

Articles

Language, Violence, and Human Rights Law

James R. Dawes*

I

Naming is violence. Among post-structuralist theorists this is an essential and commonly invoked critical maxim. The act of naming is a matter of forcibly imposing a sign upon a person or object with which it has only the most arbitrary of relationships. Names produce an Other, establish hierarchies, enable surveillance, and institute violent binaries: Naming is a strategy that one deploys in power relations. The violence cuts through at all levels, from the practically political (“They are savages,” “You are queer”) to the ontological

* Society of Fellows, Harvard University. For reading and commenting on this essay, thanks to Jeffrey Dolven, Nina Gourianova, Nancy Kokaz, Martha Minow, Miryam Sas, Tamar Schapiro, Richard Weisberg, and James Willis. Special thanks to Lawrence Buell, Zehra Baris Gumus, Patrick O'Malley, and Elaine Scarry.

(one critic writes of “the irreducibility of violence in any mark”¹). Discussing the naming practices of Nambikwara children in *Of Grammatology*, Jacques Derrida identifies naming as an act of “originary violence” that is productive of both the disciplinary violence of the law and the cognate violence of its infractions: “war, indiscretion, rape.”² Naming is authority’s attempt to categorize and control difference. For Derrida as for others, this is at the core of post-structuralist logic.

Contrast this cluster of antifoundationalist arguments (let us call it “theory” for simplicity’s sake) to the International Covenant on Civil and Political Rights. Article 16 of the ICCPR reads: “Everyone shall have the right to recognition everywhere as a person before the law.”³ Subsequent articles detail some of the freedoms contingent upon this recognition of personhood, including freedom of thought, conscience, and religion. Shortly thereafter, Article 24 establishes the fundamental duties required of each state to promote the dignity and worth of the children within its territory. What steps must states take to insure the recognition of the personhood of their children? Section 2 of Article 24 reads: “Every child shall be registered immediately after birth and *shall have a name*.”⁴ To be named is to suffer violence; to be named is the foundation of human dignity.⁵ This juxtaposition calls attention to one of the most pressing ethical questions asked today of literary and language theory.

I should begin with a word about my own attempts to categorize and control through naming. In this Article I will use “theory” as a term both broad and narrow in its application. It will denote a particular stance toward referentiality that manifests itself variously throughout the antifoundationalist practices (deconstruction, neopragmatism, constructivism, postmodernism) generated by late-1960s post-structuralism. Of course to define theory in such a way,

1. RICHARD BEARDSWORTH, *DERRIDA AND THE POLITICAL* 18 (1996). Steven Shaviro writes: “Truth in language is always a consequence of this violent making-absent, of domination enforced by the threat of murder. Such a relation of power, such violence, is present in any discourse of knowledge or of truth, as in any attempt to assign identities or names.” STEVEN SHAVIRO, *PASSION AND EXCESS: BLANCHOT, BATAILLE, AND LITERARY THEORY* 18 (1990). Judith Butler writes that “the vulnerability to being named constitutes a constant condition of the speaking subject.” JUDITH BUTLER, *EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE* 30 (1997).

2. JACQUES DERRIDA, *OF GRAMMATOLOGY* 112 (Gayatri Chakravorty Spivak trans., Johns Hopkins Univ. Press 1976) (1967).

3. International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 5, *reprinted in* TWENTY-FOUR HUMAN RIGHTS DOCUMENTS, 18, 22 (Center for the Study of Human Rights ed., 1992).

4. *Id.*, art 24.

5. On the power of naming as a source of dignity, see JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 93-94 (1995).

that is, inclusively by virtue of particular dominant features, is on one level already to position oneself against it: This characterization which glosses over radical differences between thinkers has historically signified an intention to discredit the whole. Remaining aware of this potential conceptual injustice I nonetheless want to begin by using the word theory in this special sense, although as the Article progresses I will complicate the definition by considering its potential interpenetration with the discourse of rights to which I have opposed it. For now, however, I want to treat “theory” and “rights discourse” as basic terms signifying fundamentally divergent accounts of the nature of language and its relationship to social practice.⁶

