Judith Butler, Precarious Life: the Powers of Mourning & Violence

Verso: 2004

3

INDEFINITE DETENTION

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

Donald Rumsfeld, Secretary of Defense

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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