on more sustaining grounds. This means, in part, hearing beyond
what we are able to hear. And it means as well being open to narration
that decenters us from our supremacy, in both its right- and left-wing
forms. Can we hear that there were precedents for these events and
even know that it is urgent to know and learn from these precedents
as we seek to stop them from operating in the present, at the same
time as we insist that these precedents do not “justify” the recent
violent events? If the events are not understandable without that
history, that does not mean that the historical understanding
furnishes a moral justification for the events themselves. Only then
do we reach the disposition to get to the “root” of violence, and begin
to offer another vision of the future than that which perpetuates
violence in the name of denying it, offering instead names for things
that restrain us from thinking and acting radically and well about
global options.

I propose to consider a dimension of political life that has to do
with our exposure to violence and our complicity in it, with our
vulnerability to loss and the task of mourning that follows, and
with finding a basis for community in these conditions. We cannot
precisely “argue against” these dimensions of human vulnerability,
inasmuch as they function, in effect, as the limits of the arguable,
even perhaps as the fecundity of the inarguable. It is not that my
thesis survives any argument against it: surely there are various ways
of regarding corporeal vulnerability and the task of mourning, and
various ways of figuring these conditions within the sphere of
politics. But if the opposition is to vulnerability and the task of
mourning itself, regardless of its formulation, then it is probably best
not to regard this opposition primarily as an “argument.” Indeed, if
there were no opposition to this thesis, then there would be no reason
to write this essay. And, if the opposition to this thesis were not consequential, there would be no political reason for reimagining the possibility of community on the basis of vulnerability and loss.

Perhaps, then, it should come as no surprise that I propose to start, and to end, with the question of the human (as if there were any other way for us to start or end!). We start here not because there is a human condition that is universally shared—this is surely not yet the case. The question that preoccupies me in the light of recent global violence is, Who counts as human? Whose lives count as lives? And, finally, What makes for a grievable life? Despite our differences in location and history, my guess is that it is possible to appeal to a "we," for all of us have some notion of what it is to have lost somebody. Loss has made a tenuous "we" of us all. And if we have lost, then it follows that we have had, that we have desired and loved, that we have struggled to find the conditions for our desire. We have all lost in recent decades from AIDS, but there are other losses that afflict us, from illness and from global conflict; and there is the fact as well that women and minorities, including sexual minorities, are, as a community, subjected to violence, exposed to its possibility, if not its realization. This means that each of us is constituted politically in part by virtue of the social vulnerability of our bodies—as a site of desire and physical vulnerability, as a site of a publicity at once assertive and exposed. Loss and vulnerability seem to follow from our being socially constituted bodies, attached to others, at risk of losing those attachments, exposed to others, at risk of violence by virtue of that exposure.

I am not sure I know when mourning is successful, or when one has fully mourned another human being. Freud changed his mind on this subject: he suggested that successful mourning meant being able to exchange one object for another; he later claimed that incorporation, originally associated with melancholia, was essential to the task of mourning. Freud's early hope that an attachment might be withdrawn and then given anew implied a certain interchangeability of objects as a sign of hopefulness, as if the prospect of entering life anew made use of a kind of promiscuity of libidinal aim. That might be true, but I do not think that successful grieving implies that one has forgotten another person or that something else has come along to take its place, as if full substitutability were something for which we might strive.

Perhaps, rather, one mourns when one accepts that by the loss one undergoes one will be changed, possibly for ever. Perhaps mourning has to do with agreeing to undergo a transformation (perhaps one should say submitting to a transformation) the full result of which one cannot know in advance. There is losing, as we know, but there is also the transformative effect of loss, and this latter cannot be charted or planned. One can try to choose it, but it may be that this experience of transformation deconstitutes choice at some level. I do not think, for instance, that one can invoke the Protestant ethic when it comes to loss. One cannot say, "Oh, I'll go through loss this way, and that will be the result, and I'll apply myself to the task, and I'll endeavor to achieve the resolution of grief that is before me." I think one is hit by waves, and that one starts out the day with an aim, a project, a plan, and finds oneself foiled. One finds oneself fallen. One is exhausted but does not know why. Something is larger than one's own deliberate plan, one's own project, one's own knowing and choosing.

Something takes hold of you: where does it come from? What sense does it make? What claims us at such moments, such that we are not the masters of ourselves? To what are we tied? And by what are we seized? Freud reminded us that when we lose someone, we do not always know what it is in that person that has been lost. So when one loses, one is also faced with something enigmatic: something is
hiding in the loss, something is lost within the recesses of loss. If mourning involves knowing what one has lost (and melancholia originally meant, to a certain extent, not knowing), then mourning would be maintained by its enigmatic dimension, by the experience of not knowing incited by losing what we cannot fully fathom.

When we lose certain people, or when we are dispossessed from a place, or a community, we may simply feel that we are undergoing something temporary, that mourning will be over and some restoration of prior order will be achieved. But maybe when we undergo what we do, something about who we are is revealed, something that delineates the ties we have to others, that shows us that these ties constitute what we are, ties or bonds that compose us. It is not as if an "I" exists independently over here and then simply loses a "you" over there, especially if the attachment to "you" is part of what composes who "I" am. If I lose you, under these conditions, then I not only mourn the loss, but I become inscrutable to myself. Who "am" I, without you? When we lose some of these ties by which we are constituted, we do not know who we are or what to do. On one level, I think I have lost "you" only to discover that "I" have gone missing as well. At another level, perhaps what I have lost "in" you, for which I have no ready vocabulary, is a relationality that is composed neither exclusively of myself nor you, but is to be conceived as the tie by which those terms are differentiated and related.

Many people think that grief is privatizing, that it returns us to a solitary situation and is, in that sense, depoliticizing. But I think it furnishes a sense of political community of a complex order, and it does this first of all by bringing to the fore the relational ties that have implications for theorizing fundamental dependency and ethical responsibility. If my fate is not originally or finally separable from yours, then the "we" is traversed by a relationality that we cannot easily argue against; or, rather, we can argue against it, but we would be denying something fundamental about the social conditions of our very formation.

A consequential grammatical quandary follows. In the effort to explain these relations, I might be said to "have" them, but what does "having" imply? I might sit back and try to enumerate them to you. I might explain what this friendship means, what that lover meant or means to me. I would be constituting myself in such an instance as a detached narrator of my relations. Dramatizing my detachment, I might perhaps only be showing that the form of attachment I am demonstrating is trying to minimize its own relationality, is invoking it as an option, as something that does not touch on the question of what sustains me fundamentally.

What grief displays, in contrast, is the thrall in which our relations with others hold us, in ways that we cannot always recount or explain, in ways that often interrupt the self-conscious account of ourselves we might try to provide, in ways that challenge the very notion of ourselves as autonomous and in control. I might try to tell a story here about what I am feeling, but it would have to be a story in which the very "I" who seeks to tell the story is stopped in the midst of the telling; the very "I" is called into question by its relation to the Other, a relation that does not precisely reduce me to speechlessness, but does nevertheless clutter my speech with signs of its undoing. I tell a story about the relations I choose, only to expose, somewhere along the way, the way I am gripped and undone by these very relations. My narrative falters, as it must.

Let's face it. We're undone by each other. And if we're not, we're missing something.

This seems so clearly the case with grief, but it can be so only because it was already the case with desire. One does not always stay intact. One may want to, or manage to for a while, but despite one's
best efforts, one is undone, in the face of the other, by the touch, by
the scent, by the feel, by the prospect of the touch, by the memory
of the feel. And so, when we speak about "my sexuality" or "my
gender," as we do and as we must, we nevertheless mean something
complicated that is partially concealed by our usage. As a mode of
relation, neither gender nor sexuality is precisely a possession, but,
rather, is a mode of being dispossessed, a way of being for another
or by virtue of another. It won't even do to say that I am promoting
a relational view of the self over an autonomous one or trying to
redescribe autonomy in terms of relationality. Despite my affinity
for the term relationality, we may need other language to approach
the issue that concerns us, a way of thinking about how we are
not only constituted by our relations but also dispossessed by them
as well.

We tend to narrate the history of the feminist and lesbian/gay
movement, for instance, in such a way that ecstasy figured prominently
in the sixties and seventies and midway through the eighties. But
maybe ecstasy is more persistent than that; maybe it is with us all
along. To be ecstatic means, literally, to be outside oneself, and thus
can have several meanings: to be transported beyond oneself by a
passion, but also to be beside oneself with rage or grief. I think that if
I can still address a "we," or include myself within its terms, I am
speaking to those of us who are living in certain ways beside ourselves,
whether in sexual passion, or emotional grief, or political rage.