“Rights discourse” refers to a set of claims (outside of the positivist tradition) that asserts the existence of universal, morally binding rights which inhere in the individual by virtue of a transcendent natural or rational necessity. The philosophical grounding of rights can take many forms: The most convincing include Kantian social contract theory, which locates the source of moral obligation in individual autonomy, and Habermasian ethics, which grounds our reciprocal obligations in the foundational principles of intersubjective discourse. Theory, in a contrast of premises, puts forward a hypothesis about the contingency of meaning that renders impossible the endorsement of universalizing claims. Because of this aggressive antifoundationalism theory has found itself placed by critics in opposition to a variety of cultural movements and academic disciplines,⁷ but most important for our purposes is its presumed opposition to the human rights community. Tzvetan Todorov writes: “I am simply saying that it is not possible, without inconsistency, to defend human rights with one hand and deconstruct the idea of humanity with the other.”⁸ Terry Eagleton, more impatiently,

6. For a conspectus of works concerned with the problem of identifying “theory” and establishing its relation to social practices, some of which make convincing arguments contrary to this essay, see *DECONSTRUCTION AND PRAGMATISM* (Chantal Mouffe ed., 1996); ERNEST GELLNER, *POSTMODERNISM, REASON, AND RELIGION* (1992); VINCENT LEITCH, *POSTMODERNISM: LOCAL EFFECTS, GLOBAL FLOWS* (1996); *LITERARY THEORY’S FUTURE(S)* (Joseph Natoli ed., 1989); CHRISTOPHER NORRIS, *RECLAIMING TRUTH* (1996); *POSTMODERNISM AND POLITICS* (Jonathan Arac ed., 1986); *SOCIAL POSTMODERNISM: BEYOND IDENTITY POLITICS* (Linda Nicholson & Steven Seidman eds., 1995).

7. Michel Chaouli writes of literary theory’s notion of truth:

Rather than an idea of truth yielding only to the force of logic, it presupposes a truth inextricably linked to rhetoric, and thus to the subjective and contingent distortions of opinion, affect and taste—a notion of truth that has the natural sciences and the social sciences holding their noses. It may not feel like it most of the time, but we are the ghosts that haunt the rationalist disciplines; we are *their* worry.

Michel Chaouli, *What Do Literary Studies Teach?*, *TIMES LIT. SUPP.*, Feb. 26, 1999, at 14.

8. TZVETAN TODOROV, *LITERATURE AND ITS THEORISTS* 190 (Catherine Porter trans., Cornell Univ. Press 1987).

caricatures deconstruction by ventriloquizing it thus: "I am not *for* socialism; but I am not *against* it either. Neither am I *neither* for nor against it, nor simply for or against the whole opposition of 'for' and 'against.'"⁹ The essential charge for both is that theory functions as an apology for political quietism.¹⁰ At the very least, rights-oriented thinkers argue, theory can be condemned for the rhetorical larceny of claiming the language of political terror. Its arguments and lexicon thin out notions of violence to such a degree that the term loses all of its normative force. If, as two literary critics characterize the position, "writing is not so much about violence as a form of violence in its own right," then violence is something with which we can and indeed must live.¹¹

That theory is difficult to reconcile with a vigorous defense of human rights may not be an unbeatable argument, but it is currently the argument to beat. In this Article I will evaluate the case made against theory by analyzing the role of language in social action. In the next Part I will more fully characterize the theory/rights conflict, and for the unfamiliar will briefly develop the political and hermeneutic claims of theory by looking at the writings of Maurice Blanchot and Paul de Man. I choose these thinkers not because they are generally representative but because they are exemplary of the features of theory I want to emphasize. In Parts Three and Four I will turn to the work of human rights law: I will examine the norm-

9. Terry Eagleton, *Deconstruction and Human Rights*, in FREEDOM AND INTERPRETATION 121, 123 (Barbara Johnson ed., 1993). See Johnson's introduction for important commentary on the theory/rights conflict.

10. On the ethical challenges to literary theory, and more broadly on the full range of ethical stances available to literary analysis, see Lawrence Buell, *In Pursuit of Ethics*, 114 PMLA 7 (1999). See also ALLAN STOEKL, *POLITICS, WRITING, MUTILATION: THE CASES OF BATAILLE, BLANCHOT, ROUSSEL, LEIRIS, AND PONGE* at xii (1985). Stephen White argues against those who would characterize postmodernism as quietistic. He argues that in postmodernism language functions as "world-disclosing" rather than "action-coordinating"—but that both are forms of moral responsibility:

