

ARTICLES

THE RHETORIC OF WAR: WORDS, CONFLICT, AND CATEGORIZATION POST-9/11

*Oren Gross & Fionnuala Ní Aoláin**

An atmosphere of crisis enhances the power, especially of the Executive Branch, to frame and shape the characterization, understanding, and reality of conflict. This Article addresses the language, rhetoric, status, and legality of “war” by examining the complexity of decision-making for policy-makers in the aftermath of the terrorist attacks of September 11, 2001. It does so by looking both inward, examining presidential war rhetoric in the United States, and outward, analyzing the experience of democratic states with the legal construct of “emergency” and “war” under the relevant international human rights treaties.

INTRODUCTION.....	242
I. DOMESTIC CONTROL: THE PRESIDENT AS A CHOICE	
ARCHITECT.....	244
A. <i>Purposive Framing: The Functionality of the “War”</i>	
Placeholder.....	246
B. <i>Presidential War Rhetoric</i>	253
C. <i>Presidential “Non-War” Rhetoric</i>	262
II. STATE POSITIONING, RHETORIC, AND “WAR”	264
A. <i>Reflections on the Emergency Comfort Zone</i>	275
B. <i>Framing: The Retreat from the Rhetoric and</i>	
<i>Formalities of “War”</i>	281
CONCLUSION.....	289

* Irving Younger Professor of Law and Director, Institute for International Legal & Security Studies, University of Minnesota Law School.

Dorsey and Whitney Chair in Law, University of Minnesota Law School & Professor of Law Transitional Justice Institute, University of Ulster.

The Article benefitted especially from the insights of Vicky Jackson, Gerald Neuman, Christine Bell, and Colm Campbell. Earlier versions of this Article were presented at Columbia Law School, the University of Copenhagen, the University of Iowa School of Law, and the University of Minnesota Law School. We wish to thank Mary Rumsey of the University of Minnesota Law Library for her assistance with locating sources for this Article. We acknowledge the research assistance of Laura Matson, Eric Peffley, and Rebecca Cassler.

INTRODUCTION

Words are a source of immense power. We use words not only to communicate and express our thoughts, but also to shape thought itself. Rhetorical power is a way of constituting the audiences to whom it is addressed “by furnishing [listeners] with the very equipment they need to assess its use—the metaphors, categories, and concepts of . . . discourse.”¹ These rhetorical devices are not neutral, value-free tools.² Rhetors select them, consciously or unconsciously, to fit their purposes and to accord with their own, and their audience’s, values, worldview, and perception of reality.³ Governments choose and utilize them carefully not only vis-à-vis their own domestic audiences, but also to represent the status, values, and positioning of the state vis-à-vis other states, international institutions and organizations, and international and transnational legal and political forums.

The notion of the neutrality of language is linked to the view of human reason as “conscious, literal, logical, universal, unemotional, disembodied, and serv[ing] self-interest.”⁴ One of the main attributes of being human has traditionally been considered the ability to transcend and overcome our emotions, make decisions, and take actions that are based on disembodied logic.⁵ According to this long-held view, emotions impede our ability to think and make decisions “rationally” and must be constantly checked and controlled.⁶ Plato analogized the binary approach of separating human reason and rationality from irrational emotions to a chariot harnessed to two winged horses—one representing rational impulses and positive (i.e., moral) emotions and the other representing negative or irrational emotions. The chariot’s driver represents reason, which needs to prevail over the horses in order to steer the soul in its search for truth.⁷ Yet, the strict binary separation between, and juxtaposition of, rationality and emotion has been challenged by insights from modern cognitive and brain research.⁸ Rather than seeing emotions as undermining reason, we have come to regard them as playing an essential role in how we, in fact, reason.⁹ Decision-making de-

¹ JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* 203 (1987).

² See GEORGE LAKOFF, *THE POLITICAL MIND: A COGNITIVE SCIENTIST’S GUIDE TO YOUR BRAIN AND ITS POLITICS* 13 (2009).

³ *Id.* at 15.

⁴ *Id.* at 2.

⁵ See JONAH LEHRER, *HOW WE DECIDE* 9 (2009).

⁶ See *id.*

⁷ *Id.* at 9–10.

⁸ See, e.g., DAVID REDISH, *THE MIND WITHIN THE BRAIN: HOW WE MAKE DECISIONS AND HOW THOSE DECISIONS GO WRONG* 133–34 (2013) (stating that the common horse and rider analogy is misleading, because “you are both the horse and the rider”).

⁹ JON ELSTER, *ALCHEMIES OF THE MIND: RATIONALITY AND THE EMOTIONS* 283–328 (1999); MICHAEL STOCKER & ELIZABETH HEGEMAN, *VALUING EMOTIONS* 91–121 (1996).

depends on complex interplay between reason and emotions.¹⁰ Our mind is as much “unconscious, embodied, emotional, empathetic, metaphorical, and only partly universal” as it is logical and disembodied.¹¹ Language gets its power because it works on both levels; and because “it is defined relative to frames, prototypes, metaphors, narratives, images, and emotions.”¹²

It is especially in light of these insights that the framing of a situation as a “problem,” “crisis,” “emergency,” or even “war,” as well as the very identification of an aggregation of facts as comprising “a situation,” become critical. The framing of issues and outcomes significantly shapes choices—whether pertaining to private decisions or to public policy. Individuals use frames as interpretive emotional filters through which they make sense of events around them and messages they receive.¹³ Framing filters serve as mental shortcuts in the process of decision-making, i.e., as cognitive heuristics. Being “cognitive misers,” individuals utilize shortcuts in order to minimize the effort involved in processing information and to make decisions as expediently and painlessly as possible.¹⁴ Moments of great consternation and upheaval, such as those invoked by the imagery of war and violent crisis, are characterized by sudden, urgent, and often unforeseen events or situations that require immediate action. These moments accentuate the problems related to our ability to process information and evaluate complex situations. Hence, such crises tend to lead to an even greater reliance on heuristics as a means of countering the lack of sufficient time to properly evaluate the situation.¹⁵ At the same time, reliance on framing as a shortcut also means that whoever manages to control the framing of information greatly influences, and can manipulate, the interpretation and meaning that recipients of that information are likely to attach to it. How these frames affect the legality and perception of governmental (inwardly) and state (outwardly) decision-making, and the consequences such communicated frames have in terms of legality of state action, for example, in the context of international humanitarian and human rights law, is significantly under researched and little understood.

This Article addresses the language, rhetoric, status, and legality of war by examining the complexity of decision-making for policy makers

¹⁰ LEHRER, *supra* note 5, at 9.

¹¹ LAKOFF, *supra* note 2, at 13.

¹² *Id.* at 15.

¹³ See LAKOFF, *supra* note 2, at 13.

¹⁴ SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION: FROM BRAINS TO CULTURE 37 (2007).

¹⁵ Melissa L. Finucane et al., *The Affect Heuristic in Judgments of Risks and Benefits*, 13 J. BEHAV. DECISION MAKING 1, 5–8 (2000) (the effects of time pressure on the (inverse) relationship between perceived risks and perceived benefits of an activity).

in the aftermath of the terrorist attacks of September 11, 2001. We specifically apply insights from cognitive decision-making theory both to domestic contexts and to the interaction of states on security issues post-9/11. Part I focuses on the role of the President of the United States as a national choice architect. The President's use of the power of the bully pulpit is the paradigmatic illustration of the Executive's framing power. This is so especially in the context of the extraordinary authority exerted by the President in responding to exigency and crisis. The analysis addresses presidential power beyond the formal corners of the Constitution and incorporates a situated understanding of presidential influence on determining the shape of threats to the nation. It looks closely at the adoption and adaptation of the language of emergency and war by presidents as a significant political and legal tool. Part II examines the positioning of democratic states post-9/11, as they have adopted, adapted, *and*, on occasion, rejected the language of war and emergency to respond to terrorist threats. We map the initial flirtation and embrace of war rhetoric by states followed by a more recent positioning by the United States and the United Kingdom that avoids deploying the terminology or status of "wartime." We go on to chart the significant indeterminacy indicated by the contradictory usage over time of the terminology and legal status associated with emergency, derogation, and war. Here, we examine what such varied claims by democratic states mean in the war-emergency-normalcy context, and the consequences that follow for state and international accountability as states behave as if a war footing is operative, while simultaneously claiming that the relevant legal thresholds have not been crossed. In conclusion, we assert that directing attention to the language and formalities of executive and state positioning is critical to understanding the political actions of states, the articulation and implementation of state responsibility for transgressions and violations of domestic and international law, and to engagement with the form and substance defining the legal status of conflict and crisis.

I. DOMESTIC CONTROL: THE PRESIDENT AS A CHOICE ARCHITECT

"Presidents address many audiences, but 'the people' are always listening. Skillful presidents not only adapt to their audiences; they engage in a process of transforming those who hear them into the audiences they desire."¹⁶

The constitutional framework of checks and balances in the United States recognizes the need for a vigorous presidential leadership and

¹⁶ KARLYN KOHRS CAMPBELL & KATHLEEN HALL JAMIESON, DEEDS DONE IN WORDS: PRESIDENTIAL RHETORIC AND THE GENRES OF GOVERNANCE 5 (1990). *See also* VANESSA B. BEASLEY, YOU, THE PEOPLE: AMERICAN NATIONAL IDENTITY IN PRESIDENTIAL RHETORIC (2011).

power that are balanced by a system of presidential accountability to the other branches of government as well as to the public at large.¹⁷ Many competing accounts and theories exist as to the nature and scope of, and limitations on, presidential powers. A comprehensive understanding of those accounts cannot be confined to the examination of the formal powers of the presidency as they are incorporated within the four corners of the Constitution and supplemented by statutes and judicial precedents. Indeed, the very essence of the modern president's power—the “power to persuade”—cannot be found as such in the constitutional text.¹⁸ This power of persuasion is directed at the general public, at the other two branches of government,¹⁹ and at the federal and state officials who are charged with the implementation of policy.²⁰

The language used in the framing of the relevant events and issues (indeed, the language used to describe what the issues are and which of them are, in fact, relevant) is not only shaped and informed by reality,²¹ it is, in and of itself, constitutive of what that reality may be.²² Rather than being formed by, and discoverable through, exogenous situational contexts, rhetoric precedes and informs the impact of such situations.²³ Meaning “is not discovered in situations, but *created* by rhetors.”²⁴ In the United States, no one plays the role of the national rhetorician more than the President—“the nation's chief storyteller, its interpreter-in-chief.”²⁵ Presidents, argues Kathleen Hall Jamieson, “respond to moments with words that tell us what the moments mean and then, with words, recommend to the nation and to the Congress courses of action.”²⁶ While the Office of the President is continuously defined and

17 CAMPBELL & JAMIESON, *supra* note 16, at 24–25.

18 RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN* 11 (1960).

19 *See, e.g.,* SAMUEL KERNELL, *GOING PUBLIC: NEW STRATEGIES OF PRESIDENTIAL LEADERSHIP* (4th ed. 2006).

20 *See* ANDREW B. WHITFORD & JEFF YATES, *PRESIDENTIAL RHETORIC AND THE PUBLIC AGENDA: CONSTRUCTING THE WAR ON DRUGS* 27–33 (2009).

21 *See* Richard E. Vatz, *The Myth of the Rhetorical Situation*, 6 *PHIL. & RHETORIC* 154, 156 (1973).

22 *See id.*

23 *Compare id.* at 154, with Lloyd F. Bitzer, *The Rhetorical Situation*, 1 *PHIL. & RHETORIC* 1, 2 (1968) (“The presence of rhetorical discourse obviously indicates the presence of a rhetorical situation.”).

24 Vatz, *supra* note 21, at 157. *See also* D. RYAN BERG, *THE NEW WAY AND THE WAR ON TERROR: A GENERIC ANALYSIS OF GEORGE W. BUSH'S WAR RHETORIC* 17–22 (2009).

25 MARY E. STUCKEY, *THE PRESIDENT AS INTERPRETER-IN-CHIEF* 1 (1991).

26 *Shifting Language: Trading Terrorism for Extremism*, NAT'L PUB. RADIO, at 01:32 (July 27, 2005), <http://www.npr.org/templates/story/story.php?storyId=4772826> (statement of Kathleen Hall Jamieson, director of Annenberg Public Policy Center, University of Pennsylvania). *See also* CAMPBELL & JAMIESON, *supra* note 16, at 3 (“Presidential rhetoric is one source of institutional power, enhanced in the modern presidency by the ability of presidents to speak when, where, and on whatever topic they choose, and to a national audience through coverage by the electronic media.”).

redefined by its occupants in their interactions with the people, it also shapes and defines the national identity of the people.²⁷ Presidents now regularly “go over the heads” of Congress to the people at large, and it is through presidential rhetoric that the “national fabric is woven.”²⁸

Although today rhetorical leadership forms the essence of the modern presidency, historically this was not the case. Until the twentieth century, the “old way” of U.S. governance and politics proscribed rhetorical presidency, and presidents did not engage in oral addresses to “the people.”²⁹ Presidents Theodore Roosevelt and Woodrow Wilson initiated the modern rhetorical presidency, in which popular rhetoric has become a principal tool of presidential governance.³⁰ This use of popular rhetoric marked a significant departure from the “old way.”³¹ Yet, the old rhetorical model itself recognized an important exception to the general antipathy towards presidential public oratory. Even prior to the twentieth century, in matters pertaining to the conduct of war, presidents have delivered popular speeches aimed directly at the general public. While “attempts to move the nation by moral suasion in the absence of war were almost unknown,”³² Jeffrey Tulis acknowledges that, “emergency or crisis appeals to public opinion in the manner of Theodore Roosevelt can be justified as consistent with the founding perspective.”³³

A. *Purposive Framing: The Functionality of the “War” Placeholder*

The framing of issues and outcomes significantly shapes choices—whether pertaining to private decisions or to public policy. “Frames are powerful nudges.”³⁴ We all employ frames as interpretive emotional fil-

²⁷ BERG, *supra* note 24, at 9.

²⁸ CAMPBELL & JAMIESON, *supra* note 16, at 6. *See also* KERNELL, *supra* note 19.

²⁹ TULIS, *supra* note 1, at 4–5.

³⁰ *Id.* at 4.

³¹ *Id.* at 6.

³² *Id.*

³³ *Id.* at 173. It is interesting to note that while presidential war rhetoric has been recognized as exemplifying clear patterns that allow for discussing it as a distinct genre, this has not been the case with other forms of presidential rhetoric in crises. *See, e.g.*, Samantha D. Cart, *The Presidential Rhetoric in Times of Crisis: A Textual Analysis of Speeches by Franklin Roosevelt and Ronald Reagan* (2014) (unpublished M.S. dissertation, West Virginia University); Donna R. Hoffman & Alison D. Howard, *The Presidential Rhetoric of Hard Times* (2010) (unpublished paper) (prepared for presentation at the Annual Meeting of the American Political Science Association), *available at* <http://ssrn.com/abstract=1643794>. Hoffman and Howard’s work examines presidents’ rhetoric during economic downturns and concludes that “there is not sufficient evidence to suggest there is a uniform presidential rhetoric of hard times.” *Id.* at 4.

³⁴ RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 37 (2008) (suggesting that because “people tend to be somewhat mindless, passive decision makers,” the way politicians, among others, frame issues may easily persuade, or “nudge,” public opinion on those issues). According to Thaler and Sunstein, a “nudge” is “any aspect of the choice architecture that alters people’s behavior in a

ters through which we make sense of events around us and messages we receive.³⁵ Framing filters serve as mental shortcuts in the process of decision-making—i.e., as cognitive heuristics. Reliance on framing as a shortcut also means that whoever manages to control the framing of information will greatly influence, and can manipulate, the interpretation and meaning that recipients of that information are likely to attach to it.³⁶ As Jim Kuypers argues,

[f]raming is a process whereby communicators, consciously or unconsciously, act to construct a point of view that encourages the facts of a given situation to be interpreted by others in a particular manner. Frames operate in four key ways: they define problems, diagnose causes, make moral judgments, and suggest remedies.³⁷

In framing a given situation and affixing the label of “crisis,” “emergency,” or “war” to it, the President is the nation’s chief “choice architect.”³⁸ When confronted with acute crises the President is often the first to act and his actions are the most visible. “In drama, magnitude and finality,” wrote Justice Robert H. Jackson, “[the President’s] decisions so far overshadow any others that almost alone he fills the public eye and ear.”³⁹ Presidential war rhetoric has facilitated the transformation of the original constitutional cooperative model—that of a president going to Congress to request authorization for acting as commander in chief—into a “justificatory genre designed to compel legislative ratification.”⁴⁰ In practice, presidential rhetoric works as “rhetoric of investiture,”⁴¹ explaining and legitimating the need to concentrate powers in the

predictable way without forbidding any options or significantly changing their economic incentives.” *Id.* at 6.

³⁵ ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* 21 (1974) (arguing that frames offer a “schemata of interpretation”).

³⁶ Barry Schwartz, *When Words Decide*, *SCI. AM. MIND*, Aug. 2007, at 37, 38.

³⁷ JIM A. KUYPERS, *BUSH’S WAR: MEDIA BIAS AND JUSTIFICATIONS FOR WAR IN A TERRORIST AGE* 8 (2009).