I am arguing, if I am "arguing" at all, that we have an interesting
political predicament; most of the time when we hear about "rights,"
we understand them as pertaining to individuals. When we argue for
protection against discrimination, we argue as a group or a class. And
in that language and in that context, we have to present ourselves as
bounded beings—distinct, recognizable, delineated, subjects before
the law, a community defined by some shared features. Indeed, we
must be able to use that language to secure legal protections and
entitlements. But perhaps we make a mistake if we take the definitions
of who we are, legally, to be adequate descriptions of what we are
about. Although this language may well establish our legitimacy
within a legal framework enshrined in liberal versions of human
ontology, it does not do justice to passion and grief and rage, all of
which tear us from ourselves, bind us to others, transport us, undo us,
implicate us in lives that are not are own, irreversibly, if not fatally.

It is not easy to understand how a political community is wrought
from such ties. One speaks, and one speaks for another, to another,
and yet there is no way to collapse the distinction between the Other
and oneself. When we say "we" we do nothing more than designate
this very problematic. We do not solve it. And perhaps it is, and
ought to be, insoluble. This disposition of ourselves outside our­selves seems to follow from bodily life, from its vulnerability and its
exposure.

At the same time, essential to so many political movements is the
claim of bodily integrity and self-determination. It is important to
claim that our bodies are in a sense our own and that we are entitled
to claim rights of autonomy over our bodies. This assertion is as
true for lesbian and gay rights claims to sexual freedom as it is for
transsexual and transgender claims to self-determination, as it is to
intersex claims to be free of coerced medical and psychiatric inter­ventions. It is as true for all claims to be free from racist attacks,
physical and verbal, as it is for feminism's claim to reproductive
freedom, and as it surely is for those whose bodies labor under
duress, economic and political, under conditions of colonization and
occupation. It is difficult, if not impossible, to make these claims
without recourse to autonomy. I am not suggesting that we cease to
make these claims. We have to, we must. I also do not wish to imply
that we have to make these claims reluctantly or strategically. Defined
within the broadest possible compass, they are part of any normative aspiration of a movement that seeks to maximize the protection and the freedoms of sexual and gender minorities, of women, and of racial and ethnic minorities, especially as they cut across all the other categories.

But is there another normative aspiration that we must also seek to articulate and to defend? Is there a way in which the place of the body, and the way in which it disposes us outside ourselves or sets us beside ourselves, opens up another kind of normative aspiration within the field of politics?

The body implies mortality, vulnerability, agency: the skin and the flesh expose us to the gaze of others, but also to touch, and to violence, and bodies put us at risk of becoming the agency and instrument of all these as well. Although we struggle for rights over our own bodies, the very bodies for which we struggle are not quite ever only our own. The body has its invariably public dimension. Constituted as a social phenomenon in the public sphere, my body is and is not mine. Given over from the start to the world of others, it bears their imprint, is formed within the crucible of social life; only later, and with some uncertainty, do I lay claim to my body as my own, if, in fact, I ever do. Indeed, if I deny that prior to the formation of my "will," my body related me to others whom I did not choose to have in proximity to myself, if I build a notion of "autonomy" on the basis of the denial of this sphere of a primary and unwilled physical proximity with others, then am I denying the social conditions of my embodiment in the name of autonomy?

At one level, this situation is literally familiar: there is bound to be some experience of humiliation for adults, who think that they are exercising judgment in matters of love, to reflect upon the fact that, as infants and young children, they loved their parents or other primary others in absolute and uncritical ways—and that something of that pattern lives on in their adult relationships. I may wish to reconstitute my "self" as if it were there all along, a tacit ego with acumen from the start; but to do so would be to deny the various forms of rapture and subjection that formed the condition of my emergence as an individuated being and that continue to haunt my adult sense of self with whatever anxiety and longing I may now feel. Individuation is an accomplishment, not a presupposition, and certainly no guarantee.

Is there a reason to apprehend and affirm this condition of my formation within the sphere of politics, a sphere monopolized by adults? If I am struggling for autonomy, do I not need to be struggling for something else as well, a conception of myself as invariably in community, impressed upon by others, impinging upon them as well, and in ways that are not fully in my control or clearly predictable?

Is there a way that we might struggle for autonomy in many spheres, yet also consider the demands that are imposed upon us by living in a world of beings who are, by definition, physically dependent on one another, physically vulnerable to one another? Is this not another way of imagining community, one in which we are alike only in having this condition separately and so having in common a condition that cannot be thought without difference? This way of imagining community affirms relationality not only as a descriptive or historical fact of our formation, but also as an ongoing normative dimension of our social and political lives, one in which we are compelled to take stock of our interdependence. According to this latter view, it would become incumbent on us to consider the place of violence in any such relation, for violence is, always, an exploitation of that primary tie, that primary way in which we are, as bodies, outside ourselves and for one another.

We are something other than "autonomous" in such a condition, but that does not mean that we are merged or without boundaries. It
does mean, however, that when we think about who we “are” and seek to represent ourselves, we cannot represent ourselves as merely bounded beings, for the primary others who are past for me not only live on in the fiber of the boundary that contains me (one meaning of “incorporation”), but they also haunt the way I am, as it were, periodically undone and open to becoming unbounded.

Let us return to the issue of grief, to the moments in which one undergoes something outside one’s control and finds that one is beside oneself, not at one with oneself. Perhaps we can say that grief contains the possibility of apprehending a mode of dispossession that is fundamental to who I am. This possibility does not dispute the fact of my autonomy, but it does qualify that claim through recourse to the fundamental sociality of embodied life, the ways in which we are, from the start and by virtue of being a bodily being, already given over, beyond ourselves, implicated in lives that are not our own. If I do not always know what seizes me on such occasions, and if I do not always know what it is in another person that I have lost, it may be that this sphere of dispossession is precisely the one that exposes my unknowingness, the unconscious imprint of my primary sociality. Can this insight lead to a normative reorientation for politics? Can this situation of mourning—one that is so dramatic for those in social movements who have undergone innumerable losses—supply a perspective by which to begin to apprehend the contemporary global situation?

Mourning, fear, anxiety, rage. In the United States, we have been surrounded with violence, having perpetrated it and perpetrating it still, having suffered it, living in fear of it, planning more of it, if not an open future of infinite war in the name of a “war on terrorism.” Violence is surely a touch of the worst order, a way a primary human vulnerability to other humans is exposed in its most terrifying way, a way in which we are given over, without control, to the will of another, a way in which life itself can be expunged by the willful action of another. To the extent that we commit violence, we are acting on another, putting the other at risk, causing the other damage, threatening to expunge the other. In a way, we all live with this particular vulnerability, a vulnerability to the other that is part of bodily life, a vulnerability to a sudden address from elsewhere that we cannot preempt. This vulnerability, however, becomes highly exacerbated under certain social and political conditions, especially those in which violence is a way of life and the means to secure self-defense are limited.

Mindfulness of this vulnerability can become the basis of claims for non-military political solutions, just as denial of this vulnerability through a fantasy of mastery (an institutionalized fantasy of mastery) can fuel the instruments of war. We cannot, however, will away this vulnerability. We must attend to it, even abide by it, as we begin to think about what politics might be implied by staying with the thought of corporeal vulnerability itself, a situation in which we can be vanquished or lose others. Is there something to be learned about the geopolitical distribution of corporeal vulnerability from our own brief and devastating exposure to this condition?

I think, for instance, that we have seen, are seeing, various ways of dealing with vulnerability and grief, so that, for instance, William Safire citing Milton writes we must “banish melancholy,” as if the repudiation of melancholy ever did anything other than fortify its affective structure under another name, since melancholy is already the repudiation of mourning; so that, for instance, President Bush announced on September 21 that we have finished grieving and that now it is time for resolute action to take the place of grief.6 When grieving is something to be feared, our fears can give rise to the impulse to resolve it quickly, to banish it in the name of an action invested with the power to restore the loss or return the world to a
former order, or to reinvigorate a fantasy that the world formerly was orderly.

Is there something to be gained from grieving, from tarrying with grief, from remaining exposed to its unbearability and not endeavoring to seek a resolution for grief through violence? Is there something to be gained in the political domain by maintaining grief as part of the framework within which we think our international ties? If we stay with the sense of loss, are we left feeling only passive and powerless, as some might fear? Or are we, rather, returned to a sense of human vulnerability, to our collective responsibility for the physical lives of one another? Could the experience of a dislocation of First World safety not condition the insight into the radically inequitable ways that corporeal vulnerability is distributed globally? To foreclose that vulnerability, to banish it, to make ourselves secure at the expense of every other human consideration is to eradicate one of the most important resources from which we must take our bearings and find our way.

To grieve, and to make grief itself into a resource for politics, is not to be resigned to inaction, but it may be understood as the slow process by which we develop a point of identification with suffering itself. The disorientation of grief—"Who have I become?" or, indeed, "What is left of me?" "What is it in the Other that I have lost?"—posits the "I" in the mode of unknowingness.