One can say that political reflection pursued under the pull of the responsibility to act in the world will generate cognitive machinery attuned to problems of action coordination; and, conversely, that political reflection pursued under the pull of the responsibility to otherness will use the world-disclosing capacity of language to loosen the hold of that machinery, as well as of the dominant modes of identity and action coordination connected with it. . . . The latter is charged with an irresponsible, apolitical aestheticism, as it plays with the world-disclosing capacity of language and shows us no theoretically informed way toward collective action; alternatively, it is charged with secretly desiring an aestheticized politics that exhibits a dangerous neglect of the distinction between, say, works of art and political action (a criticism often leveled at Nietzsche and Heidegger). On the other hand, political reflection pursued under the pull of a responsibility to act is charged with a conceptual imperialism that is blind to its harmful practical consequences.

STEPHEN WHITE, *POLITICAL THEORY AND POSTMODERNISM* 27-28 (1991).

11. Nancy Armstrong & Leonard Tennenhouse, *Introduction to THE VIOLENCE OF REPRESENTATION: LITERATURE AND THE HISTORY OF VIOLENCE* 2 (Nancy Armstrong & Leonard Tennenhouse eds., 1989) (describing rather than endorsing this view).

building function of argument and will analyze in detail the specific linguistic strategies that underpin rights work. At the conclusion of the Article, in the second half of Part Four, I will return to the questions and claims of theory and will test them against the rights-oriented model of political and linguistic action developed herein. Does the collision between theory and rights lead to the diminution of one or to the mutual alteration of both of their claims? In answering this question I will focus upon the international laws of war and in particular the Geneva Conventions, both because war and internal armed combat are the sites of our most pressing human rights concerns and because the international laws of war, as we shall see, call into question most dramatically the relationship between theories of language and the initiation of violence.¹²

II

The presumed theory/rights conflict manifests itself most dramatically in what might be called the cultural relativism debate. When the Commission on Human Rights created under the United Nations Charter in 1947 began considering proposals for a declaration on basic human rights, the executive board of the American Anthropological Association issued a thinly disguised preemptive critique of the expected document based upon the premise that “*standards and values are relative to the culture from which they derive.*”¹³ This cultural relativist critique of human rights initiatives can be delivered in at least three ways: first, that human rights disproportionately tend to be premised upon the values of Western liberalism, particularly upon mythologies of the social contract and the prioritization of the individual;¹⁴ second, and more

12. International law is relevant to internal as well as to international conflict through the minimal humanitarian provisions of Common Article 3 of the 1949 Geneva Conventions. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces on the Field, Aug. 12, 1949, art. 3, 6 U.S.T. 3114, 3116, 75 U.N.T.S. 31, 32-34 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, art. 3, 6 U.S.T. 3219, 3220-22, 75 U.N.T.S. 85, 86-88 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3316, 3318-20, 75 U.N.T.S. 135, 136-38 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 3518-20, 75 U.N.T.S. 287, 288-290 [hereinafter Geneva Convention IV].

13. American Anthropological Association, *Statement on Human Rights*, 49 AM. ANTHROPOLOGIST 539, 542 (1947) (emphasis in original).

14. Zygmunt Bauman critiques both the social contract theory of self as well as the communitarian vision:

In the same way as the clarion call of ‘unencumbered’ self served all too often to silence the protest against the suppression of moral autonomy by the unitary nation-state, the image of ‘situated’ self tends to cover up the ‘communitarian’ practices of similar suppression. Neither of the two is immune to misuse; neither is properly protected

deeply, that the concept of rights itself is a Western invention which cannot be imposed upon other cultures without harming them, much like the Christianity of earlier centuries; third, and deeper still, that right and wrong do not exist objectively but are rather the expression of particular cultural practices which consequently ought to be considered immune to external critique. Theory in its strong form is associated by critics with deep cultural relativism and to that degree it is considered by many to be hostile to the promotion of human rights.¹⁵

Interrogatories skeptical of theory come in a variety of forms. Does theory undermine for resistance movements the possibility of political and rhetorical unity in the face of tyranny? How can theory deconstruct totalizing systems of thought without also rendering impossible any notion of the “truth” of history—a notion useful for the condemnation of atrocity?¹⁶ Does theory subvert the universalizing notion of human rights without offering any effective alternatives for promoting certain widely shared conceptions of human dignity?¹⁷ Questions of this sort have been taken very seriously by literary and cultural critics, and have received a variety of answers in a variety of contexts. Stanley Fish, for instance, has argued from the perspective of legal pragmatism for the nonexistence of a conflict: Antifoundationalism’s revelation “that practice is not after all undergirded by an overarching set of immutable principles, or by an infallible and impersonal method, or by a neutral observation language” has no significant practical applications, and certainly none that interfere with the pursuit of

against being harnessed to the promotion of moral heteronomy and the expropriation of the individual’s right to moral judgment.

