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INDEFINITE DETENTION

I'm not a lawyer. I'm not into that end of the business.

Donald Rumsfeld, Secretary of Defense

On March 21, 2002, the Department of Defense, in conjunction with the Department of Justice, issued new guidelines for the military tribunals in which some of the prisoners detained domestically and in Guantanamo Bay would be tried by the US. What has been striking about these detentions from the start, and continues to be alarming, is that the right to legal counsel and, indeed, the right to a trial has not been granted to most of these detainees. The new military tribunals are, in fact, not courts of law to which the detainees from the war against Afghanistan are entitled. Some will be tried, and others will not, and at the time of this writing, plans have just been announced

to try 6 of the 650 prisoners who have remained in captivity there for more than a year. The rights to counsel, means of appeal, and repatriation stipulated by the Geneva Convention have not been granted to any of the detainees in Guantanamo, and although the US has announced its recognition of the Taliban as "covered" by the Geneva Accord, it has made clear that even the Taliban do not have prisoner of war status; as, indeed, no prisoner in Guantanamo has.

In the name of a security alert and national emergency, the law is effectively suspended in both its national and international forms. And with the suspension of law comes a new exercise of state sovereignty, one that not only takes place outside the law, but through an elaboration of administrative bureaucracies in which officials now not only decide who will be tried, and who will be detained, but also have ultimate say over whether someone may be detained indefinitely or not. With the publication of the new regulations, the US government holds that a number of detainees at Guantanamo will not be given trials at all, but detained indefinitely.[1] What sort of legal innovation is the notion of indefinite detention? And what does it say about the contemporary formation and extension of state power? Indefinite detention not only carries implications for when and where law will be suspended but for determining the limit and scope of legal jurisdiction itself. Both of these, in turn, carry implications for the extension and self-justificatory procedures of state sovereignty.

Foucault wrote in 1978 that governmentality, understood as the way in which political power manages and regulates populations and goods, has become the main way state power is vitalized. He does not say, interestingly, that the state is legitimated by governmentality, only that it is "vitalized," suggesting that the state, without governmentality, would fall into a condition of decay. Foucault suggests

that the state used to be vitalized by sovereign power, where sovereignty is understood, traditionally, as providing legitimacy for the rule of law and offering a guarantor for the representational claims of state power. But as sovereignty in that traditional sense has lost its credibility and function, governmentality has emerged as a form of power not only distinct from sovereignty, but characteristically late modern.[2] Governmentality is broadly understood as a mode of power concerned with the maintenance and control of bodies and persons, the production and regulation of persons and populations, and the circulation of goods insofar as they maintain and restrict the life of the population. Governmentality operates through policies and departments, through managerial and bureaucratic institutions, through the law, when the law is understood as "a set of tactics," and through forms of state power, although not exclusively. Governmentality thus operates through state and nonstate institutions and discourses that are legitimated neither by direct elections nor through established authority. Marked by a diffuse set of strategies and tactics, governmentality gains its meaning and purpose from no single source, no unified sovereign subject. Rather, the tactics characteristic of governmentality operate diffusely, to dispose and order populations, and to produce and reproduce subjects, their practices and beliefs, in relation to specific policy aims. Foucault maintained, boldly, that "the problems of governmentality and the techniques of government have become the only political issues, the only real space for political struggle and contestation" (103). For Foucault, it is precisely "governmentalization that has permitted the state to survive" (103). The only real political issues are those that are vital for us, and what vitalizes those issues within modernity, according to Foucault, is governmentalization.

Although Foucault may well be right about governmentality having assumed this status, it is important to consider that the

emergence of governmentality does not always coincide with the devitalization of sovereignty.[3] Rather, the emergence of governmentality may depend upon the *de*vitalization of sovereignty in its traditional sense: sovereignty as providing a legitimating function for the state; sovereignty as a unified locus for state power. Sovereignty in this sense no longer operates to support or vitalize the state, but this does not foreclose the possibility that it might emerge as a reanimated anachronism within the political field unmoored from its traditional anchors. Indeed, whereas sovereignty has conventionally been linked with legitimacy for the state and the rule of law, providing a unified source and symbol of political power, it no longer functions that way. Its loss is not without consequence, and its resurgence within the field of governmentality marks the power of the anachronism to animate the contemporary field. To consider that sovereignty emerges within the field of governmentality, we have to call into question, as Foucault surely also did, the notion of history as a continuum. The task of the critic, as Walter Benjamin maintained, is thus to "blast a specific era out of the homogeneous course of history" and to "grasp ... the constellation which his own era has formed with a definite earlier one."[4]

Even as Foucault offered an account of governmentality that emerged as a consequence of the devitalization of sovereignty, he called into question that chronology, insisting that the two forms of power could exist simultaneously. I would like to suggest that the current configuration of state power, in relation both to the management of populations (the hallmark of governmentality) and the exercise of sovereignty in the acts that suspend and limit the jurisdiction of law itself, are reconfigured in terms of the new war prison. Although Foucault makes what he calls an analytic distinction between sovereign power and governmentality, suggesting at various moments that governmentality is a later form of power, he also holds

open the possibility that these two forms of power can and do coexist in various ways, especially in relation to that form of power he called "discipline." What was not possible from his vantage point was to predict what form this coexistence would take in the present circumstances, that is, that sovereignty, under emergency conditions in which the rule of law is suspended, would reemerge in the context of governmentality with the vengeance of an anachronism that refuses to die. This resurgent sovereignty makes itself known primarily in the instance of the exercise of prerogative power. But what is strange, if not fully disturbing, is how the prerogative is reserved either for the executive branch of government or to managerial officials with no clear claim to legitimacy.

In the moment that the executive branch assumes the power of the judiciary, and invests the person of the President with unilateral and final power to decide when, where, and whether a military trial takes place, it is as if we have returned to a historical time in which sovereignty was indivisible, before the separation of powers has instated itself as a precondition of political modernity. Or better formulated: *the historical time that we thought was past turns out to structure the contemporary field with a persistence that gives the lie to history as chronology*. Yet the fact that managerial officials decide who will be detained indefinitely, and who will be reviewed for the possibility of a trial with questionable legitimacy, suggests that a parallel exercise of illegitimate decision is exercised within the field of governmentality.

Governmentality is characterized by Foucault as sometimes deploying law as a tactic, and we can see the instrumental uses to which law is put in the present situation. Not only is law treated as a tactic, but it is also suspended in order to heighten the discretionary power of those who are asked to rely on their own judgment to decide fundamental matters of justice, life, and death. Whereas the

suspension of law can clearly be read as a tactic of governmentality, it has to be seen in this context as also making room for the resurgence of sovereignty, and in this way both operations work together. The present insistence by the state that law can and ought to be suspended gives us insight into a broader phenomenon, namely, that sovereignty is reintroduced in the very acts by which state suspends law, or contorts law to its own uses. In this way, the state extends its own domain, its own necessity, and the means by which its self-justification occurs. I hope to show how procedures of governmentality, which are irreducible to law, are invoked to extend and fortify forms of sovereignty that are equally irreducible to law. Neither is necessarily grounded in law, and neither deploys legal tactics exclusively in the field of their respective operations. The suspension of the rule of law allows for the convergence of governmentality and sovereignty; sovereignty is exercised in the act of suspension, but also in the self-allocation of legal prerogative; governmentality denotes an operation of administration power that is extra-legal, even as it can and does return to law as a field of tactical operations. The state is neither identified with the acts of sovereignty nor with the field of governmentality, and yet both act in the name of the state. Law itself is either suspended, or regarded as an instrument that the state may use in the service of constraining and monitoring a given population; the state is not subject to the rule of law, but law can be suspended or deployed tactically and partially to suit the requirements of a state that seeks more and more to allocate sovereign power to its executive and administrative powers. The law is suspended in the name of the "sovereignty" of the nation, where "sovereignty" denotes the task of any state to preserve and protect its own territoriality. By this act of suspending the law, the state is further disarticulated into a set of administrative powers that are, to some extent, outside the apparatus of the state itself; and the forms of

sovereignty resurrected in its midst mark the persistence of forms of sovereign political power for the executive that precede the emergence of the state in its modern form.

It is, of course, tempting to say that something called the "state," imagined as a powerful unity, makes use of the field of governmentality to reintroduce and reinstate its own forms of sovereignty. This description doubtless misdescribes the situation, however, since governmentality designates a field of political power in which tactics and aims have become diffuse, and in which political power fails to take on a unitary and causal form. But my point is that precisely because our historical situation is marked by governmentality, and this implies, to a certain degree, a loss of sovereignty, that loss is compensated through the resurgence of sovereignty within the field of governmentality. Petty sovereigns abound, reigning in the midst of bureaucratic army institutions mobilized by aims and tactics of power they do not inaugurate or fully control. And yet such figures are delegated with the power to render unilateral decisions, accountable to no law and without any legitimate authority. The resurrected sovereignty is thus not the sovereignty of unified power under the conditions of legitimacy, the form of power that guarantees the representative status of political institutions. It is, rather, a lawless and prerogatory power, a "rogue" power *par excellence*.

Let me turn first to the contemporary acts of state before returning to Foucault, not to "apply" him (as if he were a technology), but to rethink the relation between sovereignty and law that he introduces. To know what produces the extension of sovereignty in the field of governmentality, first we must discern the means by which the state suspends law and the kinds of justification they offer for that suspension.