But this can be a point of departure for a new understanding if the narcissistic preoccupation of melancholia can be moved into a consideration of the vulnerability of others. Then we might critically evaluate and oppose the conditions under which certain human lives are more vulnerable than others, and thus certain human lives are more grievable than others. From where might a principle emerge by which we vow to protect others from the kinds of violence we have suffered, if not from an apprehension of a common human vulnerability? I do not mean to deny that vulnerability is differentiated, that it is allocated differentially across the globe. I do not even mean to presume upon a common notion of the human, although to speak in its "name" is already (and perhaps only) to fathom its possibility.

I am referring to violence, vulnerability, and mourning, but there is a more general conception of the human with which I am trying to work here, one in which we are, from the start, given over to the other, one in which we are, from the start, even prior to individuation itself and, by virtue of bodily requirements, given over to some set of primary others: this conception means that we are vulnerable to those we are too young to know and to judge and, hence, vulnerable to violence; but also vulnerable to another range of touch, a range that includes the eradication of our being at the one end, and the physical support for our lives at the other.

Although I am insisting on referring to a common human vulnerability, one that emerges with life itself, I also insist that we cannot recover the source of this vulnerability: it precedes the formation of "I." This is a condition, a condition of being laid bare from the start and with which we cannot argue. I mean, we can argue with it, but we are perhaps foolish, if not dangerous, when we do. I do not mean to suggest that the necessary support for a newborn is always there. Clearly, it is not, and for some this primary scene is a scene of abandonment or violence or starvation, that theirs are bodies given over to nothing, or to brutality, or to no sustenance.

We cannot understand vulnerability as a deprivation, however, unless we understand the need that is thwarted. Such infants still must be apprehended as given over, as given over to no one or to some insufficient support, or to an abandonment. It would be difficult, if not impossible, to understand how humans suffer from oppression without seeing how this primary condition is exploited and exploitable, thwarted and denied. The condition of primary vulnerability, of
being given over to the touch of the other, even if there is no other
there, and no support for our lives, signifies a primary helplessness
and need, one to which any society must attend. Lives are supported
and maintained differently, and there are radically different ways in
which human physical vulnerability is distributed across the globe.
Certain lives will be highly protected, and the abrogation of their
claims to sanctity will be sufficient to mobilize the forces of war.
Other lives will not find such fast and furious support and will not
even qualify as “grievable.”

A hierarchy of grief could no doubt be enumerated. We have seen
it already, in the genre of the obituary, where lives are quickly tidied
up and summarized, humanized, usually married, or on the way to be,
hetertosexual, happy, monogamous. But this is just a sign of another
differential relation to life, since we seldom, if ever, hear the names of
the thousands of Palestinians who have died by the Israeli military
with United States support, or any number of Afghan people,
children and adults. Do they have names and faces, personal histories,
family, favorite hobbies, slogans by which they live? What defense
against the apprehension of loss is at work in the blithe way in which
we accept deaths caused by military means with a shrug or with
self-righteousness or with clear vindictiveness? To what extent have
Arab peoples, predominantly practitioners of Islam, fallen outside the
“human” as it has been naturalized in its “Western” mold by the
contemporary workings of humanism? What are the cultural con-
tours of the human at work here? How do our cultural frames for
thinking the human set limits on the kinds of losses we can avow as
loss? After all, if someone is lost, and that person is not someone, then
what and where is the loss, and how does mourning take place?

This last is surely a question that lesbian, gay, and bi-studies have
asked in relation to violence against sexual minorities; that trans-
gendered people have asked as they are singled out for harassment
and sometimes murder; that intersexed people have asked, whose
formative years are so often marked by unwanted violence against
their bodies in the name of a normative notion of the human, a
normative notion of what the body of a human must be. This
question is no doubt, as well, the basis of a profound affinity between
movements centering on gender and sexuality and efforts to counter
the normative human morphologies and capacities that condemn or
efface those who are physically challenged. It must also be part of the
affinity with anti-racist struggles, given the racial differential that
undergirds the culturally viable notions of the human, ones that we
see acted out in dramatic and terrifying ways in the global arena at
the present time.

I am referring not only to humans not regarded as humans, and
thus to a restrictive conception of the human that is based upon their
exclusion. It is not a matter of a simple entry of the excluded into an
established ontology, but an insurrection at the level of ontology, a
critical opening up of the questions, What is real? Whose lives are
real? How might reality be remade? Those who are unreal have, in a
sense, already suffered the violence of derealization. What, then, is
the relation between violence and those lives considered as “unreal”? Does violence effect that unreality? Does violence take place on the
condition of that unreality?

If violence is done against those who are unreal, then, from the
perspective of violence, it fails to injure or negate those lives since
those lives are already negated. But they have a strange way of remain-
ing animated and so must be negated again (and again). They cannot
be mourned because they are always already lost or, rather, never
“were,” and they must be killed, since they seem to live on, stub-
bornly, in this state of deadness. Violence renews itself in the face of
the apparent inexhaustibility of its object. The derealization of the
“Other” means that it is neither alive nor dead, but interminably
spectral. The infinite paranoia that imagines the war against terrorism as a war without end will be one that justifies itself endlessly in relation to the spectral infinity of its enemy, regardless of whether or not there are established grounds to suspect the continuing operation of terror cells with violent aims.

How do we understand this derealization? It is one thing to argue that first, on the level of discourse, certain lives are not considered lives at all, they cannot be humanized, that they fit no dominant frame for the human, and that their dehumanization occurs first, at this level, and that this level then gives rise to a physical violence that in some sense delivers the message of dehumanization that is already at work in the culture. It is another thing to say that discourse itself effects violence through omission. If 200,000 Iraqi children were killed during the Gulf War and its aftermath, do we have an image, a frame for any of those lives, singly or collectively? Is there a story we might find about those deaths in the media? Are there names attached to those children?

There are no obituaries for the war casualties that the United States inflicts, and there cannot be. If there were to be an obituary, there would have had to have been a life, a life worth noting, a life worth valuing and preserving, a life that qualifies for recognition. Although we might argue that it would be impractical to write obituaries for all those people, or for all people, I think we have to ask, again and again, how the obituary functions as the instrument by which grievability is publicly distributed. It is the means by which a life becomes, or fails to become, a publicly grievable life, an icon for national self-recognition, the means by which a life becomes noteworthy. As a result, we have to consider the obituary as an act of nation-building. The matter is not a simple one, for, if a life is not grievable, it is not quite a life; it does not qualify as a life and is not worth a note. It is already the unburied, if not the unburiable.

It is not simply, then, that there is a “discourse” of dehumanization that produces these effects, but rather that there is a limit to discourse that establishes the limits of human intelligibility. It is not just that a death is poorly marked, but that it is unmarkable. Such a death vanishes, not into explicit discourse, but in the ellipses by which public discourse proceeds. The queer lives that vanished on September 11 were not publicly welcomed into the idea of national identity built in the obituary pages, and their closest relations were only belatedly and selectively (the marital norm holding sway once again) made eligible for benefits. But this should come as no surprise, when we think about how few deaths from AIDS were publicly grievable losses, and how, for instance, the extensive deaths now taking place in Africa are also, in the media, for the most part unmarkable and ungrievable.

A Palestinian citizen of the United States recently submitted to the San Francisco Chronicle obituaries for two Palestinian families who had been killed by Israeli troops, only to be told that the obituaries could not be accepted without proof of death. The staff of the Chronicle said that statements “in memoriam” could, however, be accepted, and so the obituaries were rewritten and resubmitted in the form of memorials. These memorials were then rejected, with the explanation that the newspaper did not wish to offend anyone. We have to wonder under what conditions public grieving constitutes an “offense” against the public itself, constituting an intolerable eruption within the terms of what is speakable in public? What might be “offensive” about the public avowal of sorrow and loss, such that memorials would function as offensive speech? Is it that we should not proclaim in public these deaths, for fear of offending those who ally themselves with the Israeli state or military? Is it that these deaths are not considered to be real deaths, and that these lives not grievable, because they are Palestinians, or because they are victims
of war? What is the relation between the violence by which these ungrievable lives were lost and the prohibition on their public grievability? Are the violence and the prohibition both permutations of the same violence? Does the prohibition on discourse relate to the dehumanization of the deaths—and the lives?