ZYGMUNT BAUMAN, *POSTMODERN ETHICS* 47 (1993).

15. As Elvin Hatch writes, the anthropological relativist, when encountering violence that is “an expression of the people’s values,” is “placed in the morally awkward position of endorsing the infant’s starvation, the rape of abducted women, the massacre of whole villages.” ELVIN HATCH, *CULTURE AND MORALITY: THE RELATIVITY OF VALUES IN ANTHROPOLOGY* 92-93 (1983). Zygmunt Bauman characterizes Gilles Lipovetsky as paradigmatic of the “postmodern ethical revolution,” a revolution toward a loose, “scruple-free individualism,” and indifferent relativism. BAUMAN, *supra* note 14, at 2-3. For more on the perceived problems of cultural relativism, see STANLEY FISH, *THERE’S NO SUCH THING AS FREE SPEECH: AND IT’S A GOOD THING, TOO* 186 (1994); and GEOFFREY HARPHAM, *GETTING IT RIGHT* 52-54 (1992). For an alternative view distinguishing relativism from relationism, see KARL MANNHEIM, *IDEOLOGY AND UTOPIA* 76 (Louis Wirth & Edward Shils trans., Routledge Press 1991) (1936).

16. See Saul Friedlander, *Introduction* to *PROBING THE LIMITS OF REPRESENTATION: NAZISM AND THE “FINAL SOLUTION”* 1, 6-7 (Saul Friedlander ed., 1992); Carlo Ginzburg, *Just One Witness*, in *PROBING THE LIMITS OF REPRESENTATION: NAZISM AND THE “FINAL SOLUTION”*, *supra*, at 91-95 (discussing Hayden White); see also F.R. Ankersmit, *Historiography and Postmodernism*, 28 *HIST. & THEORY* 137 (1989).

17. I am thankful to Amanda Grzyb for her enlightening formulations of these points.

rights.¹⁸ For Gayatri Spivak and Diana Fuss, on the other hand, the local pressures of perceived theory/rights conflicts necessitate an exploration of the possibilities and limits of a strategic essentialism.¹⁹ Barbara Herrnstein-Smith, insisting that the charge of quietism illuminates not theory's inability to support moral action but rather the foundationalist's inability to see theory *from the inside*, argues that relativism can coherently structure both action and the exchange and judgment of reasons;²⁰ Drucilla Cornell has conceptualized deconstruction as a utopian project oriented toward a justice that remains forever "beyond";²¹ and Derrida in his later work argues that political intervention is derivable from deconstructive premises.²² Indeed, it is asserted by many that a practical relevance to politics and to questions of ethical value is one of post-structuralism's foundational premises. Before moving into my discussion of the laws of war, I want to analyze briefly the viability of this thesis.

Contemporary theory, no doubt, is in large part rooted in a politically engaged response to the atrocities of fascism and the Holocaust. The experience of World War II generated a sense of bewildered disillusionment with previously unquestioned cultural assumptions now revealed to be constructed artifacts (here bearing the traces of "artifice," "artificial," and "artful");²³ concomitantly, it generated among intellectuals a pandemic suspicion of the impulse to elevate any subsequent system of discursive "artifice" to the "true," "reliable," or "right." For Maurice Blanchot, a writer and critic who renounced his fascism with the advent of war and joined the French Resistance, the Holocaust was the "*absolute* event of history," the moment when humanity was bound in cords of silence,

18. FISH, *supra* note 15, at 215; *see also id.* at 200-30. For Richard Rorty's critique of Derridean theorists who believe their work has positive political significance, see Richard Rorty, *Response to Simon Critchley*, in *DECONSTRUCTION AND PRAGMATISM*, *supra* note 6, at 41, 45. Geoffrey Harpham argues, on the other hand, that theory is inherently ethical. *See* HARPHAM, *supra* note 15, at 46-47.

