

Just War Claims: Historical Theory, Abu Ghraib, and Transgressive Rhetoric

Toy-Fung Tung

Old Theories, New Global Reality

A misguided understanding of the new global reality traced a trajectory from September 11, 2001, to the March 2003 invasion of Iraq, and finally to Abu Ghraib. Wars take place within contexts of global power, and they are rationalized within certain historical norms of thought. After September 11, the United States possessed the moral advantage, but as the Iraqi invasion took shape, the legitimacy of the United States' responses became questionable. The Iraqi invasion triggered renewed interest in "just war" claims, but contemporary commentators did not always fully understand the historical and humanistic origins of just war theories.¹ Just war paradigms evolved through centuries of conventional warfare marked by the gradual emergence of modern nation-states. One can question whether traditional just war theory obtains in the contemporary world, defined as it is by new technologies of warfare and communication, changing economic conditions, and transnational geopolitical realities (Murnion 2006). Still, the rhetoric of just war played a paramount role in shaping the war on terror, the Iraqi invasion, and the Abu Ghraib fiasco.

The "war against terrorism" has been called a "war everywhere" (Brooks 2004, pp. 681–682) and a war without any foreseeable end. This chapter argues that an almost inevitable path leads from the unrestricted "war against terrorism"

¹Walzer's (2006a) well-known work, *Just and Unjust Wars*, is based on historical examples, but he does not openly confront historical just war theory. Walzer's issues, however, all have precedents in just war theory. For example, in discussing "double effect" in detail (pp. 152–159), he never mentions Aquinas, the originator of this theory (Aquinas 2002, pp. 263–264), although he elsewhere mentions Vitoria. While Walzer does not situate his own work within the context of historical just war theory, many other scholars did (Bellamy 2006b; Fiala 2008; Guthrie & Quinlan 2007; Patterson 2007; Stover 2004; Wester 2004), not to mention the multitude of treatments in the popular media. The important point here is the prevalence of the rhetoric focused on "just war."

T.-F. Tung (✉)

Department of English, John Jay College of Criminal Justice, CUNY, New York, NY, USA
e-mail: ttung@jjay.cuny.edu

to Abu Ghraib. That course was set by the Bush administration's use of rhetoric, not only to defend its going to war (*jus ad bellum*),² but afterwards, unilaterally, to "rewrite" international law and the United States' own military regulations, in order to override restrictions on war conduct. Many limits were erased that regulated the status and conduct of noncombatants and occupying forces; regular soldiers and the military police (MPs); MPs and military intelligence (MIs); MIs and civilian interrogators from Other Governmental Agencies (OGAs) or private contractors. As will be argued, the new global reality and the unbounded nature of the war on terror laid the foundations for the Bush administration's erosion and violation of every boundary of conduct: geopolitical, legal, moral, and finally, even plainly human.

This breakdown was facilitated through official pronouncements – speeches, national strategies, memos, and CPA orders – and unofficial rhetorical complicities, with the aim of undercutting written law in the name of a supposedly higher law. Because so much discussion after September 11 swirled around the idea of a pre-emptive "just war," we must examine and question the contemporary distortion of the just war tradition. The vast array of today's views about just war cannot be fully accounted for here, nor can justice be done to the nuanced tradition as a whole.³ But the historical outlines of just war theory will be examined, and a proper precedent will be proposed for the Iraqi invasion.

Finally, the Bush administration's rhetoric will be analyzed for how it appropriated the moral force of just war claims within its "securitization" discourse to create a culture that fostered transgressions of the permissible limits of war conduct, first in the general war on terror, as evidenced in the Yemeni strike, and afterwards, in "Operation Iraqi Freedom" and Abu Ghraib.

²I have followed contemporary usage by generally writing "*jus*" for the Latin "*ius*" except in a couple of instances, such as "*ius gentium*" and "*ius cosmopolitanum*." The word "*ius*" is laden with significances and is hotly debated in the historical literature concerning "rights," so the reader should be aware that "*jus*" is the same word as "*ius*."

³Good contemporary editions and translations exist for all the theorists discussed in this chapter. See: Thomas Aquinas, *St Thomas Aquinas: Political Writings*, trans. and ed. R.W. Dyson (Cambridge: Cambridge University Press, 2002); Alberico Gentili, *De iure belli libri tres* (On the Law of War), trans. J.C. Rolfe, vol. 2 (1588, rev. 1598; Oxford: Clarendon Press, 1933); Francisco de Vitoria, *Francisco de Vitoria: Political Writings*, trans. and ed. Anthony Pagden and Jeremy Lawrance (Cambridge: Cambridge University Press, 2001); Hugo Grotius, *De iure belli ac pacis libri tres* (On the Law of War and Peace), trans. Francis W. Kelsey, vol. 2 (1625; Washington, DC: Carnegie Institution of Washington, 1925). While this writer does not agree with all the conclusions, an excellent background work for understanding the context of early modern just war theorists is Richard Tuck (2001), and a balanced historical treatment is found in Bellamy (2006b). Additional contemporary viewpoints grounded in analyses of historical events include: Fiala (2008), Orend (2006), Walzer (2006a); as well as essay collections by Hensel (2008), Lee (2006), and Shue and Rodin (2007).

Waging a Global War on Terrorism?

September 11 marked a turning point in global and national consciousness of the United States' role in the world.⁴ President George W. Bush's response in the aftermath of the Pentagon and World Trade Center attacks was to declare a "war against terrorism" and a "monumental struggle of good versus evil," in which nothing less was at stake than "freedom and democracy" for the entire world (2001, September 11; 2001, September 12).⁵

By not equating these "acts of terror" with international criminal activity, but instead elevating them to the status of a "war,"⁶ President Bush set the United States as a nation against a small band of enemies located possibly anywhere. Participants in today's conflicts are not only traditional nation-states, such as the United States, but also a host of other nonstate actors (NSAs), including "rogue" states as well as roaming terrorist groups such as al-Qaeda. If the assaults of NSAs are legitimized as acts of "war," rather than viewed as criminal acts, what are the rules of engagement?

In describing the global framework of the war on terrorism, the president labeled the enemy, in his 2002 State of the Union address, as a new "axis of evil" (2002, January 29). The original "axis" referred to Japan, Germany, and Italy in World War II, but Osama bin Laden and al-Qaeda are not state-sponsored foes. As late as 2007, Bush leveled the same accusation against Iraqi insurgents: "Today, the violent Islamic extremists who fight us in Iraq are as certain of their cause as the Nazis, or the Imperial Japanese, or the Soviet communists were of theirs" (2007, August 22).⁷

⁴A sampling of book-length analyses dealing with new global realities includes: Bobbitt (2008), Khanna (2008), and Zakaria (2008). Robert Kagan's 2002 article, circulated widely by e-mail, caused a stir. For an analysis of Kagan's effect, see Steven Erlanger, *The world: America the invulnerable? The world looks again*, *New York Times*, July 21, 2002. For a view and comments from the perspective of cultural anthropology, see Knauff's article (2007).

⁵On September 12, 2001, Bush declared: "This enemy attacked not just our people but all freedom-loving people everywhere in the world."

⁶Though not a formal declaration of war, a joint resolution was passed nearly unanimously by Congress (with one dissenting vote in the House), three days after 9/11, which authorized the president "to use all necessary and appropriate force...in order to prevent any future acts of international terrorism against the United States." Jane Perlez, *After the attacks: The overview; U.S. demands Arab countries 'choose sides,' New York Times*, September 15, 2001. In October 2002, another resolution was passed by Congress authorizing the president to wage war against Iraq: *Authorization for Use of Military Force Against Iraq Resolution of 2002*, Pub. L. No. 107-243, 116 Stat. 1498.

⁷See also Rudy Giuliani's remark about "radical Islamic fascism" (*Is it war?* 2007, December 23). A *Washington Post* editorial shortly after September 11 called the enemies of the United States "contemporary counterparts of the Nazis" (Neier 2001, October 9).

The leap from the September 11 terrorists to the Iraqi invasion was made by linking Iraq with so-called “weapons of mass destruction” (WMDs), and then suggesting that Saddam Hussein was likely to give WMDs to al-Qaeda. The Bush administration, therefore, claimed not to be fighting a war against Iraq per se, but (1) firstly, a pre-emptive,⁸ defensive war to remove WMDs from Iraq; and (2) secondly, a war of humanitarian intervention, to provide support for the rights of the Iraqis to be part of an “international order...integrated into a world consistent with the values and interests we share with our partners,” as the 2003 Counterterrorism Strategy stated (U.S. State Department 2003, February 14). From the earliest origins of just war theory, defensive war was the most justifiable war.⁹ When no WMDs were found in Iraq, however, the administration began highlighting the “humanitarian” aim of turning Iraq into a “beacon” of hope for the Arab world.¹⁰ This second aim is more problematic in terms of traditional just war theory.¹¹

Spreading democracy is an old idea advanced by conservatives such as Samuel Huntington and Francis Fukuyama. Huntington had argued in 1996 that the world was arrayed along “fault line conflicts” (2003, pp. 207–208) determined by a “clash of civilizations” and that this kind of war was “particularly prevalent among Muslims” (p. 268), who tended to identify themselves in opposition to Western values. Fukuyama’s 1992 idea of the “end of history” is part of the old story of Western hegemony as an inexorable march of progress towards ever-increasing acceptance of liberal democracy as the guarantor of human progress (2006, pp. 47–51, 342–354).¹²

⁸The general question of pre-emptive war is beyond the scope of this paper, but a good article from a contemporary military and ethical perspective is Rodin, in Shue & Rodin (2007), pp. 143–170.

⁹According to Augustine: “[I]t is the injustice of the opposing side that lays on the wise man the duty of waging wars; and this injustice is assuredly to be deplored by a human being, since it is the injustice of human beings” (Augustine 1972, p. 862). Also, the maxim of repelling force with force derived from Roman law and was passed down to the Middle Ages through Gratian’s *Decretum*.

¹⁰According to many commentators, humanitarian intervention was the “default” reason for going to war (Farer 2008b, p. 363). “The initial justification for the U.S. invasion, the search for nonexistent weapons of mass destruction, was made palatable to the public by a conjoining of the 9/11 attacks and Saddam Hussein’s political record. But soon the leap was made from removing him, to remaking the political map of the Middle East by transforming Iraq into a beacon of democracy and reforms” (Lazreg 2008, p. 260). Burke poses the question of “*who* gets to wage just war? Does every sufferer of harm and injustice, or merely those who have the power and the means, and who can turn their justifications into truth? ... In short, the weak do not get to wage just war” (2004, p. 348).

¹¹Walzer defines humanitarian intervention as “justified when it is a response (with reasonable expectations of success) to acts that ‘shock the moral conscience of mankind’” (2006a, p. 107). This contemporary idea of humanitarian intervention is not found in early modern thinkers or the Thomists. For more on the contemporary debate, see Walzer, “The politics of rescue” (1994), in Walzer (2004a, pp. 67–81). For other viewpoints, see: Fiala (2007, pp. 28–47); Martin, along with other articles, in Part III of Lee (2006, pp. 75–88; 89–134); and Bellamy (2006b, pp. 199–228). See also the 2008 debate between Farer (2008a) and Elstain (2008), covering three articles in *Human Rights Quarterly* 30, 356–403, 758–766, 767–771.