Dehumanization's relation to discourse is complex. It would be too simple to claim that violence simply implements what is already happening in discourse, such that a discourse on dehumanization produces treatment, including torture and murder, structured by the discourse. Here the dehumanization emerges at the limits of discursive life, limits established through prohibition and foreclosure. There is less a dehumanizing discourse at work here than a refusal of discourse that produces dehumanization as a result. Violence against those who are already not quite living, that is, living in a state of suspension between life and death, leaves a mark that is no mark. There will be no public act of grieving (said Creon in Antigone). If there is a "discourse," it is a silent and melancholic one in which there have been no lives, and no losses; there has been no common bodily condition, no vulnerability that serves as the basis for an apprehension of our commonality; and there has been no sundering of that commonality. None of this takes place on the order of the event. None of this takes place. In the silence of the newspaper, there was no event, no loss, and this failure of recognition is mandated through an identification with those who identify with the perpetrators of that violence.

This is made all the more apparent in United States journalism, in which, with some notable exceptions, one might have expected a public exposure and investigation of the bombing of civilian targets, the loss of lives in Afghanistan, the decimation of communities, infrastructures, religious centers. To the extent that journalists have accepted the charge to be part of the war effort itself, reporting itself has become a speech act in the service of the military operations. Indeed, after the brutal and terrible murder of the Wall Street Journal's Daniel Pearl, several journalists started to write about themselves as working on the "front lines" of the war. Indeed, Daniel Pearl, "Danny" Pearl, is so familiar to me: he could be my brother or my cousin; he is so easily humanized; he fits the frame, his name has my father's name in it. His last name contains my Yiddish name.

But those lives in Afghanistan, or other United States targets, who were also snuffed out brutally and without recourse to any protection, will they ever be as human as Daniel Pearl? Will the names of the Palestinians stated in that memorial submitted to the San Francisco Chronicle ever be brought into public view? (Will we feel compelled to learn how to say these names and to remember them?) I do not say this to espouse a cynicism. I am in favor of the public obituary but mindful of who has access to it, and which deaths can be fairly mourned there. We should surely continue to grieve for Daniel Pearl, even though he is so much more easily humanized for most United States citizens than the nameless Afghans obliterated by United States and European violence. But we have to consider how the norm governing who will be a grievable human is circumscribed and produced in these acts of permissible and celebrated public grieving, how they sometimes operate in tandem with a prohibition on the public grieving of others' lives, and how this differential allocation of grief serves the derealizing aims of military violence. What follows as well from prohibitions on avowing grief in public is an effective mandate in favor of a generalized melancholia (and a derealization of loss) when it comes to considering as dead those the United States or its allies have killed.

Finally, it seems important to consider that the prohibition on certain forms of public grieving itself constitutes the public sphere on the basis of such a prohibition. The public will be created on the
condition that certain images do not appear in the media, certain names of the dead are not utterable, certain losses are not avowed as losses, and violence is derealized and diffused. Such prohibitions not only shore up a nationalism based on its military aims and practices, but they also suppress any internal dissent that would expose the concrete, human effects of its violence.

Similarly, the extensive reporting of the final moments of the lost lives in the World Trade Center are compelling and important stories. They fascinate, and they produce an intense identification by arousing feelings of fear and sorrow. One cannot help but wonder, however, what humanizing effect these narratives have. By this I do not mean simply that they humanize the lives that were lost along with those that narrowly escaped, but that they stage the scene and provide the narrative means by which "the human" in its grievability is established. We cannot find in the public media, apart from some reports posted on the internet and circulated mainly through email contacts, the narratives of Arab lives killed elsewhere by brutal means. In this sense, we have to ask about the conditions under which a grievable life is established and maintained, and through what logic of exclusion, what practice of effacement and denominalization.

Mourning Daniel Pearl presents no problem for me or for my family of origin. His is a familiar name, a familiar face, a story about education that I understand and share; his wife's education makes her language familiar, even moving, to me, a proximity of what is similar. 9 In relation to him, I am not disturbed by the proximity of the unfamiliar, the proximity of difference that makes me work to forge new ties of identification and to reimagine what it is to belong to a human community in which common epistemological and cultural grounds cannot always be assumed. His story takes me home and tempts me to stay there. But at what cost do I establish the familiar as the criterion by which a human life is grievable?

Most Americans have probably experienced something like the loss of their First Worldism as a result of the events of September 11 and its aftermath. What kind of loss is this? It is the loss of the prerogative, only and always, to be the one who transgresses the sovereign boundaries of other states, but never to be in the position of having one's own boundaries transgressed. The United States was supposed to be the place that could not be attacked, where life was safe from violence initiated from abroad, where the only violence we knew was the kind that we inflicted on ourselves. The violence that we inflict on others is only—and always—selectively brought into public view. We now see that the national border was more permeable than we thought. Our general response is anxiety, rage; a radical desire for security, a shoring-up of the borders against what is perceived as alien; a heightened surveillance of Arab peoples and anyone who looks vaguely Arab in the dominant racial imaginary, anyone who looks like someone you once knew who was of Arab descent, or who you thought was—often citizens, it turns out, often Sikhs, often Hindus, even sometimes Israelis, especially Sephardim, often Arab-Americans, recent arrivals or those who have been in the US for decades.

Various terror alerts that go out over the media authorize and heighten racial hysteria in which fear is directed anywhere and nowhere, in which individuals are asked to be on guard but not told what to be on guard against; so everyone is free to imagine and identify the source of terror.

The result is that an amorphous racism abounds, rationalized by the claim of "self-defense." A generalized panic works in tandem with the shoring-up of the sovereign state and the suspension of civil liberties. Indeed, when the alert goes out, every member of the population is asked to become a "foot soldier" in Bush's army. The loss of First World presumption is the loss of a certain horizon of experience, a certain sense of the world itself as a national entitlement.
I condemn on several ethical bases the violence done against the United States and do not see it as "just punishment" for prior sins. At the same time, I consider our recent trauma to be an opportunity for a reconsideration of United States hubris and the importance of establishing more radically egalitarian international ties. Doing this involves a certain "loss" for the country as a whole: the notion of the world itself as a sovereign entitlement of the United States must be given up, lost, and mourned, as narcissistic and grandiose fantasies must be lost and mourned. From the subsequent experience of loss and fragility, however, the possibility of making different kinds of ties emerges. Such mourning might (or could) effect a transformation in our sense of international ties that would crucially rearticulate the possibility of democratic political culture here and elsewhere.

Unfortunately, the opposite reaction seems to be the case. The US asserts its own sovereignty precisely at a moment in which the sovereignty of the nation is bespeaking its own weakness, if not its growing status as an anachronism. It requires international support, but it insists on leading the way. It breaks its international contracts, and then asks whether other countries are with America or against it. It expresses its willingness to act consistently with the Geneva Convention, but it refuses to be bound to that accord, as is stipulated by its signatory status. On the contrary, the US decides whether it will act consistently with the doctrine, which parts of the doctrine apply, and will interpret that doctrine unilaterally. Indeed, in the very moment in which it claims to act consistently with the doctrine, as it does when it justifies its treatment of the Guantanamo Bay prisoners as "humane," it decides unilaterally what will count as humane, and openly defies the stipulated definition of humane treatment that the Geneva Convention states in print. It bombs unilaterally, it says that it is time for Saddam Hussein to be removed, it decides when and where to install democracy, for whom, by means dramatically anti-democratic, and without compunction.

Nations are not the same as individual psyches, but both can be described as "subjects," albeit of different orders. When the United States acts, it establishes a conception of what it means to act as an American, establishes a norm by which that subject might be known. In recent months, a subject has been instated at the national level, a sovereign and extra-legal subject, a violent and self-centered subject; its actions constitute the building of a subject that seeks to restore and maintain its mastery through the systematic destruction of its multilateral relations, its ties to the international community. It shores itself up, seeks to reconstitute its imagined wholeness, but only at the price of denying its own vulnerability, its dependency, its exposure, where it exploits those very features in others, thereby making those features "other to" itself.

That this foreclosure of alterity takes place in the name of "feminism" is surely something to worry about. The sudden feminist conversion on the part of the Bush administration, which retroactively transformed the liberation of women into a rationale for its military actions against Afghanistan, is a sign of the extent to which feminism, as a trope, is deployed in the service of restoring the presumption of First World impermeability. Once again we see the spectacle of "white men, seeking to save brown women from brown men," as Gayatri Chakravorty Spivak once described the culturally imperialist exploitation of feminism. Feminism itself becomes, under these circumstances, unequivocally identified with the imposition of values on cultural contexts willfully unknown. It would surely be a mistake to gauge the progress of feminism by its success as a colonial project. It seems more crucial than ever to disengage feminism from its First World presumption and to use the resources of feminist theory, and activism, to rethink the meaning of the tie, the bond, the
alliance, the relation, as they are imagined and lived in the horizon of a counterimperialist egalitarianism.