19. *See* GAYATRI CHAKRAVORTY SPIVAK, *IN OTHER WORLDS: ESSAYS IN CULTURAL POLITICS* 197-221 (1987); *see also* DIANA FUSS, *ESSENTIALLY SPEAKING: FEMINISM, NATURE AND DIFFERENCE* (1989) (endorsing and developing Spivak's conception of strategic essentialism).

20. *See* BARBARA HERRNSTEIN SMITH, *BELIEF AND RESISTANCE: DYNAMICS OF CONTEMPORARY INTELLECTUAL CONTROVERSY* 1-36, 61-72, 73-87, 118-23 (1997).

21. *See* DRUCILLA CORNELL, *THE PHILOSOPHY OF THE LIMIT* 182 (1992).

22. *See, e.g.*, Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority"*, in *DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE* 3 (Drucilla Cornell et al. eds. & Mary Quaintance trans., 1992). For a negative appraisal of Derrida's later work, see Thomas McCarthy, *The Politics of the Ineffable: Derrida's Deconstructionism*, in *HERMENEUTICS AND CRITICAL THEORY IN ETHICS AND POLITICS* 146-68 (Michael Kelly ed., 1990); Mark Lilla, *The Politics of Jacques Derrida*, *N.Y. REV. OF BOOKS*, June 25, 1998, at 36.

23. For a detailed analysis of the derealization of "cultural realities" associated with war, see ELAINE SCARRY, *THE BODY IN PAIN* 127-29 (1985).

when books were burned and “meaning was swallowed up.”²⁴ Henceforth, he writes, “any text . . . is empty—at bottom it doesn’t exist.”²⁵ Blanchot argues that humans are not the structurers of language but are themselves structured by it. Because language is internally different—that is, since there is a fundamental and arbitrary disjuncture between our sign-system and the world it describes—we can rely upon no ontological certainties. After all, every foundation is itself linguistically constructed. Even “existence,” which we typically think of as preceding language in some fashion, is itself a linguistically constructed concept that needs to be questioned.²⁶ The fundamental questions we can ask of the universe are thus epistemological rather than ontological: In other words, the important question is not “what do we know?” but rather “how do we know?”

Blanchot’s point, however, is not *merely* philosophical. As John Treat writes, “When someone argues that a literature of atrocity is a priori impossible because words do not, will not, suffice, that person is also insisting that he steadfastly refuses to cooperate with any such attempt and means for that stubborn insistence to suffice as its own message.”²⁷ For Blanchot, the logic of the Holocaust is a vicious double-bind: It shatters society’s frail, communally constructed meanings by shattering language, and moreover makes impossible any efforts at redemption through language by revealing that it was the very systems of meaning destroyed by the Holocaust which enabled and fostered its crimes.²⁸ “Writing is per se already (it is still)

24. MAURICE BLANCHOT, *THE WRITING OF THE DISASTER* 47 (Ann Smock trans., new ed. Univ. Neb. Press 1995) (1980) (emphasis in original).

25. *Id.* at 10.

26. See Friedlander, *supra* note 16, at 5. In an argument informed by post-structuralism, Thomas Weiskel writes: “Perhaps *being* and *depth* have no independent ontological status; perhaps they are reifications of the signifying power, spontaneously created by the mind at the zero degree, in the mere reflex of making absence significant.” THOMAS WEISKEL, *THE ROMANTIC SUBLIME: STUDIES IN THE STRUCTURE AND PSYCHOLOGY OF TRANSCENDENCE* 28 (1986).

27. JOHN TREAT, *WRITING GROUND ZERO: JAPANESE LITERATURE AND THE ATOMIC BOMB* 28 (1995). John Treat writes that there are inherent “contradictions implicit in a form of writing that would give a beginning, middle, and conclusion to events defying such narrative domestication.” *Id.* at 3. He continues: “No more words: language, its reliability already devalued by philosophy, has become almost criminally suspect in the wake of world wars. It has even collaborated in our collective victimhood. ‘Speaking always involves a treason,’ noted Albert Camus.” *Id.* at 27 (quoting Albert Camus, *A Writer’s Notebook*, ENCOUNTER, Mar. 1965, at 25, 29). For more on the Holocaust and the ethical risks of representation, see Geoffrey Hartman, *The Cinema Animal: On Spielberg’s Schindler’s List*, 106-07 *SALMAGUNDI* 127 (1995).