With the publication of the new regulations, the US government holds that a number of detainees at Guantanamo will not be given

trials at all, but will rather be detained indefinitely. It is crucial to ask under what conditions some human lives cease to become eligible for basic, if not universal, human rights. How does the US government construe these conditions? And to what extent is there a racial and ethnic frame through which these imprisoned lives are viewed and judged such that they are deemed less than human, or as having departed from the recognizable human community? Moreover, in maintaining that some prisoners will be detained indefinitely, the state allocates to itself a power, an indefinitely prolonged power, to exercise judgments regarding who is dangerous and, therefore, without entitlement to basic legal rights. In detaining some prisoners indefinitely, the state appropriates for itself a sovereign power that is defined over and against existing legal frameworks, civil, military, and international. The military tribunals may well acquit someone of a crime, but not only is that acquittal subject to mandatory executive review, but the Department of Defense has also made clear that acquittal will not necessarily end detention. Moreover, according to the new tribunal regulations, those tried in such a venue will have no rights of appeal to US civil courts (and US courts, responding to appeals, have so far maintained that they have no jurisdiction over Guantanamo, which falls outside US territory). Here we can see that the law itself is either suspended or regarded as an instrument that the state may use in the service of constraining and monitoring a given population. Under this mantle of sovereignty, the state proceeds to extend its own power to imprison indefinitely a group of people without trial. In the very act by which state sovereignty suspends law, or contorts law to its own uses, it extends its own domain, its own necessity, and develops the means by which the justification of its own power takes place. Of course, this is not the "state" in toto, but an executive branch working in tandem with an enhanced administrative wing of the military.

The state in this sense, then, augments its own power in at least two ways. In the context of the military tribunals, the trials yield no independent conclusions that cannot be reversed by the executive branch. The trials' function is thus mainly advisory. The executive branch in tandem with its military administration not only decides whether or not a detainee will stand trial, but appoints the tribunal, reviews the process, and maintains final say over matters of guilt, innocence, and punishment, including the death penalty. On May 24, 2003, Geoffrey Miller, commanding officer at Camp Delta, the new base on Guantanamo, explained in an interview that death chambers were in the process of being built there in anticipation of the death penalty being meted out.[5] Because detainees are not entitled to these trials, but offered them at the will of the executive power, there is no semblance of separation of powers in these circumstances. Those who are detained indefinitely will have their cases reviewed by officials—not by courts—on a periodic basis. The decision to detain someone indefinitely is not made by executive review, but by a set of administrators who are given broad policy guidelines within which to act. Neither the decision to detain nor the decision to activate the military tribunal is grounded in law. They are determined by discretionary judgments that function within a manufactured law or that manufacture law as they are performed. In this sense, both of these judgments are already outside the sphere of law, since the determination of when and where, for instance, a trial might be waived and detention deemed indefinite does not take place within a legal process, strictly speaking; it is not a decision made by a judge for which evidence must be submitted in the form of a case that must conform to certain established criteria or to certain protocols of evidence and argument. The decision to detain, to continue to detain someone indefinitely is a unilateral judgment made by government officials who simply deem that a given individual or, indeed, a group

poses a danger to the state. This act of "deeming" takes place in the context of a declared state of emergency in which the state exercises prerogatory power that involves the suspension of law, including due process for these individuals. The act is warranted by the one who acts, and the "deeming" of someone as dangerous is sufficient to make that person dangerous and to justify his indefinite detention. The one who makes this decision assumes a lawless and yet fully effective form of power with the consequence not only of depriving an incarcerated human being of the possibility of a trial, in clear defiance of international law, but of investing the governmental bureaucrat with an extraordinary power over life and death. Those who decide on whether someone will be detained, and continue to be detained, are government officials, not elected ones, and not members of the judiciary. They are, rather, part of the apparatus of governmentality; their decision, the power they wield to "deem" someone dangerous and constitute them effectively as such, is a sovereign power, a ghostly and forceful resurgence of sovereignty in the midst of governmentality.

Wendy Brown points out that the distinction between governmentality and sovereignty is, for Foucault, overdrawn for tactical reasons in order to show the operation of state power outside the rule of law:

> Government in this broad sense, then, includes but is not reducible to questions of rule, legitimacy, or state institutions—it is about the corralling, ordering, directing, managing, and harnessing of human energy, need, capacity, and desire, and it is conducted across a number of institutional and discursive registers. Government in this sense stands in sharp contrast to the state: while Foucault acknowledges that the state may be "no more than a composite reality and a mythicized abstraction," as a signifier, it is a containing and negating

> power, one that does not begin to capture the ways in which subjects and citizens are produced, positioned, classified, organized, and above all, mobilized by an array of governing sites and capacities. Government as Foucault uses it also stands in contrast to rule, or more precisely, with the end of monarchy and the dissolution of the homology between family and polity, rule ceases to be the dominant or even most important modality of governance. But Foucault is not arguing that governmentality—calculations and tactics that have the population as a target, that involve both specific governmental apparatuses and complexes of knowledges outside these apparatuses, and that convert the state itself into a set of administrative functions rather than ruling or justice-oriented ones—chronologically supersedes sovereignty and rule.[6]

Giorgio Agamben refuses as well the chronological argument that would situate sovereignty prior to governmentality. For Brown, both "governmentality" and "sovereignty" characterize modes of conceptualizing power rather than historically concrete phenomena that might be said to succeed each other in time. Agamben, in a different vein, argues that contemporary forms of sovereignty exist in *a structurally inverse relation* to the rule of law, emerging precisely at that moment when the rule of law is suspended and withdrawn. Sovereignty names the power that withdraws and suspends the law.[7] In a sense, legal protections are withdrawn, and law itself withdraws from the usual domain of its jurisdiction; this domain thus becomes opened to both governmentality (understood as an extra-legal field of policy, discourse, that may make law into a tactic) and sovereignty (understood as an extra-legal authority that may well institute and enforce law of its own making). Agamben notes that sovereignty asserts itself in deciding what will and will not constitute a state of exception, the occasion in which the rule of law is suspended. In

granting the exceptional status to a given case, sovereign power comes into being in an inverse relation to the suspension of law. As law is suspended, sovereignty is exercised; moreover, sovereignty comes to exist to the extent that a domain—understood as "the exception"—immune from law is established: "what is excluded in the exception maintains itself in relation to the rule in the form of the rule's suspension. The rule applies to the exception in no longer applying, in withdrawing from it" (18).

Citing Carl Schmitt, Agamben describes sovereign control over the sphere of legality through establishing what will qualify as the exception to the legal rule: "the sovereign decision 'proves itself not to need law to create law.' What is at issue in the sovereign exception is not so much the control or neutralization of an excess as the creation and definition of the very space in which the juridico-political order can have validity" (19). The act by which the state annuls its own law has to be understood as an operation of sovereign power or, rather, the operation by which a lawless sovereign power comes into being or, indeed, reemerges in new form. State power is not fully exhausted by its legal exercises: it maintains, among other things, a relation to law, and it differentiates itself from law by virtue of the relation it takes. For Agamben, the state reveals its extra-legal status when it designates a state of exception to the rule of law and thereby withdraws the law selectively from its application. The result is a production of a paralegal universe that goes by the name of law.

My own view is that a contemporary version of sovereignty, animated by an aggressive nostalgia that seeks to do away with the separation of powers, is produced at the moment of this withdrawal, and that we have to consider the act of suspending the law as a performative one which brings a contemporary configuration of sovereignty into being or, more precisely, reanimates a spectral sovereignty within the field of governmentality. The state *produces*,

through the act of withdrawal, a law that is no law, a court that is no court, a process that is no process. The state of emergency returns the operation of power from a set of laws (juridical) to a set of rules (governmental), and the rules reinstate sovereign power: rules that are not binding by virtue of established law or modes of legitimation, but fully discretionary, even arbitrary, wielded by officials who interpret them unilaterally and decide the condition and form of their invocation. Governmentality is the condition of this new exercise of sovereignty in the sense that it first establishes law as a "tactic," something of instrumental value, and not "binding" by virtue of its status as law. In a sense, the self-annulment of law under the condition of a state of emergency revitalizes the anachronistic "sovereign" as the newly invigorated subjects of managerial power. Of course, they are not true sovereigns: their power is delegated, and they do not fully control the aims that animate their actions. Power precedes them, and constitutes them as "sovereigns," a fact that already gives the lie to sovereignty. They are not fully self-grounding; they do not offer either representative or legitimating functions to the policy. Nevertheless, they are constituted, within the constraints of governmentality, as those who will and do decide on who will be detained, and who will not, who may see life outside the prison again and who may not, and this constitutes an enormously consequential delegation and seizure of power. They are acted on, but they also act, and their actions are not subject to review by any higher judicial authority. The decision of when and where to convene a military tribunal is ultimately executive, but here again, the executive decides unilaterally, so that in each case the retraction of law reproduces sovereign power. In the former case, sovereign power emerges as the power of the managerial "official"—and a Kafkan nightmare (or Sadean drama) is realized. In the latter case, sovereignty returns to the executive, and the separation of powers is eclipsed.