Feminism surely could provide all kinds of responses to the following questions: How does a collective deal, finally, with its vulnerability to violence? At what price, and at whose expense, does it gain a purchase on “security,” and in what ways has a chain of violence formed in which the aggression the United States has wrought returns to it in different forms? Can we think of the history of violence here without exonerating those who engage it against the United States in the present? Can we provide a knowledgeable explanation of events that is not confused with a moral exoneration of violence? What has happened to the value of critique as a democratic value? Under what conditions is critique itself censored, as if any reflexive criticism can only and always be construed as weakness and fallibility?

Negotiating a sudden and unprecedented vulnerability—what are the options? What are the long-term strategies? Women know this question well, have known it in nearly all times, and nothing about the triumph of colonial powers has made our exposure to this kind of violence any less clear. There is the possibility of appearing impermeable, of repudiating vulnerability itself. Nothing about being socially constituted as women restrains us from simply becoming violent ourselves. And then there is the other age-old option, the possibility of wishing for death or becoming dead, as a vain effort to preempt or deflect the next blow. But perhaps there is some other way to live such that one becomes neither affectively dead nor mimetically violent, a way out of the circle of violence altogether. This possibility has to do with demanding a world in which bodily vulnerability is protected without therefore being eradicated and with insisting on the line that must be walked between the two.

By insisting on a “common” corporeal vulnerability, I may seem to be positing a new basis for humanism. That might be true, but I am prone to consider this differently. A vulnerability must be perceived and recognized in order to come into play in an ethical encounter, and there is no guarantee that this will happen. Not only is there always the possibility that a vulnerability will not be recognized and that it will be constituted as the “unrecognizable,” but when a vulnerability is recognized, that recognition has the power to change the meaning and structure of the vulnerability itself. In this sense, if vulnerability is one precondition for humanization, and humanization takes place differently through variable norms of recognition, then it follows that vulnerability is fundamentally dependent on existing norms of recognition if it is to be attributed to any human subject.

So when we say that every infant is surely vulnerable, that is clearly true; but it is true, in part, precisely because our utterance enacts the very recognition of vulnerability and so shows the importance of recognition itself for sustaining vulnerability. We perform the recognition by making the claim, and that is surely a very good ethical reason to make the claim. We make the claim, however, precisely because it is not taken for granted, precisely because it is not, in every instance, honored. Vulnerability takes on another meaning at the moment it is recognized, and recognition wields the power to reconstitute vulnerability. We cannot posit this vulnerability prior to recognition without performing the very thesis that we oppose (our positing is itself a form of recognition and so manifests the constitutive power of the discourse). This framework, by which norms of recognition are essential to the constitution of vulnerability as a precondition of the “human,” is important precisely for this reason, namely, that we need and want those norms to be in place, that we struggle for their establishment, and that we value their continuing and expanded operation.

Consider that the struggle for recognition in the Hegelian sense requires that each partner in the exchange recognize not only that the
other needs and deserves recognition, but also that each, in a different way, is compelled by the same need, the same requirement. This means that we are not separate identities in the struggle for recognition but are already involved in a reciprocal exchange, an exchange that dislocates us from our positions, our subject-positions, and allows us to see that community itself requires the recognition that we are all, in different ways, striving for recognition.

When we recognize another, or when we ask for recognition for ourselves, we are not asking for an Other to see us as we are, as we already are, as we have always been, as we were constituted prior to the encounter itself. Instead, in the asking, in the petition, we have already become something new, since we are constituted by virtue of the address, a need and desire for the Other that takes place in language in the broadest sense, one without which we could not be. To ask for recognition, or to offer it, is precisely not to ask for recognition for what one already is. It is to solicit a becoming, to instigate a transformation, to petition the future always in relation to the Other. It is also to stake one's own being, and one's own persistence in one's own being, in the struggle for recognition. This is perhaps a version of Hegel that I am offering, but it is also a departure, since I will not discover myself as the same as the "you" on which I depend in order to be.

I have moved in this essay perhaps too blithely among speculations on the body as the site of a common human vulnerability, even as I have insisted that this vulnerability is always articulated differently, that it cannot be properly thought of outside a differentiated field of power and, specifically, the differential operation of norms of recognition. At the same time, however, I would probably still insist that speculations on the formation of the subject are crucial to understanding the basis of non-violent responses to injury and, perhaps most important, to a theory of collective responsibility. I realize that it is not possible to set up easy analogies between the formation of the individual and the formation, say, of state-centered political cultures, and I caution against the use of individual psycho-pathology to diagnose or even simply to read the kinds of violent formations in which state- and non-state-centered forms of power engage. But when we are speaking about the "subject" we are not always speaking about an individual: we are speaking about a model for agency and intelligibility, one that is very often based on notions of sovereign power. At the most intimate levels, we are social; we are comported toward a "you"; we are outside ourselves, constituted in cultural norms that precede and exceed us, given over to a set of cultural norms and a field of power that condition us fundamentally.

The task is doubtless to think through this primary impressionability and vulnerability with a theory of power and recognition. To do this would no doubt be one way a politically informed psycho-analytic feminism could proceed. The "I" who cannot come into being without a "you" is also fundamentally dependent on a set of norms of recognition that originated neither with the "I" nor with the "you." What is prematurely, or belatedly, called the "I" is, at the outset, enthralled, even if it is to a violence, an abandonment, a mechanism; doubtless it seems better at that point to be enthralled with what is impoverished or abusive than not to be enthralled at all and so to lose the condition of one's being and becoming. The bind of radically inadequate care consists of this, namely, that attachment is crucial to survival and that, when attachment takes place, it does so in relation to persons and institutional conditions that may well be violent, impoverishing, and inadequate. If an infant fails to attach, it is threatened with death, but, under some conditions, even if it does attach, it is threatened with non-survival from another direction. So the question of primary support for primary vulnerability is an ethical one for the infant and for the child. But there are broader ethical
consequences from this situation, ones that pertain not only to the adult world but to the sphere of politics and its implicit ethical dimension.

I find that my very formation implicates the other in me, that my own foreignness to myself is, paradoxically, the source of my ethical connection with others. I am not fully known to myself, because part of what I am is the enigmatic traces of others. In this sense, I cannot know myself perfectly or know my “difference” from others in an irreducible way. This unknowingness may seem, from a given perspective, a problem for ethics and politics. Don’t I need to know myself in order to act responsibly in social relations? Surely, to a certain extent, yes. But is there an ethical valence to my unknowingness? I am wounded, and I find that the wound itself testifies to the fact that I am impressionable, given over to the Other in ways that I cannot fully predict or control. I cannot think the question of responsibility alone, in isolation from the Other; if I do, I have taken myself out of the relational bind that frames the problem of responsibility from the start.

If I understand myself on the model of the human, and if the kinds of public grieving that are available to me make clear the norms by which the “human” is constituted for me, then it would seem that I am as much constituted by those I do grieve for as by those whose deaths I disavow, whose nameless and faceless deaths form the melancholic background for my social world, if not my First Worldism. Antigone, risking death herself by burying her brother against the edict of Creon, exemplified the political risks in defying the ban against public grief during times of increased sovereign power and hegemonic national unity. What are the cultural barriers against which we struggle when we try to find out about the losses that we are asked not to mourn, when we attempt to name, and so to bring under the rubric of the “human,” those whom the United States and its allies have killed? Similarly, the cultural barriers that feminism must negotiate have to take place with reference to the operation of power and the persistence of vulnerability.

A feminist opposition to militarism emerges from many sources, many cultural venues, in any number of idioms; it does not have to—and, finally, cannot—speak in a single political idiom, and no grand settling of epistemological accounts has to be required. This seems to be the theoretical commitment, for instance, of the organization Women in Black. A desideratum comes from Chandra Mohanty’s important essay “Under Western Eyes,” in which she maintains that notions of progress within feminism cannot be equated with assimilation to so-called Western notions of agency and political mobilization. There she argues that the comparative framework in which First World feminists develop their critique of the conditions of oppression for Third World women on the basis of universal claims not only misreads the agency of Third World feminists, but also falsely produces a homogeneous conception of who they are and what they want. In her view, that framework also reproduces the First World as the site of authentic feminist agency and does so by producing a monolithic Third World against which to understand itself. Finally, she argues that the imposition of versions of agency onto Third World contexts, and focusing on the ostensible lack of agency signaled by the veil or the burka, not only misunderstands the various cultural meanings that the burka might carry for women who wear it, but also denies the very idioms of agency that are relevant for such women. Mohanty’s critique is thorough and right—and it was written more than a decade ago. It seems to me now that the possibility of international coalition has to be rethought on the basis of this critique and others. Such a coalition would have to be modeled on new modes of cultural translation and would be different from appreciating this or that position or asking for recognition in ways that assume that we are all fixed and frozen in our various locations and “subject-positions.”
We could have several engaged intellectual debates going on at the same time and find ourselves joined in the fight against violence, without having to agree on many epistemological issues. We could disagree on the status and character of modernity and yet find ourselves joined in asserting and defending the rights of indigenous women to health care, reproductive technology, decent wages, physical protection, cultural rights, freedom of assembly. If you saw me on such a protest line, would you wonder how a postmodernist was able to muster the necessary “agency” to get there today? I doubt it. You would assume that I had walked or taken the subway! By the same token, various routes lead us into politics, various stories bring us onto the street, various kinds of reasoning and belief. We do not need to ground ourselves in a single model of communication, a single model of reason, a single notion of the subject before we are able to act. Indeed, an international coalition of feminist activists and thinkers—a coalition that affirms the thinking of activists and the activism of thinkers and refuses to put them into distinctive categories that deny the actual complexity of the lives in question—will have to accept the array of sometimes incommensurable epistemological and political beliefs and modes and means of agency that bring us into activism.