¹²Despite the Bush Administration’s allusions to Fukuyama’s 1992 opinions, in 2008 Fukuyama supported Obama for president and wrote that the cost of the regime change in Iraq “was hugely disproportionate,” especially since it undermined the United States’ moral authority by setting the “most recent precedent for a big power intervening to change a regime it didn’t like, without the sanction of the U.N. Security Council” (2008, August 15).

These theories assume an international order of nation-states and are inapposite to the war on terror, even though they speak to Bush's 2001 call to defend "freedom and democracy." While the Bush administration adamantly denied any "clash of civilizations,"¹³ in September 2001, Bush remarked: "This crusade, this war on terrorism, is going to take awhile (Salisbury 2001, September 30)."¹⁴ In the 2003 Counterterrorism Strategy, he reiterated Fukuyama's vision by insisting that "what we are ultimately fighting for [are] our fundamental democratic values and way of life" and "the kind of world we want to live in" (U.S. State Department 2003, February 14). The re-emergence of these old ideas in the wake of September 11 contributed to redirecting the war against terror towards the nation-state of Iraq, which provided the unbounded war on terror with a delimited battleground.

Though persistently colored by Huntington's and Fukuyama's language, the new global reality is not shaped by the singular influence of the United States, but by a complex web of interrelationships made possible by changes in technology, communications, and economics, as well as new multinational alliances, such as the European Union. In such a world, NSAs, such as nongovernmental organizations (NGOs) and terrorist groups, can play increasingly significant roles.¹⁵ Philip Bobbitt (2008) explains the new global reality by the transition from nation-states to market-states.¹⁶ The legitimizing function of the "Nation State" is to better our "material well being," while "the Market State earns its legitimacy by providing the

¹³ Bush disavowed any "clash of civilizations," because he thought that only one civilization exists today, that of the United States. The "twentieth century ended with a single surviving model of human progress," and while "America cannot impose this vision [it] can support and reward governments that make the right choices," through its "overwhelming power" (Lindberg 2002, June 4). In the 2003 National Counterterrorism Strategy, the administration denied making war against "a religion," while also quoting bin Laden to the effect that al Qaeda's obtaining WMDs was a "religious duty" (U.S. State Department 2003, February 14). The Bush administration's rhetoric had it both ways. While declaring the United States the winner in the "clash of civilizations," Bush spoke more openly after 2003 of "violent Islamic extremists [who are] as certain of their cause as the Nazis, or the Imperial Japanese, or the Soviet communists." American democracy was no longer just a civilizing force, but an imperative sanctioned by God, since "the desire for liberty [is] written into the human heart by our Creator" (2007, August 22). For a study, based on survey data, of religious factors raised by the Bush administration's rhetoric as an element in the Iraqi invasion, see Smidt 2005, pp. 243–261.

¹⁴ In commenting on the deaths of three supporters in Pakistan, bin Laden responded: "these brothers are among the first martyrs in Islam's battle in this era against the new Christian-Jewish crusade led by the big crusader Bush under the flag of the Cross" (Salisbury 2001, September 30). The endpoint of this rhetoric came in 2008, when the Bush administration banned the word "jihadist" as "unintentionally portraying terrorists, who lack moral and religious legitimacy, as brave fighters, legitimate soldiers" (Lee 2008, April 24).

¹⁵ "War can lead directly to political reconstruction.... But there is another form of direct action, which involves what we might call 'politics short of force,' noncoercive politics, the work of nongovernmental organizations, like Human Rights Watch or Amnesty International, which also aim, in their own way, at regime change" (Walzer 2006a, p. xvii; Walzer 2006b; Andreopoulos, 2006b; Falk 2006, pp. 120–121).

¹⁶ Khanna agrees with Bobbitt. "Power has migrated from monopoly to marketplace.... In the geopolitical marketplace, legitimacy is based on effectiveness – and must be *proven* in comparison with other superpowers" (2008, p. xvi).

opportunity to its citizens to advance their own well being” (Scoble 2004, September 8). The nation-state assumes moral responsibility for the common weal; while the market-state is an enabler of opportunity. This transition is crucial to contemporary war strategy, because, as Bobbitt (2008) argues in his latest book, *Terror and Consent*, wars mirror the constitutional order of the combatants. Al-Qaeda’s “new form of terrorism...reflects the emerging constitutional order of the market-state” (p. 78). While al-Qaeda is not a state of any kind, in today’s global economy it functions both as a “virtual market state” and as an “imagined” or “virtual caliphate” (pp. 64–65, 70–73, 93, 182). As a result of Bin Laden’s immense personal wealth and influence, al-Qaeda can avail itself of the global resources of war making, in the same way as any geographically constituted market-state.¹⁷ Huntington’s idea of a “clash of civilizations” might seem appropriate because of the religious affiliations of the two sides of the war on terror, Judeo-Christian and Islamic.¹⁸ But Huntington’s clashes are envisioned as occurring between geographically proximate factions. The war against the terrorists is happening irrespective of geographical boundaries. We do not even know where Bin Laden’s headquarters are.

Nothing shows more clearly that today’s “clashes” are not between civilizations. After all, civilizations are only “intellectual construct[s]...to establish the *boundaries* of a field of study” – much as we speak of “gardens.” These “can be described, analyzed and interpreted” but can never “clash” (Matlock 1999, p. 439; my italics). Even speaking metaphorically, we cannot conceive of the “war against terrorism” as a “clash” of cultures or civilizations, because al-Qaeda and other terrorist groups succeed by operating outside of all geopolitical, religious, and legal boundaries. They have no international standing to wage war – that is, no state, no citizens, and no national leadership positions. Yet Osama bin Laden agrees with President Bush that he is at war with the United States, and he has formulated his own policy statements, claiming the authority of a religious fatwa, without any ostensible religious authority. In fighting the terrorists by their rules, as combatants in a market-state “war” without boundaries – rather than as international criminals subject to state-sponsored

¹⁷“Market state terrorism will be just as global, networked, decentralized, and devolved and rely just as much on outsourcing and incentivizing as the market state. It does not depend on state sponsorship; indeed, it would appear that al-Qaeda had more influence over the government in whose jurisdiction it worked than did that government over it.” Also, because “[m]arket state terrorism ‘neither relies on the support of sovereign states nor is constrained by the limits on violence that state sponsors have observed themselves or place on their proxies’...it is horrifyingly more violent.” Bobbitt (2008, p. 45), quoting Steve Simon and Daniel Benjamin.

¹⁸President Bush’s rhetoric casts al-Qaeda’s aims in terms of religious rather than political motives, as in his September 20, 2001, address to a Joint Session of Congress: “The terrorists practice a fringe form of Islamic extremism.... The terrorists’ directive commands them to kill Christians and Jews, to kill all Americans, and make no distinctions among military and civilians, including women and children.” Of course, bin Laden replied in kind by dubbing Bush a “crusader” (Salisbury 2001, September 30). Both sides imputed religious values to political goals (Byrm 2008, p. 102).

diplomatic or policing actions – the United States risks betraying its own values as a nation-state.¹⁹

If the United States and American democracy are indeed under attack, then we must take care that in fighting terrorists, we do not lose the war against terror and become a state of terror ourselves, due to “the acts of [our] own misguided defenders” (Bobbitt 2008, p. 391). Ironically, by legitimizing the “war against terrorism,” while declaring the enemy’s agents “unlawful combatants,” the Bush administration embarked on a course that eventually transformed Iraq into an unruly market-state²⁰ and violated the boundaries of war conduct. In wars between states, enemy soldiers and civilians are both shielded from illegitimate violence. But from the outset, the war against terrorism was construed as a “war” directed against combatants acting in their personal capacities and not as soldier-agents of a state. This mentality prevailed during the Iraqi invasion, and afterwards, at Abu Ghraib, thanks to the persistent identification of Iraq with al-Qaeda. Starting shortly after September 11, the Bush administration mounted a media campaign, first linking al-Qaeda and Iraq, and then, Iraq and WMD – without presenting a shred of evidence (Bellamy 2006b, pp. 176–177; Kramer et al. 2005, pp. 57–60). This rhetoric succeeded. By the start of the invasion, “70% of Americans surveyed believed that Iraq was directly involved in the planning of the September 11 attacks” (Kramer et al., p. 57). Bush also played on the public’s fears that al-Qaeda would get WMDs from Iraq (Bush 2002, September 12).²¹ Identifying Iraq with the terrorists worked to undermine protections guaranteed to members of a warring state. In short, the war on terror and the Iraqi invasion were intentionally construed as two sides of the same market-state war.

The new targets in a market-state war are not visible state-held military installations, strategic bridges, or land and sea positions, but vast networks of money,

¹⁹ The United States responded as a “global state” – another word for Bobbitt’s “market-state” – by undertaking war actions instead of “by revamping international law enforcement through greatly augmented resources and cooperative procedures [which would have] vindicated the viability of the statist framework of world order and its ability to meet the challenge mounted by a nonstate network within the framework of international law” (Falk 2006, p. 125). Other commentators have analyzed the Iraqi invasion from the perspective of international criminology. See Agozino (2004), Hamm (2007), and Kramer et al. (2005). Choosing the war paradigm rather than the policing model “has been a strategy of the Bush Administration.... The prospect of an imminent threat posed by terrorists and terrorism is utilized by security states to expand the scope and purview of executive power and to engage in a certain state of lawlessness to counter the supercriminality that terrorism is made out to be” (Denike 2008, p. 110).

²⁰ Because occupation forces failed to establish a “monopoly of legitimate violence” and “largely abdicated this responsibility,” Iraq’s nation-state identity was compromised, and opportunities were opened for Iraqi insurgents to destroy infrastructure and interrupt basic services – for which the United States was blamed (Danner 2004, pp. 56–58; Kramer et al. 2005, pp. 68–69).

²¹ In an October speech in Cincinnati, Bush said: “Iraq’s weapons of mass destruction are controlled by a murderous tyrant.... We have experienced the horror of September 11.... Our enemies would be no less willing – in fact they would be eager – to use a biological, or chemical, or nuclear weapon.... [W]e have every reason to assume the worst, and we have an urgent duty to prevent the worst from occurring” (2002, October 7).

communication, and information, and the people who direct them. In one message, Bin Laden justifies making war against noncombatant American civilians, including women and children, even though this is considered by other interpreters to be forbidden by Islamic law (*Shari'a*).²² All Americans are legitimate war targets, he says, because “the American people are the ones who fund the attacks against us [acting] through their elected candidates” (Bin Laden’s letter, 2002, November 24). President Bush, for his part, targeted Bin Laden and his associates (2001, September 20). This intense personalizing of the terror wars – outside of the traditional boundaries separating soldier and civilian – clearly reveals the new face of Bobbitt’s market-state war.

A further complication is that this new war is being prominently waged in the communications marketplace. Because of instant global interconnectivity (via Internet, cell phones, newswires, etc.), noncombatants are drawn more intimately into the field of virtual combat. Three prominent examples of this are the Internet video clips of the gruesome beheadings attributed to Abu Musab al-Zarqawi; the worldwide dissemination of the Abu Ghraib photographs; and the constant replay on television of the World Trade Center bombings.²³

Targeting civilians is part of a growing global tendency. In the new conflicts involving both state and nonstate actors, George J. Andreopoulos has noted that both sides engage in “the deliberate targeting of civilians, who often constitute *the principal aim* rather than the unintended consequence of otherwise legitimate military operations” (2006a, p. 141; my italics). The Iraqi invasion may have started off as a nation-state war, but Abu Ghraib was the result of focusing on individuals rather than states, and there, civilians – their identities merging with al-Qaeda’s – did become “the principal aim” of military operations.