We might, and should, object that rights are being suspended indefinitely, and that it is wrong for individuals to live under such conditions. Whereas it makes sense that the US government would take immediate steps to detain those against whom there is evidence that they intend to wage violence against the US, it does not follow that suspects such as these should be presumed guilty or that due process ought to be denied to them. This is the argument from the point of view of human rights. From the point of view of a critique of power, however, we also have to object, politically, to the indefinite extension of lawless power that such detentions portend. If detention may be indefinite, and such detentions are presumably justified on the basis of a state of emergency, then the US government can protract an indefinite state of emergency. It would seem that the state, in its executive function, now extends conditions of national emergency so that the state will now have recourse to extra-legal detention and the suspension of established law, both domestic and international, for the foreseeable future. Indefinite detention thus extends lawless power indefinitely. Indeed, the indefinite detention of the untried prisoner—or the prisoner tried by military tribunal and detained regardless of the outcome of the trial—is a practice that presupposes the indefinite extension of the war on terrorism. And if this war becomes a permanent part of the state apparatus, a condition which justifies and extends the use of military tribunals, then the executive branch has effectively set up its own judiciary function, one that overrides the separation of power, the writ of habeas corpus (guaranteed, it seems, by Guantanamo Bay's geographical location outside the borders of the United States, on Cuban land, but not under Cuban rule), and the entitlement to due process. It is not just that constitutional protections are indefinitely suspended, but that the state (in its augmented executive function) arrogates to itself the right to suspend the Constitution or to manipulate the geography of

detentions and trials so that constitutional and international rights are effectively suspended. The state arrogates to its functionaries the right to suspend rights, which means that if detention is indefinite there is no foreseeable end to this practice of the executive branch (or the Department of Defense) deciding, unilaterally, when and where to suspend constitutionally protected rights, that is, to suspend the Constitution and the rule of law, so producing a form of sovereign power in these acts of suspension.

These prisoners at Camp Delta (and formerly Camp X-Ray), detained indefinitely, are not even called "prisoners" by the Department of Defense or by representatives of the current US administration. To call them by that name would suggest that internationally recognized rights pertaining to the treatment of prisoners of war ought to come into play. They are, rather, "detainees," those who are held in waiting, those for whom waiting may well be without end. To the extent that the state arranges for this pre-legal state as an "indefinite" one, it maintains that there will be those held by the government for whom the law does not apply, not only in the present, but for the indefinite future. In other words, there will be those for whom the protection of law is indefinitely postponed. The state, in the name of its right to protect itself and, hence, and through the rhetoric of sovereignty, extends its power in excess of the law and defies international accords; for if the detention is indefinite, then the lawless exercise of state sovereignty becomes indefinite as well. In this sense, indefinite detention provides the condition for the indefinite exercise of extra-legal state power. Although the justification for not providing trials—and the attendant rights of due process, legal counsel, rights of appeal—is that we are in a state of national emergency, a state understood as out of the ordinary, it seems to follow that the state of emergency is not limited in time and space, that it, too, enters onto an indefinite future. Indeed, state

power restructures temporality itself, since the problem of terrorism is no longer a historically or geographically limited problem: it is limitless and without end, and this means that the state of emergency is potentially limitless and without end, and that the prospect of an exercise of state power in its lawlessness structures the future indefinitely. The future becomes a lawless future, not anarchical, but given over to the discretionary decisions of a set of designated sovereigns—a perfect paradox that shows how sovereigns emerge within governmentality—who are beholden to nothing and to no one except the performative power of their own decisions. They are instrumentalized, deployed by tactics of power they do not control, but this does not stop them from using power, and using it to reanimate a sovereignty that the governmentalized constellation of power appeared to have foreclosed. These are petty sovereigns, unknowing, to a degree, about what work they do, but performing their acts unilaterally and with enormous consequence. Their acts are clearly *conditioned*, but their acts are judgments that are nevertheless *unconditional* in the sense that they are final, not subject to review, and not subject to appeal.

It is worth pausing to make a few distinctions here: on the one hand, descriptively, the actions performed by the President, the functionaries at Guantanamo or in the Department of State, or, indeed, by the foreign policy spokespeople for the current US government, are not sovereign in a traditional sense insofar as they are motivated by a diffuse set of practices and policy aims, deployed in the service of power, part of a wider field of governmentality. Yet in each case they appear as sovereign or, rather, bring a form of sovereignty into the domain of appearance, resurrecting the notion of a self-grounding and unconditioned basis for decision that has self-preservation as its primary aim. The sovereignty that appears in these instances covers over its own basis in governmentality, yet the

form in which it appears is precisely within the agency of the functionary and, so, within the field of governmentality itself. These appearances of sovereignty—what I have been calling anachronistic resurgences—take contemporary form as they assume shape within the field of governmentality, and are fundamentally transformed by appearing within that field. Moreover, the fact that they are conditioned but appear as unconditioned in no way affects the relation that they sustain to the rule of law. It is not, literally speaking, that a sovereign power suspends the rule of law, but that the rule of law, in the act of being suspended, produces sovereignty *in its action and as its effect*. This inverse relation to law produces the "unaccountability" of this operation of sovereign power, as well as its illegitimacy.

The distinction between governmentality and sovereignty is thus an important distinction that helps us describe more accurately how power works, and through what means. The distinction between sovereignty and the rule of law can also be described in terms of the mechanism through which those terms incessantly separate from each other. But in the context of this analysis, it is also normative: the sovereignty produced through the suspension (or fabrication) of the rule of law, seeks to establish a rival form of political legitimacy, one with no structures of accountability built in. Although we are following the reanimation of sovereignty in the cases of indefinite detention and the military tribunals, we can see that the US government invoked its own sovereignty in its declarations concerning the justifiability of its military assault on Iraq. The US defied international accords with claims that its own self-preservation was at stake. Not to attack preemptively, Bush maintained, was "suicidal," and he went on to justify the abrogation of the sovereignty of Iraq (deemed illegitimate because not instated through general elections), by asserting the sanctity of its own extended sovereign boundaries

(which the US extends beyond all geographical limits to include the widest gamut of its "interests").

"Indefinite detention" is an illegitimate exercise of power, but it is, significantly, part of a broader tactic to neutralize the rule of law in the name of security. "Indefinite detention" does not signify an exceptional circumstance, but, rather, the means by which the exceptional becomes established as a naturalized norm. It becomes the occasion and the means by which the extra-legal exercise of state power justifies itself indefinitely, installing itself as a potentially permanent feature of political life in the US.

These acts of state are themselves not grounded in law, but in another form of judgment; in this sense, they are already outside the sphere of law, since the determination of when and where, for instance, a trial might be waived and detention deemed indefinite does not take place within a legal process *per se*. These are not decisions, for instance, made by a judge, for which evidence must be submitted in the form of a case conforming to certain protocols of evidence and argument. Agamben has elaborated upon how certain subjects undergo a suspension of their ontological status as subjects when states of emergency are invoked.[8] He argues that a subject deprived of rights of citizenship enters a suspended zone, neither living in the sense that a political animal lives, in community and bound by law, nor dead and, therefore, outside the constituting condition of the rule of law. These socially conditioned states of suspended life and suspended death exemplify the distinction that Agamben offers between "bare life" and the life of the political being (*bios politikon*), where this second sense of "being" is established only in the context of political community. If bare life, life conceived as biological minimum, becomes a condition to which we are all reducible, then we might find a certain universality in this condition. Agamben writes, "We are all potentially exposed to this condition,"

that is, "bare life" underwrites the actual political arrangements in which we live, posing as a contingency into which any political arrangement might dissolve. Yet such general claims do not yet tell us how this power functions differentially, to target and manage certain populations, to derealize the humanity of subjects who might potentially belong to a community bound by commonly recognized laws; and they do not tell us how sovereignty, understood as state sovereignty in this instance, works by differentiating populations on the basis of ethnicity and race, how the systematic management and derealization of populations function to support and extend the claims of a sovereignty accountable to no law; how sovereignty extends its own power precisely through the tactical and permanent deferral of the law itself. In other words, the suspension of the life of a political animal, the suspension of standing before the law, is itself a tactical exercise, and must be understood in terms of the larger aims of power. To be detained indefinitely, for instance, is precisely to have no definitive prospect for a reentry into the political fabric of life, even as one's situation is highly, if not fatally, politicized.

The military tribunals were originally understood to apply not only to those arrested within the US, but to "high-ranking" officials within the Taliban or al-Qaeda military networks currently detained in Guantanamo Bay. The *Washington Post* reported that

> there may be little use for the tribunals because the great majority of the 300 prisoners [in March of 2002] being held at the US naval base at Guantanamo Bay, Cuba, are low-ranking foot soldiers. Administration officials have other plans for many of the relatively junior captives now at Guantanamo Bay: indefinite detention without trial. US officials would take this action with prisoners they fear could pose a danger of terrorism even if they have little evidence of past crimes.

"Could pose a danger of terrorism": this means that conjecture is the basis of detention, but also that conjecture is the basis of an indefinite detention without trial. One could simply respond to these events by saying that everyone detained deserves a trial, and I do believe that is the right thing to say, and I am saying that. But saying that would not be enough, since we have to look at what constitutes a trial in these new military tribunals. What kind of trial does everyone deserve? In these new tribunals, evidentiary standards are very lax. For instance, hearsay and second-hand reports will constitute relevant evidence, whereas in regular trials, either in the civil court system or the established military court system, they are dismissed out of hand. Whereas some international human rights courts do permit hearsay, they do so under conditions in which *non-refoulement* is honored, that is, rules under which prisoners may not be exported to countries where confessions can be extracted through torture. Indeed, if one understands that trials are usually the place where we can test whether hearsay is true or not, where second-hand reports have to be documented by persuasive evidence or dismissed, then the very meaning of the trial has been transformed by the notion of a procedure that explicitly admits unsubstantiated claims, and where the fairness and non-coercive character of the interrogatory means used to garner that information has no bearing on the admissibility of the information into trial.