There will be differences among women, for instance, on what the role of reason is in contemporary politics. Spivak insists that it is not reason that politcizes the tribal women of India suffering exploitation by capitalist firms, but a set of values and a sense of the sacred that come through religion. And Adriana Cavarero claims that it is not because we are reasoning beings that we are connected to one another, but, rather, because we are exposed to one another, requiring a recognition that does not substitute the recognizer for the recognized. Do we want to say that it is our status as “subjects” that binds us all together even though, for many of us, the “subject” is multiple or fractured? And does the insistence on the subject as a precondition of political agency not erase the more fundamental modes of dependency that do bind us and out of which emerge our thinking and affiliation, the basis of our vulnerability, affiliation, and collective resistance?

What allows us to encounter one another? What are the conditions of possibility for an international feminist coalition? My sense is that to answer these questions, we cannot look to the nature of “man,” or the a priori conditions of language, or the timeless conditions of communication. We have to consider the demands of cultural translation that we assume to be part of an ethical responsibility (over and above the explicit prohibitions against thinking the Other under the sign of the “human”) as we try to think the global dilemmas that women face. It is not possible to impose a language of politics developed within First World contexts on women who are facing the threat of imperialist economic exploitation and cultural obliteration. On the other hand, we would be wrong to think that the First World is here and the Third World is there, that a second world is somewhere else, that a subaltern subtends these divisions. These topographies have shifted, and what was once thought of as a border, that which delimits and bounds, is a highly populated site, if not the very definition of the nation, confounding identity in what may well become a very auspicious direction.

For if I am confounded by you, then you are already of me, and I am nowhere without you. I cannot muster the “we” except by finding the way in which I am tied to “you,” by trying to translate but finding that my own language must break up and yield if I am to know you. You are what I gain through this disorientation and loss. This is how the human comes into being, again and again, as that which we have yet to know.
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. 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. 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. Rather, the emergence of governmentality may depend upon the devitalization 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 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."

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. 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.

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. 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 reinscribe a sovereignty that the governmentized 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; and they do not tell us 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.” 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,
unfathomable, 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? 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 reductio ad absurdum of 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. Other reports in the spring of 2003 made clear that some detainees are minors, ranging from ages thirteen to sixteen. Even General Dunlavey, who admitted that not all the detainees were killers, still claimed that the risk is too high to release such detainees. Rumsfeld cited in support of forcible detention the prison uprisings in Afghanistan in which prisoners managed to get hold of weapons and stage a battle inside the prison. In this sense, the war is not, and cannot be, over; there is a chance of battle in the prison, and there is a warrant for physical restraint, such that the postwar prison becomes the continuing site of war. It would seem that the rules that govern combat are in place, but not the rules that govern the proper treatment of prisoners separated from the war itself.

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

If the war is against terrorism, and the definition of terrorism expands to include every questionable instance of global difficulty, how can the war end? Is it, by definition, a war without end, given the lability of the terms “terrorism” and “war”? Although the pictures were published as a sign of US triumph, and so apparently indicating a conclusion to the war effort, it was clear at the time that bombing and armed conflict were continuing in Afghanistan, the war was not over, and even the photographs, the degradation, and the indefinite
detention were continuing acts of war. Indeed, war seems to have established a more or less permanent condition of national emergency, and the sovereign right to self-protection outflanks any and all recourse to law.

The exercise of sovereign power is bound up with the extra-legal status of these official acts of speech. These acts become the means by which sovereign power extends itself; the more it can produce equivocation, the more effectively it can augment its power in the apparent service of justice. These official statements are also media performances, a form of state speech that establishes a domain of official utterance distinct from legal discourse. When many organizations and countries questioned whether the US was honoring the Geneva Convention protocols on the treatment of prisoners of war, the administration equivocated in its response. It maintained that the prisoners at Guantanamo were being treated in a manner "consistent with" the Geneva Convention, they did not say that they understand the US to be obligated to honor that law, or that this law has a binding power on the US. The power of the Geneva Convention has been established by the US as nonbinding in several instances over the last few years. The first instance seemed to be the claim that appears to honor the convention, namely, that the US is acting in a manner consistent with the convention, or, alternatively, that the US is acting in the spirit of the Geneva Accords. To say that the US acts consistently with the accords is to say that the US acts in such a way that does not contradict the accords, but it does not say that the US, as a signatory to the accords, understands itself as bound to the accords. To acknowledge the latter would be to acknowledge the limits that international accords impose upon claims of national sovereignty. To act "consistently" with the accords is still to determine one's own action, and to regard that action as compatible with the accords, but to refuse the notion that one's actions are subject to the accords. Matters get worse when we see that certain rights laid out in the Geneva Accords, Article 3, such as a war prisoner's right to counsel, to knowing the crime for which he is being charged, to be eligible for a timely consideration by a regularly constituted court, for rights of appeal, and a timely repatriation, are not being honored and are not in the planning. Matters became even more vexed, but perhaps finally more clear, when we heard that none of the detainees in Guantanamo are to be regarded as prisoners of war according to the Geneva Convention, since none of them belong to "regular armies." Under pressure, the Bush administration conceded that the Taliban were covered by the Geneva Convention, because they were the representatives of the Afghan government, but that they are still unentitled to prisoner of war status under that accord. Indeed, the administration finally said quite clearly that the Geneva Accord was not designed to handle this kind of war, and so its stipulations about who is and is not regarded as a prisoner of war, who is entitled to the rights pertaining to such a status, are anachronistic. The administration thus dismisses the accords as anachronistic, but claims to be acting consistently with them.

When relatively widespread outrage emerged in response to the published photographs of the shackled bodies in Guantanamo, the US asserted it was treating these prisoners humanely. The word, "humanely" was used time and again, and in conjunction with the claim that the US was acting consistently with the Geneva Convention. It seems important to recognize that one of the tasks of the Geneva Convention was to establish criteria for determining what does and does not qualify as the humane treatment of prisoners of war. In other words, one of the tasks was to seek to establish an international understanding of "humane treatment" and to stipulate what conditions must first be met before we can say with certainty that humane treatment has been offered. The term "humane
treatment” thus received a legal formulation, and the result was a set of conditions which, if satisfied, would constitute humane treatment. When the US says, then, that it is treating these prisoners humanely, it uses the word in its own way and for its own purpose, but it does not accept that the Geneva Accords stipulate how the term might legitimately be applied. In effect, it takes the word back from the accords at the very moment that it claims to be acting consistently with the accords. In the moment that it claims to be acting consistently with the accords, the US effectively maintains that the accords have no power over it. Similarly, if the US claims that it recognizes that the Taliban are to be considered under the Geneva Convention, but then maintains that even Taliban soldiers are not entitled to prisoner of war status, it effectively disputes the binding power of the agreement. Given that the agreement maintains that a competent tribunal must be set up to determine prisoner of war status, and that all prisoners are to be treated as POWs until such time as a competent tribunal makes a different determination, and given that the US has arranged for no such tribunal and has made this determination unilaterally, the US disregards the very terms of the agreement again. As a result, the “recognition” of the Taliban as being covered by an accord that the US treats as non-binding is effectively worthless, especially when it continues to deny POW status to those it ostensibly recognizes.

We can see that the speech acts sound official at the same time as they defy the law; the speech acts make use of the law only to twist and suspend the law in the end, even make use of the law arbitrarily to elaborate the exercise of sovereignty. And it is not that sovereignty exists as a possession that the US is said to “have” or a domain that the US is said “to occupy.” Grammar defeats us here. Sovereignty is what is tactically produced through the very mechanism of its self-justification. And that mechanism, in this circumstance, turns again and again on either relegating law to an instrumentality of the state or of suspending law in the interests of the executive function of the state. The US shows contempt for its own constitution and the protocols of international law in relegating law to an instrumentality of the state and suspending law in the interests of the state. When a reporter asked the DOD representatives why a military tribunal system was required, given that both a civil court and a military court system already exist, they responded that they needed another “instrument,” given the new circumstances. The law is not that to which the state is subject nor that which distinguishes between lawful state action and unlawful, but is now expressly understood as an instrument, an instrumentality of power, one that can be applied and suspended at will. Sovereignty consists now in the variable application, contortion, and suspension of the law; it is, in its current form, a relation to law: exploitative, instrumental, disdainful, preemptory, arbitrary.

