the action were innate (Foucault, 1977, p. 166). Second, biopolitical technologies of power dealing in the aggregate “population,” aim to target and operate at the level of biological species (Foucault, 1978). It is concerned with the propagation of populations and operates to ensure and improve “health, sanitation, birth rates, longevity, and race” (Dean, 2010, p. 99). This power deploys the science of police and political arithmetic to establish statistics of birth and death rates, longevity, fertility and so on to preserve and improve human life at the levels of individuals and populations (Foucault, 2003, p. 243).

Biopower, the specific combination of biopolitics and anatomo-politics, uses totalizing mechanisms and techniques at the level of individual bodies and populations. This government of “all and each” (Foucault, 2007, p. 129) was founded in the “Pre-Christian East” (Golder, 2007, p. 165); the pastor attended to his entire flock while caring for each individual member (Dupont & Pearce, 2001, p. 127; Foucault, 1994h, pp. 308-311; 1994d, pp. 333-334). Technologies of pastoral power multiplied and transferred to the church and eventually to the “field of political sovereignty” over men (Golder, 2007, p. 168) that problematized life as an object of governance (Foucault, 2003, p. 254).

How then can a power that problematizes life and the well-being of “all and each” as objects of governance develop into biopolitical killing machines? Historical and contemporary examples including National Socialism (i.e. Nazis) and the current War on Terror demonstrate that the “shepherd-flock game,” whereby the biopolitical rationality of preserving and enhancing “us,” renders those biologically different as parasitic and/or undesirable (Dean, 2010, p. 166). This realization was actualized by the Nazis who institutionalized medical experiments and a *Final Solution* to rid the world of Jews (Dean, 2010, p. 167; Peukert, 1993, pp. 236-242). Reeling from the 9/11 attacks, the United States transformed Guantanamo Bay and CIA black sites into “battle laborator[ies]” (Denbeaux et al, 2015, p. 39) whereby low ranking detainees were (and continue to be) systematically tortured and pushed “to the boundaries-mentally, physically, and psychologically” to produce more efficient torture techniques (on future high ranking enemies) for the purposes of battlefield data collection and protecting American lives (Denbeaux et al, 2015, p. 39; Singh, 2013).



While biopolitical initiatives are formulated “in the interests of “national well-being” (Rose, 1999, p. 39) it also constitutes the necessary justification for the establishment of biological racism. Biological discourse appraises, measures, optimizes and qualifies between desirable and “degenerate... individuals and subpopulations” (Rose, 1999, p. 39). It classifies, designates and hierarchizes between superior and inferior human subtypes (Dean, 2010). Inferior bodies must be left to die to preserve and protect those that must live. For Foucault, this relationship is not only political one but is instead it is based on the biopolitical necessity to eliminate problematized enemy races (Foucault, 2003, p. 257).

The classification of humans based on biological differences allows for the calculated “scientific” identification and extermination of entire races and populations.

Foucault (1978; 2003) has told us that the classification and proliferation of life:

over living beings as living beings, and its politics, therefore, has to be a biopolitics. Since the population is nothing more than what the state takes care of for its own sake, of course, the state is entitled to slaughter it, if necessary. So the reverse of biopolitics is thanatopolitics (Foucault, 1994i, p. 416).

In ensuring the proliferation of a desirable race, the state functions to eliminate those deemed undesirable. By undesirable races, I refer to humans deemed “unworthy of life” (Dean, 2010, p. 164) and that ostensibly pose a “danger to the biological existence” to constituted human subtypes hierarchies (Foucault, 1978, p. 137). In doing so, biopolitics does not put an end to the sovereign right to kill; rather, it intensifies and transforms it by linking it with racism and security (Foucault, 2003, p. 249; Dean, 2007).

The “dark side” of biopolitics establishes the necessary conditions to eliminate those who represent a biological risk to superior human subspecies. In dehumanizing

biologically inferior human beings, the sovereign right to kill is integrated into biopolitical discourse, problematizations, and technologies of power (Dean, 2007, pp. 158-175; Foucault, 2003, pp. 254-260). The classification and designation of “less than human” subtypes forms the foundation for genocidal killing machines (Dean, 2010, pp. 163-165; Foucault, 2003, pp. 254-260). The biopolitical state engages in “ethnic cleansing” and holocausts that slaughters entire classes, groups and races (Dean, 2010, p. 164). While there is a certain restraint in the sovereign right to kill (sovereign inoperativity), “the biopolitical imperative knows no such restraint” (Dean, 2010, p. 164).

The “darker side” of biopolitics does not merely designate and classify inferior subspecies for the purposes of elimination. It also dehumanizes the enemy as “degenerates, abnormal and feeble minded members of an inferior race” ostensibly undeserving of basic legal and human right protections (Dean, 2010, pp. 164-165). The designation of inferior human races justifies and authorizes “medical and psychological techniques and disciplines... to open the private concerns of bodies to public control” (Dean, 2010, p. 164). Death represents the failure of torture; the biopolitical monstrosity maintains the power to let die at all costs (Rejali, 1994, p. 91).

In summary, Foucault is critical of the negative representation of power that acts through sanctions and violence. Instead, he argued that governmental models of power emerged during the sixteenth to eighteenth centuries that fundamentally differed from traditional representations and practices of sovereign power. In problematizing life as an object of modern governance, biopower developed as a technology that sought to ensure, preserve and enhance human life. I argue that this technology of power (that protects and preserves each and all) can partly account for the dehumanization of the unlawful

combatant in post-9/11 governance. I argue that the unlawful combatant is classified as an inferior, racialized and historical throwback of the uncivilized savage (Mégret, 2005, p. 282). In doing so, pertinent post-9/11 texts dehumanized the unlawful combatant in similar fashion to the civilization process undertaken by earlier European settlers (See Bush, 2002b). In doing so, practices of indefinite detention and torture are justified because unlawful combatants are deemed to be inferior human subtypes (Kellner, 2006, p. 45).

### *III. Giorgio Agamben on Biopolitics and Sovereignty:*

Agamben's work in *Homo Sacer* (1998) and the *State of Exception* (2005) almost exclusively concerns itself with biopolitical sovereignty (Gratton, 2006). These works, particularly *Homo Sacer*, draw from Foucauldian conceptual resources about sovereignty and biopolitics in *History of Sexuality*, and Foucault's *Lecture Series Society Must Be Defended* (1975-76) and *Security Territory, Population* (1977-78). In Agamben, Foucault's focus on the health of populations and biological life come to be seen as concerns of the sovereign, gradually displaced as a problem of "the government of men" (Agamben, 1998, p. 3). The state is obliged to care for the population while techniques of subjectivization bind the individual subject to her/himself and the state (Agamben, 1998, p. 5). In this way, the state's primary goal is to ensure biological life, by subjecting it to the control of its jurisdiction while also shaping individual subjectivity to take care of itself. The state's political techniques and individual subjective technologies create a "political double bind" whereby the convergence of power between the state's totalizing power and individual subjectivity remains unclear (Agamben, 1998, p. 5). This conceptualization of power is problematic for Agamben (1998) because Foucault fails to

develop a general theory of power. Agamben argues that Foucault's political double bind of biopolitics and individualization creates a zone of indistinction (Agamben, 1998, p. 5). This indistinction is a central foundation for Agamben's concepts of *zoé* (bare life) and *bios* (political or social life).

Agamben's intellectual foundation is grounded in Aristotelian philosophy whereby the good life and the highest good are to be realized within the polity (Agamben, 1998; Aristotle, 1978). For Aristotle, those outside the polity are not human but instead are either beasts or gods (Aristotle, 1978, 1, II, 16; Norris, 2005, pp. 3-4). Agamben was influenced by this conceptual distinction between those included and excluded from the polity (Norris, 2005, pp. 3-5).

Agamben (1998, 2005) conflated Foucault's clear distinction between sovereignty (power to let live and make die) and biopolitics (power to let die and make live) in conceptualizing biopolitical sovereignty. The inclusion/exclusion indistinction between these two concepts influenced his understanding and classification of Foucault's "blind spot" between the totalizing political techniques of the state (police, sovereignty and biopower) and individual subjectivity. While Foucault purposely chose not to conceptualize a "unitary theory of power" (such as uniting his analysis of biopolitics and sovereignty) Agamben conceptualized this as his fundamental theoretical gap (Agamben, 1998, p. 5). Agamben thus combined Foucault's "unfinished" configurations of power in first few pages of *Homo Sacer* (both Foucault's totalizing and individualizing analytics) in forming the basis of his theoretical analysis of the sacred man and the analogous zone between the juridical sovereign and biopolitical models of power (Agamben, 1998, p. 6).

The result of his analysis was the combination of the totalizing and individualizing power of the biopolitical sovereign.

*A. The Paradigm:*

The paradigm is the central “methodological approach to problems” to elucidate a “larger historical context” (Durantaye, 2009, p. 218). For Agamben, the paradigm operates to render visible a historical contextual problematic, much like Foucault’s deployment of Bentham’s figure of the panopticon: it illustrates a way to exercise power-knowledge (Durantaye, 2009, p. 224; Raulff, 2004, p. 610). The paradigm is neither particular nor universal and “neither general nor individual” (Agamben, 2002, para. 12). This methodological approach does not try to explain the whole but instead explains a framework of a historical/philosophical whole (Agamben, 2002, para. 31). The historian analyzes and describes a historical singularity whereas Agamben employs the paradigmatic methodological approach in understanding a group of historical facts and structures in applying it to current problems (Durantaye, 2009, p. 223). In this way, Agamben is less interested with understanding the past and more concerned with the present (Durantaye, 2009, p. 223). Agamben’s paradigmatic methodology uses the *homo sacer*, the state of exception and the camp in applying historical phenomenon to contemporary western governance (Durantaye, 2009, p. 223). These “exemplary places” (Agamben, 1998, p. 10) have been criticized “as series of wild statements” (Laclau, 2007, p. 22) in mirroring the inclusion/exclusion of biopolitical sovereignty and the camp (Norris, 2005, pp. 273-275). Contrary to his critics, Agamben’s conceptual analysis of the biopolitical sovereign paradigm is not a series of wild statements nor does it favour “what it contests” (Norris, 2005, p. 264). I argue that Agamben’s historical deployment of

exemplary places provides a unique perspective into the darkest, ubiquitous, yet largely unanalyzed features of modern governance: the sovereign biopolitical decision over bare life.

*B. Homo Sacer:*

For Agamben, and contrary to Foucault, sovereign power and biopolitics cannot be separated. The indistinction between politically qualified life (*bios*) and bare life (*zoé*) constitutes the biopolitical sovereign (Agamben, 1998). Agamben claims that the *bios* (political life) and *zoé* (simple fact of being alive) indistinction dates back the Aristotelian and Ancient Greek traditions (Finlayson, 2010, pp. 105-106). The ancient tradition of bare life represents two different archaic figures: the *zoēas* representative of “biological life of human beings” and the *homo sacer* (Eduardo & Villamizar, 2014, p. 82). For the purposes of this thesis, I conceptualize bare life as the sovereign decision to exclude those from the polity (Gratton, 2006, p. 452). The sovereign ban and designation over bare life finds its origins in “ancient Germanic law” (Agamben, 1998, p. 104) and the wolf-man who is “neither man nor beast and, who dwells paradoxically within both while belonging to neither” (Agamben, 1998, p. 105). The ancient Germanic wolf-man thus embodies bare life; transgressors of communitarian law are rendered outside of public protections. Just as the wolf-man belongs to neither beast nor man, he “who has been banned” is neither “inside nor outside the juridical order” (Agamben, 1998, p. 29). The wolf-man is banned from the city and subject to a condition similar to that described by the Hobbesian notion of the state of nature (Agamben, 1998, pp. 105-106). The sovereign ban does not allow the wolf-man to reside inside the city but casts him away on the threat of the public sword to live amongst the wolves and live under the constant fear of a painful death.

The ancient Roman figure of *homo sacer* embodies the sovereign's constitutive and original power to remove the political subject (i.e., specifically the "citizen") from the polity. Yet, the *homo sacer* remains within the polity by means of his/her very exclusion (Agamben, 1998): the relation between the sovereign and the polity is constitutive of the type of subject of the ban. Although Agamben does not explicate the difference between the wolf-man and *homo sacer*, they are dissimilar. The wolf-man is banished from the polity and lives in the state of nature whereas the *homo sacer* remains within the community. He is both inside and outside the law and remains in a zone of indistinction between bare and political existence (Agamben, 1998). The *homo sacer* is entirely stripped of his/her highest good and political existence and is rendered a life of "naked existence without significance" (Datta, 2010, p. 170). He is not only naked by means of being excluded from the polity but he is also deprived of being fit for sacrifice (Ojakangas, 2005, p. 10). In this sense, he is doubly excluded; his death may neither be classified as homicide nor sacrifice (Agamben, 1998, p. 82). The sovereign decision, actualizing the original juridico-political structure that constitutes what is included and excluded from political life in the polity (Agamben, 1998, p. 19), subtracts the *homo sacer* from both "human and divine life" (Agamben, 1998, p. 82).