The conflicts initiated by September 11 and the rhetoric of both the United States and al-Qaeda, may seem to fit Huntington’s paradigm of “Muslim and Asian societies” against the West (2003, p. 183). But the power distribution is no longer along Huntington’s lines. In a January 2008 article in the *New York Times* and in a book that followed, Parag Khanna notes: “The web of globalization now has three spiders,” which are America, the European Union, and China (2008, January 27, p. 64). Thus, Western hegemony is divided between America and the European Union, while the Islamic countries are part of the “key second-world countries” – swing states that will decide the balance of power in the twenty-first century (pp. xxiv–xxv, pp. 37–39).

Significantly, since 1996 (when Bin Laden first declared war on America for stationing troops in Saudi Arabia), al-Qaeda has taken pains to be more conciliatory “towards European publics it believes can be peeled away from association with the U.S.”

²²*Shari'a* is Islamic law, drawn from Revelation and Wisdom (Qur'an and *Sunna/Hadith* or Traditions), as well as other authorities (such as *ijma* or consensus and analogy). But the Islamic legal tradition is far from unified. The Prophet prohibited killing women and children, but others, like Shāfi'i said they could be slain, along with other categories, such as the infirm, old, and hermits (Peters 2005, pp. 33–35).

²³The U.S. Department of State, in its annual report of 1999, classified “money and the Internet,” along with “human rights,” as the “three universal languages of mankind” (Pagden 2003, p. 193).

(Bobbitt, 2008, p. 79). Khanna notes that while Max Weber and Karl Marx disparaged the East as lacking the elements for “organizational” success, Oswald Spengler correctly understood that “mankind both lives and thinks in unique cultural systems, with Western ideals neither transferable nor relevant” everywhere (2008, January 27, p. 62). In the future, we may be bypassed rather than opposed. The new global economy and geopolitics, not cultural dissonance, underlie the conflicts of the twenty-first century.²⁴ Winning on those grounds means winning the “hearts and minds” of the Muslim world, and that is why Sir Michael Howard insists we should not be thinking of our engagement as a “war” at all (2002).

Just War Theory in Historical Perspective

The plethora of opinions about what constitutes “just war” played an important part in the “war of ideas” that the Bush administration pinpointed early on as a virtual battlefield in its strategy papers.²⁵ But most contemporary discussions have distorted the just war tradition by invoking the moral legitimacy of medieval theologians such as Augustine and Thomas Aquinas, without sufficiently distinguishing the framework of their discussion from the legalism and expediency advanced by early modern proponents.

In a 2004 article,²⁶ Michael Walzer, a leading contemporary just war theorist, proposed to amplify the traditional discussion by adding a just peace (*jus post bellum*) to the two traditional categories of just conditions for war (*jus ad bellum*) and just conduct in war (*jus in bello*), which he says were “first worked out by Catholic philosophers and jurists in the Middle Ages” (2004, p. xiii). History is compressed here as Walzer seems to posit a direct arc from Augustine in the late fourth or early fifth century to Aquinas in the fourteenth century. By “jurists in the Middle Ages,” he presumably means the canon lawyers. But he omits the early modern Thomists, as well as any mention of the secular early modern jurists, who should be our focus. And, as Brian Orend (2006) has shown, Immanuel Kant already laid the groundwork for the peacemaking aspect of war (*jus post bellum*), with his idea of the transnational or “cosmopolitan man” as the foundation of human identity. Without detracting from the value of Walzer’s work, a historical look at the just war tradition reveals two distinct contexts of discussion, one moralistic, grounded in theological values and the other, legalistic, concerned mainly with political legitimacy (excepting Kant).

²⁴“The unifying element among the groups to which al-Qaeda outsources its operations is not a mystical, retrograde form of Islam but a shared hatred of the U.S” (Bobbitt 2008, p. 83).

²⁵In Part III of the September 20, 2002 National Security Strategy, the Bush administration announced a “war of ideas to win the battle against international terrorism,” including “kindl[ing] the hopes and aspirations of freedom of those in societies ruled by the sponsors of global terrorism” (U.S. State Department 2002). See also the 2003 National Counterterrorism Strategy (U.S. State Department 2003, February 14).

²⁶Walzer, 2004a, p. xiii. Walzer’s 2004 article, entitled “To war or not to war” was subsequently published as the Introduction to *Arguing About War*.

The Bush administration was a true heir to the political-legalistic framework, but wanted always to be perceived as waging a moral “war,” whether this was aimed at al-Qaeda or Saddam Hussein’s Iraq. It was aided in this duplicity by the legitimate discussions of Walzer and others who too easily conflated the moral and political traditions, allowing for the moral patina of one to rub off on the expediency of the other.²⁷ The Bush administration’s pervasive rhetoric of morality enveloped a callous legalism and created a context for certain troubling events, particularly at Abu Ghraib. How the rhetoric of moral outrage helped shape the Iraqi invasion is evident from the news headlines touting the successful bombing raids as an exercise in “Shock and Awe.”²⁸ The rhetorical value of just war discourse was integral to what went wrong at Abu Ghraib.

Just war theories from Augustine through Grotius fall into three main categories: (1) *theological* or *scholastic*, as represented by Thomas Aquinas (c. 1224–1274) and the Spanish Thomists of Salamanca, including Francisco de Vitoria (1492/1493–1546); (2) *legalistic*, as represented by Alberico Gentili (*De iure belli* 1588, 1589; revised 1598; printed 1612) and Hugo Grotius (1583–1645); and (3) *humanistic* or *expedient*, as represented by Gentili and Niccolò Machiavelli (1469–1527).²⁹

Contemporary commentators typically present just war theory as a unified tradition by distilling the common concerns of just war theorists into lists of requirements for just war (*jus ad bellum*). These lists homogenize the tradition and blur significant differences. Generally, the following conditions are cited, but not necessarily in the order given here³⁰ (Fiala 2007; Guthrie & Quinlan 2007; Patterson 2007;

²⁷ Walzer calls just war theory a “common moral language” and a “critical theory” that is “doubly critical – of war’s occasions and its conduct” (2004a, pp. 7–8).

²⁸ Bonnie Mann offers an intelligent feminist critique of the Iraqi invasion, and she argues that the “Shock and Awe” language, as well as the 1996 document published by the National Defense University on which it was based, established a basis for the “spectacle” of masculine domination, which played out finally in the “culture of terror” at Abu Ghraib (Mann 2006, pp. 154–159).

²⁹ Of course, just war theories do not end with Gentili and Grotius, but this chapter is not concerned with the entire just war tradition, only with pinpointing a crucial turning point when pre-emptive war was justified. Legalism prevailed into the seventeenth century, when it “bifurcated into two sub-traditions that prioritized natural law and positive law respectively,” the former represented by Samuel von Pufendorf (1632–1694) and Christian Wolff (1679–1754), and the latter, by Emmerich de Vattel (*Le Droit de gens* 1758) and Cornelius van Bynkershoek (1673–1743) (Bellamy 2006b, pp. 76–82). Immanuel Kant (1724–1804) is credited with adding *jus post bellum*, the making of a just peace, to the tradition (Orend 2006, p. 20). Interestingly, with his idea of the “cosmopolitan man” and universal rights (*ius cosmopolitanum*), Kant was a forerunner of modern and post-modern ideas of human transnational identity, which for him were rooted in natural law, the basis also of Aquinas’s ideas of just war. But there is a difference between Kant, who starts with a notion of human nature (as does Grotius and others), and today’s rights theorists. “Whereas both the scholastics [theologians] and their Hobbesian and Grotian opponents had begun with a notion of humanity from which they had deduced what their natural rights might be, the human-rights charters begin with the notion of rights in order to arrive at the notion of what a person might be” (Pagden 2003, pp. 188, 192).

³⁰ For an interesting treatment of the just war problem from the perspective of breaking rules rather than following rules, see Bellamy 2006a.

Stover 2004; Wester 2004): (1) legitimate authority; (2) just cause; (3) right intention; (4) proportionality; (5) war as a last resort; and (6) likelihood of success. Two additional conditions speak to just conduct in war (*jus in bello*): (1) discrimination or care towards noncombatants; and (2) proportionality of force.

The first three conditions for just war were enunciated by Aquinas, and he touched on the fourth in relation to his general discussion of self-defense (2002, pp. 262–266).³¹ Aquinas was one of the few theorists who did not reason very specifically within a concrete historical set of facts, and his formulations, therefore, read like axioms. He restricted the right to wage war to the “sovereign” and the reasons for waging war to self-defense or to regaining what was wrongfully taken. Aquinas and later Thomists thought that killing, and hence war, should be avoided if possible, nor did they support any notion of pre-emptive self-defense. For how could one repay an injury not yet inflicted? While Aquinas argued generally for a response proportional to the injury received, Vitoria added the conditions of discriminatory and proportional use of force during war, because human beings often erred about which side was right (1991, pp. 304, 320–321).³²

In the theological view, a just war is undertaken solely to right a wrong, while right from wrong is discernible by correct reason.³³ But no theologian ever claimed that any particular just war was just by divine standards – and this was always Augustine’s main point.³⁴ Just war theories of every persuasion were generally responses to specific acts of aggression or coercion that called for justification or condemnation,³⁵ and these theories aimed only at containing violence by moral standards and/or the law of nations (*ius gentium*). They are not moral endorsements of any kind. Within the theological framework, war is a strictly political undertaking, which can be conducted with varying degrees of morality.

³¹ *Summa theologiae* IIaIIae 64 (On homicide).

³² See Bellamy 2006b, pp. 50–55; Panizza, 2005, October 17, p. 29.

³³ Diego Panizza argues convincingly that the belief in right reason marks a significant difference between the view of the theologians and the legalist–humanist view of Alberico Gentili. Diego Panizza (p. 15).

³⁴ “[W]e must ascribe to the true God alone the power to grant kingdoms and empires. He it is who gives happiness in the kingdom of heaven only to the good, but grants earthly kingdoms both to the good and to the evil, in accordance with his pleasure” (Augustine 1972, p. 215). “The same may be said of the duration of wars. It rests with the decision of God in his just judgment and mercy either to afflict or console mankind” (Augustine 1972, p. 216). While Augustine’s views on war are too complex to be treated of here, he did not think of wars in terms of human justice, but of divine will and justice.

³⁵ For example, Augustine considered the use of coercive force in relation to the heretics of his time. Vitoria wrote regarding the legitimacy of the Spanish conquests in the Americas, while Grotius wrote the *De Indis* to defend the seizure in 1602 by a private Dutch citizen of a Portuguese trading ship, with goods valued at the “total annual expenditure of the English government at the time” (Tuck 2001, pp. 73–75, 79–94). Trained at the University of Perugia, Gentili was a Professor of Civil Law at Oxford, and his work was a response to the Spanish Thomists, as well as to the imperialistic threats posed by the Spaniards and Turks (Panizza 2005, October 17, pp. 6–9, 22).