On C-SPAN in February of 2002, Rumsfeld appeared exasperated with the legal questions about Guantanamo which at that time centered on humane treatment and POW status. He repeatedly appealed instead to a substantive military and public goal to justify the treatment of prisoners in Cuba. He leaned over the microphone and exclaimed that he was just trying to keep these people off the streets and out of the nuclear power plants, so that they would not kill any more people—people have to be detained so they do not kill. In answer to the question of whether or not the detainees will be charged with a crime, whether they could expect trials, he thought it was reasonable to expect that they would, but he offered no commitment to that effect. Here again he did not understand the Department of Defense to be obligated in any way to do that in a timely fashion after a conflict is concluded or, indeed, to commit itself to following the international law that would make of that a strict
obligation and an unconditional right. It was "perfectly reasonable" to keep them off the streets, he said, so that they do not kill. And so what it seems perfectly reasonable to do is the basis for what he and the government are doing, and the "law" is surely there to be consulted, as international convention is there as a kind of model, but not as an obligatory framework for action. The action is autonomous, outside the law, looking to the law, considering it, consulting it, even perhaps, on occasion, acting consistently with it. But the action is itself extra-legal, and understands itself to be justified as such. In fact, the law seemed to bother him. In responding to all these questions about legal rights and responsibilities, he remarked that he would leave these questions to others who did not drop out of law school, as he had. And then he laughed, as if some praiseworthy evidence of his own American manhood was suddenly made public. The show of strength indifferent to the law was early on encapsulated by Bush's "Dead or Alive" slogan applied to Osama bin Laden, and Rumsfeld seems to continue this cowboy tradition of vigilante justice in the current situation.

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

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

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

One might conclude with a strong argument that government policy ought to follow established law. And in a way, that is part of what I am calling for. But there is also a problem with the law, since it leaves open the possibility of its own retraction, and, in the case of the Geneva Convention, extends “universal” rights only to those imprisoned combatants who belong to “recognizable” nation-states, but not to all people. Recognizable nation-states are those that are already signatories to the convention itself. This means that stateless peoples or those who belong to states that are emergent or “rogue” or generally unrecognized lack all protections. The Geneva Convention, in part, a civilizational discourse, and it nowhere asserts an entitlement to protection against degradation and violence and rights to a fair trial as universal rights. Other international covenants surely do, and many human rights organizations have argued that the Geneva Convention can and ought to be read to apply universally. The International Committee of the Red Cross made this point publicly (February 8, 2002). Kenneth Roth, Director of Human Rights Watch, has argued strongly that such rights do pertain to the Guantanamo Prisoners (January 28, 2002), and the Amnesty International Memorandum to the US Government (April 15, 2002), makes clear that fifty years of international law has built up the assumption of universality, codified clearly in Article 9(4) of the International Covenant on Civil and Political Rights, ratified by the US in 1992. Similar statements have been made by the International Commission on Jurists (February 7, 2002) and the Organization for American States human rights panel made the same claim (March 13, 2002), seconded by the Center for Constitutional Rights (June 10, 2002). Exclusive recourse to the Geneva Convention, itself drafted in 1949, as the document for guidance in this area is thus in itself problematic. The notion of “universal” embedded in that document is restrictive in its reach: it counts as subjects worthy of protection only those who belong already to nation-states recognizable within its terms. In this way, then, the Geneva Convention is in the business of establishing and applying a selective criterion to the question of who merits protection under its provisions, and who does not. The Geneva Convention assumes that certain prisoners may not be protected by its statute. By clearly privileging those prisoners from wars between recognizable states, it leaves the stateless unprotected, and it leaves those from non-recognized polities without recourse to its entitlements.

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

The fact that these prisoners are seen as pure vessels of violence, as Rumsfeld claimed, suggests that they do not become violent for the same kinds of reason that other politicized beings do, that their violence is somehow constitutive, groundless, and infinite, if not innate. If this violence is terrorism rather than violence, it is conceived as an action with no political goal, or cannot be read politically. It emerges, as they say, from fanatics, extremists, who do not espouse a point of view, but rather exist outside of “reason,” and do not have a part in the human community. That it is Islamic extremism or terrorism simply means that the dehumanization that Orientalism already performs is heightened to an extreme, so that the uniqueness and exceptionalism of this kind of war makes it exempt from the presumptions and protections of universality and civilization. When the very human status of those who are imprisoned is called into question, it is a sign that we have made use of a certain parochial frame for understanding the human, and failed to expand our conception of human rights to include those whose values may well test the limits of our own. The figure of Islamic extremism is a very reductive one at this point in time, betraying an extreme ignorance about the various social and political forms that Islam takes, the tensions, for instance, between Sunni and Shiite Muslims, as well as the wide range of religious practices that have few, if any, political implications such as the da'wa practices of the mosque movement, or whose political implications are pacifist.

If we assume that everyone who is human goes to war like us, and that this is part of what makes them recognizably human, or that the violence we commit is violence that falls within the realm of the recognizably human, but the violence that others commit is unrecognizable as human activity, then we make use of a limited and limiting cultural frame to understand what it is to be human. This is no reason to dismiss the term “human,” but only a reason to ask how it works, what it forecloses, and what it sometimes opens up. To be human implies many things, one of which is that we are the kinds of beings who must live in a world where clashes of value do and will occur, and that these clashes are a sign of what a human community is. How we handle those conflicts will also be a sign of our human-ness, one that is, importantly, in the making. Whether or not we
continue to enforce a universal conception of human rights at moments of outrage and incomprehension, precisely when we think that others have taken themselves out of the human community as we know it, is a test of our very humanity. We make a mistake, therefore, if we take a single definition of the human, or a single model of rationality, to be the defining feature of the human, and then extrapolate from that established understanding of the human to all of its various cultural forms. That direction will lead us to wonder whether some humans who do not exemplify reason and violence in the way defined by our definition are still human, or whether they are "exceptional" (Haynes) or "unique" (Hastert), or "really bad people" (Cheney) presenting us with a limit case of the human, one in relation to which we have so far failed. To come up against what functions, for some, as a limit case of the human is a challenge to rethink the human. And the task to rethink the human is part of the democratic trajectory of an evolving human rights jurisprudence. It should not be surprising to find that there are racial and ethnic frames by which the recognizably human is currently constituted. One critical operation of any democratic culture is to contest these frames, to allow a set of dissonant and overlapping frames to come into view, to take up the challenges of cultural translation, especially those that emerge when we find ourselves living in proximity with those whose beliefs and values challenge our own at very fundamental levels. More crucially, it is not that "we" have a common idea of what is human, for Americans are constituted by many traditions, including Islam in various forms, so any radically democratic self-understanding will have to come to terms with the heterogeneity of human values. This is not a relativism that undermines universal claims; it is the condition by which a concrete and expansive conception of the human will be articulated, the way in which parochial and implicitly racially and religiously bound conceptions of human will be made to yield to a wider conception of how we consider who we are as a global community. We do not yet understand all these ways, and in this sense human rights law has yet to understand the full meaning of the human. It is, we might say, an ongoing task of human rights to reconceive the human when it finds that its putative universality does not have universal reach.

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

A spurious notion of civilization provides the measure by which the human is defined at the same time that a field of would-be humans, the spectrally human, the deconstituted, are maintained and detained, made to live and die within that extra-human and extra-juridical sphere of life. It is not just the inhumane treatment of the Guantanamo prisoners that attests to this field of beings apprehended, politically, as unworthy of basic human entitlements. It is also found in some of the legal frameworks through which we might
seek accountability for such inhuman treatment, such that the brutality is continued—revised and displaced—in, for instance, the extra-legal procedural antidote to the crime. We see the operation of a capricious proceduralism outside of law, and the production of the prison as a site for the intensification of managerial tactics untethered to law, and bearing no relation to trial, to punishment, or to the rights of prisoners. We see, in fact, an effort to produce a secondary judicial system and a sphere of non-legal detention that effectively produces the prison itself as an extra-legal sphere maintained by the extra-judicial power of the state.