Agamben's conception of biopolitics distinguishes between *bios* and *zoe* (Murray, 2008). In doing so, biopower (combining biopolitics and anatomo-politics) does not seek to ensure and enhance life as one find in Foucault. Rather, this "negative eschatology" operates to include political existence and classify bare life (Datta, 2010, p. 172). In other words, Agamben's conception of sovereignty (biopolitical sovereignty) functions in accordance with the constant threat of unconditional death without sacrifice or juridical

concern (e.g., homicide); we are already designated as *homo sacer* and deemed politically and religiously naked (Datta, 2010, p. 172; Ojakangas, 2005, p. 9). Therefore, Agamben's conception of biopolitics dramatically differs from Foucault. Agamben's understanding of biopolitics is the antithesis of the power of attending to the care of populations. The following passage from *Homo Sacer* illustrates this difference well:

Along with the emergence of biopolitics, we can observe displacement and gradual expansion beyond the limits of the decision on bare life, in the state of exception, in which sovereignty consisted. If there is a line in every modern state marking the point at which the decision on life becomes a decision on death, and biopolitics can turn into thanatopolitics, this line no longer appears today as a stable border dividing two clearly distinct zones (Agamben, 1998, p. 122).

In Agamben's work, biopolitics *is* thanatopolitics because every decision to ensure life becomes a decision to take it (1998, p. 122). The exercising of sovereign power to constitute an "exception" is not a war against a biological race but a negative power actualizing the sovereign ban from Antiquity to the modern state (Murray, 2008). The "exception" is an ambiguous zone "separating between bare life and legal existence" (Lemke, 2005, p. 8).

Agamben (1998, p. 123) uses the origin of the modern example of the writ of *habeas corpus* (*British Act of 1689*) in illustrating the ambiguous inclusion/exclusion zone of the political subject. The modern British state established the *corpus* as the democratic political subject/object, with the guaranteed and fundamental right to be brought before a judge. To be clear, the constitution of this political subject was not used to limit the exercise of judicial power. On the contrary, it was used to compel the *corpus* "to the violence of sovereign decision" (Gundogdu, 2012, p. 7). In valorizing the *corpus* and life, the sovereign state extended its biopolitical sovereign decision in the designation of bare life (Gundogdu, 2012, p. 9). The *corpus* thus both embodied and transformed the



ancient power over *bios* and *zoé* (Ojakangas, 2005, p. 7) into modern exercises of state power. Therefore, the modern democratic state's power over the *corpus* shatters bare life and distributes it within individual sovereign bodies (Agamben, 1998, p. 124). The sovereign subject literally embodies a part of the sovereign; he resigns to the state the absolute authority over his bodily dominion (Agamben, 1998, p. 125). The sovereign need not designate bare life since the *corpus* "is a body of the city... of the so-called political part" (Agamben, 1998, p. 125). The newly founded sovereign power designates a complete and total bare life over those in the polity.

The ancient and classical world distinguished between "nature" that belonged to the gods, and political life (a domain of human, collective affairs). In contrast the modern state fully incorporates both. Constitutional codes (designating the natural rights of humans) authorize the inclusion of the political subject's natural life into the nation-state (Agamben, 1998, p. 127). Humans are subject to the unfettered discretion of sovereign deployments of power due to the designation of bare life into the nation-state (Agamben, 1998). Therefore, the modern political subject is nothing more than a "living dead man" (Agamben, 1998, p. 131). He exists on the threshold "that belongs neither to the world of the living nor to the world of the dead" (Agamben, 1998, p. 99).

### *C. The "State of Exception":*

In his book *State of Exception* (2005), Agamben draws on the concept of sovereign exceptionalism advanced by German political theorist Carl Schmitt in explicating the suspension of constitutional and international law in post-9/11 governance (Lippert & Williams, 2012, p. 53). According to Schmitt, the sovereign "is he who decides on the exception" and is constituted by "severe economic or political disturbance that requires

the application of extraordinary measures” (Schmitt, 1976, p. 5). An emergency is defined as imminent danger and hostility towards the state or the constitution (Schmitt, 1997, p. 32). The emergency suspension of the existing legal order results in a government with more authority and a citizenry that enjoys fewer rights and freedoms (Rossiter, 1948, p. 5). Despite this, the sovereign decision is neither outside the law nor arbitrary since it provides order and a “force-of-law” (Gratton, 2006, p. 453; Schmitt, 1985). The force-of-law is the exercise of violence by the executive branch without the support of the other branches of government (put differently, one is dealing in direct actualizations of state repression). Therefore, Schmitt’s conception of sovereignty and the decisionism that actualizes its constitutive power to subjugate humans runs contrary to Agamben. Schmitt argues that the sovereign decision omits further decisions and instead replaces law with unrestrained forms of power and violence whereas for Agamben, the sovereign (like the *homo sacer*) is both inside and outside the juridical order. In this sense, Agamben’s and Schmitt’s respective conceptions of the exception are not one and the same; Schmitt’s understanding of the exception does not relate to a zone of legal indistinction. Contrarily, the sovereign is the supreme, legally independent power and his authority to produce law need not be based on existing law (Schmitt, 1985, p. 17). In the event of an existential threat to the state, the executive suspends the existing order and established a new form of right/*Recht*.

Agamben’s concept of the “state of exception” (loosely based on Schmitt’s early conception) remains extraordinarily influential as a means to explain contemporary American responses to terrorism. The transgressions evinced by law post-9/11 are a consequence of the “biopolitical significance of the state of exception as the original

structure in which law encompasses living beings by means of its own suspension” (Agamben, 2005, p. 3). Agamben compares the zone of indistinction constituted by the sovereign to post-9/11 deployments of power. According to Agamben (2005), the terrorist attacks on 9/11 created the necessary conditions for the re-emergence and re-asserting of sovereign power in contemporary liberal governance to which it is ostensibly anathema.

The suspension of constitutional and international law generates legal lacunae whereby the executive branch applies the force of law without legal/legislated substance. For example, President Bush’s *Military Order* on November 13<sup>th</sup>, 2001 “which authorized the ‘indefinite detention’ and trial by “military commissions” acted outside of constitutional authority in establishing a biopolitical state of exception (Agamben, 2005, p. 3). Detainees subject to the *Military Order* embody the living dead man described in *Homo Sacer* and are entirely deprived of legal, political and religio-cultural significance (Agamben, 2005). Agamben (2005) and Dean (2007) relate the treatment and designation of the unlawful combatant in the War on Terror as being comparable to the Jews in Nazi concentration and death camps. Both Jews and unlawful combatants lose their legal identity and citizenship and reach the “maximum indeterminacy of bare life” (Agamben, 2005, p. 4).

Agamben’s critical analysis of “the camp” illustrates his position on the radical realization of contemporary thanatopolitics. The camp is a space devoid of legal substance (Agamben, 1998; 2000; 2005). Those within the camp are stripped of political rights and are subject to absolute violence, torture and death. For example, during World War II Jews were subject to infinite political possibilities including: systematic

deportation, institutionalized scientific experimentation, torture and a *Final Solution* to rid Europe of their existence (Agamben, 1998; Gerlach, 1998; Klaus, 2008). According to Agamben (1998, p. 173), researchers should not ask how the camp is actualized but instead analyze juridical procedures and deployments of power that enable humans being to be so completely devoid of legal and political substance.

#### *IV. Agamben's Theoretical Limitations:*

##### *A. Homo Sacer:*

The first few pages of *Homo Sacer* acknowledge Foucault's theoretical contributions to Agamben's critical analysis of biopolitics and sovereignty. Despite this, Agamben's conceptualization of biopolitics, sovereign power and bare life demonstrate an inadequate understanding of pertinent Foucauldian concepts. To begin with, Agamben's concepts of *bios* and *zoe* are founded on the inclusion/exclusion structure of the polity. Since antiquity, the sovereign deploys his/her power to designate bare life; human beings are either granted political existence or denied the right. For Foucault, modern power, especially the pastoral qualities of biopower, guides the "conduct of conduct," operating alongside technologies, specific knowledges and government logics that seek to produce productive social bodies. The Leviathan is a relic of the classical era that operates in the background of modern governmentality. Modern governmentality no longer operates to repress the social body (as per Agamben); rather, it directs "life" and "what people do" (Datta, 2010, p. 173).

Since the formation of new political rationalities during the sixteenth century, the administrative state, reason of the state and governmental models primarily problematize the individual body, the state and populations as objects of governance. While the ends or

“*raison*” of sovereignty is the continued rule over the principality, new governmental models seek to guide knowledge, discursive objects, self-conduct, people’s activities and political economy. In this sense, governmental action is concerned with what is “discovered” by the science of the police in establishing governmental statistics on health, longevity, sanitation and accompanying discursive formations (Datta, 2010). Agamben’s conceptual conflation of biopolitics and sovereignty disregards the basic tenets of emergent “modern, liberal” life in the Foucauldian analysis of biopolitics. In Foucauldian terms, then, modern biopolitics does not seek to repress and manufacture the living dead.

Indeed, Agamben’s conception of biopolitical sovereignty resembles Foucault’s extreme realization of biopolitics: thanatopolitics. For Agamben, biopolitical power is the original self-manifestation of sovereignty. In something of a reversal of Foucault’s position, the main objective of biopolitics is the sovereign’s right to exclude and take life. Therefore, the “*telos*” of biopolitical sovereignty has nothing to do with the preservation of life. On the contrary, its finality is thanatopolitics; Agamben’s concept of biopolitics derives its theoretical position from the analysis of those excluded from the *bios* and “life not worthy of being lived” (Esposito, 2008, p. 134). For Foucault, technologies of anatomic-politics and the regulation of populations (biopolitics) do not distinguish between the *bios* and *zoe*. Disciplinary mechanisms aim to produce productive bodies whereas the science of police uses political arithmetic in ensuring and preserving the life of the population through health programs, birth rates, and safety measures. At this point, those rendered scientifically deviant may be separated and differently objectivized from the desirable population (Foucault, 2007, p. 9). In doing so, those excluded by means of

political arithmetic and biopolitics are systematically subject to a power that “foster[s] life or disallow[s] it to the point of death... at the biological existence of a population” in securing the life of desirable human subspecies (Foucault, 1978, pp. 137-138).

*B. State of Exception:*

Agamben’s claim that the sovereign decision and exceptionalism is the “dominant paradigm of government in contemporary politics” (2005, p. 2) signifies a totalizing and all-encompassing logic. For Agamben, the sovereign operates by distinguishing between zones of regular law, and zones of indistinction. Discourses of exceptionalism and the sovereign decision denote a privileged sovereign center whereby the modern head of state determines entire domains of governmental practice (Neal, 2006, p. 34). Agamben’s model of exceptionalism disregards the forms, techniques, discourses and technologies of modern liberal governance. The single sovereign does not operate as the “dominant paradigm of government” (Agamben, 2005, p. 2) in deploying its sovereign power over life in every facet of the state from purported existential threats to mundane governmental affairs (Lippert & Williams, 2012, p. 55). On the contrary, modern governmental discourse problematizes specific objects and subsequent regimes of practices, thinking and “organized ways of doing things” (Dean, 2010, p. 18). High ranking government officials or “petty sovereigns” manufacture expert discourse and designate particular modes of governance (Lippert & Williams, 2012, p. 55). The crux of the theoretical matter is this: Foucault’s conceptual analysis of governmentality and its accompanying reference to the multiplicity and heterogeneity of relations of domination, technologies and apparatuses renders the totalizing logic of sovereignty depicted by Agamben implausible as a theoretical position. Agamben’s totalizing sovereign logic generates

significant difficulties for the social analyst, for example, if sovereignty re-emerged subsequent to 9/11, what role did governmental power perform prior to the attacks? Was American governmental power suspended from the end of World War II until the 9/11 attacks?

According to Agamben (2005, p. 4) the American response to the War on Terror represents the sovereign suspension of the law. Agamben (2005) refers to the enactment of the *Patriot Act* and detainee classification and treatment at Guantanamo Bay as instances of the sovereign decision. For him, President Bush operates in accordance with the inclusion/exclusion dichotomy whereby the unlawful combatant is confined to a zone of political indistinction, between political qualified and unqualified life (Lippert & Williams, 2012, p. 56). Detainees are at the mercy of new political/legal discourses and the re-emergence of sovereignty, existing as living dead men awaiting newfound legal categories and enhanced interrogation techniques (See Denbeaux, Hafetz & Denbeaux, 2015, p. 4). Detainees exist outside the rule of law within a legal black hole (Steyn, 2004). In doing so, I argue that the detainee can be neither properly conceptualized as a *homo sacer* nor as the ancient Germanic wolf-man. He resides neither within the polity nor in the state of nature. The unlawful combatant exists at the darkest, barest and purest reaches of *zoé* – a 45 square mile area outside of existing U.S. and international legal jurisdiction – (Johns, 2005, p. 619). In occupying a zone of legal indistinction – between existing legal standards and newly constituted codification that sheds every relation to law – (Agamben, 1998, p. 59), detainees are rendered to an existence of indefinite political possibilities including physical and psychological torture (Rosso, 2014), rectal force-feeding practices (Feinstein, 2014) and battle lab experimentation.