28. Adorno argues that foundationalism in Western philosophy is linked together with political violence. For Adorno, writes Martin Jay, there was “a subterranean connection between phenomenology and fascism—both were expressions of the terminal crisis of bourgeois society.” MARTIN JAY, *THE DIALECTICAL IMAGINATION: A HISTORY OF THE FRANKFURT SCHOOL AND THE INSTITUTE OF SOCIAL RESEARCH, 1923-1950*, at 7 (1973).

violence.”²⁹ “Speaking,” he explains, “propagates, disseminates [errors] by fostering belief in some truth.”³⁰ Even the smaller claims of language—its promise temporarily to alleviate hurt, to relieve loneliness and confusion—are for Blanchot radically suspect. Writing about the disaster is necessarily a lie: It gives limits to the limitless, sense to the senseless. Writing presents the “danger that the disaster acquire meaning instead of body.”³¹ He writes, “But the danger (here) of words in their rhetorical insignificance is perhaps that they claim to evoke the annihilation where all sinks always, without hearing the ‘be silent’ addressed to those who have known only partially, or from a distance the interruption of history.”³²

Meaningful language is suspect because it contributes to the establishment and consolidation of regimes of power, but also because it attempts to present as “real” an experience inaccessible to reality, insofar as reality consists of what we can understand through our socially preprogrammed conceptual categories. How then are we to communicate in the shadow of the Holocaust? The only response available to humanity is linguistic guerrilla warfare: as one critic puts it, “to speak a language that power doesn’t know.”³³ Blanchot’s answer is thus an escape into history’s wreckage of syntax, into its dilapidated heaps of verbiage and belief systems. He calls foremost for passivity and lassitude, which is “the desire for words separated from each other—with their power, which is meaning, broken, and their composition too, which is syntax or the system’s continuity [Lassitude] is intensity without mastery, without sovereignty, the obsessiveness of the utterly passive.”³⁴ Blanchot’s text is a collection

Blanchot’s and Adorno’s critique of meaning systems intersects with a diverse set of particularist and communitarian arguments. Alasdair MacIntyre writes:

Particularity can never be simply left behind or obliterated. The notion of escaping from it into a realm of entirely universal maxims which belong to man as such, whether in its eighteenth-century Kantian form or in the presentation of some modern analytical moral philosophies, is an illusion and an illusion with painful consequences. When men and women identify what are in fact their partial and particular causes too easily and too completely with the cause of some universal principle, they usually behave worse than they would otherwise do.

ALASDAIR MACINTYRE, *AFTER VIRTUE* 221 (2d ed. 1984).

29. BLANCHOT, *supra* note 24, at 46.

30. *Id.* at 10.

31. *Id.* at 41.

32. *Id.* at 84.

33. Ann Smock, *Introduction* to SARAH KOFMAN, RUE ORDENER, RUE LABAT at x (Ann Smock trans., Univ. Neb. Press 1996) (1994). Invoking Blanchot, Ann Smock celebrates *Rue Ordener, Rue Labat* because it is “bathed in a lucidity unclouded by insight. No sense of understanding or ultimate resolution—no relief, no consolation whatsoever—mars it. It is clear.” *Id.* at xii.

34. BLANCHOT, *supra* note 24, at 8, 11. John Treat explains how the experience of atrocity can make all forms of action and organization, even explicitly pacific ones, seem absurd. *See* TREAT, *supra* note 27, at 275.

of fragments, of words fallen together, as poignant as cries of pain. Like cries of pain, the text is both meaning-saturated and meaning-resistant, both urgent and indecipherable. It is language made into a puzzle, gesturing toward sense but never achieving it, assaulting meaning (and thereby power) through paradox and a splintering of grammar. It is a text that resists the reader, that refuses to open itself. Its most simple anthem, offered up with the vulnerability of prayer, contradicts its own enunciation: “May words cease to be arms; means of action, means of salvation. Let us count, rather, on disarray.”³⁵

Paul de Man, like Blanchot writing under the sign of the Holocaust,³⁶ argues for the inevitability of rhetoric’s destabilization of meaning and function. He tracks relentlessly the proclivity of language toward metaphor and catachreses—that is, toward grotesque proliferation, monstrous combination, and unrestricted mixing of modes. Stable meaning, he asserts, is continually subverted by the uncontrollable allusiveness of the figurative language upon which it depends. Language, he writes, “reintroduces the elements of indetermination it sets out to eliminate.”³⁷ De Man’s analysis of metaphor is pockmarked by the ruptures of violence, by the traces of the war he lived through. He lingers over examples that include abortion, manslaughter, and parricide,³⁸ examples that culminate in describing the abstraction manufactured by language as “a monster on which [one] then becomes totally dependent and does not have the power to kill.”³⁹ He speaks of “epistemological damage,”⁴⁰ of “policing the boundaries”⁴¹ of words, of impressions being “locked up” by understanding in a “potentially violent and authoritarian way,”⁴² of the “directly threatening”⁴³ aspect of our metaphorical