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

How then finally are we to understand this extra-legal operation of power? I suggested earlier that the protocols governing indefinite detention and the new military tribunals reinstitute forms of sovereign power at both the executive and managerial levels. If the chronology of modern power that Foucault relays and disputes in his essay “Governmentality” implies that sovereignty is for the most part supplanted by governmentality, then the current configuration of power forces us to rethink the chronology that underwrites that distinction, as he also suggested we must do. Moreover, if state power now seeks to instate a sovereign form for itself through the suspension of the rule of law, it does not follow that the state ceases to manufacture law. On the contrary, it means only that the law it manufactures, in the form of new military tribunals, is widely considered illegitimate by national and international critics alike. So it is not simply that governmentality becomes a new site for the elaboration of sovereignty, or that the new courts become fully lawless, but that sovereignty trumps established law, and the unaccountable subjects become invested with the task of the discretionary fabrication of law.

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

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

For Foucault, then, governmentality regards laws as tactics; their operation is "justified" through their aim, but not through recourse to any set of prior principles or legitimating functions. Those functions may be in place, but they are not finally what animates the field of governmentality. Understood in this way, the operations of governmentality are for the most part extra-legal without being illegal. When law becomes a tactic of governmentality, it ceases to function as a legitimating ground: governmentality makes concrete the understanding of power as irreducible to law. Thus governmentality becomes the field in which resurgent sovereignty can rear its anachronistic head, for sovereignty is also ungrounded in law. In the present instance, sovereignty denotes a form of power that is fundamentally lawless, and whose lawlessness can be found in the way in which law itself is fabricated or suspended at the will of a designated subject. The new war prison literally manages populations, and thus functions as an operation of governmentality. At the same time, however, it exploits the extra-legal dimension of governmentality to assert a lawless sovereign power over life and death. In other words, the new war prison constitutes a form of governmentality that considers itself its own justification and seeks to extend that self-justificatory form of sovereignty through animating and deploying the extra-legal dimension of governmentality. After all, it will be "officials" who deem suspected terrorists or combatants "dangerous" and it will be "officials," not representatives of courts bound by law, who ostensibly will review the cases of those detained indefinitely. Similarly, the courts themselves are conceived explicitly as "an instrument" used in the service of national security, the protection of principality, the continuing and augmented exercise of state sovereignty.

Foucault casts doubt on a progressive history in which governmentality comes to supplant sovereignty in time, and argues at one point that the two together, along with discipline, have to be understood as contemporary with each other. But what form does sovereignty take once governmentality is established? Foucault offers a narrative in which governmentality supports the continuation of the state in a way that sovereignty no longer can. He writes, for instance, "the art of government only develops once the question of sovereignty ceases to be central" (97). The question of sovereignty seems to be the question of its legitimating function. When this question ceases to be asked, presumably because no answer is forthcoming, the problem of legitimacy becomes less important than the problem of effectivity. The state may or may not be legitimate, or derive its legitimacy from a principle of sovereignty, but it continues to "survive" as a site of power by virtue of governmentization: the management of health, of prisons, of education, of armies, of goods,
along with providing the discursive and institutional conditions for producing and maintaining populations in relation to these. When Foucault writes that “the tactics of governmentality ... make possible the continual definition and redefinition of what is within the competence of the state and what is not,” he avows the dependency of the state—its operation as effective power—on governmentality: “The state can only be understood in its survival and its limits on the basis of the general tactics of governmentality” (IOJ). For us, then, the question is: how does the production of a space for unaccountable prerogatory power function as part of the general tactics of governmentality? In other words, under what conditions does governmentality produce a lawless sovereignty as part of its own operation of power?

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

Although I cannot within the confines of the present analysis consider the various historical ramifications of Foucault’s argument, one can see that the present circumstance demands a revision of his theory. It cannot be right, as he claims, that “if the problems of governmentality and the techniques of government have become the only political issues, the only real space for political struggle and contestation, this is because the governmentalization of the state has permitted the state to survive” (103). It is unclear precisely what the relation of state to sovereignty and governmentality is in this formulation, but it seems clear that, however conditioned sovereignty may be, it still drives and animates the state in some important respects. It may be, as Foucault maintains, that governmentality cannot be derived from sovereignty, that whatever causal links once seemed plausible no longer do. But this does not preclude the possibility that governmentality might become the site for the reanimation of that lost ground, the reconstellation of sovereignty in new form. What we have before us now is the deployment of sovereignty as a tactic, a tactic that produces its own effectivity as its aim. Sovereignty becomes that instrument of power by which law is either used tactically or suspended, populations are monitored, detained, regulated, inspected, interrogated, rendered uniform in their actions, fully ritualized and exposed to control and regulation in their daily lives. The prison presents the managerial tactics of governmentality in an extreme mode. And whereas we expect the prison to be tied to law—to trial, to punishment, to the rights of prisoners—we see presently an effort to produce a secondary judicial system and a sphere of non-legal detention that effectively produces the prison itself as an extra-legal sphere. Even if one were tempted to declare that
sovereignty is an anachronistic mode of power, one would be forced to come to grips with the means by which anachronisms recirculate within new constellations of power. One might claim that sovereignty is concerned exclusively with a self-grounding exercise and has no instrumental aims, but that would be to underestimate the way that its self-grounding power might be instrumentalized within a broader set of tactics. Sovereignty's aim is to continue to exercise and augment its power to exercise itself; in the present circumstance, however, it can only achieve this aim through managing populations outside the law. So, even as governmental tactics give rise to this sovereignty, sovereignty comes to operate on the very field of governmentality: the management of populations. Finally, it seems important to recognize that one way of "managing" a population is to constitute them as the less than human without entitlement to rights, as the humanly unrecognizable. This is different from producing a subject who is compliant with the law; and it is different from the production of the subject who takes the norm of humaneness to be its constitutive principle. The subject who is no subject is neither alive nor dead, neither fully constituted as a subject nor fully deconstituted in death. "Managing" a population is thus not only a process through which regulatory power produces a set of subjects. It is also the process of their de-subjectivation, one with enormous political and legal consequences.

It may seem that the normative implication of my analysis is that I wish the state were bound to law in a way that does not treat the law merely as instrumental or dispensable. This is true. But I am not interested in the rule of law per se, however, but rather in the place of law in the articulation of an international conception of rights and obligations that limit and condition claims of state sovereignty. And I am further interested in elaborating an account of power that will produce effective sites of intervention in the dehumanizing effects of the new war prison. I am well aware that international models can be exploited by those who exercise the power to use them to their advantage, but I think that a new internationalism must nevertheless strive for the rights of the stateless, and for forms of self-determination that do not resolve into capricious and cynical forms of state sovereignty. There are advantages to conceiving power in such a way that it is not centered in the nation-state, but conceived, rather, to operate as well through non-state institutions and discourses, since the points of intervention have proliferated, and the aim of politics is not only or merely the overthrow of the state. A broader set of tactics are opened up by the field of governmentality, including those discourses that shape and deform what we mean by "the human."

I am in favor of self-determination as long we understand that no "self," including no national subject, exists apart from an international socius. A mode of self-determination for any given people, regardless of current state status, is not the same as the extra-legal exercise of sovereignty for the purposes of suspending rights at random. As a result, there can be no legitimate exercise of self-determination that is not conditioned and limited by an international conception of human rights that provides the obligatory framework for state action. I am, for instance, in favor of Palestinian self-determination, and even Palestinian statehood, but that process would have to take place supported by, and limited by, international human rights. Similarly, I am equally passionate about Israel giving up religion as a prerequisite for the entitlements of citizenship, and believe that no contemporary democracy can and ought to base itself on exclusionary conditions of participation, such as religion. The Bush administration has broken numerous international treaties in the last two years, many of them having to do with arms control and trade, and many of these abrogations took place prior to the events of September 11. Even the US's call for an international coalition
after those events was one that presumed that the US would set the
terms, lead the way, determine the criterion for membership, and lead
its allies. This is a form of sovereignty that seeks to absorb and
instrumentalize an international coalition, rather than submit to a self-
limiting practice by virtue of its international obligations. Similarly,
Palestinian self-determination will be secured as a right only if there
is an international consensus that there are rights to be enforced in the
face of a bloated and violent exercise of sovereign prerogative on the
part of Israel. My fear is that the indefinite detainment of prisoners
on Guantanamo, for whom no rights of appeal will be possible within
federal courts, will become a model for the branding and manage­
ment of so-called terrorists in various global sites where no rights of
appeal to international rights and to international courts will be
presumed. If this extension of lawless and illegitimate power takes
place, we will see the resurgence of a violent and self-aggrandizing
state sovereignty at the expense of any commitment to global co­
operation that might support and radically redistribute rights of
recognition governing who may be treated according to standards
that ought to govern the treatment of humans. We have yet to
become human, it seems, and now that prospect seems even more
radically imperiled, if not, for the time being, indefinitely foreclosed.

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

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

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

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