Agamben's theoretical application of biopolitics and sovereignty in the *State of Exception* disregards both Foucault's earlier work on discursive formations shaping action and practice and his later genealogical emphasis of discourse and practice shaping one another (See Dupont & Pearce, 2001; See also Jessop, 2007). Sovereign power does not operate as a totalizing abstract logic encompassing every governmental domain; rather, it functions alongside discourses and practices of governance, other social relations, and institutions (Dupont and Pearce 2001; Datta 2007). For instance, the *Yoo-Flanigan Memo* established specific institutional domains ("surfaces of emergence" [Foucault, 2002]) in which conduct is identified for both veridical and juridical discursive practice (Foucault, 1994b) for the establishment of biopolitical racism and subsequent unlawful combatant policies. High ranking government officials manufactured specific pertinent documents that then shaped particular discourses and regimes of practice (Neal, 2006; Shaub, 2011). In short, the designation and classification of unlawful combatants as being ostensibly undeserving of fundamental legal rights is decidedly not the result of a single sovereign decision but the result of elaborate discursive regimes of determining truth, guilt, right and wrong (Baxter, 1996, Foucault, 1994b, p. 5). Pertinent post-9/11 texts manufactured a discourse and subsequent biopolitical deployments of state power with respect to unlawful combatants. Those confined and targeted at Guantanamo Bay are subject to specific problematizations of necessity, security and anti-terrorism, contingent heterogeneous political rationalities and practices, and the "foster life or disallow it" (Foucault, 1978, p. 138)

#### *V. Conclusion:*



A genealogical account of Foucault's conceptual analysis of power is crucial to understanding the contingent discursive formation of "unlawful combatants" and the deployment of rationalities of rule and exercising of state powers. So, while the medieval sovereign is often associated with the prohibitive or negative elements of power ("thou shalt not" and "thou mustest"), the juridical sovereignty (defined as the monarch in medieval Europe, now transferred to governmental branches and executive authorities in liberal constitutionalism) also instituted an elaborate system (the inquiry) for determining right, wrong, truth and error. The monarchical inquiry has been transferred and incorporated within the modern governmentalized state and operates alongside technologies, tactics and discourses of truth. Modern deployments of power are made up by multiple and diverse procedures (not infrequently inchoate), analyzes, mechanisms, calculations and tactics that incorporate techniques of individualization (anatomopolitics) and totalization (biopolitics) (Datta, 2008, p. 222; Foucault, 2007, p. 109). While Foucault's theoretical analysis of power has been extraordinarily influential, Agamben appropriates his concepts in a much different light.

Agamben begins *Homo Sacer* (1998) by claiming that Foucault's "political double-bind" between individualized subjectivity and biopolitical totalizing power creates a zone of indistinction. He used the zone as the basis for his conceptual analysis of biopolitical sovereignty and the *homo sacer*. For Agamben, the sovereign decision or ban is the original manifestation of the "juridico-political structure" (1998, p. 19). He employed the concept of the *homo sacer* and sovereign power as an explication for the American response to the terrorist attacks on 9/11. In his view, the extraordinary measures initiated by President Bush in the November 13<sup>th</sup> *Military Order* established the

re-emergence of sovereign power. Those confined to Guantanamo Bay lose both their legal identity and citizenship and are thus rendered to the barest of life (Agamben, 1998, p. 4). The President enjoys unfettered jurisdiction while detainees are subject to indefinite political possibilities of domination.

Both Foucault and Agamben offer conceptual tools for explicating the purported increase of the power over death and the suspension of constitutional, international and military law post-9/11. While Agamben's account of power is restricted to biopolitical sovereignty and its capacity to constitute bare life, Foucault's analysis of power is illustrative of a complex system of force relations and techniques (Foucault, 1996, p. 410). Although he does not disregard the medieval power over life and death, he theorized that it tends to remain firmly in the background in modern rule. In short, there are good theoretical and analytical reasons for preferring Foucault's conceptualization and analytics of power as being more nuanced and persuasive. Modern deployments of power cannot be rationally reduced to being the expression of the single sovereign ban. Nonetheless, I contend that Agamben's claim of sovereign re-emergence should not be discounted. Pertinent government texts subsequent to 9/11 transformed governmental practices away from the "conduct of conduct," force relations and the power to make live. An increase of the right over death has been witnessed but it is not the result of a single sovereign decision and classification of people as *homo sacer*. Contrarily (as argued later on) the post-9/11 increase of sovereign power is due to specific veridical discourses (i.e., the *Yoo-Flanigan*, the *Military Order* and *Executive Order*) that problematized plenary executive power (in the form of petty sovereigns), the suspension of constitutional, international and military law, and the designation of the unlawful combatant outside of

existing legal standards. In sum, high ranking executive officials constituted true statements and discourses that justified the re-emergence and re-assertion of sovereign power.

## 7. RESULTS

This section analyzes and reflects on the discursive rationality of *Yoo-Flanigan*, the *Military Order* and the *Executive Order*. Although these documents were formulated by legal-political authorities in establishing specific modalities of thought and regimes of practice (i.e. increased presidential power and the deployment of military commissions), I am less concerned with constitutional legal analysis. Instead, I am more concerned with their discursive implications and effects, in particular, the normative games and wills of truth concerning classifications of legal/illegal, constitutional/unconstitutional and right/wrong. To further clarify, a legal analysis of indefinite detention and torture in the thesis are secondary to newly constituted discursive effects, knowledge and practices in accordance with the emergence of the monarchical sovereign and unlawful combatants as discursive subjects/objects. This thesis thus considers and operationalizes liberal constitutionalism and post-9/11 governance as both operating within the normative “legal complex” (assemblage of legal practices, institutions, legal texts, judicial precedent, norms and authorities) that continuously transforms diverse discursive rules, logics and practices (Rose & Valverde, 1998, p. 542).

### *I. Yoo-Flanigan Memo:*

I have organized my findings in subsections, highlighting specific elements pertinent to my theoretical and methodological framework. Subsection A examines the formation of an executive discursive regime of retaliation against individuals, groups and/or states suspected of involvement in the 9/11 attacks. At issue are the discursive effects of executive power against those not yet charged or convicted of wrongdoing. Subsection B outlines the surfaces of emergence regarding increased presidential authority in response

to the 9/11 attacks. I explore *Yoo-Flanigan's* problematization of unfettered presidential authority as Commander-in-Chief in accordance with the declared national emergency subsequent to September 11<sup>th</sup> 2001. Subsection C examines the preemptive war doctrine as outlined in the introduction of *Yoo-Flanigan*. I explore the determination and justification of preemptive war against the enemies of the United States. I analyze how the surfaces of emergence of presidential plenary power (i.e. sovereign discretion) formed the discursive rules and logics for the construction of an alternative military justice system, the transgression of the *Geneva Conventions*, and a newly constituted preemptive doctrine against detainees.

*A. Retaliation and Due Process:*

*The Authorization for Use of Military Force (AUMF)* was passed by Congress on September 14<sup>th</sup>, 2001 and was signed into law four days later. The *AUMF* (2001, p. 1) was enacted to combat those who “planned, authorized, committed or aided” the 9/11 attacks or harboured those responsible. Just seven days after the enactment of the *AUMF*, John Yoo issued the now infamous *Yoo-Flanigan Memo*. *Yoo-Flanigan's* (2001, p. 1) determination that “the President has the constitutional power not only to retaliate against any person, organization, or State suspected of involvement in terrorist attacks on the United States, but also against foreign States suspected of harbouring or supporting such organizations,” formed a new way of thinking about presidential war power (Fisher, 2011, pp. 178-180; Hutchinson et al, 2013, pp. 129-133). The retaliation against suspects is problematic in accordance with existing tactics and logics of liberal governmentality. However, the problematizing of post-9/11 rule and the framing of terrorism as an object of governance established the surfaces of emergence for suspected enemies undeserving

of traditional legal protections. Prior to *Yoo-Flanigan*, existing “legal complex[es]” (Rose & Valverde, 1998, p. 542) nominally designated suspects as innocent until proven guilty (Clarke, 2008, p. 18; Henn, 2010, pp. 31-33). Moreover, states and groups suspected of being involved in the 9/11 attacks or suspected of being able to commit future harm are not proper objects of retaliation in accordance with the liberal problematization of punishing after-the-fact criminality (McCulloch & Pickering, 2007, p. 633). Nonetheless, *Yoo-Flanigan* established the surfaces of emergence for a series of finite, delimited, yet at the same time, productive statements regarding the newly constituted discursive effects of state power against those not charged of wrongdoing in President Bush’s *Military Order*, the *Executive Order* and subsequent *Torture Memos*<sup>3</sup>.

*B. Sovereign Power:*

The *Yoo-Flanigan Memo* reflects a transformation of traditional executive power:

[T]he constitutional structure requires that any ambiguities in the allocation of a power that is executive in nature - such as the power to conduct military hostilities - must be resolved in favor of the executive branch. Article II, section 1 provides that “[t]he executive Power shall be vested in a President of the United States.” U.S. Const. art. II, § 1. By contrast, Article I’s Vesting Clause gives Congress only the powers “herein granted.” *Id.* art. I, § 1. This difference in language indicates that Congress’s legislative powers are limited to the list enumerated in Article I, section 8, while the President’s powers include inherent executive powers that are unenumerated in the Constitution. To be sure, Article II lists specifically enumerated powers in addition to the Vesting Clause, and some have argued that this limits the “executive Power” granted in the Vesting Clause to the powers on that list. (2001, p. 4).

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<sup>3</sup> The *Torture Memos* refers to a series of key texts primarily authored by John Yoo that legally authorized enhanced interrogation methods between 2001-2003

Despite the discursive discontinuity of legislative and executive deployments of state power with respect to war making powers<sup>4</sup>, the *Memo* argued that congressional authority is “limited to the list in Article I, section 8” whereas presidential power is vested in areas not specifically enumerated in Article 2 of the *U.S. Constitution*. In short, the *Memo* employed a discursive argument for unlimited presidential authority outside of enumerated powers whereas congressional authority is limited to the list specifically outlined as per Article 1, Section 8 of the *U.S. Constitution*. Moreover, the *Memo* established the institutional basis for unilateral executive discursive deployments of presidential power during wartime (with respect to foreign relations and criminal justice) irrespective of existing legal rules of congressional authorization. In doing so, I argue that the *Memo* established a post-9/11 legal complex of unfettered presidential jurisdiction (unfettered by codification) to initiate hostilities throughout the world.

Newly constituted statements concerning plenary presidential power during times of war (as per *Yoo-Flanigan*) are conducive to Agamben’s conceptual analysis of presidential sovereign power in *The State of Exception* (2005). By way of example, *Yoo-Flanigan’s* claim of appropriate presidential responses to national security concerns (Yoo, 2001, p. 17) established specific discourses and logics for the re-emergence of the absolute sovereign right (Foucault, 1978, p. 136). Almost all significant legal advice given to military and CIA personnel in accordance with battlefield and interrogation initiatives came directly from the “Office of Legal Counsel of the Department of Justice” (Hutchinson et al, 2013, p. 119).

### *C. Pre-emption:*

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<sup>4</sup> The question of whether or not the President has the legal authority to unilaterally initiate hostilities is problematic and not a discursive historical unity as proposed in the *Memo*.

In response to the 9/11 attacks, Congress and the executive signed the *AUMF* into law granting the President increased authority to protect the United States from future terrorist attacks. However, the *AUMF* (2001, p. 1) also restricted this power to those “those nations, organizations, or persons [the] [President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.” Despite this, *Yoo-Flanigan* (2001, p. 1) claimed, “the President may deploy military force preemptively against terrorist organizations or the States that harbour or support them, whether or not they can be linked to the specific terrorist incidents of September 11.” While statements within the *AUMF* sought to limit the American response to those responsible for the attacks on 9/11, the *Memo* established surfaces of emergence for unilateral executive detention policies (i.e. the *Military Order* in November) and military action against any individual, group or state deemed to be enemies of the United States.

A main theme presented throughout *Yoo-Flanigan* is the declaration of unilateral presidential authority to preemptively attack any group or state irrespective of Al-Qaeda affiliation or link to the attacks on 9/11. Yoo explicates this position in the conclusion of the *Memo*:

Military actions need not be limited to those individuals, groups, or states that participated in the attacks on the World Trade Center and the Pentagon: the Constitution vests the President with the power to strike terrorist groups or organizations that cannot be demonstrably linked to the September 11 incidents, but that, nonetheless, pose a similar threat to the security of the United States and the lives of its people, whether at home or overseas (2001, p. 20).