³⁸ THALER & SUNSTEIN, *supra* note 34, at 3 (defining “choice architect” as someone who “has the responsibility for organizing the context in which people make decisions”).

³⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653 (1952) (Jackson, J., concurring).

⁴⁰ CAMPBELL & JAMIESON, *supra* note 16, at 118 (“The rhetorical model in the Constitution is that of a president going to Congress to request authorization for acting as commander in chief; the model that has developed through time is that of a president assuming that role and then asking for congressional ratification. As a result, what began as a genre based on reciprocity and cooperation has become a genre crafted to compel congressional approval as well as public support of unilateral executive action [A] cooperative genre has been superseded by a justificatory genre designed to compel legislative ratification.”).

⁴¹ *Id.* at 113.

Executive.⁴² Governmental powers expand in times of crisis.⁴³ War rhetoric leads to greater public acceptance, and even active demand by the public, of government exercising expansive powers and authorities in order to overcome the threat and restore peace and security. The same rhetoric also ensures the concentration of those expansive powers in the hands of the Executive, strengthening it at the expense of the other two branches.⁴⁴ The Executive's perceived ability to act swiftly, secretly, and decisively against threats to the nation becomes superior to the ordinary principles of limitation on governmental powers and individual rights.⁴⁵ The combination of "war" and being the first mover confers an added layer of legitimacy to the actions of the Executive and, at times, may even create new paradigms of legitimacy.⁴⁶ It ensures popular support of the President's actions⁴⁷ as the public "rallies 'round the flag"⁴⁸ and follows the President's lead.⁴⁹ Similarly, the President is likely to enjoy the acquiescence, if not outright affirmative support, by the legislative and judicial branches of government of his actions during a crisis. The Executive Branch assumes a leading role in countering a crisis, with the other two branches pushed aside (whether of their own volition or

⁴² ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 183 (2013).

⁴³ CLINTON L. ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* 288–90 (1948).

⁴⁴ HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 117–49 (1990) (listing various reasons for congressional acquiescence of concentrated power in the Executive Branch at expense of the other two branches).

⁴⁵ See, e.g., MONTESQUIEU, *THE SPIRIT OF LAWS* 154 (Thomas Nugent trans., Univ. of Cal. Press 1977) (1748); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 *YALE L.J.* 1385, 1386 (1989).

⁴⁶ See BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 69 (2010).

⁴⁷ *THE FEDERALIST* No. 49, at 315 (James Madison) (Clinton Rossiter ed., 1961) (noting that constitutions originated in the midst of great danger that led, among other things, to "an enthusiastic confidence of the people in their patriotic leaders, which stifled the ordinary diversity of opinions on great national questions"). See also KARL R. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 43, 198 (Princeton University Press, 5th ed. 1971); E.L. Quarantelli & Russell R. Dynes, *Community Conflict: Its Absence and Its Presence in Natural Disasters*, 1 *MASS EMERGENCIES* 139, 140, 145 (1976).

⁴⁸ BRUCE RUSSETT, *CONTROLLING THE SWORD: THE DEMOCRATIC GOVERNANCE OF NATIONAL SECURITY* 34 (1990); BERG, *supra* note 24, at 38–39; MURRAY EDELMAN, *CONSTRUCTING THE POLITICAL SPECTACLE* 31–38 (1988); see also GAD BARZILAI, *A DEMOCRACY IN WARTIME: CONFLICT AND CONSENSUS IN ISRAEL* 248–60 (1992).

⁴⁹ Using such language reflects a greater threat to a state's "vital" or even "supreme interest[s]." CHAS. W. FREEMAN, JR., *ARTS OF POWER: STATECRAFT AND DIPLOMACY* 9–10 (1997) (explaining that a state is more willing to "sacrifice many lesser interests and risk suffering heavy damage in war to secure its vital interests if it calculates that it can so without unduly jeopardizing its supreme interest in survival").

not).⁵⁰ The President's domination over the public agenda is facilitated further by the realities of party politics.⁵¹

Thus, the President's ability to frame the terms of the public discourse is greatly determinative not only of eventual outcomes and policy decisions, but also of their perceived acceptability and legitimacy. As Wojtek Wolfe suggests, in the context of the wars in Afghanistan and Iraq, President Bush "utilized framing effects and threat rhetoric in order to successfully accomplish risky foreign policy shifts . . . [in which the administration] presented a situation to the public that implied a need for decisions to be made under risk or uncertainty, allowing prospect theory to be applied to the president's framing of the issues."⁵²

Presidential war rhetoric and the narrative presidents have adopted serve several distinct purposes. Karlyn Kohrs Campbell and Kathleen Hall Jamieson's study of presidential war rhetoric in the United States identifies the main characteristics of such rhetoric.⁵³ First, presidents emphasize that the decision to use force is deliberate, serious, rational (rather than emotional), and the result of thoughtful consideration.⁵⁴ The resort to force is portrayed as a measure of last resort made necessary by the enemy's intransigence and unwillingness to resolve the conflict by peaceful means.⁵⁵ Thus, war is forced on the United States, to which it responds in self-defense.⁵⁶ Yet, at the same time, the war rhetoric contributes to the erosion of processes of deliberation and "decay of political discourse,"⁵⁷ replacing "discussion structured by the contestability of opinion inherent to issues with a competition to please or manipulate the public."⁵⁸

⁵⁰ See KOH, *supra* note 44, at 117–49; ROSSITER, *supra* note 43, at 288–90.

⁵¹ ROSSITER, *supra* note 43, at 240–55; KOH, *supra* note 44, at 117–23; Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673, 2677 (2005).

⁵² WOJTEK MACKIEWICZ WOLFE, *WINNING THE WAR OF WORDS: SELLING THE WAR ON TERROR FROM AFGHANISTAN TO IRAQ 1* (2008).

⁵³ CAMPBELL & JAMIESON, *supra* note 16, at 104–05; see also BERG *supra* note 24, at 52–64 (finding these characteristics in President George W. Bush's war rhetoric justifying the war in Iraq, but noting their absence from the rhetoric used to justify the war in Afghanistan, Berg explains that such rhetorical tactics had been unnecessary in the case of the war in Afghanistan due to the unique rhetorical situation created by the terrorist attacks of September 11, 2001); HAROLD D. LASSWELL, *PROPAGANDA TECHNIQUE IN WORLD WAR I* (1971).

⁵⁴ CAMPBELL & JAMIESON, *supra* note 16, at 105.

⁵⁵ See *id.*

⁵⁶ On the significance of the portrayal of war as defensive in character see, Robert L. Ivie, *Images of Savagery in American Justifications for War*, 47 COMM. MONOGRAPHS 279, 290 (1980).

⁵⁷ TULIS, *supra* note 1, at 176.

⁵⁸ TULIS, *supra* note 1, at 178–79. See also *id.* at 179 ("[T]he terms of discourse that structure subsequent 'sober' discussion of policy are altered, reshaping the political world in which that policy and future policy is understood and implemented. By changing the meaning of policy, rhetoric alters policy itself and the meaning of politics in the future."); CHRISTOPHER KELLEY & MARIA TERESA MARTINEZ, AM. POLITICAL SCI. ASSOC., *HITTING CAMELS IN THE*

Significantly, Campbell and Jamieson also find that presidents have used dramatic narrative filled with emotionally charged language to identify major threats by clearly identifiable enemies to the nation and the American way of life that must be immediately and forcefully met.⁵⁹ Presidential war rhetoric often exhorts the audience—the American people—to unanimity of purpose and total commitment. It distinguishes between “us” and “them” and harnesses that distinction to constitute the audience as a “united community of patriots that is urged to repulse the threat with all available resources.”⁶⁰ Although the “Us-Them” distinction is not unique to wartime,⁶¹ acute crises lead to heightened individual and group consciousness.⁶² Allegiance to the community and the willingness to sacrifice for its sake—in certain situations, the willingness to make the ultimate sacrifice of one’s own life—receive a higher premium and attention in times of peril that endanger the group.

War rhetoric not only constitutes the “united community of patriots;” it also identifies and names the enemy.⁶³ Presidential rhetoric identifies and addresses two socially constructed target populations, i.e., “us” who need protecting and the “dangerous others” who threaten us.⁶⁴ Clear lines of demarcation are drawn around “them,” separating them from “us.”⁶⁵ Thus, President George W. Bush announced shortly after the terrorist attacks of 9/11 that, “[e]very nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists.”⁶⁶ In identifying the enemy, several rhetorical tools are commonly utilized. Stereotyping is often employed with respect both to insiders and to outsiders, emphasizing gallant, noble, and worthy attributes

BUTT: WAR RHETORIC AND DELIBERATION IN THE AFTERMATH OF THE SEPTEMBER 11 TERRORIST ATTACKS (2002).

⁵⁹ See CAMPBELL & JAMIESON, *supra* note 16, at 105–18.

⁶⁰ *Id.* at 111.

⁶¹ See DAVID BERREBY, *US AND THEM: THE SCIENCE OF IDENTITY* (2d ed. 2008).

⁶² OREN GROSS & FIONNUALA NÍ AOLÁIN, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* 220–27 (2006).

⁶³ CAMPBELL & JAMIESON, *supra* note 16, at 111.

⁶⁴ See, e.g., Anne Schneider & Helen Ingram, *Social Construction of Target Populations: Implications for Politics and Policy*, 87 AM. POL. SCI. REV. 334 (1993); JAMES A. MORONE, *HELLFIRE NATION: THE POLITICS OF SIN IN AMERICAN HISTORY* (2003).

⁶⁵ See Frederick Schauer, *Community, Citizenship, and the Search for National Identity*, 84 MICH. L. REV. 1504, 1504 (1986); W. A. ELLIOTT, *US AND THEM: A STUDY OF GROUP CONSCIOUSNESS* 6–10 (1986).

⁶⁶ George W. Bush, President of the U.S., Address to a Joint Session of Congress and the American People (September 20, 2001), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html>; see also, Michael Kelly, *Pacifist Claptrap*, WASH. POST, Sept. 26, 2001, at A25 (“A war has been declared; you are either on one side or another. You are either doing what is necessary to capture or kill those who control and fund and harbor the terrorists, or you are for not doing this. If you are for not doing this, you are for allowing the terrorists to continue their attacks on America. You are saying, in fact: I believe that it is better to allow more Americans—perhaps a great many more—to be murdered than to capture or kill the murderers.”).

of the former, and negative traits of the barbarian and demonic “other.”⁶⁷ The language used is that of “good vs. evil,”⁶⁸ which may be accompanied, at times, by strong religious overtones.⁶⁹ Internal conformities within the community are exaggerated, while divergence from “outsiders” is emphasized.⁷⁰ War rhetoric facilitates this drawing of the contours of conflict around groups and communities. Thus, “a discourse of indignation, threat and suffering . . . communicated within a group, can become the basis for mobilization against an identified enemy.”⁷¹ As Robert Ivie suggests, “a people strongly committed to the ideal of peace, but simultaneously faced with the reality of war, must believe that the fault for any such disruption of their ideal lies with others.”⁷²

A special feature of group construction in this context is the element of foreignness. In his seminal study, *Strangers in the Land*, John

⁶⁷ See ELLIOTT, *supra* note 65, at 9; J. GLENN GRAY, *THE WARRIORS: REFLECTIONS ON MEN IN BATTLE 156–202* (1973); Ronald F. Reid, *New England Rhetoric and the French War, 1754–1760: A Case Study in the Rhetoric of War*, 43 COMM. MONOGRAPHS 259, 267–69 (1976); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1586–87 (2002); see also KELLEY & MARTINEZ, *supra* note 58, at 10 (“In a truly Manichean dual fashion the *us* is ultimately equated with all that is good. Writers of both newspapers use words like strong, globalizers, rightful leaders, disciplined, rich, powerful, great and free nation, brave and patient, courageous, cooperative and compassionate to describe *us*. *Them* is conceptualized as non-US (not *us*); [a]s not belonging to the same world and following a different, thus wrong logic. It is also thought of as non-Western and underdeveloped and at last they (*them*) becomes code for evil. This is portrayed in the use of words like: outsider, resentful, backward, frustrated, weak, traditionalists, crazy killers, murderous, ruthless, anti-Christian, impoverished, medieval, irrational, vengeful and elusive enemy, mad with murder.”).

⁶⁸ See, e.g., George W. Bush, President of the U.S., Remarks by the President in Photo Opportunity with the National Security Team (Sept. 12, 2001), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010912-4.html> (declaring that “This will be a monumental struggle of good versus evil. But good will prevail.”); George W. Bush, President of the U.S., Statement by the President in His Address to the Nation (Sept. 11, 2001), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010911-16.html> (positioning America and its allies as “those who want peace and security in the world” against evil acts of terrorism).

⁶⁹ See, e.g., George W. Bush, President of the U.S., Remarks by the President upon Arrival (Sept. 16, 2001), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010916-2.html> (asking for “God’s good graces” and prayers on “the Lord’s Day” (Sunday)).

⁷⁰ GRAY, *supra* note 67, at 156–202; Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 55–57 (2004).

⁷¹ Michael Billig, *Preface to MIRJANA N. DEDAČ & DANIEL N. NELSON, AT WAR WITH WORDS*, at xiii (2003). See, e.g., Thomas L. Friedman, Op-Ed., *America vs. the Narrative*, N.Y. TIMES, Nov. 29, 2009, at WK8, available at <http://www.nytimes.com/2009/11/29/opinion/29friedman.html>.

⁷² Robert L. Ivie, *Images of Savagery in American Justifications for War*, 47 COMM. MONOGRAPHS 279, 280 (1980); accord ROBERT L. IVIE, *DEMOCRACY AND AMERICA’S WAR ON TERROR 10–49* (2005). See also DENISE M. BOSTDORFF, *THE PRESIDENCY AND THE RHETORIC OF FOREIGN CRISIS 205–40* (1994) (detailing “the characteristic situation, style, and identificational appeals of presidential crisis rhetoric” from Presidents John F. Kennedy to George H.W. Bush).

Higham analyzes the phenomenon of American Nativism, which he defines as “intense opposition to an internal minority on the ground of its foreign (i.e., ‘un-American’) connections.”⁷³ Higham finds patterns of nativistic attitudes throughout American history, focusing, in particular, on anti-Catholicism, anti-radicalism, and racial nativism.⁷⁴ Yet, he also notes that “nativism usually rises and falls in some relation to other intense kinds of national feeling.”⁷⁵ Intense moments have led to the intensification and polarization of pre-existing nativistic sentiments. The stigma of foreignness, of un-Americanism, is not limited to the distinction of citizenship. “Foreign” connotes, in a real sense, anything that threatens the “American way of life.” The links to things and influences from abroad can then be easily made. Race, religion, and eventually ideas and beliefs and associations can, and have been, described as “foreign,” mobilizing significant popular forces against particular groups. As William Wiecek notes: “Since the early nineteenth century, Americans have nurtured a consistent fear that alien ideologies, as well as the foreigners who were thought to be their vectors, were invading the pristine American republic.”⁷⁶ In the aftermath of September 11, the identification of the terrorists as foreigners has followed this pattern. It also serves to explain the particular shock and feelings of betrayal and revulsion that accompany attacks orchestrated by “home grown terrorists.”⁷⁷

The combination of heightened levels of fear and anxiety and the identification and naming of the enemy who is held responsible for threatening the people may eventually result in a moral panic.⁷⁸ The behavior of the clearly identifiable group of “enemies”—real or constructed as such⁷⁹—who are depicted as “folk devils,” is seen as harmful or threatening to the values and even existence of the nation and the

⁷³ JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925*, at 4 (1955).

⁷⁴ *Id.* at 5–11.

⁷⁵ *Id.* at 4.

⁷⁶ William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of Dennis v. United States*, 2001 SUP. CT. REV. 375, 381.

⁷⁷ See, e.g., Editorial, *The Chilling Challenge of Home-Grown Jihadis: We Need to Confront the Message, Not Just the Bombers*, FIN. TIMES, July 14, 2005, at 18, available at <http://www.ft.com/intl/cms/s/0/bfba6b2e-f403-11d9-af32-00000e2511c8.html>; Jonathan Guthrie & Chris Tighe, Op-Ed., *The Eerily Ordinary Extremists*, FIN. TIMES, July 16, 2005, at 13, available at <http://www.ft.com/intl/cms/s/2/a19b0638-f559-11d9-8ffc-00000e2511c8.html>; Russell Jenkins et al., *The London Bombers*, THE TIMES, July 15, 2005, at 4, available at <http://www.thetimes.co.uk/tto/news/uk/article1935460.ece>.

⁷⁸ ERICH GOODE & NACHMAN BEN-YEHUDA, *MORAL PANICS: THE SOCIAL CONSTRUCTION OF DEVIANCE* 37–38 (2d ed. 2009).