Still, many contemporary commentators have associated the just war parameters with a moral endorsement of war.³⁶ This valuation is suggested by the very phrase “just war” and by the oft-noted fact that just war formulations originated with the theologians. What is said less often is that just war theorizing is part of a long tradition of Christian humanism, marked by very un-Christian acts of coercion, aggression, and imperialistic expansion.³⁷ While most items on typical lists may be traced to Aquinas’s language, the just war tradition has long since been assimilated to the early modern outlook of legalistic thinkers such as Gentili and Grotius.³⁸ The legalists accepted the same basic premises as the theologians, but adopted an openly political framework of analysis.

One telling point is the inclusion on many contemporary lists of the condition of likelihood of success. No theologian ever considered success a factor. Likelihood of success was added by Grotius, a major proponent of the legalistic school (Grotius 1925, pp. 574–575).³⁹ Thus, the true bent of contemporary just war doctrine is revealed as diverging from the moral proportionality of the Thomists and inclining towards the legalists’ and Machiavelli’s practical values of success and statecraft.

Grotius, and Gentili before him, thought of war in precisely the way that has framed both the “war against terrorism” and the Iraqi invasion, where “right” is flexibly construed within both a legalistic and political framework. But Grotius, unlike Gentili, did not support pre-emptive defense; and Grotius also subscribed to the “unilateral” justice of the theologians, in which only one side can be right (Panizza, 2005, p.17). The just war doctrine applied by the United States in the wake of September 11 had its roots, as we shall see, in Gentili’s legalistic and expedient humanism, not in the moral scholasticism of the theologians, nor in Grotius’s idea of the law of nations. The Bush administration followed the rule-breaking dictates of Gentili’s expediency, but it also wanted to portray itself on the right side of a unilateral and absolute justice.

³⁶ Contemporary just war theorists of every stripe fall into the trap of shading “just war” with morality. James Turner Johnson called the “just war tradition a major moral tradition of Western culture, shaped by both religious and nonreligious forces and taking shape in both religious and nonreligious forms within the culture,” and that is why he thinks it disintegrated after the Reformation, quoted in Hensel 2008, p. 79. Walzer, with reference to the 2003 Iraqi invasion, asks: “So, is this a just war? This question...asks only if it is morally defensible: just or unjust” (2004a, p. 160). Andrew Fiala is more precise. While focusing “on the morality of the idea that war should be employed as a means for advancing the ideal of democratization,” and “approach[ing] this debate as primarily a question of just war theory,” he nevertheless adds that “the just war tradition has been reluctant to approve of wars that are fought for such ideological purposes.” Fiala (2007, pp. 33, 40). Alex Bellamy is also clear that the “currency that matters most in politics is neither ethics nor law; it is legitimacy” (2006a, p. 14), and that concern, not plain morality, has always been the crux of just war theory, even among theologians.

³⁷ Brian C. Lockey has shown this admirably in Renaissance England, where natural law tradition, the underpinning of the Thomistic just war theorists, was also the foundation for imperialistic expansionism (2006, pp. 145–146, 158–159). See also Pagden.

³⁸ Gentili was a professor of the civil law, while Grotius was a humanist without specific legal training.

³⁹ I owe this observation to Bellamy (2006b, p. 73) and Orend (p. 18).

Just War and States: A Pivotal Historical Moment

In an effort to understand the relationship between just war theory and the war on terror, we should note the historical moment when the pre-emptive strike was legitimated, a moment coinciding with the emergence of the inchoate nation-state in the mid-sixteenth century. This moment is marked by Alberico Gentili's *The Law of War* (*De iure belli*), written in 1588 and revised in 1598. In Bobbitt's schema, this is also the moment when the Machiavellian "princely state" passed into the "kingly state" on its way to becoming the contemporary nation-state (2008, pp. 189–191). Gentili's work, significantly, coincides with the modern shift towards a political and legalistic view of war and away from the theological framework. While Richard Tuck ascribes this modern turning point to Hugo Grotius, writing in the period from 1608 to 1625 (*De Indis* and *De iure belli ac pacis*) (1925, pp. 16–50, 78–108), Diego Panizza argues persuasively that Gentili, and not Grotius, made the decisive break with the theological Spanish school represented by Vitoria and other Thomists (2005, pp. 12–13 & 9n.).⁴⁰

The evolution of the modern state involves a shift in war theory from a moral to a practical schema, from reasons of injustice (*iniuria*) to reasons of state, and from honor to expediency – to use the title of one of Michel de Montaigne's essays ("The Useful and the Honorable"). This means, in essence, that states – not individuals, and not Aquinas's "sovereign" – make war with the paramount aims of self-defense, self-preservation, and imperialistic expansion. The decisive paradigmatic shift from a moral to a legalistic framework, which started in the late sixteenth century with Gentili, was precisely the framework in which the 2003 Iraqi war was initiated and conducted, but this historical precedent went largely unrecognized in contemporary scholarly discussions. Instead, "Operation Iraqi Freedom" was rationalized in the mass media by allusions to the just war tradition originating in Augustine, Aquinas, and the theological framework. In this atmosphere, the Bush administration appropriated the mantle of morality with respect to the right to wage the Iraqi war, while actually conducting both the "war on terrorism" and "Operation Iraqi Freedom" through purely expedient and legalistic moves. To this end, administration spokesmen and policymakers were assisted, wittingly or unwittingly, by just war commentators such as Jean Bethke Elshtain (2003, p. 6) and Michael Walzer (2004a, p. 160), who seamlessly knit together the moral-theological and political-legalistic paradigms, allowing the moral perspective of one to be imputed to the statecraft of the other.

⁴⁰ An earlier generation of scholars also debated about who was the father of international law. James Brown Scott accorded this honor to Francisco de Vitoria (*Relectio de Indis* and *Relectio de iure belli*, 1539), while Arthur Nussbaum agrees with Richard Tuck in according the honor to Hugo Grotius (*De Indis* 1609; *De iure belli ac pacis* 1625) (Bellamy 2006b, p. 50). Thomas Erskine Holland in 1877 was the first to suggest Alberico Gentili (Panizza 2005, October 17, pp. 5 & 2n).

Alberico Gentili's Legalistic Dilution of Moral Accountability

When the United States and coalition forces invaded Iraq in 2003 as part of the war on terror, talk abounded of “just” and “unjust” war. Commentators focused on the legitimacy of the pre-emptive strike – that is, attacking a purported enemy out of fear of an imminent attack. Augustine, Aquinas, the Thomists, and Grotius never allowed for pre-emptive strikes. For them, the only just war was one to right a wrong (*iniuria*) already committed. Augustine lamented that “it is the injustice of the opposing side that lays on the wise man the duty of waging wars; and this injustice is assuredly to be deplored by a human being, since it is the injustice of human beings” (1972, p. 862, Bk. XIX.7). Under no condition was pre-emptive war allowed. The first foundation of just war doctrine was the natural law principle of being able to repel force with force (*Vim vi repellere licet*), a principle passed down from the Roman legists to the Middle Ages and beyond through its incorporation in Gratian’s *Decretum*, c. 1140 (1993, p. 7, Dist. 1 c. 7). This makes defensive war the most just of wars, followed secondly by an offensive war undertaken to redress a prior wrong.

Allowing or not allowing pre-emptive strikes is the benchmark difference between the rationale of Gentili and the views of other legalists, as well as the theologians (Panizza 2005, October 17, pp. 23–28). Panizza points to two other significant differences between Gentili and the Spanish Thomists whom Gentili openly attacked (pp. 11–20, 29–38). First, Gentili thought of war precisely in legalistic terms, as a “duel” or judicial process between two equals, each of whom has an equally plausible claim. For the Spanish theologians, war was, as it was for Augustine, the “unilateral” execution of justice (righting a wrong) (Panizza, pp. 29–38). Second, Gentili viewed war as a process of adjudication to be decided by “bilateral justice” rather than as a conflict between right and wrong (Gentili 1933, p. 32; Panizza, p. 19). In Gentili’s case what is right is decided by the outcome of the war, while from Aquinas’s perspective what is right is assumed to be *clear beforehand* to human reason.

Vitoria, a Spanish Thomist, was less optimistic. He agreed with Gentili that two parties could go to war, each sincerely believing himself to be in the right. Each would, therefore, be exculpated of any injustice, because one side would be suffering from “invincible ignorance.” Otherwise, there could be no just wars, for “[i]f it is agreed that both parties have right and justice on their side, they cannot lawfully fight each other, either offensively or defensively,” except out of ignorance (Vitoria 1991, pp. 16–17).

Vitoria was concerned with the rightness of intention, but Gentili repudiated morality as a factor in war. His idea of justice was analogous to a courtroom trial. “Those who contend in the litigation [in a court] justly, that is to say, on a plausible ground, either as defendants or plaintiffs, and lose their case...are not judged guilty of injustice [for contending]. Why should the decision be different in this kind of dispute and in a contest of arms?” (Gentili 1933, p. 32). Gentili subtracts moral right and wrong from the warring sides, because, as a humanist skeptic, he does not believe in the capacity of human reason to know right from wrong invincibly. In fact, the opposite is true:

no one can ever know which side is right. Only the outcome of war determines the side of right, and that “right” is a practical outcome, not necessarily a moral one.

Because war is permissibly undertaken on the basis of imperfect human knowledge, pre-emptive strikes, based on subjective fear and plain expediency, are sanctioned by Gentili. “I call it a defense dictated by expediency,” he says, “when we make war through fear that we may ourselves be attacked” (pp. 61–66). Grotius, siding with Vitoria, condemned Gentili’s view of pre-emptive strikes – mounted for the sole purpose of weakening a powerful neighbor.⁴¹ To Grotius, a pre-emptive war was one undertaken “on grounds of expediency, not of justice” (Grotius, p. 184), and fear of future attack was not a legitimate reason for war (pp. 173–174). Gentili’s twin grounds of expediency and subjective fear needed no justification other than the perception of threat and the calculation of advantage, for they are ultimately justified by reasons of state. And what are those reasons? The state’s right of self-preservation. Thus, the perceived threat of WMDs in Iraq would have sufficed for Gentili, although perhaps not without some credible evidence. This differs from the theologians’ moral framework for war, rooted in the *necessary* repelling of force with force or the *just* righting of wrongs. Gentili’s idea of just war equated war not with moral intentions but with might and expediency. For historical authority to justify the Iraqi invasion, Gentili, not Aquinas and Augustine, should have been invoked.

Gentili’s Legacy: The Strike in Yemen and “Unlawful Combatants”

Gentili’s paradigm of utterly practical statecraft constituted his prescient understanding of international power relations and war, and it is as relevant to today’s market-state as it was to the nascent states of his day. As Panizza shows, one of the most striking consequences of Gentili’s approach is that state security trumps any sense of absolute justice. For example, Vitoria spoke of “proportion” and “moderation” – and even of “compassion” – in exacting punishment and restitution from the conquered.⁴² Gentili’s overriding concern with security and a permanent peace, however, led him to jettison the principles of “moderation” and “proportionality.” Against those who would oppose the victor’s unlimited right of conquest, Gentili asserts: “I reply that such things [namely the seizure of lands] are just for princes, since in that way they provide for their own victory and security by making their enemies weaker and themselves stronger; so that the enemy may dare less in the future or have less power, and that they themselves may have less cause to fear the same dangers” (Gentili 1933, pp. 304–305).⁴³

⁴¹ In this sense, not much difference exists between pre-emptive and preventive war, the distinction Walzer proposed in his analysis of the 2003 Iraqi invasion (2004a, pp. 146–148).