The question of whether or not a terrorist group poses a similar threat to the 9/11 attacks is left to the unique problematization of terrorism, necessity and national security by authorities of delimitation within the *executive* branch: the capacity for judgment and



commands required for acting on a judgment rests in the president. Instances of terrorism, necessity and national security are only designated as such subsequent to discourse-object formation by those who are in a position to pose the problem of how to govern. A series of limited, constrained and marginalized statements surrounding objects of governance such as “plenary executive authority” or “terrorism” constitutes particular modalities of thought and governmental action. For example, the authority to “strike terrorist groups” is the result of the problematization of increased presidential authority. *Yoo-Flanigan* re-asserted the sovereign right (authority) to strike enemies of the United States because high ranking executives (i.e. John Yoo) discursively and effectively, drawing on techniques of legal discourse, constituted the enemy as dangerous terrorists.

The *Yoo-Flanigan Memo* established a series of statements that were later rationalized for the correct way of governing in a period characterized by fear, paranoia and purported existential threat (Henn, 2010, p. 30; Passavant, 2010, p. 565). The conflation of suspects and criminals, as illustrated in Subsection A was the “Archimedean point from which the Bush administration Office of Legal Counsel sought to undermine and systematically remove the terra firma of international humanitarian protection from those it labeled unlawful enemy combatant” (Henn, 2010, p. 32). The executive and judicial branches operationalized unlawful combatants (in early 2002 and 2004 respectively) as members of a prohibited organization and/or engaged in hostilities against U.S. or coalition forces (Denbeaux & Denbeaux, 2006, p. 7). An executive “Working Group” was established by the Pentagon to address appropriate interrogation methods in anticipation of the invasion of Iraq and were advised to consider *Yoo-Flanigan* as the central legal authority (Passavant, 2010, p. 565; Savage, 2007, p. 181).

In authorizing extraordinarily controversial interrogations powers for American authorities, the Working Group (2003, p. 50) cited the plenary authority of the Commander-In-Chief as per *Yoo-Flanigan*. The *Yoo-Flanigan Memo* thus established itself as the authoritative post-9/11 discursive resource for legitimizing extraordinary executive deployment of power.

## *II: The November 13<sup>th</sup>, 2001 Military Order*

This section outlines President Bush's November 13<sup>th</sup>, 2001 *Military Order*. I analyze the discursive deployments of the legal assemblage (practices, institutions, codes etc...) and the "narratives they engender" (Rose & Valverde, 1998, p. 542) rather than the legitimate/illegitimate claims of presidential authority. Subsection A analyzes legal discourses regarding military commissions in light of section 1(f) and 4(b)(c)(1) of the *Military Order*. Despite vested presidential authority as per Article II of the *American Constitution* [1788] to execute and not create law, President Bush enacted a new military justice system to deal with captured detainees – in accordance with apparatuses of security -. Subsection B examines the post-9/11 discursive formation of presidential authority to suspend judicial review of both the federal courts and the U.S. Supreme Court with respect to unlawful combatants. Section 7(b)(2) of the *Order* establishes the executive as the final arbiter or court of last resort in existing military legal discourse. Subsection C concerns humanitarian protections pursuant to section 4 of the *Order* afforded to detainees as it pertains to varying logics and tactics of governance. This section examines the protection of life and tactics of liberal governance. Subsections A, B and C distil the sum of governmental tactics encompassing an overall, yet unrecognized (at this point) strategy.

*A. President Authority and Military Commissions:*

On November 13<sup>th</sup>, 2001, President Bush issued the *Military Order* for the purpose of establishing an alternative military justice system for non-citizens whom either he, or the Secretary of Defense, believed pose an immediate threat to U.S. national security:

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 (Bush, 2001a, p. 1).

The unilateral deployment of military commissions reflects Agamben's conceptual analysis of a state of exception and the suspension of nomic games of truth concerning the rule of law. The *Order* institutionalized a justice system that suspended "principles of law" and "rules of evidence" in violation of military Court Martials, the *Uniform Code of Military Justice* and domestic U.S. criminal courts jurisdiction. Under the new justice system, traditional due process rights were abolished and suspects were referred to as "terrorists" (Bush, 2001a, pp. 1-4)

The *Military Order* suspended the existing legal complex in the pursuit of newly constituted legal procedural practices. First, section 4(a) of the *Order* establishes that "an individual subject to this order, when tried, be tried by military commission" (Bush, 2001a, p. 2). In employing conditional statements such as "when tried", the *Military Order* established a discursive practice for the indefinite detention of suspects, a practice that remains in effect to this day (Hutchinson et al., 2013, p. 13). Second, President Bush (2001a, p. 2) declared, "the Secretary of Defense shall issue orders and regulations, including pre-trial, trial, and post-trial procedures, modes of proof, issuance of process,

and qualifications of attorneys”. Therefore, the *Military Order* transgressed existing legal discourse, norms and practices concerning modes of trial and evidence (i.e.: hearsay evidence, *habeas corpus* relief, and competent and preferred legal counsel) in authorizing an alternate system of prosecuting purported wrongdoers (Cutler, 2005, pp. 67-68; Dickinson, 2002, p. 1434). In summary, the *Military Order* problematized and deployed a discourse that gave President Bush (and his executive) the unlimited power to constitute military commissions in violation of his constitutional authority (as President), the regular military justice system (Meyer, 2007, p. 49), and established alternative modes of criminal and international justice systems.

### *B. Judicial Review*

The *Military Order* not only circumvented traditional military and criminal justice, it also established the President and his executive as the sole judicial authority. This realization is demonstrated as per section 7(b)(2) of the *Order*:

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 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 (Bush, 2001a, p. 4).

In problematizing terrorism and national emergency as objects of governance, the *Military Order* unilaterally established military commissions outside the traditional court structure (Henn, 2010, pp. 77-79). This realization can be considered the most critical departure from established legal-political discourse and deployments of state power in fighting the War on Terror. According to the *Military Order*, triers of fact and law<sup>5</sup> are appointed by “the Secretary of Defense” (Bush, 2001a, p. 3) and consist of “three to

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<sup>5</sup> The judicial branch is traditionally responsible for determining questions of law and fact and not the Secretary of Defense

seven professional military officers” (Cutler, 2005, p. 76). Neither the *American Constitution* nor legislative codes, including President Bush’s earlier reference to section 836 of the *Uniform Code of Military Justice* (outlined as *United States Code* in the *Military Order*) in section 1(f) of the *Order*, give him the authority to overstep the Supreme Court of the United States as final arbiters of judicial review (Cutler, 2005, pp. 187-190; Henn, 2010, pp. 78-79; *Hamdi v. Rumsfeld* [2004]). American legal discourse from constitutional ratification to the 9/11 attacks gives federal courts exclusive jurisdiction “involving possible offenses against the law of nations” (Henn, 2010, p. 78). In doing so, the *Military Order* posed a new problem of how to govern by constituting military commissions as the final arbiter of offences against captured detainees during the War on Terror.

### *C: Liberal Governance*

While the *Military Order* can be criticized for constituting new legal discursive rules and government logics, the *Order* also established detention camps whereby “law and liberal proceduralism speak and operate in excess” (Johns, 2005, p. 614). To demonstrate, captured detainees pursuant of the *Military Order* are afforded rights as follows:

- 2(a) detained at an appropriate location designated by the Secretary of;
- (b) treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria;
- (c) afforded adequate food, drinking water, shelter, clothing, and medical treatment;
- (d) allowed the free exercise of religion consistent with the requirements of such detention; and
- (e) detained in accordance with such other conditions as the Secretary of Defense may prescribe.

Although the President unilaterally established detainee conditions outside of existing legal discourse, he nonetheless manufactured a territorially legal-political space respecting basic liberal protections (Bush, 2001a, p. 2). The *Military Order* is the result of authorities of delimitation within the Bush Administration that established the terrorist problem and military commissions as a solution. Therefore, the *Order* is the result of numerous “explanatory logics” (Rose & Valverde, 1998, p. 546), practices, hyper-securitization (everything is considered in terms of extreme risk) and deployments of power (Dean, 2007, p. 192; 2010, p. 246). The aforementioned liberal protections are the result of discursive unities, discontinuities, differing and clashes logics and legal/extra-legal “processes and practices” (Rose & Valverde, 1998, p. 546). In this regard, liberal discourse amounts to one element among many in the legal assemblage of post-911 governance.

### *III. February 7<sup>th</sup> 2002, Executive Order:*

This section outlines the unilateral executive decision to suspend provisions of the *Geneva Conventions Relative to Prisoners of War* (hereafter, “*GPW*”) against suspected terrorists. Subsection A of this section concerns President Bush’s determination that the War on Terror requires a “new paradigm” and discursive deployment in accordance with laws of war (2002a, p. 1). Following this, Subsection B analyzes the legal-political discursive formation regarding President Bush’s claim of absolute presidential authority to suspend the *GPW*. Subsection A and B reflects the governmental programmes, rationalities and tactics that are deployed within the *Executive Order*.

*A. A New Paradigm:*

The *Executive Order* manufactured an expert legal/political discourse whereby the executive unilaterally suspended the *GPW* and customary international law (Henn, 2010, pp. 127-134- Khan<sup>6</sup>, 2007 pp. 4-5). The newly constituted governmental rationality for suspending *Geneva* reads as follows: “Our nation recognizes that this new paradigm - ushered in not by us, but by Terrorists - requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva” (Bush, 2002a, p. 1). The *Executive Order* posed the problem of how to govern and then manufactured expert discourse and governmental logics in accordance with the newly formulated governmental paradigm. Prior to 9/11, terrorist attacks and networks were deemed to be illegal by sovereign states (Henn, 2010, pp. 127-128) and were considered to be “crime[s] against humanity” (Khan, 2007, pp. 3-4). Moreover, according to the Staff Statement (2004, p.1), the FBI (not the CIA or the military as was the case after 9/11) was responsible for combating domestic terrorism and conducted “after the fact” investigations in “identify[ing], arrest[ing], prosecut[ing] and convict[ing]” suspected terrorists. Therefore, the new rationality was not ushered “by terrorists” but by the *Executive Order* (made by Bush and other high ranking executive officials) that problematized new discursive subject/objects and suspended the *GPW*, due process and prohibition against torture (Khan, 2007, p. 5).

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<sup>6</sup> Irene Khan delivered this speech as part of the Mitchell Lecture at the State University of New York at Buffalo Law School while occupying the position of Secretary General of Amnesty International

This path was not the only one available. For instance, Dr. Ron Paul<sup>7</sup> introduced a bill into the House of Representatives on October 10, 2001 that granted Congress the constitutional authority to “grant letters of marque and reprisal to punish, deter, and prevent” future acts of terrorism pursuant to Article 1, s. 8, cl. 10 of the *U.S. Constitution*. The bill authorized the President to grant bounties to private U.S. citizens to capture Bin Laden and other Al Qaeda co-conspirators that were responsible for the 9/11 attacks (Paul, 2001, p. 4). This alternative governmental strategy proposed by Ron Paul demonstrates historically contingent discursive rules and events in association with the problematization of unlawful combatants and the unilateral executive decision to suspend existing legal discourses and practices. Paul’s bill sought to specifically target those responsible for 9/11 rather than engage in aggressive foreign occupations throughout the Near and Middle East and establish military detention regimes in violation of existing legality.

### *B. The Suspension of the GPW*

By declaring post-9/11 governance to be a “new paradigm”, President Bush unilaterally suspended key provisions in the *GPW*:

2(a) I accept the legal conclusion of the Department of Justice and determine none of the provisions of Geneva apply to our conflict with al-Qaida in Afghanistan or elsewhere throughout the world because, among other reasons, Al-Qaida is not a High Contracting Party to Geneva.

(b) I accept the legal conclusion of the attorney general... that I have the Authority under the Constitution to suspend Geneva... but I decline to exercise that authority at this time... I reserve the right to exercise the authority in this or future conflicts.

(c) I also accept the legal conclusion of the Department of Justice and determine that common Article 3 of Geneva does not apply... Article 3 applies only to

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<sup>7</sup> Ron Paul was a fourteen-term Republican Congressmen and three time presidential candidate. He was the founder of the Tea Party before it was hi-jacked by the corporate/neoconservative fascist oligarchy. His criticisms towards the military industrial complex and preemptive war could be considered the surfaces of emergence for the emerging shift of Republican foreign policy.



armed conflict not of an international character.