If these trials make a mockery of evidence, if they are, effectively, ways of circumventing the usual legal demands for evidence, then these trials nullify the very meaning of the trial, and they nullify the trial most effectively by taking on the name of the "trial." If we consider as well that a trial is that to which every subject is entitled if and when an allegation of wrong-doing is made by a law enforcement agency, then these trials also cease to be trials in this sense. The Department of Defense maintains explicitly that these trials are

planned "only for relatively high-ranking al-Qaeda and Taliban operatives against whom there is persuasive evidence of terrorism or war crimes."[9] This is the language of the Department of Defense, but let us consider it closely, since one can see the self-justifying and self-augmenting function of sovereign power in the way that the law is not only suspended, but deployed as a tactic, and as a way of differentiating among more or less entitled subjects. If the trials are saved for high-ranking officials against whom there is persuasive evidence, then this formulation suggests that either the relatively low-ranking detainees are those against whom there is no persuasive evidence, or even if there is persuasive evidence against low-ranking members, these members have no entitlement to hear the charge, to prepare a case for themselves, or to obtain release or final judgment through a tribunal procedure. Given that the notion of "persuasive evidence" has been effectively rewritten to include conventionally non-persuasive evidence, such as hearsay and second-hand reports, and there is a chance that the US means that there is no evidence that would be found to be persuasive against these members by a new military tribunal, the US is effectively admitting that not even hearsay or second-hand reports would supply sufficient evidence to convict these low-ranking members. Given as well that the Northern Alliance is credited with turning over many of the al-Qaeda and Taliban detainees to US authorities, it would be important to know whether that organization had good grounds for identifying the individuals detained before the US decides to detain them indefinitely. If there is no such evidence, one might well wonder why they are being detained at all. And if there is evidence, but such individuals are not given a trial, one might well wonder how the worth of these lives is regarded such that they remain ineligible for legal entitlements guaranteed by existing US law and international human rights law.

Because there is no persuasive evidence, and because there is no evidence that would be persuasive even when we allow non-persuasive evidence to become the standard in a trial, it follows that where there is no non-persuasive evidence, indefinite detention is justified. By first incorporating non-persuasive evidence into the very meaning of persuasive evidence, the state frees itself to make use of an equivocation to augment its extra-legal prerogative. To be fair, there are international precedents for indefinite detention without trial. The US cites European human rights courts that allowed the British authorities to detain Irish Catholic and Protestant militants for long periods of time, if they were "deemed dangerous, but not necessarily convicted of a crime." They have to be "deemed dangerous," but the "deeming" is not, as discussed above, a judgment that needs to be supported by evidence, a judgment for which there are rules of evidence. They have to be deemed "dangerous," but the danger has to be understood quite clearly as a danger in the context of a national emergency. In those cases cited by the Bush administration, the detentions lasted indefinitely, as long as "British officials"—notably not courts—reviewed the cases from time to time. So these are administrative reviews, which means that these are reviews managed by officials who are not part of any judicial branch of government, but agents of governmentality, as it were, administrative appointees or bureaucrats who have absorbed the adjudicative prerogative from the judicial branch. Similarly, these military tribunals are ones in which the chain of custody is suspended, which means that evidence seized through illegal means will still be admissible at trials. The appeal process is automatic, but remains within the military tribunal process in which the final say in matters of guilt and punishment resides with the executive branch, and the office of the President. This means that, whatever the conclusions of these trials, they can be potentially reversed or revised

by the executive branch through a decision that is accountable to no one and no rule, a procedure that effectively overrides the separation of powers doctrine, suspending once again the binding power of the constitution in favor of an unchecked enlargement of executive power.

In a separate argument, the government points out that there is another legal precedent for this type of detention without criminal charge. This happens all the time, they claim, in the practice of the involuntary hospitalization of mentally ill people who pose a danger to themselves and others. We have to hesitate at this analogy for the moment, I think, not only because, in a proto-Foucaultian vein, it explicitly models the prison on the mental institution, but also because it sets up an analogy between the suspected terrorist or the captured soldier and the mentally ill. When analogies are offered, they presuppose the separability of the terms that are compared. But any analogy also assumes a common ground for comparability, and in this case the analogy functions to a certain degree by functioning metonymically. The terrorists are *like* the mentally ill because their mind-set is unfathomable, because they are outside of reason, because they are outside of "civilization," if we understand that term to be the catchword of a self-defined Western perspective that considers itself bound to certain versions of rationality and the claims that arise from them. Involuntary hospitalization is *like* involuntary incarceration, only if we accept the incarcerative function of the mental institution, or only if we accept that certain suspected criminal activities are themselves signs of mental illness. Indeed, one has to wonder whether it is not simply selected acts undertaken by Islamic extremists that are considered outside the bounds of rationality as established by a civilizational discourse of the West, but rather any and all beliefs and practices pertaining to Islam that become, effectively, tokens of mental illness to the extent that they depart from the hegemonic norms of Western rationality.

If the US understands the involuntary incarceration of the mentally ill as a suitable precedent for indefinite detention, then it assumes that certain norms of mental functioning are at work in both instances. After all, an ostensibly mentally ill person is involuntarily incarcerated precisely because there is a problem with volition; the person is not considered able to judge and choose and act according to norms of acceptable mental functioning. Can we say that the detainees are also figured in precisely this way?[10] The Department of Defense published pictures of prisoners shackled and kneeling, with hands manacled, mouths covered by surgical masks, and eyes blinded by blackened goggles. They were reportedly given sedatives, forced to have their heads shaved, and the cells where they are held in Camp X-Ray were 8 feet by 8 feet and 7½ feet high, larger than the ones for which they are slated and which, Amnesty International reports in April of 2002, are appreciably smaller than international law allows. There was a question of whether the metal sheet called a "roof" offered any of the protective functions against wind and rain associated with that architectural function.

The photographs produced an international outcry because the degradation—and the publicizing of the degradation—contravened the Geneva Convention, as the International Red Cross pointed out, and because these individuals were rendered faceless and abject, likened to caged and restrained animals. Indeed, Secretary Rumsfeld's own language at press conferences seems to corroborate this view that the detainees are not like other humans who enter into war, and that they are, in this respect, not "punishable" by law, but deserving of immediate and sustained forcible incarceration. When Secretary Rumsfeld was asked why these prisoners were being forcibly restrained and held without trial, he explained that if they were not restrained, they would kill again. He implied that the restraint is the only thing that keeps them from killing, that they are beings whose

very propensity it is to kill: that is what they would do as a matter of course. Are they pure killing machines? If they are pure killing machines, then they are not humans with cognitive function entitled to trials, to due process, to knowing and understanding a charge against them. They are something less than human, and yet—somehow—they assume a human form. They represent, as it were, an equivocation of the human, which forms the basis for some of the skepticism about the applicability of legal entitlements and protections.

The danger that these prisoners are said to pose is unlike dangers that might be substantiated in a court of law and redressed through punishment. In the news conference on March 21, 2002, Department of Defense General Counsel Haynes answers a reporter's question in a way that confirms that this equivocation is at work in their thinking. An unnamed reporter in the news conference, concerned about the military tribunal, asks: If someone is acquitted of a crime under this tribunal, will they be set free? Haynes replied:

> If we had a trial right this minute, it is conceivable that somebody could be tried and acquitted of that charge, but might not automatically be released. The people we are detaining, for example, in Guantanamo Bay, Cuba, are enemy combatants that [*sic*] we captured on the battlefield seeking to harm US soldiers or allies, and they're dangerous people. At the moment, we're not about to release any of them unless we find that they don't meet those criteria. At some point in the future ...

The reporter then interrupted, saying: "But if you [can't] convict them, if you can't find them guilty, you would still paint them with that brush that we find you dangerous even though we can't convict you, and continue to incarcerate them?" After some to and fro, Haynes stepped up to the microphone, and explained that "the people

that we now hold at Guantanamo are held for a specific reason that is not tied specifically to any particular crime. They're not held—they're not being held on the basis that they are necessarily criminals." They will not be released unless the US finds that "they don't meet those criteria," but it is unclear what criteria are at work in Haynes's remark. If the new military tribunal sets the criteria, then there is no guarantee that a prisoner will be released in the event of exoneration. The prisoner exonerated by trial may still be "deemed dangerous," where that deeming is based in no established criteria. Establishing dangerousness is not the same as establishing guilt and, in Haynes's view, and in views subsequently repeated by administrative spokespersons, the executive branch's power to deem a detainee dangerous preempts any determination of guilt or innocence established by a military tribunal.

In the wake of this highly qualified approach to the new military tribunals (themselves regarded as illegitimate), we see that these are tribunals whose rules of evidence depart in radical ways from both the rules of civilian courts and the protocols of existing military courts, that they will be used to try only some detainees, that the office of the President will decide who qualifies for these secondary military tribunals, and that matters of guilt and innocence reside finally with the executive branch. If a military tribunal acquits a person, the person may still be deemed dangerous, which means that the determination by the tribunal can be preempted by an extra-legal determination of dangerousness. Given that the military tribunal is itself extra-legal, we seem to be witnessing the replication of a principle of sovereign state prerogative that knows no bounds. At every step of the way, the executive branch decides the form of the tribunal, appoints its members, determines the eligibility of those to be tried, and assumes power over the final judgment; it imposes the trial selectively; it dispenses with conventional evidentiary procedure.