⁴² I have reproduced only the broad outlines of Panizza’s extensive and convincing treatment of the differences between Gentili and the Spanish school (2005, October 17, pp. 28–39).

⁴³ See Panizza (p. 34).

Gentili's privileging of state security over Vitoria's moral values of "proportion" and "moderation" may have emerged from a discussion of "Exacting Tribute and Lands from the Vanquished," but the framework of that antiquated discussion illuminates the debate surrounding one of the most infamous incidents in the war on terror: the United States' missile attack in 2002 on a car traveling through Yemen that was thought to contain al-Qaeda operatives. In that attack, six people were killed, including an American citizen. If we consider the Yemeni strike an act of war, then the law of armed conflict should come into play. And that law, in the words of one law professor, mandates that "military violence must seek to avoid 'unnecessary' suffering, and violence must be in accordance with the principles of *proportionality* and *discrimination* [as to lawful targets], or else it is not immunized" (Brooks 2004, p. 693). War immunity means that actions, otherwise considered criminal, are exonerated, such as when soldiers kill. What guarantees immunity? One answer: the application of Vitoria's moral principles of care, when acting as an agent of the state. But that was not the administration's response.

Was the Yemeni attack subsequently justified from the perspective of the morality or the expediency of war? Interestingly, in defending the Yemeni attack, the Bush administration did not argue, as it could have, that it had observed proper proportion and discrimination in targeting the "enemy" with little or no collateral damage. National Security Advisor Condoleezza Rice called the Yemen strike a "different battlefield[]" in a "new kind of war" (Witt 2002, November 24), while other officials argued on the grounds of pre-emptive self-defense, because one of the occupants of the car, Ali Qaed Sinan al-Harithi, had assisted in the *USS Cole* attack.⁴⁴ Thus, the administration did not align itself with arguments historically belonging to the Thomistic morality of Vitoria and others, but with Gentili's rationale of state security. Taking the strict view of international law, Amnesty International called the missile strike a "summary execution," because a state such as the United States could not declare war on a "non-state actor...should the armed group not form part of the armed forces of a Party to the Geneva Conventions" (Amnesty International 2003, September 23, p. 23). Gentili would have disagreed, because for him the paramount law of war was security. But the strictures of legality are not without ambiguity either, as we shall see.

Not all the wars of the twentieth and twenty-first centuries have been clearly marked by the traditional boundaries of war. For example, Aquinas defined a just war as one: (1) waged by a sovereign authority and not a "private individual," (2) for a just cause (righting wrongs), and (3) with the right intentions (not for personal motives).⁴⁵ By these standards, al-Qaeda cannot wage war, because it has no "sovereign authority," that is, no territory, no citizens, and no identifiable combat forces. While accepting al-Qaeda's right to wage war, the Bush administration has also argued, rather disingenuously, that because al-Qaeda is not a signatory "party" to

⁴⁴ Dana Priest. CIA killed U.S. citizen in Yemen missile strike; action's legality, effectiveness questioned. *Washington Post*, November 8, 2002: A1. See the excellent discussion in Brooks (pp. 720–724).

⁴⁵ Aquinas, *Summa Theologiae* 2a2ae.40 (On War) (2002, pp. 239–247).

the four Geneva Conventions, its combatants are not entitled to the legal protections of the Geneva Conventions' covenants against torture and "degrading treatment."⁴⁶ These were the very same legal grounds ironically – al-Qaeda's not being a signatory "party" to the Geneva Conventions – on which Amnesty International had rejected the Yemeni missile strike as a legitimate act of war, because it did not target a legitimate state adversary. Arguing that al-Qaeda's members have no standing as soldiers or prisoners of war, even though we are at "war" with them, the Bush administration has created a new "grey" category of "unlawful combatants" and a new extraterritorial prison in Guantánamo Bay to hold them, in a bold move to circumvent the laws regulating the treatment of both military and civilian detainees. In its most expansive form, the term "unlawful combatants" includes all those who can be construed as direct or indirect supporters, agents, or members of al-Qaeda, including Saddam Hussein's Iraq, the detainees at Guantánamo Bay, and the prisoners at Abu Ghraib.⁴⁷ In this "war" without traditional boundary lines, law is confounded by new definitions arbitrarily changing the legal status of the enemy and detainee. Nevertheless, many commentators have condemned the Bush administration's stance on torture and "degrading treatment" as plainly illegal. For whatever the legal framework and whatever the status of the detainee, "international law and U.S. treaty commitments prohibit the use of torture and other forms of cruel, inhuman, and degrading treatment" (Brooks 2004, p. 683).

⁴⁶Brooks (2004, pp. 677–685). The four Geneva Conventions are: (1) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 3, 6 U.S.T.3114, 3116–18, 75 U.N.T.S. 31, 32–34; (2) Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, art. 3, 6 U.S.T. 3217, 3220–22, 75 U.N.T.S. 85, 86–88; (3) Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3316, 3318–3320, 75 U.N.T.S. 135, 136–138; and (4) Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3516, 3518–3520, 75 U.N.T.S. 287, 288–290. Common Article 3 is contained in all four Conventions, and it prohibits "cruel treatment and torture" as well as "outrages upon personal dignity, in particular, humiliating and degrading treatment." Bobbitt notes that the McCain amendment, Department of Defense Appropriations Act, 2006, Pub. L. No. 109–148, sec. 1003, 119 Stat. 2680, 2739 (2005), sets a dangerous precedent in distinguishing cruel and degrading treatment from torture. This distinction facilitates a "necessity" exemption with regard to cruel and degrading treatment, which the U.S. Supreme Court has recognized in precedents that establish the benchmark for cruel and degrading treatment as a "shocks the conscience" test, which might be absent in cases of state necessity (Bobbitt 2008, pp. 370 & 54n).

⁴⁷Addressing a Joint Session of Congress, Bush declared: "We will drive [terrorists] from place to place until there is no refuge or no rest. And we will pursue nations that provide aid or safe haven to terrorism. Every nation in every region now has a decision to make: Either you are with us or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime" (2001, September 20).

Abu Ghraib Prison: Between Crime and War

Whereas al-Qaeda has “something in common with criminal gangs and something in common with armies” (Brooks 2004, p. 718), this does not apply to Iraq. “Operation Iraqi Freedom” targeted a sovereign state, and Abu Ghraib, a Baghdad prison, was part of that military arena. Both the United States and Iraq signed the Geneva Conventions, although not the two 1977 Protocols,⁴⁸ so presumably these Conventions applied to the Iraqi nationals held at Abu Ghraib.

Abu Ghraib was a tremendous defeat in the war for “hearts and minds,” because it diminished the United States’ moral standing with no corresponding gain on the side of state security. What went wrong? Abu Ghraib was the result of the Bush administration’s heightened discourse of “securitization,”⁴⁹ which, when combined with absolutist moral claims and rhetorical maneuvers, lowered the bar of moral conduct.⁵⁰ The Bush administration’s rhetoric of “security,” morality, and fear was a way of stifling dissent and escaping accountability. “What is being enacted [by such rhetoric demonizing the enemy] is a subtle but effective game of defence against possible dissent with respect to plans preventatively inserted in governmental agenda” (Ferrari 2007, p. 606).⁵¹ This is the pre-emptive strike played out at the rhetorical level – as evidenced by Bush’s linking of Iraq and al-Qaeda as early as January 2002.⁵² With rationales similar to those justifying the Yemeni strike and

⁴⁸ See American Bar Association Report to the House of Delegates 2004, in *The Torture Papers* (2005, pp. 1140–1146).

⁴⁹ The discourse of “securitization,” as understood by political scientists, is “essentially an inter-subjective process. The senses of threat, vulnerability, and (in)security are socially constructed rather than objectively present or absent” (Buzan et al. 1998, p. 57). In fact, “securitization” is a discursive enterprise whereby the “securitizing actors” or spokespersons of a “referent object,” often a state, attempt to convince an “audience,” such as citizens, of the need to “accept exceptional procedures because of the specific security nature [threat] of some issue” (pp. 40–41). See also Vetlesen (2008, pp. 64–66).

⁵⁰ “In the post-9/11 period, the eagerness with which governments around the world have adopted ‘security’ measures that can render them less accountable to their own people...is indeed troubling” (Andreopoulos 2006a, pp. 155–156).

⁵¹ In this context where “the real justification is not the reason for the war, but the subject that is constituted through it...all critique is an attack on the state, all dissent becomes a threat to identity, to self-expression, and international outcry becomes an irritating misunderstanding of who we are” (Mann 2006, p. 160).

⁵² President Bush, in his January 29, 2002 State of the Union Address, clearly linked Iraq with both terrorism and WMDs: “Iraq continues to flaunt its hostility toward America and to support terror. The Iraqi regime has plotted to develop anthrax and nerve gas and nuclear weapons for over a decade.... This is a regime that has something to hide from the civilized world.” After suggesting a number of links between Iraq and al-Qaeda in an October 7, 2002, speech, he then said: “Saddam Hussein’s regime gleefully celebrated the terrorist attacks on America. Iraq could decide on any given day to provide a biological or chemical weapon to a terrorist group or individual terrorists.” The role of rhetoric has been recognized as a significant factor in justifying the Iraqi invasion (Burke 2004). Ferrari quotes P.A. Chilton to the effect that “what constitutes a legitimate concept of ‘war’ can only be established [linguistically]” (2007, pp. 622 & 8n). See P.A. Chilton (1997, p. 175).

Guantánamo Bay, the administration stripped both Iraq and Abu Ghraib of nation-state status and turned them into “grey” zones of legality.

Traditional wars are marked by clear geopolitical, administrative, and human boundaries, which determine the rules applicable to combatants, civilians, MPs, MIs, and prisoners of war (POWs). All of these boundaries were erased in “Operation Iraqi Freedom” by acts that rewrote, circumvented, or blurred the rules of war conduct. As one Bush administration official said: “We’re an empire now, and when we act, we create our own reality” (Suskind 2004, October 17).⁵³

First, geopolitical boundaries were undone by the physical invasion itself. After Saddam Hussein’s government was toppled, the conditions of Bobbitt’s “market-state” prevailed. Iraq was no longer self-governing (Danner 2004, pp. 54–56). The occupying forces, under international law, had no legal standing to govern, but were obliged to observe the Geneva Conventions (Kramer et al. 2005, pp. 67–68).⁵⁴ Instead, they appropriated for the Multinational Force (MNF) temporary sovereignty over part of Iraqi territory – the so-called “Green Zone.” Second, new law was made by rhetorical fiat. Order 17, signed in June 2004 by Paul Bremer, the head of the Coalition Provisional Authority (CPA), decreed that all civilian contractors in Iraq were immunized from prosecution in Iraqi courts “with respect to acts performed by them pursuant to the terms and conditions of a Contract” with the CPA or any “Sending State.”⁵⁵ This plainly contradicts international law.