(d) I determine that the Taliban detainees are unlawful combatants and therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note that because Geneva does not apply to our conflict with Al-Qaida, Al-Qaida detainees also do not qualify as prisoners of war (2002a, pp. 1-2)

President Bush unilaterally suspended key Articles of the *GPW* by claiming that “Geneva does not apply to our conflict with Al-Qaeda”. If the *GPW* does not apply, how could the *Executive Order* determine that detainees are unlawful combatants and therefore fail to qualify as prisoners of war pursuant to Article 4 of the *GPW*? Even if the President had the constitutional authority<sup>8</sup> as Commander-in-Chief to suspend the *GPW*, he cannot apply them whilst suspending it (Art. 142, S. 3). In this way, the President acted both inside and outside existing legal discourses by unilaterally suspending the legal protections afforded to captured enemies in differentiating between unlawful combatants and prisoners of war (Henn, 2010, p. 129) and establishing an “alternative assemblage of legal practices” (Rose & Valverde, 1998, p. 542). In suspending legal protections for enemies, President Bush established a legal-political configuration that eliminated the protection against human rights abuses.

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<sup>8</sup> The President must have two-thirds of Senatorial support before making or withdrawing from treaties pursuant to Article 2, section 2 of the U.S Constitution

## 8. ANALYSIS

This chapter outlines and reflects on the component parts of pertinent U.S. executive orders presented above. I explicate the composition of new political-legal statements dealing with unlawful combatants who exist in the geographic-spatiality of “the camp” (See Agamben, 1998, pp. 166-180; 2000, pp. 37-45,) and unlawful combatants. Subsection I explores the dualistic rationalities of “black letter” constitutional theory and the executive application of the law; the former is concerned with strict constitutional rules whereas the latter examines legal discourse alongside rationalities and will and games of truth. Subsection II critically explores the institutional basis of presidential authority in its capacity to preempt future harm in fighting “evil doers” and the “axis of evil.” The doctrine of “preemption and retaliation” against individuals, groups, and states, parallels the problematizations, discourses, and practices employed by criminal anthropologists in the 1890’s. Subsection III examines the re-emergence of “the king,” a figure of sovereign power and its mentalities, and the rise of contemporary political rationalities concerned with national security and populations in contrast to the earlier concern with maintaining rule over a territory (e.g., a principality). The tripartite analysis of legal discourse, preemptive rationality, and the purported emergence of sovereign power establishes the basis for a thorough examination and analysis of the discursive framing of War on Terror and unlawful combatants.

### *I. Legal Discourse and Liberal Legality:*

The production and deployment of *Yoo-Flanigan* constituted the surfaces of emergence for exceptional discourses and practices on the part of the executive branch. Post-9/11

deployments of state power subsequent to the *Memo* were made possible by the "already existing discursive formation" of subjects, objects, enunciative modalities, authorities of delimitation, concepts, and strategies (Neal, 2006, p. 44). *Yoo-Flanigan* can thus be considered the discursive origin or unity of post-9/11 sovereign rationality by which the "infinity continuity of discourse[s]" (Foucault, 2002, p. 25) and deployments of extraordinary state power have become actualized. I do not mean that *Yoo-Flanigan* is the secret origin of post-9/11 exceptionalism; rather, *Yoo-Flanigan* is a landmark text whereby plenary presidential power was first enunciated within the post-9/11 juridico-political field.

A central theme discussed above concerns the legal limit of unilateral presidential deployments of state power. I will not conduct an archaeological excavation of "law" and thus use of unilateral presidential power since the Founding Fathers to the 9/11 attacks. Moreover, I am unconcerned with discourses of positive law and the legitimacy/illegitimacy dichotomy. Liberal theory is itself taken to be a specific discourse illustrative of the continuity between the "law, state and society" (Hunt, 1993, p. 142). Normative liberal legal theory, in which the rule of law<sup>9</sup> is deemed to operate in excess and in unison throughout governmental branches and the population, fails to account for multifaceted interplay of relations, tactics and discourses illustrative of post-9/11 governance. In accordance with the black letter application of liberal constitutionalism, the President does not have the constitutional authority to unilaterally initiate foreign hostilities, create a separate military justice system (*Hamdi v. Rumsfeld 2004*), and

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<sup>9</sup> Although "the rule of law" refers to many different notions (such as equality before and under the law), I focus in particular on the supremacy of constitutional and regular law over arbitrary law, the separation of powers pursuant to the *U.S. Constitution* and the supremacy of the *Bill of Rights* over Congressional and Executive Orders (See O'Donnell, 2004, pp. 32-34).

suspend the *GPW* (Henn, 2010, pp. 127-130). Nonetheless, since 9/11, President Bush initiated conflicts throughout the Near and Middle East irrespective of congressional authorization, unilaterally suspended the established military criminal justice and suspended international legal protections for captured prisoners.

*A. Legal Narratives:*

Ewick and Silbey (1999) offer a helpful analytical tool to supplement Foucauldian archaeological and genealogical sensibilities for examining the gap between legal theory and its application. Foucault's conception of the "legal assemblage" (Rose & Valverde, 1998, p. 542), much like Ewick and Silbey's model, considers the complex multi-dimensional relation between legal and non-legal forms of the legal complex (See Lippert, 2005, pp. 141-175). Their tripartite analysis differentiates among "before the law,... playing with the law... and up against the law" (Ewick & Silbey, 1999, pp. 1028-1034). The first narrative conceptualizes law as the traditional strict application of legally formal, rational and hierarchical systems of established procedural rules (Ewick & Silbey, 1999, p. 1028). The second narrative reflects law "as a terrain for tactical encounters" whereby new legal rules, uses, and application surface (Ewick & Silbey, 1999, p. 1031). The third narrative (up against the law) conceptualizes law as "arbitrary, capricious... [and] a product of unequal power" (Ewick & Silbey, 1999, p. 1034).

Ewick and Silbey's notions of "before the law" and "playing with the law" help one examine how the executive deploys extraordinary unilateral authority as Commander-In-Chief and designates detainees as being outside of traditional legal protection. In this respect, legal discourse functions in accordance with linguistic games and claims of truth. It functions as a "discourse [of] regular set[s] of linguistic facts...

[and] as an ordered set of polemical and strategic facts” (Foucault, 1994b, pp. 2-3). The same logic can be applied in post-9/11 governance. On the one hand, the executive is bound by existing law and the limits of presidential powers in what Ewick and Selby conceptualize as “before the law.” On the other hand, pertinent executive texts (e.g., the *Military Order*) transformed and problematized the enemy as “a legally unnameable and unclassified being” (Agamben, 2005, p. 3) in protecting U.S. national security (Johns, 2005, p. 629). In this regard, law reflects an interpretative, “brooding normativity” (Hunt, 1993, p. 8) encompassing both established legal rules (i.e. the long standing tradition of the separation of powers) and emerging legal logics, rules and complexes.

*B. Law: A Nominalist Approach:*

Foucault’s nominalism helps one grasp the affectivity of legal discourses. Discursive objects exist alongside sets of rules for the formation of discourse and previously made statements, in short “the archive” (Datta, 2007, pp. 279-281). Post-9/11 legal discourse is not the result of clearly established legal standards whereby the President follows strict constitutional limits. Instead, (legal) discourse reflects a particular production of knowledge and political responses (Datta, 2008, p. 250; Neal, 2006, p. 33). Contrary to legal positivists, legal discourse does not possess a privileged historical continuity. Indeed, Executive Orders post-9/11 transformed political-legal statements in accordance with discursive strategies of sovereign power rather than employ constitutional codes and judicial precedent in advancing the case of presidential limits. In doing so, John Yoo employed *obiter dicta*<sup>10</sup> in advancing the historical unity and application of plenary

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<sup>10</sup> *Obiter dicta* refers to statements made by the judiciary that is made in passing and not pertinent to important questions of legal fact. It is not normally considered important in future cases (Garner, 2009, p. 1177)

presidential authority during times of war (Fisher, 2011; Passavant, 2010, p. 559). In this respect, I argue that law functions as a tactic in post-9/11 governance.

Post-9/11 surfaces of emergence constituted legal discourse and regimes of “exceptional state prerogatives” (Neal, 2006, p. 33) as the domain of the exercising of sovereign power in the guise of the “executive”. *Yoo-Flanigan*, the *Military Order* and *Executive Order* suspended established legal standards and substituted it with alternate normative domains, tactics, discursive practices, and political/legal rationalities. In this regard, the War on Terror is governed by both existing liberal constitutionalism (and legal theory) and new legal/political discourse distinct from existing standards (See Dean, 2007, p. 183). Thus, in this respect, genealogical sensibilities are apt in highlighting the agonic forces in play.

The juridical enunciative field reflects a “generative locus for a number of forms of truth” (Foucault, 1994b, p. 4). Legal discourse is not the stuff of divine revelations passed down from the creator to the awaiting legal prophet; rather, it emerges as historical strokes of chance that then came to constitute what counts as truthful juridical forms. The *U.S. Constitution* is itself the result of historically contingent struggles and processes, and specific discursive strategies in which the United States successfully rebelled and defeated the British Monarchy. Liberal legality, like discourses and practices of exceptionalism, are subject to discursive rules and historically contingent conditions (Neal, 2006, p. 36). Due process and claims of constitutional and international law, much like the establishment of military commissions and the violation of existing legal standards, are “dispersed... and transformed in their contemporary expression and exercise” (Neal, 2006, p. 37). Legal discourses are nothing more than normative truth

games concerning, “how men govern” according to the production of a specific modality of the will to truth (Foucault, 1994j, p. 230). Liberal constitutionalism and exceptional measures alike are produced and accepted as domains of “true and correct” within ordered and delimited enunciative fields. In summary, post-9/11 discursive deployments of exceptionalism constituted terrorism as an existential threat that required the dual emergence of a presidential with unlimited authority and an enemy undeserving of existing legal protections.

## *II. Preemption and Good/Evil:*

*Yoo-Flanigan*, the *Military Order*, and the *Executive Order* fundamentally transformed legal/political discourse and deployments of executive state power. Just fourteen days after 9/11, John Yoo composed a memo that justified the President as the sole organ of government with respect to foreign policy. The three central pillars of the *Memo* (increased presidential authority to initiate wars irrespective of involvement in the 9/11 attacks, the annihilation of existing legal standards, and the doctrines of pre-emption and retaliation) were “built into the text of the President’s [*Military*] [*Order*] [and] February 7 *Executive Order* that remain virtually unchallenged to the present day (Henn, 2010, p. 30). *Yoo-Flanigan* constituted the institutional basis for a series of connected and delimited statements in authorizing the President to deploy extraordinary and preemptive measures against individuals, groups and states of the Muslim world.

### *A. Terrorism and Homicidal Monomania:*

The 9/11 attacks cannot be considered the beginning or reference point for increased unilateral presidential power to engage in retaliation and preemptive measures against

individuals, groups and states. Prior to the 9/11 attacks, terrorism were constituted as a domestic, criminal act and those responsible were brought before American criminal courts (Shultz & Vogt, 2003, p. 3). Moreover, the United States refrained from establishing terrorism as war despite Bin Laden's declaration of war against the United States in 1998 (Shultz & Vogt, 2003, p. 3). Therefore, the claim that terrorism amounts to attacks of war (as per *Yoo-Flanigan*) can be considered the primary discursive tactic that changed the world (rather than the 9/11 attacks) in allowing the President to preemptively invade countries at his discretion (Passavant, 2010, p. 562).

The argument advanced by Yoo (2001, p. 3) that the President has the authority to preemptively retaliate against "any person, organization or state suspected" of terrorism whether or not they could be linked to the 9/11 attacks is the "Archimedean point by which the Bush Administration Office of Legal Counsel sought to undermine" the rights of captured prisoners and initiate hostilities abroad (Henn, 2010, p. 32). The twofold discursive combination (retaliating against the dangerous and evil terrorist and preempting future existential threats) justified regimes of practices to fight "Operation Infinite Justice<sup>11</sup>" (Kellner, 2006, p. 45). Authorities of delimitation (via the executive orders) within the post-9/11 legal/political enunciative field manufactured "good/evil," "civilized/uncivilized" and "terrorist/saviour" dichotomies to reconceptualise preemptive operations as self-defense within the just war theory (Shultz & Vogt, 2003, p. 26).

To be clear, the "just war" theory is a classical normative doctrine used to differentiate between legitimate and illegitimate wars and was employed by supporters of post-9/11 American invasions to fight a just defensive war (Crawford, 2003, p. 5). Bush's

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<sup>11</sup> The euphemism used by the Bush Administration in their pursuit of "just" wars.



preemptive war doctrine and his claim “to be on a mission from God when he launched the invasions of Iraq and Afghanistan” (MacAskill, 2005, para. 1), further exemplified the good/evil dichotomy that was used in fighting the “never clear and present... danger... in an age of terrorism” (Snauwaert, 2004, p. 129). At the same time, this justification is discursively and historically contingent and is subject to specific problematizations and governmental objects; an alternative conception of this theory of what counts as “just” may conceptualize preemptive war as having neither legal nor moral authority precisely because the threat is neither present nor clear.