⁷⁹ PADDY HILLYARD, *SUSPECT COMMUNITY: PEOPLE’S EXPERIENCE OF PREVENTION OF TERRORISM ACTS IN BRITAIN* 257 (1993) (noting that the most important feature of the series of Prevention of Terrorism Acts in Britain has been the way in which they have constructed a suspect community in Britain: the Irish community living in Britain or traveling between Britain and Northern Ireland).

people.⁸⁰ Moral panics with their identification of “us” not merely as the good folk but also as the “victims”⁸¹ of the behavior of deviant “others” lead to a “tough on crime” mentality among the public, the press, law enforcement agents, politicians, and the courts.⁸² Thus, facilitated by governmental rhetoric, and further inflamed by media exaggeration,⁸³ moral panics, such as those that may come about as a result of high-profile terrorist attacks, in turn create immense pressures on all three branches of government to “do something” about the threat. As politicians and legislators engage increasingly in “symbolic alignments”—in which what counts is not the nature of the target but rather being seen as taking a position “against the devil and on the side of angels”—the focus is clearly put on a particular threat, terrorism, caused by a clearly identifiable group of folk devils, rather than on other types of threat, such as the infringement on civil liberties.⁸⁴

The dichotomized and polarizing dialectic of “us versus them” not only facilitates mobilization of the people, but also reverts to the essential characteristic of presidential war rhetoric as rhetoric of investiture, as it accounts for the greater willingness to confer sweeping war and emergency powers on the government.⁸⁵ This is especially so when the “other” is well defined and clearly separable from the members of the community.⁸⁶

B. Presidential War Rhetoric

“[T]he appearance of a crisis is a political act, not a recognition of a fact or of a rare situation.”⁸⁷ Defining the situation as a “crisis,” an

⁸⁰ STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS: THE CREATION OF THE MODS AND ROCKERS* 11–12 (1972); see also DAVID LIVINGSTONE SMITH, *LESS THAN HUMAN: WHY WE Demean, ENslave, and EXTERMINATE OTHERS* (2011) (discussing the phenomenon of the “dehumanization” of other groups of human beings).

⁸¹ Frank Furedi, *Fear and Security: A Vulnerability-Led Policy Response*, 42 *SOC. POL'Y & ADMIN.* 645, 651 (2008) (“A vulnerability-led analysis of contemporary times tends to regard society one-sidedly as a target and people as victims Its defining feature is a powerful sense of vulnerability to risk and an inflated assessment of the threat it faces.” (emphasis omitted)).

⁸² For the latter see, e.g., Joanna Cohn Weiss, Note, *Tough on Crime: How Campaigns for State Judiciary Violate Criminal Defendants' Due Process Rights*, 81 *N.Y.U. L. REV.* 1101, 1117–20 (2006) (describing how elected judges take on a “tough on crime” stance in response to uninformed “media-induced public outrage”). See also Melissa Hamilton, *The Child Pornography Crusade and Its Net Widening Effect*, 33 *CARDOZO L. REV.* 1679 (2012) (describing how the moral panic surrounding child pornography produces a “net-widening” effect that unnecessarily punishes even “low-risk individuals and relatively harmless behaviors”).

⁸³ GOODE & BEN-YEHUDA, *supra* note 78, at 88–108.

⁸⁴ *Id.* at 26.

⁸⁵ CAMPBELL & JAMIESON, *supra* note 16, at 113.

⁸⁶ GROSS & NÍ AOLÁIN, *supra* note 62, at 220–22.

⁸⁷ EDELMAN, *supra* note 48, at 31.

“emergency,” or “war” (rather than merely a “problem”) changes the public perception and “heralds instability” which gathers public support for whatever actions need to be taken.⁸⁸ Hence, “[i]f yearning for security and protection creates leaders, leaders themselves do more than their share to construct the threats to well-being that keep those aspirations alive.”⁸⁹ People’s need to pass their guilt and responsibility to someone in charge is facilitated through rhetoric of leadership. The President “is likely to latch onto more-or-less serious challenges to the political community and refashion them into life-or-death threats, or if the crisis at hand is indeed a dire one, milk it for everything it is worth politically even at the cost of undermining the rule of law.”⁹⁰

The term “war” makes people hypersensitive to particular narratives and heightens their feelings of fear, hysteria, panic, insecurity, outrage, and xenophobia. These particularly strong emotions have a pronounced effect on people’s perceptions of, and reactions to, risk because they act as multipliers of the perceived likelihood of risk.⁹¹ That effect is then amplified and re-amplified as a result of emotional contagion. Individuals are highly responsive to other people’s emotions, and certain emotions, such as fear, are particularly contagious.⁹²

People also shape their opinions (particularly their publicly expressed opinions) to conform with the dominant position in the relevant reference group because they like to “belong” and to be favorably perceived by others.⁹³ This is especially so the less people feel that they know about a certain issue; they then tend to rely on the judgments of those “in the know.” War means uncertainty. The notion of the fog of war is not limited to the frontlines but is applicable to the home front as well. Decision-making that takes place under conditions of uncertainty is particularly prone to the influences of informational and reputational influences and cascades. “In an informational cascade,” writes Cass Sunstein, “people cease relying . . . on their private information or opinions. They decide instead on the basis of the signals conveyed by

⁸⁸ *Id.*

⁸⁹ *Id.* at 38.

⁹⁰ William E. Scheuerman, *Presidentialism and Emergency Powers*, in *EMERGENCIES AND THE LIMITS OF LEGALITY* 258, 266 (Victor V. Ramraj ed., 2008).

⁹¹ See Cass R. Sunstein, *On the Divergent American Reactions to Terrorism and Climate Change*, 107 *COLUM. L. REV.* 503, 544–45; see generally Peter M. Sandman, *Hazard Versus Outrage in the Public Perception of Risk*, in *EFFECTIVE RISK COMMUNICATION: THE ROLE AND RESPONSIBILITY OF GOVERNMENT AND NONGOVERNMENT ORGANIZATIONS* 45 (Vincent T. Covello et al. eds., 1989) (describing the “outrage model”).

⁹² ELAINE HATFIELD ET AL., *EMOTIONAL CONTAGION* 115 (1994).

⁹³ For discussion of “reputational cascade” see CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* 74–95 (2003) [hereinafter *SUNSTEIN, WHY SOCIETIES NEED DISSENT*]. See also Cass R. Sunstein & Reid Hastie, *Four Failures of Deliberating Groups* 15–17 (Law Sch. Univ. Chi. Pub. Law & Legal Theory Working Paper Series, Paper No. 215, April 2008), available at <http://ssrn.com/abstract=1121400>.

others. . . . It follows that the behavior of the first few people can, in theory, produce similar behavior from countless followers.”⁹⁴ Violent crises, emergencies, counter-terrorism measures, and war present significant information asymmetries among the various branches of government and between the government and the public, and are thus especially prone to the effects of informational cascades.⁹⁵ Informational cascades also partially explain why “civilians”—including not merely the public at large, but also the Judicial, and Legislative Branches of government, as well as individuals within the Executive Branch—tend to defer to the judgment of military experts in such matters.⁹⁶

Availability entrepreneurs, including the President himself, may seek to manipulate such informational and reputational cascades. They have a particular stake in the outcomes of the policy-making process and may seek to shape and influence public discourse to control the policy-selection process.⁹⁷ This may not only lead other organizations and institutions, including the courts, to accord a significant margin of appreciation and deference to the judgments of national security entrepreneurs, but also molds the general public’s perception of the risks that terrorists, wars, or emergencies present to the nation.⁹⁸ High-magnitude, low-probability threats are especially susceptible to governmental “probability inflation”⁹⁹ as they involve acute informational asymmetries between the Executive and other government branches and the public.¹⁰⁰

“War,” much like “national security,” is invoked as a “god term,” i.e., a rhetorical absolute that imparts the capacity to demand sacrifice, “for when a term is so sacrosanct that the material goods of this life must be mysteriously rendered up for it, then we feel justified in saying that it is in some sense ultimate.”¹⁰¹ As such, a “god term” is an enabler on multiple levels. At the same time, the term “war” says very little about

⁹⁴ SUNSTEIN, *WHY SOCIETIES NEED DISSENT*, *supra* note 93, at 55.

⁹⁵ See Oren GROSS, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 *YALE L.J.* 1011, 1052 n.169 (2003).

⁹⁶ *Id.* at 1034.

⁹⁷ See Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 *STAN. L. REV.* 683, 727 (1999). See also Molly J. Walker Wilson & Megan P. Fuchs, *Publicity, Pressure, and Environmental Legislation: The Untold Story of Availability Campaigns*, 30 *CARDOZO L. REV.* 2147, 2154–55 (2009) (distinguishing the availability heuristic from availability cascades and campaigns).

⁹⁸ See Oren GROSS, *Security vs. Liberty: On Emotions and Cognition*, in *THE LONG DEC-ADE: HOW 9/11 CHANGED THE LAW* 45, 55 (David Jenkins et al. eds., 2014).

⁹⁹ Jonathan S. Masur, *Probability Thresholds*, 92 *IOWA L. REV.* 1293, 1325 (2007).

¹⁰⁰ See *id.* at 1329. Masur notes, “High-magnitude harms are national-security-implicating harms, and national-security-implicating harms are the province of the executive.” *Id.* at 1330.

¹⁰¹ LANGUAGE IS SERMONIC: RICHARD M. WEAVER ON THE NATURE OF RHETORIC 88, 90 (Richard M. Johannesen et al. eds., 1970).

its specific content because only the actual content can speak for itself.¹⁰² The notion of “war” is highly generalized and is used to define everything that falls into its purview.

The seductive attributes of the war frame have not been lost on presidents even outside the context of armed conflict. In his 1933 inaugural address, President Franklin Delano Roosevelt declared: “I assume unhesitatingly the leadership of this great army of our people dedicated to a disciplined attack upon our common problems.”¹⁰³ Those “common problems,” against which Roosevelt assumed command of the “army of people,” were economic, not militaristic. Roosevelt went on to warn Congress that should it fail to enact and authorize him to take the necessary measures to face the economic crisis, he would “not evade the clear course of duty that will then confront [him].”¹⁰⁴ He stated, “I shall ask the Congress for the one remaining instrument to meet the crisis—broad Executive power to wage a war against the emergency, as great as the power that would be given me if we were in fact invaded by a foreign foe.”¹⁰⁵

Similarly, in 1964, President Lyndon Johnson invoked war imagery, with its attendant built-in assumptions about the powers of the federal government, particularly the Executive Branch, when he declared war on poverty.¹⁰⁶ President Johnson’s strategy was to develop the popular rhetoric that would “serve[] as a surrogate for deliberation at crucial junctures of the congressional process. The content of the poverty program was shaped, in large measure, by the ‘imperatives’ or the ‘logic’ of the War on Poverty rhetoric.”¹⁰⁷ In his first State of the Union message,

¹⁰² See RICHARD M. WEAVER, *THE ETHICS OF RHETORIC* 212 (1953) (the phrase “God term” was coined and identified with a set of particular words to a certain age that have “inherent potency” in their meanings).

¹⁰³ Franklin D. Roosevelt, President of the U.S., First Inaugural Address (Mar. 4, 1933), available at <http://www.inaugural.senate.gov/swearing-in/address/address-by-franklin-d-roosevelt-1933>.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* See also DAVIS W. HOUCK, *RHETORIC AS CURRENCY: HOOVER, ROOSEVELT, AND THE GREAT DEPRESSION 195–200* (2001) (examining President Hoover and President Roosevelt’s economic rhetoric and its relation to policy concerns); William E. Leuchtenburg, *The New Deal and the Analogue of War*, in *CHANGE AND CONTINUITY IN TWENTIETH-CENTURY AMERICA* 81, 81–82 (John Braeman et al. eds., 1964) (discussing President Hoover’s use of war imagery to describe the Great Depression); Michal R. Belknap, *The New Deal and the Emergency Powers Doctrine*, 62 *TEX. L. REV.* 67, 70–76 (1983) (analogizing the Great Depression to World War I and characterizing it as a war against economic ruin).

¹⁰⁶ See generally, e.g., MICHAEL L. GILLETTE, *LAUNCHING THE WAR ON POVERTY: AN ORAL HISTORY*, at xi–xii (2010); DAVID ZAREFSKY, *PRESIDENT JOHNSON’S WAR ON POVERTY: RHETORIC AND HISTORY*, at xiii (1986).

¹⁰⁷ TULIS, *supra* note 1, at 161. Tulis contrasts Johnson’s approach with Woodrow Wilson’s failed rhetorical practice regarding the League of Nations, where the merits of a technically complex program had been worked out first, leaving the President with the difficult task of explaining it to the public later. *Id.*

President Johnson declared an “unconditional war on poverty in America” and urged, “Congress and all Americans to join with [him] in that effort.”¹⁰⁸ However, at the time of this declaration, most of the concrete details and measures necessary to wage the war had yet to be figured out.¹⁰⁹ Thus, the President’s message was not about setting out specific programs to fight poverty, but rather,

[T]he simple declaration of war. The metaphor of war not only structured or provided the form for that section of the speech, it constituted its meaning as well In place of an argument indicating why poverty should be considered a national problem, why it required a coordinated program, why present efforts were insufficient or ill-conceived, and why the kinds of legislation suggested by the [P]resident fit together as a single program—instead of this, the [P]resident offered a metaphor, whose premise provided the answers. If we were at war with poverty, such an effort would require a national mobilization, coordination, extensive executive discretion, and the potential involvement of virtually any social program as vital to the war effort.¹¹⁰

Within six weeks of the President’s speech “an extensive six-title legislative package” was put together.¹¹¹ “[T]he primary problem was to fashion a program that fit Johnson’s rhetoric . . . one program . . . could not show enough significant ‘victories’ to constitute a nation seriously at war, but it was thought that an effort with five or six visible programs might indeed appear to be a warlike effort.”¹¹² The bill was accompanied by the President’s Special Message to the Congress Proposing a Nationwide War on the Sources of Poverty.¹¹³ Once again, the Message

¹⁰⁸ Lyndon Johnson, President of the U.S., Annual Message to Congress on the State of the Union (Jan. 8, 1964), *available at* <http://www.lbjlibrary.net/collections/selected-speeches/november-1963-1964/01-08-1964.html>.

¹⁰⁹ TULIS, *supra* note 1, at 162 (quoting JAMES L. SUNDQUIST, *POLITICS AND POLICY: THE EISENHOWER, KENNEDY, AND JOHNSON YEARS* 135 (1968)).

¹¹⁰ TULIS, *supra* note 1, at 164–65.

¹¹¹ *Id.* at 166. Note the similar gap in time between 9/11 and the enactment of USA PATRIOT Act (enacted on October 26, 2001). See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001* (USA Patriot Act), Pub. L. No. 107-56, 115 Stat. 272 (codified at 18 U.S.C. § 1 (2001)).

¹¹² TULIS, *supra* note 1, at 166. See also SUNDQUIST *supra* note 109, at 142 (“The President and the [p]ress had by this time built up expectations so vast that a one-idea, one-title bill would be a serious letdown. The very idea of a massive coordinated attack on poverty suggested mobilizing under that banner all, or as many as possible, of the weapons that would be used.”).

¹¹³ Lyndon Johnson, President of the U.S., President’s Special Message to the Congress Proposing a Nationwide War on the Sources of Poverty (Mar. 18, 1964), *available at* <http://www.presidency.ucsb.edu/ws/?pid=26109>.

did not attempt to provide a detailed defense of the programs included in the bill, but rather was drafted in the style and format of a popular address.¹¹⁴ It included such phrases as: “To finish [the] work I have called for a national war on poverty. Our objective: total victory” and “[o]n similar occasions in the past we have been called upon to wage war against foreign enemies which threatened our freedom. Today we are asked to declare war on a domestic enemy which threatens the strength of our nation and the welfare of our people.”¹¹⁵

President Nixon’s War on Drugs followed the well-established path of presidential war rhetoric when he announced in 1973 that, “[d]rug abuse is still public enemy number one in America. . . . We have already made encouraging progress in the war against drug abuse. Now we must consolidate that progress and strike even harder.”¹¹⁶ All subsequent presidents made use of similar war rhetoric,¹¹⁷ with the exception of President Carter, who framed the issue in terms of law enforcement and criminal law,¹¹⁸ and President Obama who introduced a public health framing.¹¹⁹

President George W. Bush and his administration’s decision to invoke the imagery, frames, metaphors, and associative connections of “war” was a conscious decision after the terrorist attacks of September

¹¹⁴ See *id.*

¹¹⁵ *Id.*

¹¹⁶ Richard Nixon, President of the U.S., Radio Address About the State of the Union Message on Law Enforcement and Drug Abuse Prevention (Mar. 10, 1973), available at <http://www.presidency.ucsb.edu/ws/?pid=4135>.

¹¹⁷ WHITFORD & YATES, *supra* note 20, at 87–88 (quoting President Ford’s reference to “the international war on drugs”); *id.* at 86 (quoting President Reagan: “Drugs are menacing our society. They’re threatening our values and undermining our institutions. They’re killing our children Drug abuse is a repudiation of everything America is . . . mock[s] our heritage . . . we mobilize for this national crusade.”); *id.* at 90–91 (quoting President George H.W. Bush: “[L]ike all wars, we must be united in our efforts as a country and as a community . . . join as one . . . all must be part of this crusade for a drug-free America. . . . We will not surrender our children. . . . We [are] in this fight to win”); *id.* at 91 (quoting President Clinton: “We must fight drugs on every front, on our streets and in our schools, at our borders and in our homes. Every American must accept this responsibility. There is no more insidious threat to a good future than illegal drugs. I’m counting on all of you to help us win the fight against them.”); *id.* at 92 (quoting President George W. Bush: “You can’t ask people on the frontline of the war on terror to protect the American people and then not give them the tools necessary to do so. . . . The information-sharing provisions in the PATRIOT Act helped [to] connect the dots in an Al Qaida drugs-for-weapons plot.”).