And it justifies all this through recourse to a determination of "dangerousness" which it alone is in the position to decide. A certain level of dangerousness takes a human outside the bounds of law, and even outside the bounds of the military tribunal itself, makes that human into the state's possession, infinitely detainable. What counts as "dangerous" is what is deemed dangerous by the state, so that, once again, the state posits what is dangerous, and in so positing it, establishes the conditions for its own preemption and usurpation of the law, a notion of law that has already been usurped by a tragic facsimile of a trial.

If a person is simply deemed dangerous, then it is no longer a matter of deciding whether criminal acts occurred. Indeed, "deeming" someone dangerous is an unsubstantiated judgment that in these cases works to preempt determinations for which evidence is required. The license to brand and categorize and detain on the basis of suspicion alone, expressed in this operation of "deeming," is potentially enormous. We have already seen it at work in racial profiling, in the detention of thousands of Arab residents or Arab-American citizens, sometimes on the basis of last names alone; the harassment of any number of US and non-US citizens at the immigration borders because some official "perceives" a potential difficulty; the attacks on individuals of Middle Eastern descent on US streets, and the targeting of Arab-American professors on campuses. When Rumsfeld has sent the US into periodic panics or "alerts," he has not told the population what to look out for, but only to have a heightened awareness of suspicious activity. This objectless panic translates too quickly into suspicion of all dark-skinned peoples, especially those who are Arab, or appear to look so to a population not always well versed in making visual distinctions, say, between Sikhs and Muslims or, indeed, Sephardic or Arab Jews and Pakistani-Americans. Although "deeming" someone dangerous is considered a

state prerogative in these discussions, it is also a potential license for prejudicial perception and a virtual mandate to heighten racialized ways of looking and judging in the name of national security. A population of Islamic peoples, or those taken to be Islamic, has become targeted by this government mandate to be on heightened alert, with the effect that the Arab population in the US becomes visually rounded up, stared down, watched, hounded and monitored by a group of citizens who understand themselves as foot soldiers in the war against terrorism. What kind of public culture is being created when a certain "indefinite containment" takes place outside the prison walls, on the subway, in the airports, on the street, in the workplace? A falafel restaurant run by Lebanese Christians that does not exhibit the American flag becomes immediately suspect, as if the failure to fly the flag in the months following September 11, 2001 were a sign of sympathy with al-Qaeda, a deduction that has no justification, but which nevertheless ruled public culture—and business interests—at that time.

If it is the person, or the people, who are deemed dangerous, and no dangerous acts need to be proven to establish this as true, then the state constitutes the detained population unilaterally, taking them out of the jurisdiction of the law, depriving them of the legal protections to which subjects under national and international law are entitled. These are surely populations that are not regarded as subjects, humans who are not conceptualized within the frame of a political culture in which human lives are underwritten by legal entitlements, law, and so humans who are not humans.

We saw evidence for this derealization of the human in the photos of the shackled bodies in Guantanamo released by the Department of Defense. The DOD did not hide these photos, but published them openly. My speculation is that they published these photographs to make known that a certain vanquishing had taken place, the reversal

of national humiliation, a sign of a successful vindication. These were not photographs leaked to the press by some human rights agency or concerned media enterprise. So the international response was no doubt disconcerting, since instead of moral triumph, many people, British parliamentarians and European human rights activists among them, saw serious moral failure. Instead of vindication, many saw instead revenge, cruelty, and a nationalist and self-satisfied flouting of international convention. So that several countries asked that their citizens be returned home for trial.

But there is something more in this degradation that calls to be read. There is a reduction of these human beings to animal status, where the animal is figured as out of control, in need of total restraint. It is important to remember that the bestialization of the human in this way has little, if anything, to do with actual animals, since it is a figure of the animal against which the human is defined. Even if, as seems most probable, some or all of these people have violent intentions, have been engaged in violent acts, and murderous ones, there are ways to deal with murderers under both criminal and international law. The language with which they are described by the US, however, suggests that these individuals are exceptional, that they may not be individuals at all, that they must be constrained in order not to kill, that they are effectively reducible to a desire to kill, and that regular criminal and international codes cannot apply to beings such as these.

The treatment of these prisoners is considered as an extension of war itself, not as a postwar question of appropriate trial and punishment. Their detention stops the killing. If they were not detained, and forcibly so when any movement is required, they would apparently start killing on the spot; they are beings who are in a permanent and perpetual war. It may be that al-Qaeda representatives speak this way—some clearly do—but that does not mean that every individual

detained embodies that position, or that those detained are centrally concerned with the continuation of war. Indeed, recent reports, even from the investigative team in Guantanamo, suggest that some of the detainees were only tangentially or transiently involved in the war effort.[11] Other reports in the spring of 2003 made clear that some detainees are minors, ranging from ages thirteen to sixteen. Even General Dunlavey, who admitted that not all the detainees were killers, still claimed that the risk is too high to release such detainees. Rumsfeld cited in support of forcible detention the prison uprisings in Afghanistan in which prisoners managed to get hold of weapons and stage a battle inside the prison. In this sense, the war is not, and cannot be, over; there is a chance of battle in the prison, and there is a warrant for physical restraint, such that the postwar prison becomes the continuing site of war. It would seem that the rules that govern combat are in place, but not the rules that govern the proper treatment of prisoners separated from the war itself.

When General Counsel Haynes was asked, "So you could in fact hold these people for years without charging them, simply to keep them off the street, even if you don't charge them?" he replied, "We are within our rights, and I don't think anyone disputes it that we may hold enemy combatants for the duration of the conflict. And the conflict is still going and *we don't see an end in sight right now*" (my emphasis).

If the war is against terrorism, and the definition of terrorism expands to include every questionable instance of global difficulty, how can the war end? Is it, by definition, a war without end, given the lability of the terms "terrorism" and "war"? Although the pictures were published as a sign of US triumph, and so apparently indicating a conclusion to the war effort, it was clear at the time that bombing and armed conflict were continuing in Afghanistan, the war was not over, and even the photographs, the degradation, and the indefinite

detention were continuing acts of war. Indeed, war seems to have established a more or less permanent condition of national emergency, and the sovereign right to self-protection outflanks any and all recourse to law.

The exercise of sovereign power is bound up with the extra-legal status of these official acts of speech. These acts become the means by which sovereign power extends itself; the more it can produce equivocation, the more effectively it can augment its power in the apparent service of justice. These official statements are also media performances, a form of state speech that establishes a domain of official utterance distinct from legal discourse. When many organizations and countries questioned whether the US was honoring the Geneva Convention protocols on the treatment of prisoners of war, the administration equivocated in its response. It maintained that the prisoners at Guantanamo were being treated in a manner "consistent with" the Geneva Convention, they did not say that they understand the US to be obligated to honor that law, or that this law has a binding power on the US. The power of the Geneva Convention has been established by the US as nonbinding in several instances over the last few years. The first instance seemed to be the claim that appears to honor the convention, namely, that the US is acting in a manner *consistent with* the convention, or, alternatively, that the US is acting *in the spirit of* the Geneva Accords. To say that the US acts consistently with the accords is to say that the US acts in such a way that does not contradict the accords, but it does not say that the US, as a signatory to the accords, understands itself as *bound to* the accords. To acknowledge the latter would be to acknowledge the limits that international accords impose upon claims of national sovereignty. To act "consistently" with the accords is still to determine one's own action, and to regard that action as compatible with the accords, but to refuse the notion that one's actions are subject to

the accords. Matters get worse when we see that certain rights laid out in the Geneva Accords, Article 3, such as a war prisoner's right to counsel, to knowing the crime for which he is being charged, to be eligible for a timely consideration by a regularly constituted court, for rights of appeal, and a timely repatriation, are not being honored and are not in the planning. Matters became even more vexed, but perhaps finally more clear, when we heard that *none* of the detainees in Guantanamo are to be regarded as prisoners of war according to the Geneva Convention, since none of them belong to "regular armies." Under pressure, the Bush administration conceded that the Taliban were covered by the Geneva Convention, because they were the representatives of the Afghan government, but that they are still unentitled to prisoner of war status under that accord. Indeed, the administration finally said quite clearly that the Geneva Accord was not designed to handle this kind of war, and so its stipulations about who is and is not regarded as a prisoner of war, who is entitled to the rights pertaining to such a status, are anachronistic. The administration thus dismisses the accords as anachronistic, but claims to be acting consistently with them.

When relatively widespread outrage emerged in response to the published photographs of the shackled bodies in Guantanamo, the US asserted it was treating these prisoners humanely. The word, "humanely" was used time and again, and in conjunction with the claim that the US was acting consistently with the Geneva Convention. It seems important to recognize that one of the tasks of the Geneva Convention was to establish criteria for determining what does and does not qualify as the humane treatment of prisoners of war. In other words, one of the tasks was to seek to establish an international understanding of "humane treatment" and to stipulate what conditions must first be met before we can say with certainty that humane treatment has been offered. The term "humane

treatment" thus received a legal formulation, and the result was a set of conditions which, if satisfied, would constitute humane treatment. When the US says, then, that it is treating these prisoners humanely, it uses the word in its own way and for its own purpose, but it does not accept that the Geneva Accords stipulate how the term might legitimately be applied.[12] In effect, it takes the word back from the accords at the very moment that it claims to be acting consistently with the accords. In the moment that it claims to be acting consistently with the accords, the US effectively maintains that the accords have no power over it. Similarly, if the US claims that it recognizes that the Taliban are to be considered under the Geneva Convention, but then maintains that even Taliban soldiers are not entitled to prisoner of war status, it effectively disputes the binding power of the agreement. Given that the agreement maintains that a competent tribunal must be set up to determine prisoner of war status, and that all prisoners are to be treated as POWs until such time as a competent tribunal makes a different determination, and given that the US has arranged for no such tribunal and has made this determination unilaterally, the US disregards the very terms of the agreement again. As a result, the "recognition" of the Taliban as being covered by an accord that the US treats as non-binding is effectively worthless, especially when it continues to deny POW status to those it ostensibly recognizes.