In deploying American forces in Afghanistan and Iraq to preempt future harm (Merskin, 2004, pp. 158-160), the United States engaged in similar tactics and rationalities used by the criminal anthropologists in the 1890’s. In a purported rise of psychotic killers, criminal anthropologists problematized “an entirely fictitious entity, a crime that is insanity, a crime that is nothing but insanity, an insanity that is nothing but a crime... this entity was called homicidal monomania” (Foucault, 1994a, p. 182). By way of example, the existential threat posed by the evil terrorist is such that not practical to apply “the rules of evidence generally recognized in the trial of criminal cases in the United States” (Bush, 2001a, p. 2). The problematization of post-9/11 terrorism is similar to the rationality employed against homicidal monomania; the Bush Administration (much like the Criminal Anthropologists) established entirely new procedures, codes and justice systems to preemptive the “axis of evil”. Instead of being privy to existing legal standards, captured unlawful combatants required extraordinary measures, including indefinite detention without charge, to prevent a future imminent threat.

*Yoo-Flanigan*, the *Military Order* and the *Executive Order* problematized new government objects that displaced traditional understandings of measures of containment and deterrence in favour of preemption to prevent future terror plots (Bush, 2002b, para. 13). The use of biopolitical techniques were used on groups and individuals not directly responsible for the 9/11 attacks. They were used to dehumanize the evil doers which therefore justified American military intervention, indefinite detention policies and innovative information extraction techniques (i.e. torture) to prevent another 9/11 attack (Denbeaux et al, 2015; Rose, 2004, p. 81). These policy directives were deemed to be imperative for protecting the forces of good (Merskin, 2004, p. 168) against the evil Arab man (much like the monomaniacal homicidal man) that “remains invisible until [he] explodes” (Foucault, 1994a, p. 185). These unique problematizations and subsequent solutions are deemed crucial in fighting the ever present existential threat of death and complete destruction posed by the face of evil.

*B. Discursive Hegemony and Unlawful Combatants: Evil Versus Good:*

Statements concerning unlawful enemy combatants constitute a discursive unity alongside “formal identities, thematic continuities, translation of concepts, and polemical interchanges” (Foucault, 2002, p. 127). The unlawful combatant designation did not exist before post-9/11 discourse but was manufactured by specific problematizations (Kinsella, 2005, p. 179). A discourse concerning military operations in Afghanistan and a war against terrorism was declared, and captured enemies were deemed unlawful because they illegally took up arms against the United States (Venzke, 2009, p. 168). This logic is *circulus in probando*; all those who take up arms against the United States are deemed to be evil fighters and are indefinitely detained without charge or *habeas corpus* relief until

the end of hostilities because they engaged in hostilities (Bush, 2001a; *Hamdi. v. Rumsfeld* [2004]; Yoo, 2001).

The *Military Order* and the *Executive Order* are texts pertinent to understanding the application and deployment of the classification of “unlawful combatant” as a subject unworthy of traditional legal rights. The *Military Order* determined that the “magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorisms against the United States” required extraordinary measures to deal with the existential threat (Bush, 2001a, p. 2). Extraordinary measures (such as the creation of military commissions and the suspension of the *GPW*) were signed into law to deal with the purported threat. In doing so, the “new paradigm [and] thinking in the law of war” (Bush, 2002a, p. 1) sought to exclude traditional legal standards for captured detainees. The new paradigm constituted domains of exceptionalism (i.e. sovereign power and Guantanamo Bay) whereby the executive manufactured expert discursive deployments against terrorism to secure the population against the ever-present existential threat.

The *Military* and *Executive Orders* also transformed normative depictions about ways of thinking, feeling and acting towards captured enemies during the War on Terror. To demonstrate, the terms “terrorism” or “terrorists” are stated thirteen times in the *Military Order* whereas “prisoners of war” or “due process” are non-existent. Moreover, President Bush routinely addressed the War on Terror using rhetoric of this kind:

Targeting innocent civilians for murder is always and everywhere wrong.  
(Applause.) Brutality against women is always and everywhere wrong.  
(Applause.) There can be no neutrality between justice and cruelty, between the innocent and the guilty. We are in a conflict between good and evil, and America will call evil by its name. (Applause.) By confronting evil and

lawless regimes, we do not create a problem, we reveal a problem. And we will lead the world in opposing it. (Bush, 2002b, para. 3).

In this regard, the United States is fighting a war of righteousness, among good, desirable humans and evil, uncivilized and lawless “muselmann<sup>12</sup>” (Agamben, 1998, p. 186). The post-9/11 muselmann is illustrative of a discursive subject-object that “recognize[s] no barrier of morality... no conscience... and cannot be reasoned with” (Bush, 2002b). According to the State Department, the terrorist is uncivilized and “consumed by a hatred of progress, freedom, choice, culture... and laughter... [and] is someone that worships only power and then uses that power to kill the innocent without mercy” (Bankoff, 2003, p. 425). Moreover, the Bush Administration determined that unlawful combatants do not respect the laws of war (Mégret, 2005) and fail to provide humane treatment to American prisoners (Delahunty & Yoo, 2005). Terrorists are deemed to be illegitimate, inferior belligerents who fail to follow humane standards during warfare (Yoo & Ho, 2003, p. 11). Therefore, it is only fitting that discourses of exclusion were used to preclude the enemy from both traditional military justice and Articles three, four and five of the *GPW*.

Post-9/11 discourse concerning unlawful combatants can be conceptualized as a “system of exclusion” (Foucault, 2002, p. 219) whereby particular juridical statements (Datta, 2008, p. 126) are accepted as true and correct. Enemy combatants are omitted from the U.S. court system (Ratner & Ray, 2004, pp. 1-6) and protections offered to prisoners of war in accordance with the *GPW* (McNamara, 2003). The non-applicability of domestic and international laws of war is rooted in the discourses of the uncivilized savage other who fails to demonstrate restraint in warfare (Mégret, 2005, p. 282).

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<sup>12</sup> The Muselmann is the most extreme figure of the Nazi camp. It is a life of “pure zoé”, he is cold, alone and awaiting the absolute fury of the SS (Agamben, 1998, p. 186). This figure literally embodies the “living dead man” and thus cannot be further dehumanized because there is nothing human left.

Discourses of biopolitical dehumanization towards unlawful combatants closely resemble that of colonial officials (Bankoff, 2003, p. 425) that classified the indigenous population as brutes and savages in Asian, African and North American colonies (Mégret, 2005). Civilized Europeans were “restrained, moderate in their violence...from the barbarian who [were] like children who allow[ed] their passions to rule their behavior” (Kinsella, 2005, p. 180). This historical condition resembles the anomie of the enemy combatant who is rendered the status of a living dead man (Agamben, 2005; Bush, 2001a). American domestic and international law (during the war on terror) differentiates between the civilized “us” and the “infrahumanity” (Aradau & Munster, 2009, p. 9) of the terrorist that hates everything good and decent in this world (Blair, 2003). Post-9/11 biopolitical, racialized discourses dehumanize the enemy as being inhumane savages who must be indefinitely detained and are not subject to U.S. or international prohibitions against torture.

### *III. Agamben, Foucault and Sovereignty:*

This subsection deals with what I contend is the re-emergence of sovereign power within post- 9/11 discourse and practices. This subsection reconceptualizes Foucauldian and Agambenian analysis of sovereign power to analyse the most extreme deployment of executive power against unlawful combatants. Foucault often conceptualized sovereign power as a “means of deduction” (Foucault, 1978, p. 136) – taking things away – exemplified in the “spectacle of the scaffold” (Foucault, 1977, p. 32). Agamben however, conceptualized it in terms of his biopolitical sovereign paradigm (1998, p. 181). In this respect, Foucauldian and Agambenian conceptions of sovereignty are inadequate on their own for providing a sound theoretical account of the newly emergent unilateral

presidential authority to wage wars against geopolitical territories and the deployment of law as a tactic that transgresses human rights. Refining Foucauldian and Agambenian conceptions of power is thus necessary, one that is able to account for both sovereign and security that combines both the power to take life or let live of the juridical sovereign and the “optimal mean within a tolerable bandwidth of variation... [within] the ensemble of a population” of governmental rationality and its valorization of security (Gordon, 1991, p. 20).

#### *A. The Return of the Sovereign?*

Following Foucault, Datta (2008, pp. 222-223) argues that the “head of the king has been cut off,” given Foucault’s analysis of the rationalities and goals of liberal governmentality that have effectively displaced the archaic sovereign concern with territorial rule. Datta’s conceptual analysis<sup>13</sup> can be used in reconceptualizing the “legally unnamable and unclassifiable being” (Agamben, 2005, p. 3) illustrative of unlawful combatants detained at Guantanamo Bay and undisclosed black sites. Liberal governmental rationality guides the “conduct of conducts” of free subjects (Foucault, 1994d, pp. 341). It is a relationship between those who act and those on “whom power is exercised,” operating alongside fields of possibilities to minimize or maximize the power relationship (Foucault, 1994d, p. 340). Contrary to governmental rationality, unlawful combatants are simply subjugated and unable to actively resist; they are deprived of the legal field of contest since they are held indefinitely without charge and *habeas corpus*. Those confined at Guantanamo Bay are “low level enemy combatants” (Rumsfeld, 2003b, p. 4) serving as an “interrogation battle lab” as stated by Major-General Geoffrey Miller (Rose, 2004, p. 81), for “world-

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<sup>13</sup> I use Datta’s conceptual analysis of the “sovereignty of security” despite his object of concern being the emergence of post-politics.

wide interrogation, torture training and research” (Denbeaux et al, 2015, p. 3). Unlawful combatants exist to test the “effects of torture and the limits of the human spirit” (Denbeaux et al, 2015, p. 4). They exist as objects of “pure de facto rule” where “bare life reaches its maximum indeterminacy” (Agamben, 2005, p. 4).

The power to “take life or let live” (Foucault, 1978, p. 136), the power to “foster life or disallow it” (Foucault, 1978, p. 138) and the power to guide the “conduct of conduct” (Foucault, 1994d, pp. 341-342) are inadequate for analyzing post-9/11 governance. Therefore a re-conceptualization in terms of a “sovereignty of security” (hereafter referred to as the security-sovereign) can be a useful model (Datta, 2008, p. 229). The sovereign represents the original and founding agent of political order, occupying a space both inside and outside the law on which the ancient and modern political system exists (Agamben, 1998, p. 9). Yet this founding order has since been transferred to “petty sovereigns” (Lippert & Williams, 2012, p. 55) in the securitized state to deal with the uncertain risk posed by the terrorist threat. *Yoo-Flanigan* (2001, p. 1) established the institutional bases for unfettered presidential authority to preempt purported future harm against hostile individuals, groups and states regardless of involvement in the 9/11 attacks. This new paradigm rationalized Presidential authority to preemptively and indefinitely detain non-U.S. citizens (*sans habeas corpus relief*), in violation of existing legality (Everett, 2006; Fitzpatrick, 2002). Moreover, *Yoo-Flanigan* was considered the exclusive legal authority (Passavant, 2010, p. 565) in authorizing “unlimited executive power to engage in any tactic, including torture” (Darmer, 2009, p. 646). *Yoo-Flanigan* was instrumental in blurring the legal/illegal, inside/outside and

rule/exception dichotomies beyond distinction while establishing the continuity of security-sovereign monstrosity.

While the juridical sovereign seeks revenge for a wrong committed against his/her realm (See Foucault, 1977, p. 48), security governs through appeals to future catastrophic events and extraordinary governmental action to preempt it (Goede, 2011, p. 506). Expert post-9/11 documents discursively constituted terrorism as an act of war and problematized the unlawful combatant as an always possible existential threat, thereby establishing the necessary conditions for the fictional state of emergency<sup>14</sup> (See Agamben, 1998, pp. 53-56). In this respect, the Bush Administration embodied the security-sovereign model: the president institutionalized this new-found power to take revenge against the imagined threat to the state's commitments to socio-economic development, i.e., an *existential threat*, (as noted in the *Military Order*) and reduced all those residing in the Near and Middle East to the inclusive-exclusion of a sovereign ban. Unlawful combatants were excluded from the protection of existing constitutional, international and military law yet were indefinitely detained by an exercise of sovereign power as security threats irrespective of evidence.

**Table 1.1:** *Security, Sovereignty and the Security-Sovereign*

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<sup>14</sup> Agamben (1998, p. 53-56) differentiates between real and fictitious states of exception. A real state of exception concerns a state legitimately facing an existential threat whereas a fictitious state of exception includes claims of existential threats.