¹¹⁸ *Id.* at 89 (quoting President Carter: “I’m ordering the Attorney General to concentrate on breaking the links between organized crime and drug traffic, to enhance cooperation among all law enforcement agencies, and to ensure more certain conviction and quick punishment for those who traffic in drugs”).

¹¹⁹ Barack Obama, President of the U.S., Remarks by the President at University of Maryland Town Hall (July 22, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/07/22/remarks-president-university-maryland-town-hall> (“We need to have an approach that emphasizes prevention, treatment, a public health model for reducing drug use in our country.”).

11, 2001. In the immediate aftermath of the attacks, administration spokespersons framed the attacks, and the need to respond to them, in terms of law enforcement, calling the attacks a “crime” and emphasizing the United States’ resolve to bring those responsible to justice.¹²⁰ That approach changed quickly. Recognizing the moment as “an opportunity,” the President set the course away from the law enforcement frame and towards a decidedly war rhetoric.¹²¹ Brushing aside objections to the use of war terminology from within his administration—for example, from the Chairman of the Joint Chiefs of Staff, General Richard Myers who argued that “if you call it a war, then you think of people in uniform as being the solution,”¹²² and from Defense Secretary Donald Rumsfeld who preferred to speak of “global struggle against violent extremism”¹²³—the President made his position clear: “Make no mistake about it, we are at war.”¹²⁴ Also, by identifying the war as a war “on terrorism”—a technique or a method, rather than a clearly identified enemy—there was greater ambiguity and malleability in the operating space of the administration. Using the rhetoric of war, the President was able to frame the threats facing the nation and the responses to these threats away from a criminal law model and instead anchor them in a decidedly war model.¹²⁵

Using the language and rhetoric of “war” to frame the events of 9/11 allowed President Bush to cast himself in the role of a war president, playing directly to “[t]he tendency of presidents to see themselves as the most immediate embodiments of a unitary popular will, standing above normal politics and in possession of super-mundane talents and a special aura.”¹²⁶ The war frame confers legitimacy on a wide spectrum of presidential actions, including many that would have otherwise been strongly challenged. As Richard Jackson comments: “[T]he discourse of the war on terrorism . . . set the logic and possibilities of policy formulation in

¹²⁰ John Ashcroft, U.S. Attorney Gen., Remarks at White House Press Briefing (Sept. 11, 2001), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010911-10.html>.

¹²¹ BOB WOODWARD, *BUSH AT WAR* 32 (2002). See also LAKOFF, *supra* note 2, at 148 (by invoking the war frame, the President could “outframe” the framers of the Constitution).

¹²² Eric Schmitt & Thom Shanker, *New Name for ‘War on Terror’ Reflects Wider U.S. Campaign*, N.Y. TIMES, July 26, 2005, at A7.

¹²³ *Id.*

¹²⁴ Richard W. Stevenson, *President Makes It Clear: Phrase Is “War on Terror,”* N.Y. TIMES, Aug. 4, 2005, <http://www.nytimes.com/2005/08/04/politics/04bush.html>; see also KELLEY & MARTINEZ, *supra* note 58, at 4–5.

¹²⁵ See, e.g., Elaine Tyler May, *Echoes of the Cold War: The Aftermath of September 11 at Home*, in *SEPTEMBER 11 IN HISTORY: A WATERSHED MOMENT?* 35, 39 (Mary L. Dudziak ed. 2003).

¹²⁶ Scheurman, *supra* note 90, at 266.

the first instance . . . [and] helped to create the wider legitimacy and social consensus that [is] required to enact . . . policy.”¹²⁷

The use of the language of war also justified appeals for national and individual sacrifice while, at the same time, undermining the possibility of robust opposition because opponents could be, and were, easily castigated as being unpatriotic, defeatists, fifth column[ists], soft on terror, and even putting soldiers in harm’s way. Similarly, Tulis notes that in the context of the War on Poverty, the war rhetoric “puts doubters under the suspicion of being in favor of poverty” and of being “unpatriotic, immoral, or both.”¹²⁸ As George Orwell suggests in his *Principles of Newspeak*, “The purpose of Newspeak [is] not only to provide a medium of expression for the world-view and mental habits proper to the devotees of Ingsoc, but to make all other modes of thought impossible. . . . [A] heretical thought . . . should be literally unthinkable, at least so far as thought is dependent on words.”¹²⁹

Framing is closely linked to the phenomenon of anchoring. Amos Tversky and Daniel Kahneman demonstrated that when needing to make numerical estimates and judgments, the first number with which a decision-maker is presented has a demonstrably disproportionate effect on that person’s ultimate choice.¹³⁰ That first number becomes the anchor to which all future assessments are then tied even when the anchor is clearly irrelevant.¹³¹ Anchors strongly influence the ultimate decision, in so far as they would be taken as the starting points against which adjustments are made and as influences on subsequent decisions and actions.¹³² This concept can be readily applied to the War on Terror. Anchoring the traumatic events of September 11 in the context of “war” has greatly shaped and influenced the responses to the attacks. The baseline for future reference—the first “number” with which we were presented—was “war.” Everything followed from that. Using the rhetoric of war, the President was able to frame the threats facing the nation and the responses to these threats away from a criminal law model and instead

¹²⁷ Richard Jackson, *Language, Policy and the Construction of a Torture Culture in the War on Terrorism*, 33 REV. INT’L STUD. 353, 354 (2007); Richard Jackson, Aberystwyth Univ., Political Language, Policy Formulation and the Practice of Torture in the War on Terrorism: Implications for Human Rights 2 (Sept. 3, 2006), available at <http://www.aber.ac.uk/en/media/departmental/interpol/csr/political-language-and-torture-richard-3.pdf>; see also RICHARD JACKSON, WRITING THE WAR ON TERRORISM: LANGUAGE, POLITICS AND COUNTER-TERRORISM (2005).

¹²⁸ TULIS, *supra* note 1, at 171.

¹²⁹ GEORGE ORWELL, *Appendix: The Principles of Newspeak*, in 1984, at 246 (The New American Library ed., Harcourt, Brace & Company, Inc. 1964).

¹³⁰ Amos Tversky & Daniel Kahneman, *Framing of Decisions and the Psychology of Choice*, 211 SCI. 453, 457–58 (1974).

¹³¹ *Id.*

¹³² *Id.* See also SCOTT PLOUS, THE PSYCHOLOGY AND JUDGMENT OF DECISION MAKING 145–46 (1993).

anchor them in a decidedly war model.¹³³ The media and public quickly picked up the message that the attacks of September 11, 2001 were not a crime, but an act of war against the United States. For example, George Will wrote in the *Washington Post* on September 23, 2001 that, “[t]he goal is not to ‘bring terrorists to justice,’ which suggests bringing them into sedate judicial settings—lawyers, courtrooms, due process, all preceded by punctilious readings of Miranda rights. Rather, the goal is destruction of enemies.”¹³⁴ Once put in place, the war frame was repeated over and over again until it was eventually used reflexively rather than reflectively, becoming normalized rather than conceived of as aberrational and exceptional.

The war frame informs us of a sharp break with peacetime normalcy. The message is that war is a discontinuity, a cusp, beyond which rules that pertain to the ordinary way of things no longer apply.¹³⁵ President George W. Bush sought to convey precisely this message, making his war narrative even more compelling, by invoking the four most expensive words in the English language: “This time is different”¹³⁶—the “New Paradigm” frame.¹³⁷ The war frame buttressed the argument by suggesting that existing laws and institutions were incompatible with the new and unprecedented challenges that the nation was facing. Indeed, violent crises tend to bring about a rush to legislate.

The prevailing belief may be that if new offenses are added to the criminal code and the scope of existing offenses broadened, and if the arsenal of law enforcement agencies is enhanced by putting at their disposal more sweeping powers to search and seize, to eavesdrop, to interrogate, to detain without trial, and to deport, the

¹³³ May, *supra* note 125, at 39–41.

¹³⁴ George F. Will, *Battle Hymn*, *WASH. POST*, Sept. 23, 2001, at B07.

¹³⁵ *But see*, Michael Walzer, *First, Define the Battlefield*, *N.Y. TIMES*, Sept. 21, 2001, at A35 (“The word [‘war’] is unobjectionable so long as those who use it understand what a metaphor is. There is, right now, no enemy state, no obvious battlefield. “War” may serve well, however, as a metaphor to signify struggle, commitment, endurance. Military action, though it may come, is not the first thing we should be thinking about. Instead, in this “war” on terrorism three other things take precedence: intensive police work across national borders, an ideological campaign to engage all the arguments and excuses for terrorism and reject them, and a serious and sustained diplomatic effort.”).

¹³⁶ Sir John Templeton quotation. *See* KENNETH L. FISHER, *MARKETS NEVER FORGET (BUT PEOPLE DO): HOW YOUR MONEY IS COSTING YOU MONEY—AND WHY THIS TIME ISN’T DIFFERENT 1* (2011).

¹³⁷ *See* Editorial, *In for the Long Haul*, *N.Y. TIMES*, Sept. 16, 2001, at A10 (“Coming to terms with that new reality, winning this war, will require discipline, stamina and sacrifice.”).

country will be more secure and better able to face the emergency.¹³⁸

It is often easier to pass new legislation than to examine why the existing legislation, and the powers granted under it to the government and its agencies, was not sufficient. This procedure allows the government to demonstrate that it is doing something against the dangers facing the nation rather than sitting idly. The need to respond quickly to future threats—as much as to assure the public that its government is acting with a vengeance against past and future terrorists—frequently results in rushed legislation, often without much debate and at times forgoing normal legislative procedures.¹³⁹ Once again, the “war” rhetoric displaces deliberation and stifles dissent.

C. Presidential “Non-War” Rhetoric

Despite the perceived advantages to the president gained by invoking the imagery of war, we can readily find examples of presidents shying away from war rhetoric and instead labeling a crisis as something less than a war. After all, too frequent utilization of the war rhetoric will result in its dilution and undermine its usefulness and potency when it is actually needed. There are also lessons learned from previous declarations of “wars.” President Johnson’s popular rhetoric in the context of the War on Poverty offered the President popular support as well as full control of the legislative agenda. However, it also “ensured that he and not Congress would be blamed if the program failed. And fail it did.”¹⁴⁰ Similarly, President Bush’s persistent use of the Global War on Terror frame resulted in a decline in the President’s approval ratings and in support for the Iraq War.¹⁴¹

The president may choose not to invoke the terminology of war and warfare in order to de-escalate tensions with other countries or to avoid the application of the *jus ad bellum* international legal regime from applying.¹⁴² The terminology of war and armed conflict has direct legal ramifications as far as international legal rules and norms are concerned.

¹³⁸ Gross, *supra* note 95, at 1031–32. See also Kent Roach, *The Dangers of a Charter-Proof and Crime-Based Response to Terrorism*, in *THE SECURITY OF FREEDOM: ESSAYS ON CANADA’S ANTI-TERRORISM BILL* 131, 138–42 (Ronald J. Daniels et al. eds., 2001).

¹³⁹ Gross, *supra* note 95, at 1031–32; Roach, *supra* note 138, at 138–42.

¹⁴⁰ TULIS, *supra* note 1, at 172.

¹⁴¹ BERG, *supra* note 24, at 51, 65–73. In this context, Berg notes specifically the change in the rhetorical situation brought about by the President himself when he made his “mission accomplished” speech on May 1, 2003. *Id.* at 65 (“Bush’s rhetoric changed the rhetorical situation. No longer were we in a war . . . Bush set about a new rhetorical situation: we were now in control of the country.”).

¹⁴² See, e.g., Margaret Jane Radin, *Rhetorical Capture*, 54 ARIZ. L. REV. 457, 466 (2012) (discussing what she terms “rhetorical capture by substitution” that occurs when weak words are substituted for strong ones, “[]war is police action, attack is preemption[]. This strategy

It signifies the transition from one set of international legal rules to a distinctly different legal regime, i.e., the law of armed conflict (or international humanitarian law). And while the Bush Administration found the war paradigm to be preferable to the criminal law and law enforcement paradigm when fighting against Al Qaeda and its affiliates, it wished to redefine that paradigm so as not to accord the protections of the Geneva Conventions of 1949 (and specifically the Third Geneva Convention that deals with prisoners of war) to Al Qaeda and Taliban detainees captured and held by the United States.¹⁴³

Refraining from invoking the terminology of war may also have direct domestic legal ramifications. Under the Constitution, Congress, rather than the President, is vested with the power to declare war.¹⁴⁴ Although the President is authorized (indeed bound) “to resist force by force . . . without waiting for any special legislative authority”¹⁴⁵ when the country is invaded by a foreign nation, he does not have the authority under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation. However, presidents have made the argument that if committing American armed forces does not constitute “war” then there is no constitutional requirement for a congressional declaration of war prior to the president’s taking military action abroad. Thus, for example, a memorandum prepared by the Office of Legal Counsel (OLC) setting out the President’s authority to use military force in Libya in 2011, argued that not every military engagement, however limited, that the President initiates falls within the Declaration of War Clause of the Constitution.¹⁴⁶ Rather, the “nature, scope and duration” of the engagement ought to be evaluated.¹⁴⁷ In the context of the intervention in Libya, the OLC concluded that the use of military force would not amount to “war” in the

can dissipate political arousal in the populace by dislodging a political or moral commitment.”).

¹⁴³ For France’s refusal to accord POW status to captured FLN members during the Algerian War, see, e.g., Gross & Ní Aoláin, *supra* note 62, at 190–202; Katherine Draper, *Why a War Without a Name May Need One: Policy-Based Application of International Humanitarian Law in the Algerian War*, 48 TEX. INT’L L.J. 575 (2013). For the Arab-Israeli context, see, e.g., Christopher C. Burris, Comment, *Re-Examining the Prisoner of War Status of PLO Fedayeen*, 22 N.C. J. INT’L L. & COM. REG. 943 (1997); Emanuel Gross, *Democracy in the War Against Terrorism—The Israeli Experience*, 35 LOY. L.A. L. REV. 1161, 1188–94 (2002).

¹⁴⁴ U.S. CONST. art. I, § 8, cl. 11.

¹⁴⁵ *The Brig Amy Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635, 668 (1863) (Grier, J.).

¹⁴⁶ Authority to Use Military Force in Libya, 35 Op. O.L.C., 8 (Apr. 1, 2011), 2011 WL 1459998, [hereinafter *Libya Memo*], available at <http://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya.pdf>; see also Harold Hongju Koh, Legal Advisor U.S. Dep’t of State, Statement Regarding the Use of Force in Libya (Mar. 26, 2011), available at <http://www.state.gov/s/l/releases/remarks/159201.htm>.

¹⁴⁷ *Libya Memo*, *supra* note 146, at 10.

constitutional sense and thus would not require prior congressional approval.¹⁴⁸ In particular, the opinion emphasized the limited nature of the mission and the fact that the use of force would be confined to air strikes and that no ground troops were going to be deployed.¹⁴⁹ The anticipated military operation would be “time-limited, well-defined, discrete and aimed at preventing an imminent humanitarian catastrophe” and the air strikes “limited in their nature, duration, and scope.”¹⁵⁰ Pointing to “historical gloss” placed on the Constitution by two hundred years of practice,¹⁵¹ the OLC opined that “war” in the constitutional sense mostly referred to “prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period.”¹⁵² Again, what is important to note here is not the soundness of the particular interpretation given by the OLC—challenges can surely be mounted¹⁵³—but rather the end which that interpretation serves.

II. STATE POSITIONING, RHETORIC, AND “WAR”

“It was this moral authority, whereby the United States was intrinsically linked with the idea of the Good, to which Robert Jackson referred in the first words of his opening speech to the International Military Tribunal at Nuremberg: ‘That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.’ At the same time, by positioning itself as the champion of the law, the

¹⁴⁸ *Id.* at 12–13.

¹⁴⁹ *Id.* at 13.

¹⁵⁰ Koh, *supra* note 146.

¹⁵¹ Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 417–32 (2012); see also Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1099–100 (2013).

¹⁵² Libya Memo, *supra* note 146, at 8.

¹⁵³ See LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 101 (2d ed. 1996) (“[T]he use of force for foreign policy purposes can almost imperceptibly become a national commitment to war.”). There is always the risk that even if the use of force is limited initially in scope, nature and purpose, things may get out of control. At the same time, accepting the OLC interpretation may potentially read Congress out of the processes leading up to war since, in some sense, every use of force is “limited.” See Trevor W. Morrison, *Libya, “Hostilities,” the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. F. 62 (2011); Louis Fisher, *Military Operations in Libya: No War? No Hostilities?*, 42 PRES. STUD. Q. 176, 180–83 (2012); Bruce Ackerman & Oona Hathaway, *Obama’s Illegal War*, FOREIGN POL’Y (June 1, 2011), http://www.foreignpolicy.com/articles/2011/06/01/obamas_illegal_war. See also, Michael N. Schmitt, *Wings Over Libya: The No-Fly Zone in Legal Perspective*, 36 YALE J. INT’L L. ONLINE 45 (2011).