In a June 2008 decision, *Munaf v. Geren*, 128 S. Ct. 2207 (2008), the U.S. Supreme Court reiterated that two American citizens held at Camp Cropper in Iraq for crimes committed on Iraqi soil were fully subject to the Iraqi legal process, as mandated by international law.⁵⁶ The *Munaf* Court stressed that nations have a “‘sovereign right to try and punish [American citizens] for offenses committed within their borders,’ unless they ‘have relinquished [their] jurisdiction’ to do so” (*Id.* at 2222, quoting *Kinsella v. Krueger*, 351 U.S. 470, 479 (1956); alterations in original). Of course, the two petitioners in *Munaf* were not shielded

⁵³For an analysis, see Michalowski (2009, p. 310)

⁵⁴As an occupying force, the United States and the CPA were also obliged, under international law, to observe the Hague Regulations of 1907, and to assure “public safety and order,” while respecting the “lives and property of civilians...at all times” (Kramer et al. 2005, p. 67).

⁵⁵CPA Order Number 17 (Revised), sec. 4 (3). Paralleling this are infringements on the rights of United States citizens, such as those authorized by the Patriot Act, and protections granted domestic companies. On July 10, 2008, President Bush signed into law the Foreign Intelligence Surveillance Act Amendments of 2008, which provides sweeping immunities from lawsuits to telecommunications companies for providing the federal government with information on their customers, without any judicial oversight. The Obama administration supports this immunity.

⁵⁶In *Munaf*, the Court noted: “The habeas petitioners do not dispute that they voluntarily traveled to Iraq...or that they are alleged to have committed serious crimes in Iraq.... Given these facts, our cases make clear that Iraq has a sovereign right to prosecute [petitioners] for crimes committed on its soil” 128 S. Ct. at 2221.

by any contract with the CPA, unlike the six “hired guns” from Blackwater who shot indiscriminately into a Baghdad crowd and killed 17 civilians in September 2007.⁵⁷

Not only was Iraq’s sovereignty over criminal matters infringed by Order 17, but under the “market-state” conditions of Iraq’s lost geopolitical and national identity, other CPA orders issued in 2003 “rewrote Iraqi law to make the country available for foreign investment and ownership,” with United States companies, such as Bechtel and Halliburton, reaping the benefits of this “privatization” (Kramer et al., 2005, p. 69). At Abu Ghraib, even more unscrupulous opportunities were provided.

Abu Ghraib had been an infamous Iraqi prison under Saddam Hussein. During the invasion, it became a visible emblem of the erasure of boundaries in the Iraqi invasion as a whole. Located outside the field of combat, but shelled daily by mortar fire, it was situated in a grey zone between combat and noncombat. Neither a facility for POWs nor for ordinary criminals, its population included a mix of security detainees, hardened criminals, and civilian suspects who had been rounded up in indiscriminate “sweeps” (Kingsbury, 2008, May 20).

At varying times, Abu Ghraib contained anywhere from 2,000 to 7,000 inmates. One estimate is that 19,000 prisoners passed through Abu Ghraib between 2004 and 2006 (Hamm, 2007, p. 282). Army rules mandate that for every 4,000 POWs, one MP battalion be assigned. But at Abu Ghraib, a single battalion was being asked to supervise 7,000 detainees. Thus, if Abu Ghraib had been a regular POW camp, it would have been severely understaffed, with only about one-half of the needed staff (Taguba Report, 2004, p. 433). But in actuality the problem was much worse.

Because Abu Ghraib’s detainees were civilians, not only did MPs need a higher grade of training to handle them,⁵⁸ but the ratio of guards to detainees also needed to be higher (Mastroianni & Reed 2006, p. 243). Most MPs at Abu Ghraib were lacking even “basic” guard duty training, not to mention the more specialized training to handle non-POW populations.⁵⁹ MPs probably would have found POWs relatively unproblematic to guard, because of their identity as fellow soldiers, “who clearly are entitled to humane treatment” (Mastroianni & Reed 2006, p. 243).

⁵⁷ See Tom Engelhart (2007, September 24). As of November 2008, the Pentagon had 163,000 contractors in Iraq, while the State Department employed around 5500 (Lee 2008, November 20). On November 27, 2008, the Iraqi Parliament approved a Status of Forces Agreement (SOFA) by a vote of 149 to 35, which rescinded the immunities granted to private contractors by Order 17. Previously, the Iraqi Cabinet and the White House had approved the same measures (Rubin 2007, October 31).

⁵⁸ MPs staffing military correctional facilities, such as the one at Fort Leavenworth, require a higher specialty classification, and more specialized training, than MPs guarding POWs, that is, a Military Occupational Safety (MOS) classification of 95C, as compared to 95B for the latter. An MOS of 95C was needed at Abu Ghraib, which was not a POW prison (Mastroianni & Reed 2006, p. 243). But the MPs at Abu Ghraib apparently had neither kind of training: “I find that prior to its deployment to Iraq for Operation Iraqi Freedom, the 320th MP battalion and the 372nd MP Company had received no training in detention/internment operations” (Taguba Report, 2004, p. 419).

⁵⁹ “There is abundant evidence...that soldiers throughout the 800th MP Brigade were not proficient in their basic MOS skills” (Taguba Report, 2004, p. 433).

But in view of the disruptions occasioned by the invasion, Abu Ghraib's inmate population was not shielded by any recognizable identity either as enemy POWs or as noncombatant citizens – or even as human beings.

Many analyses of Abu Ghraib cite administrative faults, and these fall into two broad categories:⁶⁰ the “few bad apples” theory, favored by both the Bush administration and the army, which blames low-level soldiers; and the institutional theories, blaming military and prison organizational elements, as well as failures in leadership.⁶¹ In a CBS interview on *60 Minutes II* in April 2004, shortly after the scandal broke, Brig. Gen. Mark Kimmitt, deputy director of coalition operations in Iraq, said: “[Americans] need to understand that is not the Army. The Army is a values-based organization. We live by our values. Some of our soldiers every day die by our values, and these acts that you see in these pictures may reflect the actions of individuals, but by God, it doesn't reflect my army” (2004, April 28). The “few bad apples” theory targets individuals in their personal capacities and not as agents of the state.

In a text cited by contemporary just war commentators, Augustine suggested that a soldier may kill as an “agent” of war, while an ordinary person may not be justified in killing even a highway robber or rapist.⁶² This distinction hinges on the difference between one's official and personal identities. Preserving the common weal is a necessity, while preserving one's own life or chastity is optional and, therefore, not exculpable under law.

Whether an individual is acting in an official or personal capacity has legal and moral implications. Singling out and punishing the low-ranking MPs directly involved in the Abu Ghraib scandal, without also punishing their superiors in the chain of command, means that those soldiers were being held accountable in their personal and not official capacities. Only one high-level officer was ever disciplined, and that was Army Reserve Brig. Gen. Janis Karpinski, a career Army reservist, who took over the 800th Military Police Brigade in June 2003 and was in charge of Abu Ghraib when the abuses occurred.⁶³ In May 2005, after a lengthy investigation, Karpinski was demoted and relieved of her command. Four other top officers were cleared of any wrongdoing (CNN 2005, May 5), although Col. Thomas Pappas was reprimanded and fined \$8,000 (Dishneau 2007, January 31). In August 2007, three years after the scandal broke, Lt. Col. Steven Jordan, the only other

⁶⁰ Hamm lists three theories: (1) the few “bad apples”; (2) Zimbardo's theory that stress brings out the “latent torturer[.]” in all of us; and (3) a governmental policy sanctioned by the “upper echelons” of policymakers (2007, pp. 269–270).

⁶¹ The institutional and failed leadership theories are the most interesting, among which is Hamm's study, as well as Jamieson & McEvoy's (2005). A broader sampling includes Malinowski (2008); Gordon (2006); Monahan & Quinn (2006); Hooks & Mosher (2005).

⁶² Augustine (1993, p. 8), *On Free Choice of the Will (De libero arbitrio)*. Note that these comments are put in the mouth of Augustine's interlocutor, Evodius, not of Augustine himself. See also Aquinas (2002, pp. 262–265).

⁶³ Bush demotes officer in charge of Abu Ghraib (CNN 2005, May 5). According to the *Taguba Report*, those abuses likely occurred in late October and early November 2003 (*Taguba Report*, 2004, p. 436).

officer prosecuted, was acquitted of all abuse charges (Clifton 2007, August 29). Eleven low-ranking soldiers were tried and convicted, with Cpl. Charles Graner, Jr., receiving the longest prison sentence (ten years). In short, army MPs were being held to the standards usually reserved for domestic policemen, and they were not shielded by a soldier's "following orders."⁶⁴

When the reasons for the Iraqi invasion defaulted to humanitarian goals, "Operation Iraqi Freedom" changed from a war action to one analogous to a domestic policing action, with a prolonged period of occupation. "In humanitarian intervention, as in *domestic law enforcement*, we cannot and we do not forsake our laws and moral principles in order to enforce and protect them."⁶⁵ All policing actions, even military ones, unfold within a "moral framework," calling for minimal force, as opposed to a battle context, calling for the "maximum amount of force" (Luban 2007, p. 177).⁶⁶ Punishment for the Abu Ghraib abuses was meted out as if it were a policing rather than a military operation, and this reflects a growing trend of "increasing deployment of the military in 'military operations other than war' (MOOTW), which owe as much to policing as to traditional soldiering in their methods and objectives" (Walker 2003, p. 131).⁶⁷

Abu Ghraib was neither an ordinary POW camp nor a civilian prison, and its administrative personnel mirrored that indeterminate status. Viewed in terms of Waddington's distinctions, MPs are neither strictly soldiers, whose aim is "to eliminate the enemy," nor are they strictly police, whose targets are "still citizens" (1999, p. 154).

Counter-terrorism has blurred the military and police distinction even further. The Abu Ghraib inmates were detainees in the broader "war against terrorism." Practically all were civilians; a few were former soldiers.⁶⁸ Guarding the Abu Ghraib detainees posed the common problem of counter-terrorism actions generally: that overpowering military forces are providing "aid to the civil power" (1999, p. 154). This is disturbing, especially in light of the United States' response to terrorism, which "disclose[s] a frightening design to overwhelm the state structure of world order from above, imposing global dominance, by fascist means if necessary" (Falk 2006, p. 136).

In this charged context, just war rhetoric helped to create an illusion of moral infallibility, while also justifying responses based on purported reasons of state, or extraordinary "security" considerations, even though the International Red Cross estimates that "nearly 99% of all prisoners held by U.S. authorities in its now-infamous torture cells at Abu Ghraib were arrested 'in error' – that is with no probable

⁶⁴ "Soldiers are required to obey superior orders.... Civil police are characteristically individually liable for their actions in using force and cannot claim that they were acting under superior orders" (Waddington 1999, p. 154).

⁶⁵ George Lucas, From *jus ad bellum* to *jus ad pacem*, quoted in Fiala (2007, p. 40) (emphasis mine).

⁶⁶ In this connection, Luban (2006, p. 18n) credits Lieutenant Colonel Tony Pfaff with making a clear distinction between policing morality and war morality in two articles: "Military ethics in complex contingencies" and "Peacekeeping and the just war tradition."

⁶⁷ Walker also notes a preference for the term "transnational" and gives reasons that are analogous to the rationale of Bobbitt's "market state" (2008, p. 111).