Models, Styles of Rationality	Security	Sovereignty	Security-Sovereign
Defined as	Managing potential threats and uncertainties. Operates through tolerable ranges of risk.	Monarchical right over life and death with respect to after-the-fact criminality. Exclusive jurisdiction over territory	Power over life, death, bodies, populations, thoughts, and future (imagined) deeds.
Era	Primarily associated (but not limited to) with the rise of liberal governmentality.	Medieval monarchies and Absolutism but remains in the background of liberal governmentality (e.g., constitutional monarchies)	Specific emergence is unknown. It is associated with the permanent (or real) state of exception and subsequent state deployment of “hyper-securitization”
Tactics	Functions to preempt, contain, displace and eliminate intolerable risks.	Means of deduction. Primarily governed through the threat of the public sword.	Power over life and death irrespective of previous transgression. Operates via means of preemption, elimination and displacement on thoughts and deeds over bodies, populations and territories. Also concerned with battle lab experiments.
Rationalities	Liberal governmentality of not governing “too much” or “too little”. Future governance of potential risks and a “better” and securitized future.	Preservation of the monarchy and his/her principality as primary rationality.	Violent police-military deployments secure populations and order. Designates and classifies new evils and authorizes extraordinary measures, including torture and killing.

## *B. The Camp:*

The darkest reaches of the security-sovereign paradigm is realized in the camp as opposed to the city:

The camp is thus the structure in which the state of exception – the possibility of deciding on which founds sovereign power – is realized normally... actually delimits a space in which the normal order is de facto suspended and in which whether or not atrocities are committed depends not on the law but on the civility and ethical sense of the police who temporarily act as sovereign (Agamben, 1998, p. 170, 174).

Those confined to Guantanamo Bay and American black sites operate outside of traditional law and are subject to indefinite (but not unconstrained) political possibilities for the exercising of the power of the security-sovereign. While Agamben argued that the camp is a geographic spatiality, I propose that it instead functions as a “dividing practice” (Foucault, 1994d, p. 326). Those deemed to be security threats are banned from the polity and can be subsequently abducted, subject to extraordinary rendition on “secret flights” and flown to unknown locations awaiting “waterboarding, forced nudity... and extended sleep deprivation while [being] shackl[ed]... in a standing position” (Singh, 2013, p. 16, 18). In accordance with the *Military Order*, the President can indefinitely detain an individual when “there is reason to believe” that s/he poses a national security threat (Bush, 2001a, p. 2). The *National Defense Authorization Act* (2012, hereafter, “*NDAA*”) illustrated an even darker realization. Section 1021 of the *NDAA* originally authorized “indefinite detention of American citizens without due process at the discretion of the President” (2012).<sup>15</sup> To go one step further, a leaked 2013 NBC news article (referred to as the *White Paper*) claimed a high ranking U.S. government official could assassinate a U.S. or non-U.S. citizen who poses an “immanent [security] threat” without the need to

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<sup>15</sup> This section of the *NDAA* was later amended to only include non-U.S. citizens

show that a such an act can be reasonably expected to occur in the “immediate future” (pp. 6-7). In this regard, all non-U.S. citizens already exist as security threats within the President’s zone of indistinction: security threats can be indefinitely detained and/or subject to assassination.

While Datta (2008, p. 229) argues that the sovereignty of security concerns the “thoughts” (i.e., discursive practices) rather than the body as governmental objects, I argue that the sovereign/security paradigm at Guantanamo includes and excludes styles of government. Security exercises its power over “the thought of a different future,” (Datta, 2008, p. 229), populations and tolerable ranges of action (Hunt & Wickham, 1994, p. 54) whereas sovereignty operates on bodies, death and time within a territory (Foucault, 1978, p. 136; 2007, p. 25). However, President Bush’s executive orders constituted power over an “indefinite series of events” (Foucault, 2007, p. 35), life, territories, and thoughts. The executive orders designated President Bush as the exclusive creator, enforcer and arbiter of law (Johns, 2005, p. 619). While the classical sovereign is solely concerned with after-the-fact criminality over their principality, the executive orders established purported threats, deeds, and thoughts over the Near and Middle East as terrorism subject to presidential designation (Bush, 2001a, p. 2) to be indefinitely detained without *habeas corpus*. In doing so, conventional understandings of sovereignty and security and the sovereign-security paradigm are further impeded.

While Donald Rumsfeld claimed that Guantanamo is used to house “the worst of the worst” (Denbeaux & Denbeaux, 2006, p. 4) to prevent future terrorist attacks, the “true purpose behind the base... [was] [a] world-wide interrogation and torture training and research” program (Denbeaux et al, 2015, p. 26; See also Mestrovic & Lorenzo,

2008, p. 184). Torture and research programs at Guantanamo were not authorized by a few bad apples in lower military ranks but were deployed by President Bush. To illustrate this reality, Intelligence Commander of the battle lab experimentation mission (Major General Michael Dunlavey), declared under oath that “I got my marching orders from the President of the United States” (Denbeaux et al, 2015, p. 5). With unfettered power from court immunity authorized by President Bush, U.S. authorities engaged in severe torture methods including the breaking of bones, genital mutilation (Singh, 2013, p. 97), and medically induced psychosis before the brink of organ failure on detainees (including Chinese Muslims) who posed no serious threat to American interests (Denbeaux & Denbeaux, 2006, p. 3; Denbeaux et al, 2015, p. 31). The primary purpose of Guantanamo Bay is unrelated to past or future detainee wrongdoing but instead operates to “radically create” new torture techniques for future battlefield operations (Denbeaux et al, 2005, p. 13; See also Mestrovic & Lorenzo, 2008). Detainees are monitored by medical experts during interrogations to prevent organ failure and death to ensure the survival of the purchased lab rat (Denbeaux et al, 2015, p. ii).

Battle lab operations at Guantanamo Bay employ the darkest features of the security-sovereign. Security functions to preempt, contain and eliminate intolerable risks (Deukmedjian, 2013, p. 55; See also Table 1) while the sovereign tortures and kills the regicide (Foucault, 1977, p. 12). The majority of detainees are deemed to be low level risks and determined as having never committed “any hostile acts” against the United States or its allies (Denbeaux & Denbeaux, 2006, p. 2; See also Welch, 2009, p. 69). Detainees are “transported in chains... and come to inhabit a racialized space left vacant by their historical brethren who are always actively reproduced as bare life: rebels,

refugees and slaves” (Reid-Henry, 2007, p. 641). The majority of detainees (80 percent) were purchased by U.S. authorities<sup>16</sup> (for the sum of \$ 3000 to \$ 25 000) from Pakistani and Afghani tribal enemies (Honigsberg, 2010, p. 82) while being shackled to the ceiling by chains<sup>17</sup> (Gillian, 2005). In an effort to protest their indefinite detention, inhumane treatment and bodily integrity, detainees engage in hunger strikes (Hutchinson et al, 2013, p. 227). This act of detainee resistance is matched by American force-feeding practices (Hutchinson et al, 2013, p. 227). In doing so, detainees exist as slaves to serve their masters; they are bought and sold regardless of past criminality, are subject to indefinite detention and infinite physical and psychological torture to the point of organ failure and death and are force-fed to ensure their continued destiny as the purchased lab rat.

Plenary Commander-in-Chief authority (first proposed in *Yoo-Flanigan*) justified both enhanced interrogation methods (including battle lab experimentation) and military commissions (Denbeux et al, 2015, p. 25; Feinstein, 2014, p. 181). *Yoo-Flanigan* discursively deployed the re-emergence of the sovereign that was concerned with bodies, truth extraction, and territory but added to this list populations, and future threats to life (See Table 1). In protecting U.S. national security, the security-sovereign constructed Guantanamo Bay as a laboratory for purchased human test subjects. To be clear, the security-sovereign and the human slave (i.e. unlawful combatants) were “objectiviz[ed]” as specific subjects (Foucault, 1994d, p. 326) by post-9/11 governmental discursive

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<sup>16</sup> The practice of being bought and sold bears resemblance to the practice of human trafficking. The United Nations Trafficking Protocol defines human trafficking as “the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal, manipulation or implantation of organs”

<sup>17</sup> Chains and collars used at Guantanamo in 2005 were manufactured by Hiatt & Company that also produced “nigger chains” during the 18<sup>th</sup> century.

practices for identifying “terrorism,” plenary presidential power and unlawful combatants.

Objectivization and subjectivization are not independent process but instead are co-constituted in domains of truth telling (Veyne, 2010, p. 87). The “objectivizing” of the President as the “speaking subject” (Foucault, 1994d, p. 326; See also Veyne, 2010, pp. 87-88) authorized extraordinary deployments of executive power (i.e. the *Military Order*) against the newly constituted unlawful combatant subject/object. The newly subjectivized all-seeing sovereign-subject constituted populations and bodies, torture, but not death, and efficient scientific torture truth extraction methods as proper tactics and solutions to the terrorist problem (See Table 1). The problematization of the existential threat (posed by terrorism) required “hyper securitization” and preemptive measures to ensure the safety and security of the United States (Dean, 2007, pp. 192-193). The objectification of sovereign executive power and subsequent deployment of military commissions and lab experimentation illustrates the radical realizations of the post-9/11 sovereign-subject monstrosity. Terrorists were constituted as the savage-subject which required lab experimentation on low risk detainees “to generate data with which to counsel and train interrogators at military facilities across the globe” (Denbeaux et al, 2015, p. ii). The camp is necessary to ensure continued survival of the rationality of hyper-securitization of the United States.

While Datta provides a compelling theoretical tool for explaining tactics and rationalities of the security-king, a further development is necessary in accordance with the post-9/11 battle lab. The security-sovereign monopolizes the power over life and death with respect to past and future thoughts, deeds and threats. However, the majority

of detainees at Guantanamo pose no serious threat but are instead indefinitely detained to serve the production of scientific knowledge concerning interrogation techniques for future battlefield deployments. While the monarchical sovereign is limited to rationalities and tactics of life, death and the end of sovereignty, the security-sovereign's power is limitless precisely because "apparatuses of security" produces security-sovereign rationality and tactics that "draw and sustain that limit" (Datta, 2008, p.231; See also Table 1). The problematization of plenary presidential authority post-9/11 constitutes the unlawful combatant as an existential threat that requires limitless national security measures. The production of truth (via pertinent documents) poses the problem of the evil doer as well as the necessity of unlimited presidential authority to displace, contain and eliminate the threat. Thus, the camp embodies the most extreme boundaries of necessity, the security-sovereign and terrorism. The security-sovereign knows no boundaries nor limits due to the fact that the security-sovereign produces pertinent documents and classifications of legal/illegal, good/bad and existential/low threats. Guantanamo Bay belongs neither to the state of nature nor the polity. Detainees are rendered to the barest designation of the *homo sacer*/wolf man. Detainees have neither transgressed the law nor pose a future threat; instead they exist as dehumanized and valueless (apart from for experimentation purposes) lab test-subjects for the imagined future evil doer. In summary, Guantanamo guinea pigs exist within the boundaries of the security-sovereign rationality because expert discourse designates and determines appropriate discursive objects and unfettered discursive deployment.

#### *IV: Conclusion*

This chapter analyzed and reconceptualized the pertinent elements of Datta's model of security. Legal discourse was shown to be a continuously shifting set of statements, polemics, problematizations and manifestations of a will to truth. I conceptualize *Yoo-Flanigan* as the post-9/11 institutional basis for unilateral presidential authority to initiate "extraordinary" measures in subsequent executive orders and deployments of power. That is to say, post-9/11 American foreign policy reflects a radical departure from the "normal processes of law" (Dean, 2007, p. 190) and existing rationalities of the legal complex. The President problematized terrorism as an existential threat, unilaterally established a separate military justice system and suspended the *GPW*. The problematization of a new paradigmatic threat authorized the re-emergence of the founding constitutional order that both functions inside and outside of the law (see Datta, 2008, p. 229). Medieval sovereignty merged with apparatuses of security in an all-out effort to securitize the homeland against the ever-present terrorist threat. Agamben's conception of the camp embodies the maximum indeterminacy of the security-sovereign: those confined to the camp are subject to indefinite detention and infinite physical and psychological trauma irrespective of past criminality or future risk. Lab experimentation is conducted on low level detainees to develop the most advanced and effective interrogation methods to test on purported future terrorist threats.

Unique post-9/11 problematizations constituted the emergence of new rationalities and solutions in opposition to existing legal discourse and practices. Reconceptualizing of Foucault and Agamben facilitated a more comprehensive analysis of the radical exclusion of unlawful combatants from existing discourse and regimes of



practice. Post-9/11 U.S. state power cannot be properly conceptualized as biopolitical sovereignty or the power over life and death. Instead, post-9/11 governance can be conceptualized in accordance with the security-sovereign that problematized the terrorist as an existential threat which required a new military justice system, legal discourses and delegated authority to high ranking government officials (i.e. petty sovereigns). The continuous threat posed by the inferior, evil savage justifies exceptional measures, radical exclusion of human rights for those not yet charged of wrongdoing and hyper-militarized operations against the Near and Middle East. In an effort to combat terrorism, the Bush Administration deployed sophisticated torture regimes and lab experimentations on low level security risks. In constituting the enemy as evil doers and terrorists, the Bush Administration engaged in indefinite detention and infinite torture methods that can be considered nothing less than institutionalized state crime. This is the focus of my next chapter.