United States put itself in a difficult position. It could no longer distance itself from the rules and values that it formulated without paying the political price for this betrayal.”¹⁵⁴

The rhetoric of war is addressed at one and the same time to both domestic and international audiences.¹⁵⁵ In a modern interconnected world, presidents (and prime ministers) do not operate in isolation. The domestic positioning of an administration or a government has distinct consequences beyond the state’s borders. The president must carefully consider the risks as well as the advantages of appealing to the generality, globality, and interconnected nature of any threat that is defined domestically in war terms, as other nations, international institutions, and even non-state actors reposition themselves in response. Consider the usage of the adjective “global” to describe the substantive and geographical scope of the war on terror. On the one hand, it seemed to confer legitimacy on the breadth and scale of the responses to the 9/11 attacks. By suggesting multilateral action, rather than unilateral operations, the word “global” informed Americans that they were not alone in the fight.¹⁵⁶ Others saw the cause as just and joined it, much like others did ten years earlier when the “Coalition of the Willing” joined the United States in Operation Desert Storm.¹⁵⁷ At the same time, the Bush Administration used the term “global” to put pressure on other governments to do precisely that—join the United States in the war.¹⁵⁸ The war frame also allowed certain justificatory claims—such as the use of self-defense claims to justify the war in Iraq—to be more readily available and acceptable.¹⁵⁹ Yet, it also entailed certain legal and political risks. As we discuss below, adopting the framework of war may entail direct, swift, and highly practical legal costs for states especially when contrasted with actions that do not activate the same legal threshold. In particular, our analysis explores the conceptual relationship between the notion of “emergency” under international human rights law and a state of war sufficient to overlap with the application of the Geneva Conventions of 1949.¹⁶⁰ Our interest lies in better understanding why states choose to

¹⁵⁴ PIERRE HAZAN, *JUDGING WAR, JUDGING HISTORY: BEHIND TRUTH AND RECONCILIATION* 15 (2010).

¹⁵⁵ For the idea of two-level games in international relations, see Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 *INT’L ORG.* 427 (1988).

¹⁵⁶ GUANTÁNAMO AND BEYOND: EXCEPTIONAL COURT AND MILITARY COMMISSIONS IN COMPARATIVE PERSPECTIVE 20 (Fionnuala Ní Aoláin & Oren Gross eds., 2013).

¹⁵⁷ Daniela V. Dimitrova et al., *War on the Web: The Immediate News Framing of Gulf War II*, 10 *HARV. INT’L J. PRESS/POL.* 22, 23 (2005).

¹⁵⁸ Ní Aoláin & Gross, *supra* note 156, at 20.

¹⁵⁹ *Id.*

¹⁶⁰ An emergency was first defined by the European Court of Human Rights in the *Lawless* case as constituting “an exceptional situation of crisis or emergency which affects the

accept the status of war or emergency (sometimes simultaneously) and at other times distinctly avoid such legal and political characterizations.¹⁶¹ The symbolic investiture that follows from the acceptance or denial of status in international law has rhetorical, symbolic, and communicative function.

Prior to the attacks of 9/11, relatively little scholarly or policy attention was given to situations of emergency.¹⁶² Emergencies and emergency powers were seen as a backwater of scholarly and policy interest.¹⁶³ For the most part, emergencies were frequently considered as part of the unique experiences of repressive regimes or those with poor or limited democratic performance and characterized by gross and systematic human rights violations. To the extent the emergencies concerned democratic states, they were generally considered to follow an “ideal,” model form: “Emergency” was considered a sudden, urgent, usually unforeseen event or situation that required immediate action.¹⁶⁴ Thus, the notion of “emergency” was linked inherently to the concept of “normalcy” in the sense that the former was considered to be outside the ordinary course of events or anticipated actions. For the concept of “emergency” to be meaningful, it had to be understood against the back-

whole population and constitutes a threat to the organized life of the community of which the state is composed”. *Lawless v. Ireland* (No. 3), 1 Eur. Ct. H.R. (ser. A) at 27 (1961). *See also*, *Aksoy v. Turkey*, App. No. 21987/93, 23 Eur. H.R. Rep. 553 (1996); *Brannigan v. United Kingdom*, App. Nos. 14553/89 and 14554/89, 258 Eur. Ct. H.R. (ser. A) at 29 (1993); *Brogan v. United Kingdom*, App. Nos. 11209/84; 11234/84; 11266/84; and 11386/85, 145 Eur. Ct. H.R. (ser. A) at 11 (1988); *Ireland v. United Kingdom*, App. No. 5310/71, 25 Eur. Ct. H.R. (ser. A) at 1 (1978); *Cyprus v. Turkey*, App. Nos. 6780/74 and 950/75, 4 Eur. H.R. Rep. 482 (1976); *Denmark v. Greece (The Greek Case)*, App. Nos. 3321/67; 3322/67; 3323/67; and 3344/67, 12 Y.B. Eur. Conv. on H.R. 1 (Eur. Comm’n on H.R. 1969); Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316; 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516; 75 U.N.T.S. 287.

¹⁶¹ Our interest intersects with the puzzle posed by realist international law scholars’ explanations for why states enter into human rights treaties, which are generally based on notions of reciprocity. As Cowell points out this explanation is “difficult to balance with the idea of derogation clauses, as the management of emergency powers at the supranational level is in many respects an inherent interference with sovereign powers at the national level.” Frederick Cowell, *Sovereignty and the Question of Derogation: An Analysis of Article 15 of the ECHR and the Absence of a Derogation Clause in the ACHPR*, 1 BIRKBECK L. REV 135, 141 (2013).

¹⁶² *But see*, SUBRATA ROY CHOWDHURY, *RULE OF LAW IN A STATE OF EMERGENCY* (1989); JAIME ORAÁ, *HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW* (1992); Joan F. Hartman, *Derogations from Human Rights Treaties in Public Emergencies—A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations*, 22 HARV. INT’L L.J. 1 (1981).

¹⁶³ GROSS & NI AOLÁIN, *supra* note 62, at 2 (illustrating the backwater status of emergency analysis in mainstream constitutional law).

¹⁶⁴ NEW SHORTER OXFORD ENGLISH DICTIONARY 806 (5th ed. 1993).

ground of normalcy. As such, the concept of emergency had to be informed by the twin and interrelated notions of temporariness and exception. For normalcy to be “normal,” it had to be the general rule—the ordinary state of affairs—whereas emergency had to constitute no more than an exception to that rule. It must last only a relatively short time and yield no substantial permanent effects. Therefore, traditional discourse on emergency powers posited normalcy and exigency as two separate phenomena and assumed that emergency was the exception. Hence, the governing paradigm was that of the “normalcy-rule, emergency-exception.”¹⁶⁵ However, state practice amply demonstrates that the exception has, in fact, become the norm. Emergencies have rarely operated in textbook form. The emergency deviation has become systematically entrenched in state legal and political systems and culture. The “ideal emergency” rarely exists. To wit, a number of consistent problems have been identified with the practice of emergency powers.¹⁶⁶ These include situations of *de facto* emergency,¹⁶⁷ situations of complex and institutionalized emergency,¹⁶⁸ and situations of permanent emergency.¹⁶⁹ In all these situations, emergencies went hand in hand with extraordinary limitations on a broad range of civil and political rights, producing, in many contexts, systematic and sustained violations of human rights.

In addition to these historical patterns of abuse or misuse of emergency law and powers, Fenwick and Phillipson have more recently described the emergence of a distinctly new category of emergency practice termed “covert” emergencies.¹⁷⁰ In the European democratic context, the covert emergency includes the subtle persuasion of parliaments and courts to acquiesce to the “minimal interpretations of certain *ECHR* rights that has stripped them of much of their content. This tactic has the effect of, at worst, seeking to create effective covert derogations and, at

¹⁶⁵ Oren Gross, “*Once More unto the Breach*”: *The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23 *YALE J. INT’L L.* 437, 440 (1998).

¹⁶⁶ GROSS & NÍ AOLÁIN, *supra* note 62, at 315–22.

¹⁶⁷ Comm. on Human Rights, Subcomm. on Prevention of Discrimination and Prot. of Minorities, Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency, 35th Sess., July 27, 1982, U.N. Doc. E/CN.4/Sub.2/1982/15, § 103, at 26 (Nov. 8, 1982) (a *de facto* state of emergency arises where “there is no proclamation or termination of the state of emergency or . . . the state of emergency subsists after it has been officially proclaimed and then terminated.”).

¹⁶⁸ *Id.* at § 118, at 29.

¹⁶⁹ *A v. U.K.*, App. No. 3455/05, 49 Eur. H.R. Rep. 625 (2009) (The decision of the European Court of Human Rights in *A. and Others v. United Kingdom* remarkably holds that emergencies declared under Article 15 of that Convention can be perpetual).

¹⁷⁰ Helen Fenwick & Gavin Phillipson, *Covert Derogations and Judicial Deference: Redefining Liberty and Due Process Rights in Counterterrorism Law and Beyond*, 56 *MCGILL L.J.* 863, 906 (2011).

best, of redefining the rights so that they emerged only in a diluted form in practice.”¹⁷¹ To enable this result, the insidious tactics identified to advance covert emergencies include simple assurances to parliamentarians that the measures complied with the European Convention on Human Rights, or, for those more inquiring parliamentarians, a government’s issued assurances that the measures involve only partial minimization of rights justified by the necessity of the exceptional threat posed by terrorists.¹⁷²

The terrorist attacks of September 11, 2001 and their aftermath brought about a substantial change with respect to the prevalence of emergency law practice, not so much in the practices of repressive states or poor quality democracies whose usage of emergency powers remains broadly consistent with prior patterns, but rather with respect to democratic states.¹⁷³ The international legal regimes ushered in by United Nations Security Council Resolution 1373 and the creation of the Counter-Terrorism Committee at the United Nations, in conjunction with the European Union Regulations on Combatting Terrorism,¹⁷⁴ have enabled democratic states to broadly utilize emergency powers, and to do so with less need for justification or excuse than would previously have been deemed necessary. Yet, despite an apparent loosening of the validation criteria for the activation of emergency powers, democratic states have made little, if any, use of the formal derogation provisions of interna-

¹⁷¹ *Id.* at 867.

¹⁷² *Id.* See, e.g., Joint Committee on Human Rights, PARLIAMENT.UK, <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/> (last visited on Dec. 24, 2014). The U.K.’s Joint Committee on Human Rights is the Committee where government ministers have to answer to, and appear before on, Human Rights issues. The reports over time reveal that there is a persistent tendency to issue platitudes. The recent example of the response to the Government’s new proposed anti-terrorism legislation is a good one. See *The Human Rights Implications of the Justice and Security Green Paper*, PARLIAMENT.UK (Feb. 01, 2012), <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/inquiries/parliament-2010/justice-and-security-green-paper/>.

¹⁷³ This is based on a review of derogation practices and country reporting to the regional and international human rights bodies (ECHR and UNHRC in particular). See also a shift in the literature from human rights review to theorizing and reflection across other legal fields. Eric Neumayer, *Do Governments Mean Business When They Derogate? Human Rights Violations During Declared States of Emergency*, 8 REV. INT’L. ORG. 1 (2013); Christopher Michalson, *Permanent Legal Emergencies and the Derogation Clause in International Human Rights Treaties: A Contradiction?*, in POST 9/11 AND THE STATE OF PERMANENT LEGAL EMERGENCY 287 (Aniceto Masferrer ed., 2012); Tom R. Hickman, *Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism*, 68 MOD. L. REV. 655 (2005); Emilie M. Hafner-Burton et al., *Emergency and Escape: Explaining Derogations from Human Rights Treaties*, 65 INT’L ORG. 673 (2011).

¹⁷⁴ Fionnuala Ní Aoláin, *Balancing Human Rights: International Legal Responses to Terrorism in the Wake of September 11*, 33 ISR. Y.B. ON HUM. RTS. 63, 63–66 (2003); Commission Regulation 1190/2008, 2008 O.J. (L 322/25) (EC). See also Commission Regulation No. 60/2013, 2013 O.J. (L 21/23) (EU).

tional human rights treaties in the post-9/11 period.¹⁷⁵ There has been a proliferation of exceptional powers practice post-9/11 intertwined with democratic states avoiding formal acknowledgment of de facto emergency power usage.¹⁷⁶ Specifically, states avoid explicit recognition that additional or layered domestic emergency powers activate derogation responsibilities under international human rights treaties.¹⁷⁷ By deploying ordinary legislative measures to enact rights-limiting regulation and to avoid any invocation of exceptionalism in the overt language of emergency regulation, states consistently normalized the exception.¹⁷⁸ This is not to say that the use and abuse of emergency powers by democratic states has decreased in this period. Indeed, there is consistent evidence of a substantial augmentation of emergency laws and emergency administrative practices.¹⁷⁹ The challenge is, in part, explaining why states are

¹⁷⁵ On the derogation regime under the various international human rights treaties see, for example, Gross, *supra* note 165; Scott P. Sheeran, *Reconceptualizing States of Emergency Under International Human Rights Law: Theory, Legal Doctrine, and Politics*, 34 MICH. J. INT'L L. 491, 521 (2013); Alan Green, *Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights*, 12 GERMAN L.J. 1764, 1782–83 (2011).

¹⁷⁶ No such declarations have been made to the United Nations or the Council of Europe except by the United Kingdom. The United Kingdom's derogation is to be found at: The Human Rights Act 1998 (Designated Derogation), 2001, S.I. 2001/3644 (U.K.), available at <http://www.refworld.org/docid/46e5564f2.html>.

¹⁷⁷ Aniceto Masferrer, *Introduction: Security, Criminal Justice and Human Rights in Countering Terrorism in the Post 9/11 Era*, in POST 9/11 AND THE STATE OF PERMANENT LEGAL EMERGENCY: SECURITY AND HUMAN RIGHTS IN COUNTERING TERRORISM 1, 9 (Aniceto Masferrer ed., 2012) (questioning whether “the derogation clauses remain adequate in an era of international terrorism. In the aftermath of the 9/11 attacks, the vast majority of states did not invoke derogation clauses in spite of the fact that, in many instances, anti-terrorism legislation developed to counter the perceived new threat raised serious concerns in relation to their compatibility with international human rights obligations. An exception to this trend was the United Kingdom, which derogated from both the European Convention and the International Covenant. These derogations were subsequently challenged in English courts—including the House of Lords—as well as before the European Court of Human Rights in Strasbourg.”).

¹⁷⁸ GROSS & NÍ AOLAÍN, *supra* note 62, at 228–43; Stephen I. Vladeck, *The New National Security Canon*, 61 AM. U. L. REV. 1295, 1300 (2012); DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* 17–65 (2006).

¹⁷⁹ The post-9/11 derogation landscape has been dominated in Europe by newly established democracies. For example, in the Council of Europe system, Armenia declared a state of emergency on the city of Yerevan on March 2, 2008 (lifted on March 21, 2008). The declared state of emergency allowed Armenia to ban meetings, rallies, and demonstrations; to ban strikes and other actions that could suspend the activities of organizations; to limit the freedom of movement of individuals; to allow the means of transportation in the state to be searched by law enforcement bodies; to limit the operation of the mass media; to ban ‘political propaganda’; to temporarily suspend the activity of political parties and other public organizations; to remove persons from a given area those who are deemed to violate the state of emergency or people who do not officially reside in specific areas. Additionally, on March 2, 2006, Georgia availed itself of the right of derogation from Article 1 of Protocol 1 and Article 2 of Protocol 4 in response to the outbreak of H5N1 (bird flu) in the Khelvachauri district (withdrawn on March 23, 2006). This pattern corresponds to Moravcsik’s observation that during the creation of the ECHR system, newly established democracies has significant interests in

not making greater use of the available justificatory regime to validate the use of exceptional powers under international law. We suggest that a significant part of the answer lies, once again, with the idea of rhetorical framing.

As noted above, governments utilize framing to increase public support for their actions while limiting opposition.¹⁸⁰ Governments do this by manipulating information pertaining both to the magnitude and probability of potential risks as well as to the costs and benefits of pursuing different measures in response to such risks.¹⁸¹ The choice to define state action in terms of war, derogation, or “business as usual” is, we suggest, an important framing moment for states.

In the aftermath of the 9/11 terrorist attacks, the Bush Administration embraced the legal language and some, but not all, of the attendant consequences of operating within a “war” frame.¹⁸² Although some countries initially followed America’s rhetorical lead, numerous democratic states have shifted away from a “war” frame, showing greater comfort in the legal and political universe of unacknowledged emergency practice, status, and powers.¹⁸³ This is not to suggest that the rhetoric of “threat” has disappeared. The vocabulary of terrorism and counter-terrorism remains ubiquitous in state positioning and continues to provide justificatory and legitimizing rationales for legislative and executive action. Nonetheless, the choice to sit in one rhetorical universe (unacknowledged emergency) over the other (“war”), is not accidental. It plays out in visible and connected ways within the choice architectures addressed in Part I. In many of the same ways, as executive decision makers seek to communicate with their domestic constituencies (and the varied constituencies of their allies and foes) as to the strength, vulnerability, resolve, and will of a particular political administration, parallel

bedding down a reciprocity based human rights system based primarily on their own self-interest. See Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT’L ORG. 217, 220 (2000) (arguing that, for some states, “[e]stablishing an international human rights regime is an act of political delegation akin to establishing a domestic court or administrative agency”).

¹⁸⁰ See text *supra* Part I.