We can see that the speech acts sound official at the same time as they defy the law; the speech acts make use of the law only to twist and suspend the law in the end, even make use of the law arbitrarily to elaborate the exercise of sovereignty. And it is not that sovereignty exists as a possession that the US is said to "have" or a domain that the US is said "to occupy." Grammar defeats us here. Sovereignty is what is tactically produced through the very mechanism of its self-justification. And that mechanism, in this circumstance, turns again

and again on either relegating law to an instrumentality of the state or of suspending law in the interests of the executive function of the state. The US shows contempt for its own constitution and the protocols of international law in relegating law to an instrumentality of the state and suspending law in the interests of the state. When a reporter asked the DOD representatives why a military tribunal system was required, given that both a civil court and a military court system already exist, they responded that they needed another "instrument," given the new circumstances. The law is not that to which the state is subject nor that which distinguishes between lawful state action and unlawful, but is now expressly understood as an instrument, an instrumentality of power, one that can be applied and suspended at will. Sovereignty consists now in the variable application, contortion, and suspension of the law; it is, in its current form, a relation to law: exploitative, instrumental, disdainful, preemptory, arbitrary.

On C-SPAN in February of 2002, Rumsfeld appeared exasperated with the legal questions about Guantanamo which at that time centered on humane treatment and POW status. He repeatedly appealed instead to a substantive military and public goal to justify the treatment of prisoners in Cuba. He leaned over the microphone and exclaimed that he was just trying to keep these people off the streets and out of the nuclear power plants, so that they would not kill any more people—people have to be detained so they do not kill. In answer to the question of whether or not the detainees will be charged with a crime, whether they could expect trials, he thought it was reasonable to expect that they would, but he offered no commitment to that effect. Here again he did not understand the Department of Defense to be obligated in any way to do that in a timely fashion after a conflict is concluded or, indeed, to commit itself to following the international law that would make of that a strict

obligation and an unconditional right. It was "perfectly reasonable" to keep them off the streets, he said, so that they do not kill. And so what it seems perfectly reasonable to do is the basis for what he and the government are doing, and the "law" is surely there to be consulted, as international convention is there as a kind of model, but not as an obligatory framework for action. The action is autonomous, outside the law, looking to the law, considering it, consulting it, even perhaps, on occasion, acting consistently with it. But the action is itself extra-legal, and understands itself to be justified as such. In fact, the law seemed to bother him. In responding to all these questions about legal rights and responsibilities, he remarked that he would leave these questions to others who did not drop out of law school, as he had. And then he laughed, as if some praiseworthy evidence of his own American manhood was suddenly made public. The show of strength indifferent to the law was early on encapsulated by Bush's "Dead or Alive" slogan applied to Osama bin Laden, and Rumsfeld seems to continue this cowboy tradition of vigilante justice in the current situation.

He wouldn't worry about the metal sheets that act as roofs on the cages in which the prisoners are found. After all, Rumsfeld said earnestly, I've been to Cuba, and it has beautiful weather. And then, as if these legal questions were so many gnats around his ankle on a hot day in Cuba, he says, "I'm not a lawyer. I'm not into that end of the business."

So he's not into that end of the business, but we might say that, more generally, many actions have been taken that are not into that end of the business. Bush expressed this sentiment a few days later by claiming with an air of disdain and exasperation that he would review all the "legalisms" before making a final decision on their status. At work in these statements is the presumption that detention and legal process are separable activities, that detention is the DOD's end of

the business, and legal processes belong somewhere else. So the question is whether these are illegal combatants, those who are not fighting in a regular armed force, as the US maintains, or whether this is illegal detention, as international rights perspectives seem to concur that it is. It is as if the entire conflict takes place in an extra-legal sphere or, rather, that the extra-legal domain in which these detentions and expected trials take place produces an experience of the "as if" that deals a blow to the common understanding of law. The confusion Rumsfeld had—and here it is not just a matter of his confusion, but a confusion that runs through the entire detainment effort—when asked whether these people had been charged with anything is telling: "Well, yes," he said, hesitating; "they have been charged," and then, as if realizing that this term might have a technical meaning, he revised his claim, explaining that they "have been *found to be* people shooting," emphasizing the word "found." Of course, they haven't been "found" in some legal sense, but only "found" by someone, a representative of the Northern Alliance most likely, who claimed to see or to know, and so a certain equivocation takes place between a legal and non-legal use of "a finding." The fact remains that these individuals are being detained without having been charged with a crime or given access to lawyers to prepare their own cases. That there are rules governing lawful detention of war prisoners does not seem to be important. Of importance, apparently, is averting the consequence of having potential killers on the street. If the law gets in the way, if the law requires that charges be made and substantiated within a given period of time, then there is a chance that compliance with the law would stand in the way of realizing the goal of the more or less permanent detention of "suspects" in the name of national security.

So, these prisoners, who are not prisoners, will be tried, if they will be tried, according to rules that are not those of a constitutionally

defined US law nor of any recognizable international code. Under the Geneva Convention, the prisoners would be entitled to trials under the same procedures as US soldiers, through court martial or civilian courts, and not through military tribunals as the Bush administration has proposed. The current regulations for military tribunals provide for the death penalty if all members of the tribunal agree to it. The President, however, will be able to decide on that punishment unilaterally in the course of the final stage of deliberations in which an executive judgment is made and closes the case. Is there a timeframe set forth in which this particular judicial operation will cease to be? In response to a reporter who asked whether the government was not creating procedures that would be in place indefinitely, "as an ongoing additional judicial system created by the executive branch," General Counsel Haynes pointed out that the "the rules [for the tribunals] ... do not have a sunset provision in them ... I'd only observe that the war, we think, will last for a while."

One might conclude with a strong argument that government policy ought to follow established law. And in a way, that is part of what I am calling for. But there is also a problem with the law, since it leaves open the possibility of its own retraction, and, in the case of the Geneva Convention, extends "universal" rights only to those imprisoned combatants who belong to "recognizable" nation-states, but not to all people. Recognizable nation-states are those that are already signatories to the convention itself. This means that stateless peoples or those who belong to states that are emergent or "rogue" or generally unrecognized lack all protections. The Geneva Convention is, in part, a civilizational discourse, and it nowhere asserts an entitlement to protection against degradation and violence and rights to a fair trial as universal rights. Other international covenants surely do, and many human rights organizations have argued that the Geneva Convention can and ought to be read to apply universally. The

International Committee of the Red Cross made this point publicly (February 8, 2002). Kenneth Roth, Director of Human Rights Watch, has argued strongly that such rights do pertain to the Guantanamo Prisoners (January 28, 2002), and the Amnesty International Memorandum to the US Government (April 15, 2002), makes clear that fifty years of international law has built up the assumption of universality, codified clearly in Article 9(4) of the International Covenant on Civil and Political Rights, ratified by the US in 1992. Similar statements have been made by the International Commission on Jurists (February 7, 2002) and the Organization for American States human rights panel made the same claim (March 13, 2002), seconded by the Center for Constitutional Rights (June 10, 2002). Exclusive recourse to the Geneva Convention, itself drafted in 1949, as the document for guidance in this area is thus in itself problematic. The notion of "universality" embedded in that document is restrictive in its reach: it counts as subjects worthy of protection only those who belong already to nation-states recognizable within its terms. In this way, then, the Geneva Convention is in the business of establishing and applying a selective criterion to the question of who merits protection under its provisions, and who does not. The Geneva Convention assumes that certain prisoners may *not* be protected by its statute. By clearly privileging those prisoners from wars between recognizable states, it leaves the stateless unprotected, and it leaves those from non-recognized polities without recourse to its entitlements.

Indeed, to the extent that the Geneva Convention gives grounds for a distinction between legal and illegal combatants, it distinguishes between legitimate and illegitimate violence. Legitimate violence is waged by recognizable states or "countries," as Rumsfeld puts it, and illegitimate violence is precisely that which is committed by those who are landless, stateless, or whose states are deemed not worth recognizing by those who are already recognized. In the present

climate, we see the intensification of this formulation as various forms of political violence are called "terrorism," not because there are valences of violence that might be distinguished from one another, but as a way of characterizing violence waged by, or in the name of, authorities deemed illegitimate by established states. As a result, we have the sweeping dismissal of the Palestinian Intifada as "terrorism" by Ariel Sharon, whose use of state violence to destroy homes and lives is surely extreme. The use of the term, "terrorism," thus works to delegitimate certain forms of violence committed by non-state-centered political entities at the same time that it sanctions a violent response by established states. Obviously, this has been a tactic for a long time as colonial states have sought to manage and contain the Palestinians and the Irish Catholics, and it was also a case made against the African National Congress in apartheid South Africa. The new form that this kind of argument is taking, and the naturalized status it assumes, however, will only intensify the enormously damaging consequences for the struggle for Palestinian self-determination. Israel takes advantage of this formulation by holding itself accountable to no law at the very same time that it understands itself as engaged in legitimate self-defense by virtue of the status of its actions as state violence. In this sense, the framework for conceptualizing global violence is such that "terrorism" becomes the name to describe the violence of the illegitimate, whereas legal war becomes the prerogative of those who can assume international recognition as legitimate states.