## 9. DISCUSSION

### *I. State Crime and Impunity*

The tripartite post-9/11 problematizations of plenary presidential authority, terrorism and unlawful combatants reflect a state of impunity; high ranking government officials responsible for state or war crimes are protected by newly configured post-9/11 legal/political discourses that suspended existing legal standards. Post-9/11 pertinent documents created new “legal” moves for monopolizing governmental authority in the re-emergence of sovereign power- conceptualized as the security-sovereign -. Newly constituted political/legal discourse produced law that shed every relation to existing legal standards, executive courts (i.e. military commissions) that have no basis in traditional judicial courts and a legal process that bears no resemblance to due process (See Butler, 2004, p. 62). *Yoo-Flanigan*, the *Military Order* and *Executive Order* established three discursive objectives: 1) the unfettered presidential authority to initiate hostilities and retaliate against those he deems to be enemy states, groups and individuals; 2) the suspension of existing criminal, military and international law concerning captured prisoners which places detainees beyond the geographic-spatiality of law; 3) to radically re-define limits of state power including prohibitions against torture and absolve responsibility for those responsible for drafting and implementing enhanced interrogation methods (See Dratel, 2005, p. xxi; See also Welch, 2009, p. 23). As a result, government officials (or their designated agents such as private contractors) at Guantanamo Bay and CIA black sites are (essentially) given torture licenses to tests the limits of physical and psychological torture on purchased human lab rats.

Post-9/11 discursive deployment of physical and psychological torture is not the result of a totalizing, single security-sovereign but the cooperation and recruitment of petty security-sovereigns (e.g. John Yoo, Dick Cheney, Michael Hayden or Michael Dunlavey – whoever happens to occupy the position -) that transfer power from one local and site to another (Garland, 1997, p. 182). To be clear, Michael Dunlavey or Dick Cheney are of little significance; this thesis is concerned with the actualizing apparatuses of the security-sovereign. The production of neutralization techniques by government officials against detainees is enunciated via expert political/legal discourse that informs, guides and transmits the torture culture. Torture practices cannot be explained by recourse to a few “bad apples” but are widely dispersed in post-9/11 torture-cultures. Post-9/11 discourse shrouded the War on Terror as a “crusade” against evil, barbaric and uncivilized savages (Kellner, 2006, p. 45). The U.S. executive employed psychologists (Feinstein, 2014, p. 46), psychiatrists, doctors and other medical personnel to test the most sophisticated scientific experiments on the limits of torture efficacy and the human psyche (Denbeaux, et al, 2015). Detainees at Guantanamo are regularly given “mind-altering drugs” including mefloquine (used to treat malaria) at five times the recommended legal dose for the purposes of producing extreme side-effects including anxiety, paranoia and alternate states of mind including pushing the detainee to the brink of suicide and depression (Denbeaux et al, 2015, p. 27). Other experimental torture techniques include being chained and shackled up in the fetal position for up to twenty-four hours (Lewis, 2005), female sexual assault on detainees (Lewis & Schmitt, 2005, p. 35), exposure to extreme conditions of hot and cold, death threats, rectal force-feeding (Feinstein, 2014), and severe beatings (Welch, 2005, p. 91). The aim of the physical and

psychological torture program is clear: the security-sovereign conducts scientific experimentation and “behavioural modification” to breakdown detainee resistance which can be used on future high profile detainees during battlefield operations and/or interrogations (Denbeaux et al, 2015, p. 27); such is the actuality of the security-sovereign’s *will to truth*.

As discussed in the results section, post-9/11 discourse and regimes of practice are not inevitable and inherently necessary as demonstrated by Congressman Ron Paul’s proposal to issue private warrants to American citizens against those directly responsible for the 9/11 attacks. Instead, post-9/11 governance can be conceptualized in terms of a state crime perspective. At the core of any state are powerful individuals, departments, organizations and elected representatives. The *Military Order* and the *Torture Papers* (constituted by President Bush and other high ranking government officials) suspended existing military legal standards and constituted a separate military justice that authorized enhanced interrogation methods previously deemed illegal by the traditional military justice system and the *GPW*. While the War on Terror is responsible for the overthrow of regimes and resulting chaos including the deaths of over 405 000 Iraqis (Hagopian et al, 2013, p. 1), new detention facilities outside of existing due process that Amnesty International estimates holds over 70 000 detainees (Dean, 2007, p. 168) it also authorized the corporate/government collusion of war profiteering (Welch, 2009, pp. 105-106). By way of example, the U.S. executive awarded Halliburton (a U.S. defense contractor) government contracts worth upwards of 155 million dollars to re-construct Guantanamo Bay as a military prison after the 9/11 attacks (McCulloch, 2007, p. 28; Pease, 2003, p. 15). This instance of government/corporate collusion is extremely

problematic given the fact that then-Vice President Dick Cheney held more than 433 000 stock options in the corporation (worth 36 million dollars) when the contract was awarded (Welch, 2009, p. 106). Moreover, other instances of war profiteering and collusion include the fact that Halliburton was the largest corporate war profiteer in the Iraq War, earning more than 3.9 billion US dollars from military contracts in 2003 alone (Chatterjee, 2004, p. 39). Halliburton is just the tip of the iceberg of high ranking corporate/government policy planners that profited in committing war crimes against Afghanistan and Iraq (See Kramer & Michaelowski, 2005, p. 460). In summary, a post-9/11 discourse of indefinite and unconstrained political possibilities manufactured a political realm of extraordinary state crime illustrative of preemptive war, torture cultures and high ranking government/corporate collusion of war profiteering.

Post-9/11 problematizations of terrorism, pre-emption and retaliation, unlawful combatants and plenary constitutional authority produce and justify institutionalized regimes of dehumanization and torture. The post-9/11 American torture-culture (See Kinsella, 2005; See also Mégret, 2005) denied responsibility (Bin Laden and Saddam started the war) denied victims of torture (those captured are evil savages unworthy of protection) and appealed to higher authorities including President Bush's claim that he was instructed by God to liberate Iraq (Welch, 2009, p. 168). This blanket denial of responsibility is linked to my research questions; post-9/11 pertinent documents deployed a series of marginalized, constrained and delimited statements and practices concerning the War on Terror and the emergence of the security-sovereign and the purchased unlawful combatant. Executive deployments of preemption, retaliation and torture against suspected states, groups and individuals is the result of post-9/11 discourses that

suspended existing law and established separate justice systems that authorized extreme exercises of power against captured Muslims. Pertinent post-9/11 documents (i.e. the *Military and Executive Orders*) manufactured legal black holes whereby abuses of power, including war profiteering by the corporate/government collusion and the deployment of battle laboratories authorized by the President, were approved by the highest reaches of the U.S. government.

In short, in response to the 9/11 attacks, the Bush Administration deployed a series of connected and delimited statements in authorizing the following widespread deployments of state crime: 1) the authorization of military commissions violated constitutional, military and international law in developing a torture regime illustrative of rectal force-feeding and battle lab experimentation; 2) the invasion of Iraq resulting in over 405 000 deaths and construction of detention facilities including secret black sites and Abu Ghraib; 3) the formation of discursive neutralization and a state of impunity for the gross violation of human rights law. The suspension of existing legal standards, the violation of constitutional, international and military law and the widespread regimes of torture are worthy of criminological consideration.

## *II. Considerations for Future Research:*

While I have focused here on post-9/11 legal/political discourses that suspended existing legal standards and established alternate legal/illegal, truth/false and good/bad games of truth, an archaeological excavation into the problematization of constitutionalism is an area of similar and future research. The American Founding Fathers posed the problem of executive tyranny which constituted a constitutional separation of powers between judicial, legislative and judicial branches (See Malcolmson

& Myers, 2009, p. 38). Scholars critical of state abuses of power post-9/11 consider the violation of the separation of powers doctrine by the Bush Administration to be partly responsible (See Fisher, 2011; See also Henn, 2010). An archaeological excavation of constitutional texts, interpretive practices, judicial precedent, and customary law is worthy of criminological/legal analysis. Did post-9/11 legal/political discourse violate American constitutional law? If so, a state crime perspective, based on the rule of law, may be used to punish high ranking state officials that not only violated key constitutional principles but also initiated cultures and regimes of torture? What might the discursive effects of constitutionalism be able to tell us about the tensions between sovereignty and liberalism as models of rule? While this may be considered a normative endeavour and thus contrary to Foucauldian studies, legal system and illegal/legal designations are also polemical frameworks.

## 10. CONCLUSION

Drawing on Foucault and Agamben, I critically investigated post-9/11 sovereign logics and discursive frameworks. I demonstrated how key texts posed specific problems of how to govern that transformed existing liberal discourses and governmental logics. Answers to the two research questions revealed the emergence of binary post-9/11 objectivization/subjectivization games of truth. Overall, this thesis reflects the twofold emergence of the security-sovereign and the unlawful combatant as governmental subjects/objects.

This research critically analyzed Foucauldian and Agambenian scholarship in accordance with the rise of unlawful combatants and sovereign power. I demonstrated how Agambenian literature is largely concerned with the biopolitical paradigm and its inherent linkage to the sovereign ban. Put simply, from Ancient Rome to modern governance, the sovereign power constitutes bare life. For Foucault, however, power is much more complex and nuanced. Power is constituted by diverse governmental rationalities, knowledges, logics and apparatuses. Sovereign power is but one resource in modern governmentality. Modern rule emerges from heterogeneous discourses, tactics and deployments of power that is primarily concerned with liberal rationality and rule. At the same time, sovereign power has not disappeared but remains firmly in the background of liberal governmentality.

The data set, consisted of the key texts of *Yoo-Flanigan*, the *Military Order* and the *Executive Order* and demonstrated the emergence of new kinds of governance. First, the results section reflected the rise of discourses and practices of retaliation, plenary



presidential authority and pre-emption. Second, the *Military Order* established new legal discourses/complexes in transgressing existing military and international law and also violated judicial and congressional vested powers. Last, the *Executive Order* reflects the emergence of the “new paradigm” that suspended international human rights previously guaranteed by the *GPW*.

The analysis section reflects three key component parts outlined in the results. First, it analyzes law as a will to truth, between existing legal standards and new transformative games of truth. In this sense, law is not solely reflected in the strict, established legal tradition but also newly constituted normative truth games. Second, I analyzed how this legal discourse constituted a new class of subject, the dehumanization of the evil, uncivilized, and savage “unlawful combatant.” In constituting the enemy as an inhuman (Aradau & Munster, 2009, p. 9) consumed by hatred and waiting to kill innocent victims, the U.S. executive were justified in deploying regimes of torture. Last, I analyzed the re-emergence of sovereign power in the form of the security-sovereign. Logics of sovereignty (power over life and death) and security (pre-empting future harm) alone are incompatible in explicating widespread tactics of hyper-securitization (Dean, 2007, p. 192). Rather than limit itself to past criminal transgression or purported future harm, the security-sovereign purchased human test-subjects. The rationality of such practices cannot be properly conceptualized as a security or a sovereign style of government but can instead be aptly reconceptualised as the effect of a new kind of governance: the security-sovereign.

Post-9/11 discursive deployments are illustrative of U.S. executives that criminal, military and international law. In transgressing all established legal standards, the U.S.

executive were granted exclusive jurisdiction to act outside the confines of the law in invading countries irrespective of past wrongdoing and institutionalizing torture programs against purchased test subjects. Experimental, psychological regimes whereby U.S. medical personnel administer large and illegal doses of drugs for the purposes of breaking the detainee psyche illustrates the most abhorrent realizations of the security-king abomination.. Was the invasion of Iraq (which killed hundreds of thousands of Iraqis) conducted for the purposes of human trafficking and experimental testing? In closing, what I have aimed to offer is a critical, but careful reconceptualization of post-9/11 rationalities of governance. The problematization of sovereign power, unrestrained war powers and the constitution of unlawful combatants outside of existing legality belie the purported dominance of liberal governance. Post-9/11 American governance is illustrative of an obliteration of the rule of law and the federal government operates as an “oligarchy” (Gilens & Page, 2014, p. 566). The issue of whether the Iraq war was initiated to free the Iraqis or for corporate profit is a highly contentious issue. Moreover, unlimited hyper-securitization, exceptionalism, institutionalized torture and arbitrary assassination against both U.S. and non-U.S. citizens (i.e. the drone program) cannot be properly analyzed through a liberal lens. If liberal governance is conceptualized as not governing “too much” and following established legal norms, how can exceptional governance be conceptualized within the liberal rationality? The security-sovereign’s lab rats at Guantanamo Bay place the limits of liberal rationality into sharp relief; they have been displaced by discourses and rationalities of risk, hyper-securitization (including bailouts and quantitative easing) and systems of mass exclusion. Instead, I consider it apt to conceptualize the suspension of existing legality, aggressive foreign invasions and

institutionalized regimes of torture within the dominance of exceptional governance  
whereby liberalism functions at the margins of arbitrary and lawless governance.

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## **VITA AUCTORIS**

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