⁶⁸ The *Taguba Report* mentions only "hundreds of former Iraqi soldiers and officers" (2004, p. 436).

cause” – and hence, unlikely to be “high-value detainees” (Kramer et al. 2005, p. 71; Taguba 2004, p. 410).

The main arguments for torture advanced by some contemporary just war theorists center, unsurprisingly, on legalistic rationales of state expediency. These arguments envision exceptional circumstances, such as Michael Walzer’s “ticking bomb” scenario (2004b, pp. 64–65) and Michael Ignatieff’s “states of emergency” (2004, pp. 8, 25–53), and they may involve duplicitous definitions of torture, as in Jean Bethke Elshtain’s advocacy of “light” torture in a school bomb situation (2004, pp. 87–88).⁶⁹

The problem, many other commentators are quick to point out, is that the exceptional rapidly becomes the institutional norm, so normal, in fact, that, as one observer notes, the Abu Ghraib torturers forgot their task of extracting useful information, yet got carried away by “emotional catharsis and revenge” and tortured anyway.⁷⁰ Marnia Lazreg notes that these torture justification theories rely heavily on fictional narratives of necessity (2008, pp. 247–248). Elshtain’s argument, for example, makes detailed comparisons between her own fictional scenario of the school bomb and another fiction, the movie *Marathon Man* (2004, pp. 85–87).⁷¹ One must remember that Abu Ghraib and the entire Iraqi invasion were occasioned by what turned out to be the fictional narrative of an Iraq ready to provide al-Qaeda terrorists with WMDs to use against the United States.

What, then, was the trajectory from fictional scenarios to the brutal realities documented in the Abu Ghraib photographs? The short answer is that a culture was created⁷² whereby MPs – and Army Reserve Staff Sgt. Ivan L. Frederick, one of the primary offenders, testified to this on *60 Minutes II* (CBS News 2004, April 28) – felt so beholden to the unofficial authority of the army MIs and civilian interrogators (OGA operatives and private contractors) that they violated the duties mandated by their identities as MPs in the chain of command.

⁶⁹ See Lazreg’s excellent analysis and critique of these views, and her point that they are based on rank fictions (2008, pp. 237–252). Danner calls the mélange of fact and fiction at Abu Ghraib a “faintly hysterical absurdity” (2004, p. 39).

⁷⁰ The soldiers punished at Abu Ghraib “made two inter-related mistakes: (1) they failed to focus on the instrumental goal of information extraction, and (2) they abused prisoners for reasons of emotional catharsis or revenge. Had they committed the same actions...[and] these abuses yielded information...the horrific actions...would be fully acceptable” (Hooks & Mosher 2005, p. 1641). Exceptional brutality soon becomes a state of normalcy (Gordon 2006, pp. 45–49). Two retired generals note: “Any degree of flexibility about torture at the top drops down the chain of command like a stone – the rare exception fast becoming the rule,” quoted in Malinowski (2008, p. 154). Thus, Hooks quotes the *New York Times*’ drawing of a “dotted line” from President Bush to Abu Ghraib, via administration lawyers (2005, p. 1634).

⁷¹ For a fine analysis of the pitfalls of taking fiction as a justification of torture, see Luban (2006, pp. 249–262). Luban calls the ticking bomb scenario “an intellectual fraud” (2006, p. 259).

⁷² This culture was established not only on-site at Abu Ghraib, but at the highest levels of the administration. Retired colonel Tom Laney, who was a battalion commander in the 1991 Gulf War explains: A pronouncement such as Rumsfeld’s about the POWs not being prisoners of war “starts to create a culture of coercion that begins to permeate not just the military but the government.... So people who think they’re doing the right thing begin to do the wrong thing. And as a result, efforts to extract intelligence become more important than the strategic objectives for which we are fighting, and that creates a problem” (Halton 2004, May 13).

Army MPs are forbidden to take part in interrogations. In other words, the boundaries between MPs and MIs, as well between MIs and the various civilian interrogators, were erased. While both the MPs and the MI-interrogators are constrained by the Geneva Conventions, the MPs have a specifically moral charge, as distinct from the state expediency guiding the MIs. When interrogators impermissibly enlisted the help of MPs to “set the conditions’ for MI interrogations” (Taguba 2004, p. 418), they violated the norms of international law and the U.S. military code, as well as the moral charge of the MPs.

Gary Myers, the attorney for Staff Sgt. Frederick, excused Frederick by saying he was besotted with “the elixir of power, the elixir of believing [he was] helping the CIA.... And so, good guys sometimes do things believing that they are being of assistance and helping a just cause” (CBS News 2004, April 28). This chilling language, “helping a just cause,” means, in the words of Neal Puckett, Karpinski’s attorney, that Frederick and others “took all their instructions from military intelligence interrogators, who instructed them to bring the prisoners to and away from [interrogations], and sometimes perhaps to soften them up” (Jehl & Schmitt 2004, May 9; Taguba 2004, p. 436). Furthermore, the command was notably silent about the Geneva Conventions (Taguba 2004, pp. 419, 424–425). Copies of these Conventions were not “prominently displayed in all detention facilities,” nor were periodic informational briefings held, as the *Taguba Report* deemed necessary (2004, pp. 420, 430). Thus, the rhetoric of unofficial complicity and silence trumped international law and U.S. Army regulations.

Further complicating matters, in August 2003 a team of 27 civilian interrogators arrived at Abu Ghraib, led by Steven Stefanowicz, a former U.S. Navy petty officer and an employee of a company called CACI International, Inc., which had been given a one-year contract to assist the MPs and the MI interrogators (Jehl & Schmitt 2004, May 9). Adding civilians to the military mix was part of the intentional design of “judicial othering,” as Ruth Jamieson and Kieran McEvoy argue, whereby civilians – U.S. nationals and non-nationals – are used as interrogators and private security forces, because these personnel elude accountability under present international or domestic law.⁷³

⁷³ This “judicial othering” works two ways, to put harm-doers beyond the reach of the law, and to deprive their victims of any judicial recourse. “Contractors who are American nationals can be tried under U.S. extraterritorial jurisdiction, but non-national contractors cannot and they ‘fall into the same gray area as unlawful combatants in Guantánamo Bay.’ Private military contractors do not fit the existing definition of mercenaries and have an ambiguous legal status as a basis for enforcing accountability. The employees of private companies are accountable as individuals, as are their superiors in some cases. But attributing responsibility to a private company is much more difficult and, in any case, PMFs as corporate entities do not come under the jurisdiction of the ICC. As for prosecuting the private military companies themselves through national courts, this too is difficult, given their fluid multinational presence and their relationship with their subcontractors. There is less transparency about PMF activities if they are contracted by other government agencies like the CIA.... Also PMFs tend not to have a continuous corporate existence, have ‘few fixed assets or permanent employees’ and they can ‘move relatively easily from one jurisdiction to another’ and ‘regularly mutate’.... Using private military firms or local proxies is not only more flexible but it also offers the states that use these strategies *greatly enhanced scope for denying responsibility for illegal or abusive activities*” (Jamieson & McEvoy 2005, pp. 513–514; citations omitted; my italics). Compounding these observations is Order 17, which actually protects civilian CPA contractors from prosecution under Iraqi law, a protection that runs contrary to international law.

Just as the detainees were deprived of any identity as citizens or POWs, some of the MI interrogators intentionally blended their identities with civilian interrogators, who were not answerable to the army chain of command: “The intelligence officers’ practice of wearing uniforms without insignia made it difficult for soldiers to identify the officers or even to determine which of them were military and which belonged to other agencies, including the C.I.A., whose officers periodically visited Abu Ghraib to participate in interrogations” (Jehl & Schmitt 2004, May 9; Taguba 2004, p. 436). Also, in August 2003, Maj. Gen. Geoffrey D. Miller, formerly in charge of the “gray” Guantánamo Bay facility known as “Gitmo” was sent to Abu Ghraib, purportedly to “Gitmo-ize” it (Halton, 2004, May 13). Finally, in a move which sounded the death knell for the MPs’ moral policing mission at Abu Ghraib, in November 2003, Gen. Sanchez transferred command of Abu Ghraib to the 205th MI Brigade under Colonel Thomas M. Pappas (Jehl & Schmitt 2004, May 9). What had been the unofficial culture of state expediency was now formalized by this change of command.

The Dehumanizing Rhetoric of “Othering”

The culture at Abu Ghraib only becomes comprehensible when viewed in the context of the rhetoric of the unbounded “war against terrorism” and of a just war beyond ordinary morality. By designating al-Qaeda members “unlawful combatants,” President Bush denied them any cognizable status. By identifying Iraq with al-Qaeda, he similarly stripped the Iraqi people of their identities as sovereign citizens and deprived some of them of all political, legal, moral, and, finally, even ordinary human status.⁷⁴ The administration’s persistent linking of Iraq and al-Qaeda⁷⁵ was part of a wider strategy of “Othering,” which vilified and dehumanized the Iraqi enemy, and concluded in erasing the protective strictures governing interpersonal actions, even in war.⁷⁶

⁷⁴ “In an environment in which terms such as *terrorist* or *war* can be used in an imprecise or loose manner, the risk of rendering a large number of people vulnerable increases” (Andreopoulos 2006a, p. 156).

⁷⁵ As late as August 22, 2007, speaking at the Veterans of Foreign Wars’ national convention, Bush was linking Iraq and the war against terrorism: “Iraq is one of several fronts in the war on terror – but it is the central front – it’s the central front for the enemy that attacked us and wants to attack us again.”

⁷⁶ No one writes more eloquently than Joan Dayan of the long history in the United States of using the denial or redefinition of legal status as a political tool, from slavery to Abu Ghraib. She speaks of putting certain targeted groups on “enthralled ground.... [T]he ground that is a dead zone, a judicial no-man’s land, where region or what is regional can be everywhere. The persons currently deprived of rights, most importantly through labeling, through words in time that that sustain the idea of the wicked or unfit, carry the idea of region with them. They make up a world that has no political boundaries, and where geographical boundaries are dislodged from their proper places. How can I describe the place that becomes synonymous with the incapacitation of the person? In untangling a philosophy of personhood in the rules of law, we ought to understand how two apparently distinct discourses – expulsion and dehumanization – are joined, or, more precisely, operate along a continuum” (2003, p. 95).

First, the political and legal limits on conduct were erased at Abu Ghraib, as discussed above, through rhetorical complicity, in the form of unofficial and illegal “orders,” and through an officially sanctioned silence on the Geneva Conventions. In “set[ting] the conditions” for interrogations, a climate ensued that was hospitable to further moral encroachments on basic human identity. Denied any status as Iraqi citizens or POWs, the Abu Ghraib detainees were easily absorbed into the nonhuman identities of terrorists, publicly portrayed since 2001 as evil incarnate. “Once a category of people is defined as existing outside the human community, all obligations to treat them humanely are nullified” (Kramer et al. 2005, p. 72).⁷⁷

From the start, the “war against terrorism” was characterized in Manichean terms of absolute good versus pure evil (Ferrari 2007, p. 607). When Bush first mentioned the “axis of evil,” he was appropriating the moral justification of World War II. We were not dealing simply with saboteurs, insurgents, or anarchists, but with agents who were, in Bush’s words, “the heirs of all the murderous ideologies of the twentieth century...fascism, Nazism, and totalitarianism” (Burke 2004, p. 334). What we were seeking in Iraq was not simply a regime change and Saddam Hussein’s downfall. What we were fighting for, in Jean Bethke Elshtain’s just war discourse, was nothing less than a defense of who we are. “We must and will fight – not in order to conquer any countries or to destroy peoples or religions, but to defend who we are and what we, at our best, represent” (2003, p. 6).