¹⁸¹ See, Richard L. Hasen, Comment, *Efficiency Under Informational Asymmetry: The Effect of Framing on Legal Rules*, 38 UCLA L. REV. 391, 416–18 (1990); MICHAEL STOHL, WAR AND DOMESTIC POLITICAL VIOLENCE: THE AMERICAN CAPACITY FOR REPRESSION AND REACTION 93–95 (1976); Paul Slovic et al., *Facts Versus Fears: Understanding Perceived Risk*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 482–83 (Paul Slovic et al. eds., 1982); Paul Slovic, *The Affect Heuristic*, in INTUITIVE JUDGMENT: HEURISTIC AND BIASES 410–11 (T. Gilovich et al. eds., 2002); see also George Loewenstein & Jane Mather, *Dynamic Processes in Risk Perception*, 3 J. RISK & UNCERTAINTY 155, 161–65 (1990).

¹⁸² See text *supra* Part I.

¹⁸³ See Hafner-Burton et al., *supra* note 173, at 675–76 (arguing that “stable democracies and countries where domestic courts can exercise strong oversight of the executive are more likely to derogate than other regimes” based their analysis of a comprehensive data sets of derogations and states of emergency around the world from 1976 to 2007).

processes come into play as the state positions itself formally vis-à-vis other states and international institutions. As robust state action is mandated against terrorist actors and terrorist financiers,¹⁸⁴ cooperation and support to other states in the direct line of (perceived or actual) terrorist threat has become an important marker of the democratic state's reliability and legitimacy in its inter-state relationships.¹⁸⁵ Political and economic pressures to demonstrate vigorous backing to counter-terrorism measures has produced remarkable formal compliance with the reporting requirements of the United Nations Counter-Terrorism Committee as

¹⁸⁴ S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001); S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001). It may be worth recalling the obligations imposed by the Security Council on UN Member States by way of Res. 1373:

The Security Council . . . Acting under Chapter VII of the Charter of the United Nations, 1. *Decides* that all States shall: (a) Prevent and suppress the financing of terrorist acts; (b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts; (c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities; (d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons; 2. *Decides also* that all States shall: (a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists; (b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information; (c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens; (d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens; (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts; (f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings; (g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents.

Id.

¹⁸⁵ See Andrei Bianchi, *Assessing the Effectiveness of the UN Security Council's Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion*, 17 EUR. J. INT. L. 881 (2006).

well as widespread domestic implementation of Security Council mandated obligations into domestic legal orders and a rhetoric of reinforcement to “joined-up” international action on terrorism.¹⁸⁶ This is a new departure in framing collective responses to terrorism, one that democratic states have been eager to adopt, not least for the reciprocity and legitimacy benefits that follow.

The expansion of domestic emergency powers derived from and justified by reference to the obligations that stem from Security Council (SC) resolutions leaves a number of conceptual gaps,¹⁸⁷ not least of which is the consistent and precise identification of the status of conflict(s), which justify such legal action at the national level. It also leads to some intriguing questions, including whether “[g]iven the rather exceptional circumstances that have led the SC to broadly interpret its powers under Chapter VII . . . [is] the SC itself . . . acting in some sort of state of emergency?”¹⁸⁸

The slippage between war and emergency in national practice merits close scrutiny.¹⁸⁹ First, when states are engaged in armed conflict—whether an “international” armed conflict that is subject to Common Article 2 of the four Geneva Conventions,¹⁹⁰ a “non-international” armed conflict that is subject to Common Article 3,¹⁹¹ or a “transnational non-international” armed conflict¹⁹²—there are many pragmatic reasons why the legal status of their operative framework should be publicly revealed. There are consequentialist, utilitarian, transparency, and efficiency reasons to call the status of a state as being in a situation of war, state of emergency, or undeclared emergency at any given point (or as moving between these positions). Moreover, clarity on the status of state posi-

¹⁸⁶ On the early days and reporting success of the CTC, see Eric Rosand, *Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism*, 97 AM. J. INT. L. 333 (2003).

¹⁸⁷ The named gaps have included the lack of sufficient human rights protections in the enforcement of these new norms, a view confirmed by the European Court of First Instance in the cases of Yassin Abdullah Kadi and Ahmed Ali Yusuf and Al Barakaat International Foundation, holding that the Security Council “must observe the fundamental peremptory provisions of jus cogens.” Case T-306/01, Ahmed Ali Yusuf v. Council, 2005 E.C.R. II-3533, at ¶ 281; Case T-315/01, Yassin Abdullah Kadi v. Council, 2005 E.C.R. II-2659, at ¶ 230.

¹⁸⁸ Bianchi, *supra* note 185, at 891.

¹⁸⁹ See Oren Gross & Fionnuala Ní Aoláin, *Emergency, War and International Law—Another Perspective*, 70 NORDIC J. INT’L L. 29 (2001).

¹⁹⁰ GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 150–51 (2008).

¹⁹¹ *Id.* at 151–56; see also Fionnuala Ní Aoláin, *Hamdan and Common Article 3: Did the Supreme Court Get It Right?*, 91 MINN. L. REV. 1525 (2007).

¹⁹² See Naz K. Modirzadeh, *Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance*, 5 HARV. NAT’L SEC. J. 225, 254–56 (2014); Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT’L L. 1 (2003); Jelena Pejic, *Terrorist Acts and Groups: A Role for International Law?*, 75 BRIT. Y.B. INT’L L. 71 (2004).

tions would shed light on the validity of extending the emergency analogy to the practice of international institutions such as the United Nations Security Council. Second, emergency regimes, formal and informal, afford unexpected latitude to state action both under national constitutional review and international human rights derogation review that makes it a paradoxically attractive position to take.¹⁹³ A state of emergency may be an appealing option, and not a lesser evil, where the state's capacity to maneuver is potentially greater than one would instinctively expect. A key point of course, is whether the state acknowledges formally the emergency situation and affirms the rights restrictions that follow by initiating derogation from human rights treaty obligations, or rather restricts rights with no formal notice to other states with which it shares treaty obligations. In both cases, clarity of legal location for the purposes of evaluating state action and holding the executive responsible remains an overarching imperative.

Recent empirical analysis of state derogation practices posits the claim that established democracies derogate precisely because they have internal compliance constituencies enabling accountability. However, we suggest that in practice these constituencies are generally weak and ineffective. Rather, it is structural frailty and the variability of oversight mechanisms that have made derogation attractive to democratic states.¹⁹⁴ Moreover, democratic states are generally not derogating.¹⁹⁵

¹⁹³ Hafner-Burton et al., *supra* note 173, at 673, 675 (claiming that “derogations are a rational response to domestic political uncertainty”).

¹⁹⁴ A related argument is that emergency and derogations regimes send a signal to voters, courts, and interest groups that the restrictions on liberties and rights are necessary and lawful and thus gives the state substantial breathing space.

¹⁹⁵ A survey of recent practices by derogating states illustrates that the persistent offenders (namely regularly derogating states) maintain a tenacious presence in formal derogation notification. These states generally fall into the category of transitional, fragile, or conflict afflicted states. Overall, in 2013, the number of derogations decreased relative to the preceding years, with only two filed—one on January 15 and one on February 27 (specifying derogation to Article 12). One derogation has been filed in 2014—on September 24 (specifying derogation to Articles 12 and 21); Peru, is a serial derogation-filer. Many if not all of Peru's derogations in 2013 and 2014 were notices that a previously-declared state of emergency is being extended. In 2013, Peru filed fifteen derogations on seven different dates (March 13, March 28, May 9, May 30, July 31, October 11, December 5). Similarly, in 2014, Peru has thus far filed eleven derogations on four dates (January 28, April 2, June 27, August 11). These notices list a consistent set of Articles from which Peru is derogating, including 17, 12, 21, 9, and parts of 2. Guatemala is also a persistent derogator, derogations were current in 2013 and were previously filed in 2006, 2008, 2009, 2010, 2011, and 2012. Thailand formally filed three ICCPR derogations in 2014, on January 28, March 20, and July 8. The January derogation declared a state of emergency and specified derogation of ICCPR Articles 12, 19, and 21. The March filing was a notice that the state of emergency imposed in January was lifted. The last notice, filed in July, specified derogation to Articles 12(1), 14(5), 19, and 21. See List of Declaration and Reservations to the International Covenant on Civil and Political Rights of 1966, U.N. TREATY COLLECTION, https://treaties.un.org/pages/viewdetails.aspx?chapter=4&src=treaty&mtdsg_no=iv-4&lang=en (last visited Nov. 29, 2014).

Separately, we maintain that a state's resort to the sustained use of emergency powers may, in certain circumstances, be assessed usefully through the legal prism of the laws of armed conflict, and not solely through regular constitutional review or through the derogation provisions of international human rights treaty law.¹⁹⁶ We advance this position, because sustained emergencies frequently function as "place-holding" mechanisms to avoid the form of legal and political scrutiny that might be activated if the international laws of war or domestic, war-activating constitutional clauses were deemed applicable to the experience of perpetual crisis. Moreover, the accountability mechanisms of these legal regimes vary considerably, emphasizing the practical import of asking which rules ought to apply in assessing a range of practices such as rendition, targeted killing, torture, and modified trial. To state the obvious, even domestic rules are understood to shift when the law of armed conflict applies formally, so the issues arise both as an internal matter within domestic legal systems and at the point of interface between the domestic and the international.

States of emergency have a tendency to persist, and because they provide an escape mechanism, they effectively authorize deviant state behavior precisely when compliance may most be needed.¹⁹⁷ The negative press of the unending "war on terror" has forced a contemporary rhetorical retreat from the language of war. As a result, emergencies may function as an attractive placeholder for legitimizing state practices of expanding executive and emergency powers in the face of a terrorist threat. Sustained emergencies may pose much less of a challenge on the public relations front and still allow a government or an administration interested in ratcheting security and supporting liberty-depriving measures to have a greater capacity to do so. At the same time, the state of sustained emergency allows governmental action and measures that are subject to less judicial and political interference than one might expect. But there is a fundamental oversight challenge when emergencies are undeclared or operate informally without derogation from human rights treaties. In this universe, states use the terminology of exigency and crisis, deploy rights limiting emergency legislation, and pay none of the oversight and review costs associated with operating exceptional powers on a consistent and normalized basis.

¹⁹⁶ This is consistent with the empirical findings of Hafner-Burton et al. Based on their data set they find that stable democracies derogate for long periods of time when faced with extreme levels of political violence. See Hafner-Burton et al., *supra* note 173, at 676.

¹⁹⁷ Ní Aoláin & Gross, *supra* note 156, at 3–5.

A. *Reflections on the Emergency Comfort Zone*

There is a puzzle inherent in the assertion that states would, with reflection and foresight, choose to use an emergency framing in their responses to violent internal challengers or external armed conflict rather than invoke an armed conflict (war) or business-as-usual framing. Evidently, the legal status of “emergency” can apply to a substantial number of economic, social, and political situations. Understanding state emergency positioning brings us back to storytelling and architecture motifs.¹⁹⁸ Drawing on Giorgio Agamben—who has suggested that against the backdrop of the “global civil war,” the state of exception is increasingly the “dominant paradigm of government in contemporary politics”¹⁹⁹—it is plausible to conceive of the practice of “emergency” as an ever-deepening normalization of exceptional measures.²⁰⁰ Permanent (and derogated) emergencies had become a virtual norm of some states’ practices even before 9/11.²⁰¹ While in theory derogation measures seem clear in scope and definition, in practice they allow for an evasion of robust accountability in complex and challenging ways.²⁰² The source of accountability for derogation or for the use, misuse, or abuse of emergency powers beyond any domestic constraints lies with the regional human rights courts and the UN Human Rights Committee.

Undertaking a two-pronged historical analysis, one sees that these bodies have, in practice, consistently legitimized the democratic state’s use of emergency powers. First, focusing on the justification for calling the emergency, the case law under the European Convention on Human Rights and its American counterpart has, by and large, upheld states’ drawing on the legitimacy and necessity of particular derogations.²⁰³

¹⁹⁸ STUCKEY, *supra* note 25, at 1.

¹⁹⁹ GIORGIO AGAMBEN, *STATE OF EXCEPTION* 2 (2005).

²⁰⁰ For an extension of this analysis to an emergency regime for the use of force see Eyal Benvenisti, *The US and the Use of Force: Double-Edged Hegemony and the Management of Global Emergencies*, 15 EUR. J. INT. L. 677 (2004) (the state of emergency exception has been advocated to accommodate the changing demands of the international legal regime for the use of force within the framework of the UN collective security system).

²⁰¹ GROSS & NÍ AOLÁIN, *supra* note 62, at 228–43.

²⁰² Oren Gross & Fionnuala Ní Aoláin, *From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights*, 23 HUM. RTS. Q. 625 (2001).

²⁰³ See, e.g., *Lawless v. Ireland*, 1 Eur. H.R. Rep. 15, 37 (1961); *Ireland v. United Kingdom*, 2 Eur. H.R. Rep. 25, 107 (1976); *Refah Partisi v. Turkey*, 35 Eur. H.R. Rep. 3, 89 (2002); *Askoy v. Turkey*, 1996-VI Eur. Ct. H.R. 2260, 2281 (holding that there was an unquestionably serious problem of terrorism in south-east Turkey and acknowledging the difficulties for the state in taking measures against it. On this basis upholding that there was a “public emergency threatening the life of the nation.”); *Sakik v. Turkey*, 1997-VII Eur. Ct. H.R. 2609, 2628 (while there is a narrow reading of the scope of the derogation, the core deference to the state in derogation is maintained); see also Fionnuala Ní Aoláin, *The Emergence of Diversity: Differences in Human Rights Jurisprudence*, 19 FORDHAM INT’L L.J. 101 (1995); Gross, *supra* note 165.

The second step involves close scrutiny of judicial proportionality analysis, most notably as deployed by the European Court of Human Rights.²⁰⁴ Until the attacks of 9/11, this second prong had allowed the Court to scrutinize more robustly the actual practice of states coming before it, often striking down the measures taken by the derogating state as disproportionate to the threat faced, or articulating a lesser means-to-ends analysis.²⁰⁵ However, post-9/11, we identify a subtle shift in the outcomes of proportionality-based analysis, suggesting that it works increasingly to the respondent state's benefit in determining whether the measures deployed were proportionate and suitable to the perceived or actual threat at hand.²⁰⁶ Importantly the proportionality test is being deployed in cases where there is no formal derogation in place, but the state advances claims about the broad context of terrorism as necessary to understand the complexity and contextual implications of its vulnerable position. This is effectively derogation and sustained emergency by stealth. This shift is evident in cases involving non-derogable rights (specifically torture or inhuman and degrading treatment) as well as specific derogable rights, such as due process and liberty, in which the very importation of a weak form of proportionality analysis, allied with pervasive references to the challenges of terrorism and exceptionalism broadly articulated, is weakening the core of the rights under review. One scholar has termed this approach an "extra-textual interpretation" by the European Court of Human Rights.²⁰⁷

The persistent calls for judicial deference to executive action in the realm of national security operate to undermine or close the interpretative

²⁰⁴ Article 15 of the ECHR sets out that "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law." European Convention for the Protection of Human Rights and Fundamental Freedoms art. 15, Nov. 4, 1950, 213 U.N.T.S. 221. This has been taken to mean that measures must thus be strictly proportionate. In general this has been interpreted to mean that the measures taken must be strictly required, that the measures must be connected with the emergency, that the measures should only be used for as long as they are needed, and that the extent to which the measures deviate from the treaty standards have to be in proportion to the severity of the threat, and finally that some safeguards should be in place to prevent abuse of such measures. See Gross & Ní Aoláin, *supra* note 202.

²⁰⁵ See e.g., *Aksoy v. Turkey*, 1996-VI Eur. Ct. H.R. 2260 at ¶78; see also *McCann and Others v. the United Kingdom*, 324 Eur. Ct. H.R. (ser. A) at ¶149–50 (1995).

²⁰⁶ *Sec'y of State for the Home Dep't v. AF (No 3)*, [2009] UKHL 28, [2010] 2 A.C. 269 ¶33; *Sec'y of State for the Home Dep't v. MB & AF*, [2007] UKHL 46, [2008] 1 A.C. 440, 484–85, 496–97.