The fact that these prisoners are seen as pure vessels of violence, as Rumsfeld claimed, suggests that they do not become violent for the same kinds of reason that other politicized beings do, that their violence is somehow constitutive, groundless, and infinite, if not innate. If this violence is terrorism rather than violence, it is conceived as an action with no political goal, or cannot be read politically. It

emerges, as they say, from fanatics, extremists, who do not espouse a point of view, but rather exist outside of "reason," and do not have a part in the human community. That it is Islamic extremism or terrorism simply means that the dehumanization that Orientalism already performs is heightened to an extreme, so that the uniqueness and exceptionalism of this kind of war makes it exempt from the presumptions and protections of universality and civilization. When the very human status of those who are imprisoned is called into question, it is a sign that we have made use of a certain parochial frame for understanding the human, and failed to expand our conception of human rights to include those whose values may well test the limits of our own. The figure of Islamic extremism is a very reductive one at this point in time, betraying an extreme ignorance about the various social and political forms that Islam takes, the tensions, for instance, between Sunni and Shiite Muslims, as well as the wide range of religious practices that have few, if any, political implications such as the *da'wa* practices of the mosque movement, or whose political implications are pacifist.

If we assume that everyone who is human goes to war like us, and that this is part of what makes them recognizably human, or that the violence we commit is violence that falls within the realm of the recognizably human, but the violence that others commit is unrecognizable as human activity, then we make use of a limited and limiting cultural frame to understand what it is to be human. This is no reason to dismiss the term "human," but only a reason to ask how it works, what it forecloses, and what it sometimes opens up. To be human implies many things, one of which is that we are the kinds of beings who must live in a world where clashes of value do and will occur, and that these clashes are a sign of what a human community is. How we handle those conflicts will also be a sign of our humanness, one that is, importantly, in the making. *Whether or not we*

continue to enforce a universal conception of human rights at moments of outrage and incomprehension, precisely when we think that others have taken themselves out of the human community as we know it, is a test of our very humanity. We make a mistake, therefore, if we take a single definition of the human, or a single model of rationality, to be the defining feature of the human, and then extrapolate from that established understanding of the human to all of its various cultural forms. That direction will lead us to wonder whether some humans who do not exemplify reason and violence in the way defined by our definition are still human, or whether they are "exceptional" (Haynes) or "unique" (Hastert), or "really bad people" (Cheney) presenting us with a limit case of the human, one in relation to which we have so far failed. To come up against what functions, for some, as a limit case of the human is a challenge to rethink the human. And the task to rethink the human is part of the democratic trajectory of an evolving human rights jurisprudence. It should not be surprising to find that there are racial and ethnic frames by which the recognizably human is currently constituted. One critical operation of any democratic culture is to contest these frames, to allow a set of dissonant and overlapping frames to come into view, to take up the challenges of cultural translation, especially those that emerge when we find ourselves living in proximity with those whose beliefs and values challenge our own at very fundamental levels. More crucially, it is not that "we" have a common idea of what is human, for Americans are constituted by many traditions, including Islam in various forms, so any radically democratic self-understanding will have to come to terms with the heterogeneity of human values. This is not a relativism that undermines universal claims; it is the condition by which a concrete and expansive conception of the human will be articulated, the way in which parochial and implicitly racially and religiously bound conceptions of human will be made to yield to a

wider conception of how we consider who we are as a global community. We do not yet understand all these ways, and in this sense human rights law has yet to understand the full meaning of the human. It is, we might say, an ongoing task of human rights to reconceive the human when it finds that its putative universality does not have universal reach.

The question of who will be treated humanely presupposes that we have first settled the question of who does and does not count as a human. And this is where the debate about Western civilization and Islam is not merely or only an academic debate, a misbegotten pursuit of Orientalism by the likes of Bernard Lewis and Samuel Huntington who regularly produce monolithic accounts of the "East," contrasting the values of Islam with the values of Western "civilization." In this sense, "civilization" is a term that works against an expansive conception of the human, one that has no place in an internationalism that takes the universality of rights seriously. The term and the practice of "civilization" work to produce the human differentially by offering a culturally limited norm for what the human is supposed to be. It is not just that some humans are treated as humans, and others are dehumanized; it is rather that dehumanization becomes the condition for the production of the human to the extent that a "Western" civilization defines itself over and against a population understood as, by definition, illegitimate, if not dubiously human.

A spurious notion of civilization provides the measure by which the human is defined at the same time that a field of would-be humans, the spectrally human, the deconstituted, are maintained and detained, made to live and die within that extra-human and extra-juridical sphere of life. It is not just the inhumane treatment of the Guantanamo prisoners that attests to this field of beings apprehended, politically, as unworthy of basic human entitlements. It is also found in some of the legal frameworks through which we might

seek accountability for such inhuman treatment, such that the brutality is continued—revised and displaced—in, for instance, the extra-legal procedural antidote to the crime. We see the operation of a capricious proceduralism outside of law, and the production of the prison as a site for the intensification of managerial tactics untethered to law, and bearing no relation to trial, to punishment, or to the rights of prisoners. We see, in fact, an effort to produce a secondary judicial system and a sphere of non-legal detention that effectively produces the prison itself as an extra-legal sphere maintained by the extra-judicial power of the state.

This new configuration of power requires a new theoretical framework or, at least, a revision of the models for thinking power that we already have at our disposal. The fact of extra-legal power is not new, but the mechanism by which it achieves its goals under present circumstances is singular. Indeed, it may be that this singularity consists in the way the "present circumstance" is transformed into a reality indefinitely extended into the future, controlling not only the lives of prisoners and the fate of constitutional and international law, but also the very ways in which the future may or may not be thought.

How then finally are we to understand this extra-legal operation of power? I suggested earlier that the protocols governing indefinite detention and the new military tribunals reinstitute forms of sovereign power at both the executive and managerial levels. If the chronology of modern power that Foucault relays and disputes in his essay "Governmentality" implies that sovereignty is for the most part supplanted by governmentality, then the current configuration of power forces us to rethink the chronology that underwrites that distinction, as he also suggested we must do. Moreover, if state power now seeks to instate a sovereign form for itself through the suspension of the rule of law, it does not follow that the state ceases

to manufacture law. On the contrary, it means only that the law it manufactures, in the form of new military tribunals, is widely considered illegitimate by national and international critics alike.[13] So it is not simply that governmentality becomes a new site for the elaboration of sovereignty, or that the new courts become fully lawless, but that sovereignty trumps established law, and the unaccountable subjects become invested with the task of the discretionary fabrication of law.

This contemporary resurgence of sovereignty is distinct from its other historical operations, but remains tied to them in certain important ways. In "Governmentality" Foucault distinguishes between *the art of government*, which has as its task the management and cultivation of populations, goods, and economic matters, and *the problem of sovereignty*, which, he maintains, is traditionally separated from the management of goods and persons, and is concerned above all with preserving principality and territory. Indeed, sovereignty, as Foucault sketches its evolution from the sixteenth century onwards, comes to have *itself* as its highest aim. He writes, "In every case, what characterizes the end of sovereignty, this common and general good, is in sum nothing other than the submission to sovereignty. This means that the end of sovereignty is circular: this means that the end of sovereignty is the exercise of sovereignty" (95). He calls this the "self-referring circularity of sovereignty" from which it follows that sovereignty's main aim is the positing of its own power. Sovereignty's highest aim is to maintain that very positing power as authoritative and effective. For Machiavelli, Foucault argues, the primary aim of the prince was to "retain his principality" (95). The more contemporary version of sovereignty has to do with the effective exercise of its own power, the positing of itself as sovereign power. We might read the animated traces of this sovereignty in the acts by which officials "deem" a given prisoner to deserve indefinite

detention, or the acts by which the executive "deems" a given prisoner to be worthy of a trial, or the acts by which the President decides final guilt or innocence, and whether the death penalty ought to be applied.

Foucault distinguishes governmentality from sovereignty by claiming that governmentality is an art of managing things and persons, concerned with tactics, not laws, or as that which uses laws as part of a broader scheme of tactics to achieve certain policy aims (95). Sovereignty, in its self-referentiality provides a legitimating ground for law, but is for that reason not the same as the law whose legitimacy it is said to underwrite. Indeed, if we take this last point seriously, it would seem that governmentality works to disrupt sovereignty inasmuch as governmentality exposes law as a set of tactics. Sovereignty, on the other hand, seeks to supply the ground for law with no particular aim in sight other than to show or exercise the self-grounding power of sovereignty itself: law is grounded in something other than itself, in sovereignty, but sovereignty is grounded in nothing besides itself.