While this mission to fight evil has been called “American Exceptionalism” (Fiala 2008, pp. 59–74) and “prime modernity” (Falah et al. 2006, p. 145), these are merely new words for Huntington’s and Fukuyama’s old narrative of the superiority of the United States’ liberal democracy and Western hegemony. European commentators, however, view the Bush administration’s rhetoric of “friend” versus “enemy” and “good” versus “evil” as identical to the “typical language of totalitarian regimes” (Ferrari 2007, p. 605).

In this framework of archetypal good and evil, the dehumanization of al-Qaeda terrorists was extended to all Iraqis in general. Worse even, this dehumanization, combined with the prior personalizing of the war on terror, vilified a people rather than the impersonal state. In an August 2009 article on the civilian contractors who helped the C.I.A. develop its harsh interrogation techniques, one of them is quoted as saying that interrogation required “a comparable level of fear and brutality to flying planes into buildings” (Shane 2009, August 12). Finally, this kind of personal vilification is connected to a long history of imperial motivation aimed at Arabs, among others (Lazreg 2008), in which sexual humiliation is part and parcel of imperial domination.⁷⁸

⁷⁷ “However, as the rights of man became increasingly political rights which could only be held within specific political regimes, so they became increasingly useless as a notion in international or intercultural relations” (Pagden 2003, p. 190).

⁷⁸ The relationship among colonialism, sex, and torture is evident in a French intelligence officer’s advice to a colleague in Algiers: “An interrogation is like making love. An essential rule is to take your time, know how to hold yourself long enough until you reach the crucial moment, keep up pain until it reaches its climax. Most of all do not go beyond this threshold or your partner will die on you. If you can motivate him, he’ll talk. Well, you know, orgasm. Otherwise, he’ll pass out. If you love women, lieutenant, you should understand” (Lazreg 2008, p. 125).

Supposedly, Raphael Patai's book *The Arab Mind*, suggested to a "government consultant" that sexually humiliating photos such as those taken at Abu Ghraib could be used to blackmail detainees into spying on their "associates" (Massad 2007, p. 45; Hamm 2007, p. 264). But as Joseph Massad demonstrates – and Edward Said (1978) before him – the Arab was simultaneously romanticized and brutalized by colonizing discourses starting in the nineteenth century (Tétreault 2006, pp. 37–40), and the torture scenarios at Abu Ghraib repeat what happened during the Palestinian anti-colonial revolt in the 1930s (Massad 2007, pp. 43–47).

The culture of permissiveness at Abu Ghraib was not the result of lapses in leadership, but part of a conscious policy of the Bush administration. The sanctions for torture at Abu Ghraib emanated from the highest echelons of the U.S. government. Coupled with the president's public rhetoric championing adherence to law⁷⁹ are other speech acts supporting and carving out exemptions to the law.⁸⁰ We have already mentioned Order 17 and other legalistic moves by the CPA. With respect specifically to the impermissibility of torture under the Geneva Conventions and international law, the president first exempted al-Qaeda operatives by labeling them "unlawful combatants." Then his administration systematically undid protections for all detainees in Iraq and the worldwide war on terror, by unilaterally redefining the international meaning of torture. In the now-infamous memos by administration lawyers, the limits of torture were changed from the international standards of "severe pain or suffering, whether physical or mental" to that degree of pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."⁸¹

The historical tradition of just war theory does not rationalize war with apocalyptic scenarios of good versus evil. The contemporary tendency to justify war with a heightened discourse of security threaded through with moral absolutism is dangerous, because it erases all protective boundaries regulating human conduct. Even an enemy has a legal, moral, and human identity. "Just war theory is particularly dangerous because, even as it claims universal moral validity, it avoids the ultimate moral test of universality [and in] the hands of [someone like] Elstain, it makes humanitarian arguments for war against Iraq to protect the innocent, but allows for the Iraqi innocent, military and civilian, to be slaughtered" (Burke 2004, p. 352).

Another commentator speaks of the "elasticity of the principle of evil as opposed to the reality or truth principle" (Agozino 2004, p. 81). Truth, or whether there were WMDs in Iraq, "resists elasticity," whereas good and evil have no measurable standards (Agozino 2004, p. 81). The discourse of evil is a dysfunctional discourse and results

⁷⁹ See, for example, President Bush's remarks at a June 10, 2004, Press Conference at Sea Island, Georgia, where he uses the word "law" five times in six short sentences, quoted in Danner (2004, p. 46).

⁸⁰ Hamm reports an anecdote in which Bush inquires about a severely wounded Abu Zubaydah, who was reportedly unresponsive to questioning: "Who authorized putting him on pain medication?" (Hamm 2007, p. 267), quoting from James Risen (2006, p. 22).

⁸¹ This legalistic maneuvering by the president's lawyers – White House counsel Alberto Gonzales, his associate, John Yoo, and Assistant Attorney General Jay S. Bybee – has been documented and discussed many times (Danner 2004, p. 115; Hamm 2007, p. 266).

in an “elastic” notion of what it or is not allowable in war. To protect an abstract freedom and a democratic identity, the right is asserted to slaughter and torture individuals, all in the name of a higher morality and higher purpose. This is to forget that the realities of human identity begin with a human being in a body. Torture, as Robert Cover brilliantly understood decades before “Operation Iraqi Freedom,” takes place between two human beings; and the infliction of the kind of pain allowable under the Bush doctrine invariably reduces one of them to mere “thingness,” hardly a way to save the world from undemocratic tyranny:

“The deliberate infliction of pain in order to destroy the victim’s normative world and capacity to create shared realities we call torture. The interrogation...is rarely designed to elicit information [but rather to] demonstrate the end of the normative world of the victim – the end of what the victim values, the end of the bonds that constitute the community in which the values are grounded.... That is why torturers always require betrayal – a demonstration that the victim’s intangible normative world has been crushed by the material reality of pain and its extension, fear. (Cover 1986, p. 1603).”

The tyranny of total power, whether it goes by the name of American liberal democracy or Islamic fascism, always devolves upon some confrontation with one’s own individual humanity. In hunting terrorists, who act in their personal capacities to promote terrorism, the Bush administration has at least been honest about its aim of destroying the humanity and identity of terrorists. In “Operation Iraqi Freedom” and at Abu Ghraib, however, to claim to be defending national security or the high ideals of freedom and democracy against persons, unproven as either personal or state agents of war or terror, is plainly untenable. How could we be said to have been defending “who we are and what we, at our best, represent”? Unfortunately, part of the answer lies in the mirror that history will hold up – for as long as words and images endure – of those shameful photographs taken at Abu Ghraib. Perhaps that is why the United States had to elect a president in 2008, identifiable both with Khanna’s second-world potentiality and America’s first-world elitism: a Harvard-educated African-American with the middle name “Hussein,” who personifies another face of “American Exceptionalism.”

Conclusion and a Look Ahead

The pictures from Abu Ghraib are burned forever into the global consciousness, no less than the twin towers of September 11 and the horrific beheadings connected to al-Zarqawi. If we are truly waging a “war against terrorism,” we must hold fast to the outward and inward views, the road of expediency and the path of morality. For otherwise, what will our victory be worth, when we finally do win the war on terror? The discourse of “just war” helped to buttress the Bush administration’s claims of moral exceptionalism in the face of extraordinary “securitization” demands. These rationales of righteousness and fear combined to support a culture of moral permissiveness, both at Abu Ghraib and in the American populace.

Historically, “just war” theory is a retrospective doctrine, applied after the fact to justify questionable actions. No purported list of requirements for just war can ever serve as any kind of moral guide to war, and viewing just war theory as a predictive doctrine is dangerous, especially if the facts and motives for undertaking war are elastic or false.

In a global context where the security wars in Afghanistan and Iraq are not succeeding, the unilateral discourse of “war” and particularly of “just war”⁸² should be avoided, while the alternatives offered by multilateral international law and authority should be developed. Because military actions today share many of the functions and objectives of domestic policing, clearer guidelines are also needed to regulate status and conduct in complex situations of mixed authority, as at Abu Ghraib.

President Obama has not been in office very long as of this writing. On his second day in office, he issued an Executive Order mandating the closing of Guantánamo Bay within a year.⁸³ Under President Bush, Abu Ghraib had already been renovated and turned over to the Iraqi government. While Obama’s plans for closing Guantánamo Bay’s prison may not be realizable, because of difficulties in concluding tainted legal proceedings, or repatriating the detainees, or keeping some incarcerated indefinitely – still, by his executive mandate, he has acknowledged the ill-advisedness of establishing Guantánamo Bay in the first place. Another Executive Order incontrovertibly bans torture and reverses, as a matter of policy, the Bush administration’s normalization of torture.⁸⁴

But the Obama administration is also “danc[ing] awkwardly with Bush policies” (Balz 2009, August 26), continuing, for example, the policy of “rendition” or “shipping suspects abroad for interrogation.” In his speeches and public statements, however, Obama has intentionally steered clear of the heightened “securitization” rhetoric of the Bush administration, and moved towards a discourse of reconciliation by saying, for example, in his Cairo University speech, that “Islam has always been a part of America’s story” and by arguing for a transnational human identity: “[W]hen a financial system weakens in one country, prosperity is hurt everywhere. When a new flu infects one human being, all are at risk” (2009, June 4).

The mistakes of the recent past cannot be reversed instantly. But whether or not additional photographs from Abu Ghraib will be released, whether or not further investigations will be launched or more individuals punished for Abu Ghraib, whether or not Guantánamo Bay will be closed on time – none of these particular actions will be the ultimate measure of future success.

⁸² Walzer trumpets the “triumph” of just war theory (2004a, pp. 3–22), but the very success of just war theory has proved problematic, because this has helped tip the scales away from alternatives offered by multilateral international law and cooperation.

⁸³ Executive Order No. 13492 (signed Jan. 22, 2009). Review and disposition of individuals detained at the Guantánamo Bay naval base and closure of detention facilities. 74 FR 4897 (Jan. 27, 2009).t

⁸⁴ Executive Order No. 13491 (signed Jan. 22, 2009). Ensuring lawful interrogations. 74 FR 4893 (Jan. 27, 2009).

Reversing past errors necessitates a change in the culture of the United States' transnational actions, especially those taken in pursuit of the "war against terrorism," an undertaking without any boundaries and without any end in sight. A new outlook is needed, one that President Obama seems to be promising, one in which the United States abandons the unrealizable goal of political hegemony, while accepting a world of differences knit together by a shared humanity. The erasing of old boundaries occasioned by market-state conditions must not be allowed to erase the ultimately unifying boundary of human identity. In situations of last resort, under the pressures of a seeming necessity to abandon all rules, the one rule of respect for human dignity must not be cast off. Few are as fortunate as Michel de Montaigne, who served state expediency, while keeping intact some part of his private morality. We must remember, Montaigne cautions, "that not all things are permissible for an honorable man in the service of his king, or of the common cause, or of the laws" (1965, p. 609). A state security that savages human dignity may hardly be worth having.

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