²⁰⁷ See Nicolas A.J. Croquet, *The European Court of Human Rights' Norm-Creation and Norm-Limiting Processes: Resolving a Normative Tension*, 17 COLUM. J. EUR. L. 307, 307 (2011) ("The ECtHR has resorted to an extra-textual interpretation of the ECHR at three different normative phases of human rights reasoning: definition of scope, review of external limits placed on the exercise of rights not subject to a limitation clause, and review of suspension measures in case of public emergency.").

space open to judges in highly fraught security or terrorism-related cases.²⁰⁸ In earlier work, we identified a contextual deference approach by the European Court in the 1993 *Brannigan and McBride* decision.²⁰⁹ *Brannigan* was an unusual case coming in the context of a derogation that had been activated by the United Kingdom in the immediate aftermath of the adverse decision *Brogan v. United Kingdom*.²¹⁰ In *Brogan*, the absence of a formal derogation meant that the United Kingdom was found in violation of Article 5(3) of the Convention for detaining an individual under section 12(1)(b) and (4) of the 1984 Prevention of Terrorism Act beyond the permissible time lines set by the Court.²¹¹ Counsel and supporting amicus briefs to the European Court stressed that the sole factor that had initiated the derogation was an adverse Court decision, and not a material change in the circumstances that properly gave rise to limitations on Article 5. We argued that in *Brogan* the blinders evidenced by the Court should be understood as uniquely adjusted to the specificity of the United Kingdom's position as a leading democratic state encountering local terrorism difficulties in the 1980s.²¹² The unwillingness to address the motives of this state in activating a derogation and the Court's passive approach to apparent manipulation of the treaty regime, we explained by reference to the status and perceived legitimacy of the United Kingdom in the Council of Europe system. We viewed *Brogan* as a "one-off" case, highly specific to the context and to the

²⁰⁸ A cogent example is found in the House of Lords *Belmarsh* case, in which the executive argued that, "as it was for Parliament and the executive to assess the threat facing the nation, so it was for those bodies and not the courts to judge the response necessary to protect the security of the public. These were matters . . . calling for an exercise of political and not judicial judgment." *A v. Sec'y of State for the Home Dep't*, [2004] UKHL 56, [37] (appeal taken from Eng.). The government position was rejected in *Belmarsh*, but it has had more insidious influence elsewhere. Lord Justice Brooke encapsulated this overly deferential approach in *Belmarsh* (CA) when he urged judges to trust the executive more, and (mis)characterized the insistence on upholding human rights standards as "a purist approach" that entailed "saying that it is better that this country should be destroyed . . . than that a single suspected terrorist should be detained without due process." *A v. Sec'y of State for the Home Dep't*, [2002] EWCA Civ 1502, [2004] QB 335, at ¶ 87 [*Belmarsh* (CA)], *rev'g* *Belmarsh*.

²⁰⁹ *Brannigan & McBride v. United Kingdom*, App. Nos. 14553/89 and 14554/89, 258 Eur. Ct. H.R. (ser. A) at 29 (1993); Ní Aoláin argues that the way in which the Court interpreted "the context of terrorism" in Northern Ireland gave de facto leeway to the UK: "Setting the balance of discretion in favor of democratic states is directly aided by the use of context justification. The context is the subjective assessment of a terrorist or other political threat, imported into the core of the judicial argument that becomes the base-line from which legal justifications follow. The sub-text of this justification is an unwillingness to impute to democratic states the negation that regularly occurs in respect to rights, in situations where the government perceives threats to the democratic structure or to public order." Ní Aoláin, *supra* note 203, at 119 (internal citations omitted).

²¹⁰ Derogation of the 23 December 1988.

²¹¹ *Brogan v. United Kingdom*, App. Nos. 11209/84; 11234/84; 11266/84; and 11386/85, 145 Eur. Ct. H.R. (ser. A) at 11 (1988).

²¹² *Id.*

respondent State's status. Now, it appears that *Brogan* and the approach it typifies may not be an aberration at all. Rather, the contextual deference motif is making a more sustained appearance in non-derogation cases, especially those involving due process rights, where invocations and appeals to the scourge of terrorism operate as a means to contextualize the contemporary interpretation of these rights.²¹³ As Fenwick and Phillipson illustrate, judicial outcomes are also shaped by prior legislative interaction where the government has preemptively sought to undermine liberty leaning protections, "by exploiting any ambiguities in the interpretation of *ECHR* rights so as to produce the most executive-friendly reading of them possible. In general, such tactics become possible due to the febrile atmosphere typically generated by government claims that we are in a semi-permanent state of emergency."²¹⁴

More broadly, after 9/11 the metaphor of "balancing" between security and human rights or liberty has been used widely to reduce the effect and curtail the capacity of human rights based claims.²¹⁵ For nihilists and realists alike, 9/11 opened an opportunity to reduce law to represent one "view" that could be overruled by an opinion sought from other fields of expertise. Such an approach to "balancing" resulted in the undermining of absolute, non-derogable human rights, in accepting intrusions into the essential core of other human rights, and in a reordering of values so that security would always trump human rights. The language of robust protection of human rights has been replaced by rhetoric of balancing. Nowhere was this transformation more pernicious than in the context of non-derogable rights. As we argued elsewhere, when faced with violent states of emergency, public officials are likely to be unable to assess accurately the risks facing the nation. In those circumstances an act of balancing between security and liberty—of optimizing the trade-off between the two—is likely to be biased. The pressures exerted by acute exigencies on decision-makers (and the public at large), coupled with certain unique features of crisis mentality and thinking, are likely to result in a systematic undervaluation of one interest (liberty) and overval-

²¹³ An example cited by Fenwick and Phillipson is Lord Hoffmann's of the House of Lords. In one significant decision on Article 5 of the ECHR he wrote: "The liberty of the subject and the right to habeas corpus are too precious to be sacrificed for any reason other than to safeguard the survival of the state. But one can only maintain this position if one confines the concept of deprivation of liberty to actual imprisonment or something which is for practical purposes little different from imprisonment. Otherwise the law would place too great a restriction on the powers of the state to deal with serious terrorist threats to the lives of its citizens." *Sec'y of State for the Home Dep't v. JJ*, [2007] UKHL 45, [44] (appeal taken from Eng.); Fenwick & Phillipson, *supra* note 170, at 870.

²¹⁴ Fenwick & Phillipson, *supra* note 170, at 868.

²¹⁵ Gross, *supra* note 98, at 45; Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Human Rights Council, ¶ 47 U.N. Doc. A/HRC/13/37 (Dec. 28, 2009) (by Martin Scheinin).

uation of another (security) so that the ensuing balance would be tilted in favor of security concerns at the expense of individual rights and liberties.²¹⁶

Underlining the shift away from derogation mechanisms and rhetoric is the empirical reality that only one democratic state has derogated under its international human rights treaty obligations since 9/11.²¹⁷ The United Kingdom entered a substantial derogation after the events of 9/11 under Article 15 of the European Convention on Human Rights.²¹⁸ Whatever the perceived merits of derogation framing, it is debatable what tangible leeway this derogation subsequently gave the United Kingdom. It is reasonable to assume that a formal derogation brought greater attention to the practices of the United Kingdom as the one democratic state in derogation,²¹⁹ and that it became a lightning rod for the cries of foul play. One lesson from the British choice to frame the situation as a public emergency that justified resort to derogation, and the criticism directed at the U.K. government as a result, is simply not to derogate formally from human rights treaty obligations and avoid ceding the narrative space to the formalized exception. Rather, the working principle might well be that the maintenance of emergency powers is, by and large, not dependent on derogation, as evidenced by the 2000 Crime Act

²¹⁶ Gross, *supra* note 98.

²¹⁷ See Andrej Zwitter, Annajorien Prins & Hannah Pannwitz, *State of Emergency Mapping Database* (2014) (University of Groningen Faculty of Law Research Paper Series), available at <http://emergencymapping.org/onewebmedia/140423%20-%20STEM%20Working%20Paper.pdf>. See *id.* at 8 (“The data shows that a high number of states of emergency are declared in Latin American countries. Whereas there are a vast number of countries that have declared and exercised emergency powers across the world throughout the period of 1998-2013, it is only a relatively small number of countries that have reported their states of emergency and related human rights derogations to the United Nations.”). The mapping exercise goes on to confirm that, “Other than Peru and Guatemala, there are 17 different countries that have reported states of emergency with human rights derogations to the United Nations over the 15-year period. These are: Argentina, Armenia, Bahrain, Bolivia, Colombia, Ecuador, France, Georgia, Jamaica, Namibia, Nepal, Paraguay, Serbia and Montenegro, Sri Lanka, Sudan, Thailand, and Trinidad and Tobago. Most of these countries have only reported a state of emergency declaration with human rights derogations once or twice to the UN Secretary-General. The only country that has reported more frequently than once or twice is Ecuador.” *Id.* at 9 n.13.

²¹⁸ List of Declarations Made by the United Kingdom Regarding the Convention for the Protection of Human Rights and Fundamental Freedoms, COUNCIL EUR. TREATY OFF. (Oct. 29, 2014), <http://www.conventions.coe.int/treaty/Commun/ListeDeclarations.asp?PO=UK&NT=005&MA=999&CV=1&NA=&CN=999&VL=1&CM=5&CL=ENG>.

²¹⁹ JOINT COMMITTEE ON HUMAN RIGHTS, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS (SEVENTEENTH REPORT): BRINGING HUMAN RIGHTS BACK IN, 2009–10, H.L. 86, H.C. 111, at 7–8 (U.K.) (see in particular paragraphs 11 and 12, where the Parliamentary Committee disputes the executive’s assertion that the conditions exist sufficient to claim a state of emergency relying on the assessment of the Joint Terrorism Analysis Center (JTAC)).

in the United Kingdom.²²⁰ Essentially, the “work” can get done in other ways.²²¹ The normalization frame is now well in place.

The production of legislation that is emergency-driven in character, but framed formally as ordinary, continues unabated.²²² Democracies such as the United Kingdom, the United States, Canada,²²³ Germany,²²⁴ and Australia²²⁵ have enacted substantial and far-reaching legislation aimed at containing terrorist or national security threats and virtually all of it has been marshaled through the ordinary criminal law.²²⁶ The most cogent example of this phenomenon is the conversion in the United Kingdom of decades of exceptional emergency legislation including the Emergency Powers Act and the Prevention of Terrorism Acts into consolidated “ordinary” U.K. wide legislation at the ending phase of the conflict in Northern Ireland.²²⁷ We are witnessing “the subversion of legal norms to counter-insurgency ends.”²²⁸ A perilous articulation of this view is found in the oft-quoted statement by General Frank Kitson (who served a key military role in Northern Ireland in the early 1970s):

²²⁰ Terrorism Act, 2000, c. 11 (U.K.).

²²¹ There is historical evidence in the United Kingdom for this assertion too. For example, the Special Powers Act 1922 (modeled after the Defence of the Realm Act and the Restoration of Order in Ireland Act 1920), while initially an exceptional piece of legislation was eventually made permanent in 1933. It is also significant to note that the “sovereignty cost” of delegation is not as high as we might think. *But see*, Moravcsik *supra* note 179, at 227 (“[A]ll other things equal, the ‘sovereignty cost’ of delegating to an international judge is likely to be even greater than that of delegating to a domestic judge.”). As our earlier studies of international judicial practice have illustrated, it is not evident that these symbolic or sovereignty costs are particularly high for a consolidated democracy. *See generally*, Ní Aoláin & Gross, *supra* note 202; Ní Aoláin, *supra* note 203.

²²² GROSS & NÍ AOLÁIN, *supra* note 62, at 66–67.

²²³ PRIVY COUNCIL OFFICE, SECURING AN OPEN SOCIETY: CANADA’S NATIONAL SECURITY POLICY (2004); *see also* KENT ROACH, SEPTEMBER 11: CONSEQUENCES FOR CANADA (2003).

²²⁴ Germany’s post 9/11 anti-terror legislation amends and extends previous legislation. *See* Arne Lichtenberg, *Germany’s Anti-Terror Law, 10 Years On*, DW.DE (Sept. 1, 2012), <http://www.dw.de/germanys-anti-terror-law-10-years-on/a-15654829>.

²²⁵ Since 9/11, Australian states have passed a number of laws authorizing temporary emergency powers. *See, e.g.*, *Terrorism (Extraordinary Temporary Powers) Act 2006*, (Austl. Cap. Terr.) (Austl.), available at <http://www.legislation.act.gov.au/a/2006-21/current/pdf/2006-21.pdf>; *Terrorism (Emergency Powers) Act 2003* (N. Terr.) (Austl.), available at http://www.austlii.edu.au/au/legis/nt/consol_act/tpa323/; *Terrorism (Police Powers) Act 2002* (N.S.W.) (Austl.), available at http://www.austlii.edu.au/au/legis/nsw/consol_act/tpa2002291/.

²²⁶ *See, e.g.*, Terrorism Act, 2000, c. 11 (U.K.); Kim Lane Scheppele, *The Migration of Anti-Constitutional Ideas: The Post 9/11 Globalization of Public Law and the International State of Emergency*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* (Sujit Choudhry ed., 2006).

²²⁷ The legislation included the Terrorism Act (2000), the Anti-Terrorism, Crime and Security Act (2001), the Criminal Justice Act (2003), the Prevention of Terrorism Act (2005), the Terrorism Act (2006), the Terrorism (United Nations Measures) Order 2006, and the Counter-Terrorism Act (2008).

²²⁸ *See, e.g.*, Mark McGovern, *The Dilemma of Democracy: Collusion and the State of Exception*, 2 *STUD. SOC. JUST.* 213, 223 (2011).

[T]he [l]aw should be used as just another weapon in the government's arsenal, and in this case it becomes little more than a propaganda cover for the disposal of unwanted members of the public. For this to happen efficiently, the activities of the legal services have to be tied into the war effort in as discreet a way as possible.²²⁹

Any analysis of emergency practice should be attuned to "creation of zones of in-distinction in contemporary institutions, where the formal normative order is adapted, misshaped, subverted, and/or suspended."²³⁰ There is substantial evidence of the necessity of preserving the appearance of constitutional "normalcy," particularly in well established democracies.²³¹ This occurs, in part, by governmental attention to the framing of the exception and greater sophistication in weaving a narrative that affirms threats but avoids legal forms that may limit the maneuverability of the Executive. The ordinariness of emergency law and practice absorbed into the post-9/11 juridico-institutional order rationalizes and maintains the legitimacy of the democratic order and its normal-yet-exceptional functioning, rather than exposing it for what it is.

B. *Framing: The Retreat from the Rhetoric and Formalities of "War"*

As noted above, individuals use frames as interpretive emotional filters through which they make sense of surrounding events and messages. States engage in a similar kind of action.

Despite the prominence of "War on Terror" rhetoric post-9/11, democratic states' flirtation with the status of being "at war" has been, as a formal matter, a rather short-lived affair. The lexicon of legal engagement with terrorist organizations and non-state actors of various types in various locations has changed noticeably over time, sometimes with little advance notice of the vocabulary shifts and the legal consequences that follow. For instance, the United States and its allies speedily made moves to avoid the appearance that law of occupation obligations may apply to their involvements in Iraq and Afghanistan.²³² In other contexts, the language, rhetoric, and regulation of derogation and armed con-

²²⁹ FRANK KITSON, *LOW INTENSITY OPERATIONS: SUBVERSION, INSURGENCY AND PEACEKEEPING* 69 (1971).

²³⁰ McGovern, *supra* note 228, at 227.

²³¹ *Id.*

²³² See Siobhán Wills, *The Obligations Due to Former 'Protected Persons' in Conflicts that Have Ceased to Be International: The People's Mujahedin Organization of Iran*, 15 J. CONFLICT & SEC. L. 117, 118–20 (2010); see generally Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L L. 580 (2006); Adam Roberts, *The End of Occupation: Iraq 2004*, 54 INT'L & COMP. L.Q. 27 (2005).

flict have been abandoned, or not assumed initially, leaving it to “ordinary” law to “do the work.”

Once again, that assertion is partly sustained by the absorption of exceptional legal norms addressing terrorism and counter-terrorism into the ordinary legal regimes of many states.²³³ Thus, for democratic states, submerging de facto emergency practices into ordinary law and rhetoric are deemed more attractive as framing devices to state action than the resort to a “law of war” framing and practice. At the same time, significant overlap exists between emergency and armed conflict legal regimes, and shifts between these two frameworks can and do occur over time. Eventually both can, and do, impact the ordinary legal terrain in insidious ways.

While it is likely that some states will maintain emergencies and resort to the legal regime of derogation as a means to cover regime illegitimacy, this is not the case for most. For consolidated democracies managing internal armed conflict, emergency framing serves multiple purposes. These include legitimacy, flexibility, and control to strengthen and extend executive powers in ways much less likely to garner defeating scrutiny than might be the case under overt declaration of armed conflict.²³⁴ We are not suggesting that emergency regimes do not entertain domestic and external scrutiny; they clearly do. However, the robustness and effectiveness of such scrutiny is limited in crucial ways, thereby giving the democratic state more substantial leeway under emergency frameworks domestically and internationally than might be the case in other legal frames.²³⁵ Derogations do not make national or international newspaper headlines, nor do they engage the general public, civil society, and interested outsiders in sustained preoccupation with the

²³³ See generally Dermot P.J. Walsh, *The Impact of the Antisubversive Laws on Police Powers and Practices in Ireland: The Silent Erosion of Individual Freedom*, 62 TEMP. L. REV. 1099 (1989); Alan Dowty, *The Use of Emergency Powers in Israel*, 21 MIDDLE EAST REV. 34 (1988); LAWYERS COMM. FOR HUMAN RIGHTS, ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY IN THE POST-SEPTEMBER 11 UNITED STATES (2003); Jason Collins Weida, *A Republic of Emergencies: Martial Law in American Jurisprudence*, 36 CONN. L. REV. 1397 (2004); David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565 (2003).

²³⁴ Lori Fisler Damrosch, *The Interface of National Constitutional Systems with International Law and Institutions on Using Military Forces: Changing Trends in Executive and Legislative Powers*, in DEMOCRATIC ACCOUNTABILITY AND THE USE OF FORCE IN INTERNATIONAL LAW 39 (Charlotte Ku & Harold K. Jacobson eds., 2003) (providing a comparative assessment of increasing parliamentary and democracy infusions in the use of war powers by democratic states. While this aptly noted phenomena is important to an analysis of democratic control over the exertion of war enabling powers, this move may also provide one explanatory dimension to the unwillingness of executives to resort to the usage of war powers *ab initio* because there are veto and compromise costs involved).