For Foucault, then, governmentality regards laws as tactics; their operation is "justified" through their aim, but not through recourse to any set of prior principles or legitimating functions. Those functions may be in place, but they are not finally what animates the field of governmentality. Understood in this way, the operations of governmentality are for the most part extra-legal without being illegal. When law becomes a tactic of governmentality, it ceases to function as a legitimating ground: *governmentality makes concrete the understanding of power as irreducible to law*. Thus governmentality becomes the field in which resurgent sovereignty can rear its anachronistic head, for sovereignty is also ungrounded in law. In the present instance, sovereignty denotes a form of power that is fundamentally lawless, and whose lawlessness can be found in the way in

which law itself is fabricated or suspended at the will of a designated subject. The new war prison literally manages populations, and thus functions as an operation of governmentality. At the same time, however, it exploits the extra-legal dimension of governmentality to assert a lawless sovereign power over life and death. In other words, the new war prison constitutes a form of governmentality that considers itself its own justification and seeks to extend that self-justificatory form of sovereignty through animating and deploying the extra-legal dimension of governmentality. After all, it will be "officials" who deem suspected terrorists or combatants "dangerous" and it will be "officials," not representatives of courts bound by law, who ostensibly will review the cases of those detained indefinitely. Similarly, the courts themselves are conceived explicitly as "an instrument" used in the service of national security, the protection of principality, the continuing and augmented exercise of state sovereignty.

Foucault casts doubt on a progressive history in which governmentality comes to supplant sovereignty in time, and argues at one point that the two together, along with discipline, have to be understood as contemporary with each other. But what form does sovereignty take once governmentality is established? Foucault offers a narrative in which governmentality supports the continuation of the state in a way that sovereignty no longer can. He writes, for instance, "the art of government only develops once the question of sovereignty ceases to be central" (97). The question of sovereignty seems to be the question of its legitimating function. When this question ceases to be asked, presumably because no answer is forthcoming, the problem of legitimacy becomes less important than the problem of effectivity. The state may or may not be legitimate, or derive its legitimacy from a principle of sovereignty, but it continues to "survive" as a site of power by virtue of governmentalization: the management of health, of prisons, of education, of armies, of goods,

along with providing the discursive and institutional conditions for producing and maintaining populations in relation to these. When Foucault writes that "the tactics of governmentality ... make possible the continual definition and redefinition of what is within the competence of the state and what is not," he avows the dependency of the state—its operation as effective power—on governmentality: "The state can only be understood in its survival and its limits on the basis of the general tactics of governmentality" (103). For us, then, the question is: how does the production of a space for unaccountable prerogatory power function as part of the general tactics of governmentality? In other words, under what conditions does governmentality produce a lawless sovereignty as part of its own operation of power?

Foucault argues that the extra-legal sphere of governmentality emerges only once it becomes separated from the "rights of sovereignty." In this sense, then, governmentality depends upon "the question of sovereignty" no longer predominating over the field of power. He argues that "the problem of sovereignty was never posed with greater force than at this time, because it no longer involved ... an attempt to derive an art of government from a theory of sovereignty" (101). Indeed, it appears that once a sphere of managing populations outside of law emerges, sovereignty no longer operates as a principle that would furnish the justification for those forms of population management. What is the use of sovereignty at this point? The self-referring circularity of sovereignty is heightened once this separation of governmentality from sovereignty takes place. It offers no ground, it has no ground, so it becomes radically, if not manically and tautologically, self-grounding in an effort to maintain and extend its own power. But if the self-preserving and self-augmenting aims of the state are once more linked with "sovereignty" (delinked now from the question of its legitimating function), it can be mobilized as one of the tactics of governmentality both to manage populations, to

preserve the national state, and to do both while suspending the question of legitimacy. Sovereignty becomes the means by which claims to legitimacy function tautologically.

Although I cannot within the confines of the present analysis consider the various historical ramifications of Foucault's argument, one can see that the present circumstance demands a revision of his theory. It cannot be right, as he claims, that "if the problems of governmentality and the techniques of government have become the only political issues, the only real space for political struggle and contestation, this is because the governmentalization of the state has permitted the state to survive" (103). It is unclear precisely what the relation of state to sovereignty and governmentality is in this formulation, but it seems clear that, however conditioned sovereignty may be, it still drives and animates the state in some important respects. It may be, as Foucault maintains, that governmentality cannot be derived from sovereignty, that whatever causal links once seemed plausible no longer do. But this does not preclude the possibility that governmentality might become the site for the reanimation of that lost ground, the reconstellation of sovereignty in new form. What we have before us now is the deployment of sovereignty as a tactic, a tactic that produces its own effectivity as its aim. Sovereignty becomes that instrument of power by which law is either used tactically or suspended, populations are monitored, detained, regulated, inspected, interrogated, rendered uniform in their actions, fully ritualized and exposed to control and regulation in their daily lives. The prison presents the managerial tactics of governmentality in an extreme mode. And whereas we expect the prison to be tied to law—to trial, to punishment, to the rights of prisoners—we see presently an effort to produce a secondary judicial system and a sphere of non-legal detention that effectively produces the prison itself as an extra-legal sphere. Even if one were tempted to declare that

sovereignty is an anachronistic mode of power, one would be forced to come to grips with the means by which anachronisms recirculate within new constellations of power. One might claim that sovereignty is concerned exclusively with a self-grounding exercise and has no instrumental aims, but that would be to underestimate the way that its self-grounding power might be instrumentalized within a broader set of tactics. Sovereignty's aim is to continue to exercise and augment its power to exercise itself; in the present circumstance, however, it can only achieve this aim through managing populations outside the law. So, even as governmental tactics give rise to this sovereignty, sovereignty comes to operate on the very field of governmentality: the management of populations. Finally, it seems important to recognize that one way of "managing" a population is to constitute them as the less than human without entitlement to rights, as the humanly unrecognizable. This is different from producing a subject who is compliant with the law; and it is different from the production of the subject who takes the norm of humanness to be its constitutive principle. The subject who is no subject is neither alive nor dead, neither fully constituted as a subject nor fully deconstituted in death. "Managing" a population is thus not only a process through which regulatory power produces a set of subjects. It is also the process of their de-subjectivation, one with enormous political and legal consequences.

It may seem that the normative implication of my analysis is that I wish the state were bound to law in a way that does not treat the law merely as instrumental or dispensable. This is true. But I am not interested in the rule of law *per se*, however, but rather in the place of law in the articulation of an international conception of rights and obligations that limit and condition claims of state sovereignty. And I am further interested in elaborating an account of power that will produce effective sites of intervention in the dehumanizing effects

of the new war prison. I am well aware that international models can be exploited by those who exercise the power to use them to their advantage, but I think that a new internationalism must nevertheless strive for the rights of the stateless, and for forms of self-determination that do not resolve into capricious and cynical forms of state sovereignty. There are advantages to conceiving power in such a way that it is not centered in the nation-state, but conceived, rather, to operate as well through non-state institutions and discourses, since the points of intervention have proliferated, and the aim of politics is not only or merely the overthrow of the state. A broader set of tactics are opened up by the field of governmentality, including those discourses that shape and deform what we mean by "the human."

I am in favor of self-determination as long we understand that no "self," including no national subject, exists apart from an international socius. A mode of self-determination for any given people, regardless of current state status, is not the same as the extra-legal exercise of sovereignty for the purposes of suspending rights at random. As a result, there can be no legitimate exercise of self-determination that is not conditioned and limited by an international conception of human rights that provides the obligatory framework for state action. I am, for instance, in favor of Palestinian self-determination, and even Palestinian statehood, but that process would have to take place supported by, and limited by, international human rights. Similarly, I am equally passionate about Israel giving up religion as a prerequisite for the entitlements of citizenship, and believe that no contemporary democracy can and ought to base itself on exclusionary conditions of participation, such as religion. The Bush administration has broken numerous international treaties in the last two years, many of them having to do with arms control and trade, and many of these abrogations took place prior to the events of September 11. Even the US's call for an international coalition

after those events was one that presumed that the US would set the terms, lead the way, determine the criterion for membership, and lead its allies. This is a form of sovereignty that seeks to absorb and instrumentalize an international coalition, rather than submit to a self-limiting practice by virtue of its international obligations. Similarly, Palestinian self-determination will be secured as a right only if there is an international consensus that there are rights to be enforced in the face of a bloated and violent exercise of sovereign prerogative on the part of Israel. My fear is that the indefinite detainment of prisoners on Guantanamo, for whom no rights of appeal will be possible within federal courts, will become a model for the branding and management of so-called terrorists in various global sites where no rights of appeal to international rights and to international courts will be presumed. If this extension of lawless and illegitimate power takes place, we will see the resurgence of a violent and self-aggrandizing state sovereignty at the expense of any commitment to global co-operation that might support and radically redistribute rights of recognition governing who may be treated according to standards that ought to govern the treatment of humans. We have yet to become human, it seems, and now that prospect seems even more radically imperiled, if not, for the time being, indefinitely foreclosed.

4

THE CHARGE OF ANTI-SEMITISM: JEWS, ISRAEL, AND THE RISKS OF PUBLIC CRITIQUE

Profoundly anti-Israeli views are increasingly finding support in progressive intellectual communities. Serious and thoughtful people are advocating and taking actions that are anti-Semitic in their effect if not their intent.

Lawrence Summers, President of Harvard University, September 17, 2002

When the President of Harvard University, Lawrence Summers, remarked that to criticize Israel at this time and to call upon universities to divest from Israel are "actions that are anti-Semitic in their effect, if not their intent,"[1] he introduced a distinction between an effective and intentional anti-Semitism that is controversial at best. Of course, the counter-charge has been that, in making his statement,