²³⁵ But see Andrew T. Guzman, *A Compliance Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002); BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (2009).

activities of the state: declarations of war and engagement of military forces guarantee a level of interest and scrutiny for the state which is invariably significant and intrusive. Ordinarily, courts closely scrutinize restrictions on constitutional and human rights. However, when a state of emergency is declared, judicial attitudes shift.²³⁶ There is some dispute as to whether that shift is sustained the longer the emergency lasts.²³⁷ However, evidence of judicial practice across jurisdictions is at the very least mixed, so states can make reasonable bets as to the intensity and effectiveness of that scrutiny even over the life of a sustained emergency tilting in their favor.

An established international relations literature broadly acknowledges that democratic states are much less likely to seek military conflict, at least amongst themselves, or to mediate intra-state disputes through a resort to force.²³⁸ However, when democracies engage in international armed conflicts, a number of factors influence whether such conflicts are classified as inter-state engagements or the more complex intersection of state and non-state actors. These include the pressure for democracies to end speedily such engagements, the lack of tolerance by democratic polities for significant loss of civilian or combatant lives,²³⁹ and the transparency pressures that are more likely to be placed on the executive in its oversight and war management.

In 2001, shortly after the 9/11 attacks, the United States launched a war against Afghanistan. The full force of the Geneva Conventions applied to this war, notwithstanding the fact that the United States had previously refused diplomatic recognition to the Taliban-controlled Afghani government.²⁴⁰ In parallel, emergency language and invocation was part

²³⁶ See GROSS & NÍ AOLÁIN, *supra* note 62, at 72–79.

²³⁷ See generally ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* (2007).

²³⁸ See, e.g., MORAVCSIK, *supra* note 179, at 224 (asserting that “governments support human rights regimes to advance partisan and public interest in preventing domestic violence and interstate warfare”). On the idea of “democratic peace” see, e.g., PATHS TO PEACE: IS DEMOCRACY THE ANSWER? (Miriam F. Elman ed., 1997) (providing case studies of the democratic peace hypothesis); BRUCE RUSSETT, *GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST-COLD WAR WORLD* (1993) (establishing the democratic peace theory); Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT’L L. 367, 382–83 (1998) (providing context for the democratic peace theory in liberal international relations theory). See generally THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 195–98 (1999) (referring to a globalized “McDonald’s” world with a “Golden Arches Theory of Conflict Avoidance”).

²³⁹ This can also be read as a compliance pressure for democratic states to laws of war adherence. On compliance to laws of war, see generally JAMES D. MORROW, *The Laws of War, Common Conjectures, and Legal Systems in International Politics*, 31 J. LEGAL STUD. S41 (2002).

²⁴⁰ KENNETH KATZMAN, CONG. RESEARCH SERV., RL 30588, *AFGHANISTAN: POST-TALIBAN GOVERNANCE, SECURITY, AND U.S. POLICY* 5–6, 43 (2014).

of the rhetoric of the moment.²⁴¹ Thus, on September 14, 2001, the President declared a national emergency “by reason of the terrorist attacks at the World Trade Center . . . and the Pentagon, and the continuing and immediate threat of further attacks on the United States.”²⁴² President Bush renewed the declaration of a state of national emergency in every subsequent year of his presidency. The initial response of the international human rights community was an insistence that the terrorist acts of 9/11 were serious crimes and ought to be handled within a law enforcement paradigm.²⁴³ Gradually, however, academics and international human rights actors have become more willing to concede that despite a preference for many of operating within a law enforcement paradigm, there is an undeniable need to accept that there may be overlap between law enforcement models and the law of armed conflict.²⁴⁴ Such overlaps are not necessarily of unlimited duration, rather, there may be temporal, geographical, and actor specificity to the continuities and discontinuities of these two legal regimes. Parsing out the degree to which state positioning, pragmatism, and even enlightened self-interest have motivated the partial shift, there can be little doubt that the initial definitive privileging of the armed conflict narrative has been at least partly responsible for the shift beyond state framing.

Eventually, presidential awareness of the constitutive power of language and framing led the Obama Administration to forego the use of the war frame in two contexts. News reports in March 2009 indicated that the Administration decided to drop the term “Global War on Terror” from its lexicon, although some reports suggested that it was to be replaced by yet another euphemism: “Overseas Contingency Operation.”²⁴⁵ Similarly, on May 13, 2009, the Director of the Office of National Drug Control Policy announced that the new administration would no longer use the term “War on Drugs,” noting that the term was counter-productive and contrary to the Administration’s policy of favor-

²⁴¹ JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11*, at ix (2009) (noting that an “endless war, and an endless emergency” were in sight).

²⁴² Proclamation No. 7463: Declaration of National Emergency by Reason of Certain Terrorist Attacks, 3. C.F.R. 7463 (Sept. 14, 2001).

²⁴³ *United Nations: Responding to Sept. 11: General Assembly Urged to Use Human Rights As Basis*, HUMAN RIGHTS WATCH (Oct. 1, 2001), <http://www.hrw.org/news/2001/09/30/united-nations-responding-sept-11>.

²⁴⁴ See JONATHAN R. WHITE, *DEFENDING THE HOMELAND: DOMESTIC INTELLIGENCE, LAW ENFORCEMENT, AND SECURITY* (2004); Noah Feldman, *Choices of Law, Choices of War*, 25 HARV. J.L. & PUB. POL’Y 457 (2002); Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AM. J. INT’L L. 345 (2002).

²⁴⁵ Scott Wilson & Al Kamen, *‘Global War on Terror’ Is Given New Name*, WASH. POST, Mar. 25, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032402818.html>.

ing treatment over incarceration.²⁴⁶ While studiously avoiding President Bush's refrain of "War on Terror," the Obama Administration has repeatedly declared that the United States is "at war against [A] Qaeda."²⁴⁷ President Obama has similarly maintained the emergency declaration initiated by President Bush, noting that, "[t]he terrorist threat that led to the declaration on September 14, 2001, of a national emergency continues. For this reason, I have determined that it is necessary to continue in effect . . . the national emergency with respect to the terrorist threat."²⁴⁸

If commentators are to probe more fulsomely the preferred framing of executive leaders to address, as a legal matter, the precise linkage between permanent emergencies, derogation, and international armed conflict, then the treaty language of the derogation provisions should bear greater scrutiny. As our pre- and post-9/11 data demonstrates, states engaged in armed conflicts (internal or external) generally do not utilize derogation to proclaim their involvement in hostilities.²⁴⁹ States see no necessary need for derogation, as they assume that the application of the law of war is a *de facto* ouster of human rights law or that the ordinary law of the land can adapt in times of war, thereby excluding the need for derogation.²⁵⁰

Shared understandings of unacceptable conduct, which are central to compliance in the laws of war arena, may pose unexpected costs to democratic states. These costs may, in turn, result in states attempting to move out of law of war regulation to other legal areas. Such a move might create a type of forum shopping for democracies engaged in armed conflict that incentivizes regulation under an emergency framework (preferably in one perspective a *de facto* emergency framework), rather

²⁴⁶ Gary Fields, *White House Czar Calls for End to "War on Drugs,"* WALL ST. J., May 14, 2009, <http://online.wsj.com/news/articles/SB124225891527617397>.

²⁴⁷ See, e.g., Barack Obama, President of the U.S., Remarks by the President on Strengthening Intelligence and Aviation Security (Jan. 7, 2010), *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-strengthening-intelligence-and-aviation-security> ("We are at war. We are at war with [A] Qaeda, a far reaching network of violence and hatred that attacked us on 9/11, that killed nearly 3,000 innocent people, and that is plotting to strike us again.")

²⁴⁸ Barack Obama, President of the U.S., Message from the President to Congress Regarding the Continuation of the National Emergency with Respect to Certain Terrorist Attacks (Sept. 11, 2012), *available at* <http://www.whitehouse.gov/the-press-office/2012/09/11/message-continuation-national-emergency-respect-certain-terrorist-attack>.

²⁴⁹ See text *supra* Part II.

²⁵⁰ Nonetheless, some human rights treaties, including Article 15 of the European Convention on Human Rights, specifically allows derogation for a situation of war. Note that while arguing in favor of the ICCPR's derogation clause in 1947, the U.K. emphasized that "under general international law in time of war States were not strictly bound by conventional obligations unless the conventions contained provisions to the contrary." Hafner-Burton et al., *supra* note 173, at 676.

than a laws-of-war framework.²⁵¹ Unexpected costs for states may include the practical realities of enforcing accountability for violations of the law of armed conflict at the domestic level and for treaty breaches when the democratic state is embroiled in conflict with non-state actors—a situation that weakens the reciprocal legitimacy that aids enforcement of norms at the national level. Arguably, asymmetric information about the state’s adversary or common knowledge about compliance may affect substantially the state’s willingness to play the game according to these rules, notwithstanding that a doctrinal legal analysis would suggest that the appropriate regulatory arena is the law of war.

Finally, as Morrow notes, “[r]atification . . . can operate as a screen on the intentions of states to observe the standards of a treaty.”²⁵² We should take seriously the claim that democratic states ratify humanitarian law treaties but “screen” rather than “signal” in their decisions to observe those treaties in the midst of active armed conflict. In terms of the compliance puzzle, a move to the non-utilization of formal derogation may not necessarily portend the triumph of realism over idealism, but rather point to micro-adjustments to states’ framing of their responses to human rights obligations. This move occurs in a universe where human rights norms have been deeply embedded in the practices and identity projections of consolidated democracies. Governments remain staunchly committed to the rhetorical ideal of human rights and exercise significant resources to coerce or persuade others to accept human rights norms. However, the challenges emanating from ongoing internal or external conflict create deep zones of regulatory discomfort and generate a state desire for greater operational latitude. Hence, a certain twilight zone of emergency practice, informally sustained and woven into the ordinary law instead of being marked and cordoned off as exceptional becomes attractive. Moreover, state responses track an emergent move from counter-terrorism to criminal justice management.²⁵³

A number of factors compound the lack of recognition by legal commentators for the slippage and interplay between legal regimes. First, the emergency oversight mechanisms created by treaty law are grossly inadequate to confront the complexity of emergencies themselves. Looking to the drafting history of regional and international human rights instruments, the working assumption of drafters and state

²⁵¹ Drawing on Morrow, *supra* note 239, at S43, the challenges shared understanding may lie with state understanding of the “appropriate standard of conduct, reciprocal enforcement when states cannot completely observe the causes of violations, and the need for agreements to cooperate at the individual level as well as at the state level.”

²⁵² *Id.* at S49.

²⁵³ See Mike Tomlinson, *From Counter-Terrorism to Criminal Justice: Transformation or Business as Usual?*, 51 *How. J. CRIM. JUST.* 442 (2012).

parties was that “emergencies” would be short-lived and inconsequential affairs. What the instruments themselves failed to anticipate, and the oversight bodies proved inept at otherwise containing, was the practice of sustained emergencies by states. National legal systems proved no less robust in challenging and redirecting state practices with respect to the sustained resort to emergency powers. The very complexity of emergency practices by states proved a challenge to the oversight capacity of states and international instruments, conceptually and practically clouding their ability to “think outside the emergency box” and address the range of other potential legal regimes.

Second, with a focus on human rights protection in the context of emergency (where in fact much of the challenge to state action occurs), all actors in the human rights drama—such as the Human Rights Committee, the European Court (and, in the past, Commission) of Human Rights, the Inter-American Court and Commission, and the Human Rights Council—are concerned with the regulation of state action within their respective spheres of influence. For the majority of these bodies, it was perceived as inappropriate to shift their examination of certain emergency situations to include humanitarian law terms of reference or to hypothesize that such consideration would best or mutually be considered within the human rights framework. Relatedly, the human rights regime remains generally unwilling, both conceptually and politically, to recognize within its own boundaries the validation of another phenomenon, i.e., armed conflict, which is regarded by some as anathema to the very application of human rights, or at the very least, as dislodging the primacy of human rights norms by claims of *lex specialis*.²⁵⁴ The Inter-American Court and Commission have shown greater capacity in this regard than the European Court (and previously Commission), which despite a plethora of cases from Chechnya, South-East Turkey, and previously from Northern Ireland, found it exceptionally difficult to “call” the overlap between humanitarian law application and the human rights regime.²⁵⁵ For the ECHR in particular this results from the bi-polar splintering of legal conceptions of war and peace, allowing little shared ground in-between and creating ambiguities for states seeking “wiggle” room from which to benefit.

²⁵⁴ Institutionally the OHCHR has moved to seek greater interface over time between the human rights infrastructure and the counter-terrorism infrastructure post-9/11. See U.N. High Commissioner for Human Rights, *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism: Study of the U.N. High Commissioner for Human Rights*, U.N. Doc. A/59/428 (Oct. 8 2004). But see Joan Fitzpatrick, *Speaking Law to Power: The War Against Terrorism and Human Rights*, 14 EUR. J. INT'L L. 241, 247–60 (2003) (arguing that after 9/11 a reconceptualization of counter-terrorism as international armed conflict may displace human rights laws and international criminal law may develop).

²⁵⁵ See Inter-Am. Comm'n H.R., *Report on Terrorism and Human Rights*, OEA/Ser.L./V/II.116, (Oct. 22, 2002).

Third, the fluidity of regimes creates uncertainty for governments, who have little interest in seeking international consensus for recognition of status that may undermine their own stability and capacity to respond when under siege.²⁵⁶ Thus, states are likely to maintain and encourage the status quo on distinct regimes with all the limitations outlined above and benefit directly from the gray zones that follow. Hence, the juridical nexus between the humanitarian law of internal armed conflict and the emergency exception of human rights remains an uncharted area that leaves a very particular space to the state to frame its response to crisis in state-affirming ways. This is not to belie the substantial work undertaken by jurists and scholars in charting the relationship between international human rights and humanitarian law generally framed.²⁵⁷ For example, in the Advisory Opinion of the International Court of Justice on *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, the Court stated that: “[T]he Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights.”²⁵⁸

There is substantial analysis and mapping in the micro-space between emergency and the threshold application of the law of armed conflict still to be done. Specifically, the relationship between an available repertoire of framing designations and a broader set of narrative management forged by governments, administrations, and even non-state actors, deserves greater concerted analysis and understanding. Both armed conflict and emergency status are significant conceptual categories in their own right, invested with state interest and containing external symbols of meaning. Both “boxes” are important categories that affect the status and legitimacy of state and non-state actors engaged in conflict or crisis. It matters to states that they exercise control over the definition and application of these categories when they are experiencing war and/or exigency of a serious kind. The intensity of state investment in framing explains in part why states work so hard in trying to control the designation that applies to them. This happens because both emergency and armed conflict are legal categories that have a significant universe of obligation, each posing distinct and separate duties on states and other actors. In this universe of obligation the consequences of accountability,

²⁵⁶ For an interesting proposal that seeks to exploit the overlaps between both regimes, see Tom Hadden & Colin Harvey, *The Law of Internal Crisis and Conflict*, 81 INT’L REV. RED CROSS 119 (1999).

²⁵⁷ See, e.g., Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239 (2000).

²⁵⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, 2004 I.C.J. 136, 178 (July 9).

transparency, and exposure are all real risks for states, and so they have a vested interest in damage limitation as well as in presenting the best projection of the state's actions and interests. This partly clarifies the active hostility to any whiff of interference with executive judgments on the status of conflict within or between states and in the selection of language used to signal a zone of exclusion to the legal and political space of framing.

CONCLUSION

One important element of information processing and analysis is the time needed to investigate consequences and alternatives. As “cognitive misers,” as Susan Fiske and Shelley Taylor famously put it, individuals utilize shortcuts in order to minimize the effort and time involved in processing information to make decisions as expediently and painlessly as possible.²⁵⁹ Moments of great consternation and upheaval, such as those the imagery of war and violent crisis invokes, which are characterized by sudden, urgent, and often unforeseen events or situations that require immediate action, accentuate the problems related to our ability to process information and evaluate complex situations. Hence, such crises tend to lead to an even greater reliance on heuristics as a means of countering the lack of sufficient time to properly evaluate the situation. At the same time, reliance on framing as a shortcut also means that whoever manages to control the framing of information would greatly influence, and could manipulate how recipients interpret the information.²⁶⁰

In the universe of reliance and shortcuts, executive enunciations to their domestic constituencies and state framing vis-à-vis other states have much in common. Both constitute central elements of making and unmaking the legal universe. This Article exhorts those concerned with the modalities of exceptionality and crisis in law to pay particular attention to how the Executive Branch and governments shift their framing of emergencies over time and to remain deeply attuned to the influences such articulation may have on the legal status of conflict and crisis. One core concern in this analysis has been the extent to which “saying” becomes the stand-in for formal and informal understandings of applicable legal regimes and facilitates slippage in oversight and accountability for the exercise of exceptional powers in situations that are rhetorically identified as crises. Critical attention to the heuristics of framing and the reception of knowledge in times of exigency may not undo the shortcuts, but it does make us more firmly aware of the slippage points.

²⁵⁹ FISKE & TAYLOR, *supra* note 14, at 13.

²⁶⁰ See Schwartz, *supra* note 36.