35. BLANCHOT, *supra* note 24, at 11. On this stylized breakdown of grammar, see also SHOSHANA FELMAN & DORI LAUB, TESTIMONY: CRISES OF WITNESSING IN LITERATURE, PSYCHOANALYSIS, AND HISTORY 37 (1992); TREAT, *supra* note 27, at 32, 59. For what Sartre called Georges Bataille’s “hatred” of language, see MICHÈLE H. RICHMAN, READING GEORGES BATAILLE: BEYOND THE GIFT 112-38 (1982). For more on antifoundationalism and indescribability in Blanchot, see SHAVIRO, *supra* note 1, at 1-34.

36. Throughout his life, de Man kept secret his early fascist political alignment. For arguments that see his theory as a repudiation of these earlier views, along with arguments that see it as an extension, see RESPONSES ON PAUL DE MAN’S WARTIME JOURNALISM (Werner Hamacher et al. eds., 1989).

37. Paul de Man, *The Epistemology of Metaphor*, in AESTHETIC IDEOLOGY 34, 48 (Andrzej Warminski ed., 1996).

38. *See id.* at 40-41.

39. *Id.* at 44.

40. *Id.* at 34.

41. *Id.* at 39.

42. *Id.* at 44.

43. *Id.* at 46.

construction, and finally of the “disfiguring power of figuration”⁴⁴ which is set against “totalizing systems”⁴⁵ of meaning (meaning now permanently stained with the traces of the totalitarian). Playing on the double meaning of “passage” (the act of passing/a section of text), de Man writes: “Motion is a passage and passage is a translation; translation, once again, means motion, piles motion upon motion.”⁴⁶ Translation creates only “the fallacious illusion of definition,” for the translation itself may be translated, and meaning is thus perpetual motion.⁴⁷

For many literary and cultural critics following de Man the discovered motion and free play of language has functioned as a sometimes implicit, sometimes explicit normative value. Contingency is taken to represent a complex form of liberation; identification of a lack has become a celebration.⁴⁸ This is a core concern for those who experience the dissolution of meaning through the slippage of language as a threat. If Blanchot’s anti-manifesto is perceived as quietistically redefining the political prisoner’s silence and structured social alienation as a sort of moral victory,⁴⁹ then certain rhetorics derived from de Man seem unintentionally to sanction power’s

44. *Id.* at 49.

45. *Id.*

46. *Id.* at 38.

47. *Id.* On non-referentiality and de Man, see Stanley Cavell, *Politics as Opposed to What?*, 9 CRITICAL INQUIRY 157 (1982).

48. Elsewhere de Man asserts the salubrious quality of theory’s dismantling of socially accepted interpretations and meaning. See PAUL DE MAN, *THE RESISTANCE TO THEORY* 11 (1986). Terry Eagleton traces this tendency to the French semiotic journal *Tel Quel*. He argues that the association of meaning with a violent rigidity and the implicit celebration of the free play of the signifier “is a latently libertarian theory of the subject, which tends to ‘demonize’ the very act of semiotic closure and uncritically celebrate the euphoric release of the forces of linguistic production. It occasionally betrays an anarchic suspicion of meaning as such; and it falsely assumes that ‘closure’ is always counterproductive.” TERRY EAGLETON, *IDEOLOGY* 196-97 (1991). For a broader historical view, see *id.* at 106-07, 186. Christopher Norris argues similarly against the assumption that “values like truth, reason and critique are on the side of a repressive ‘monological’ discourse that entertains no question as to its own grounding rationale,” as well as against its counterpart assumption that “there is no principle of justice more important than the maintenance of a pluralist (‘language-games’) approach that acknowledges the range of incommensurable values, beliefs or criteria, and which thus makes a virtue of abstaining from judgments of determinate truth and falsehood.” CHRISTOPHER NORRIS, *UNCRITICAL THEORY* 79, 177 (1992). The postmodernist mistake is, according to Norris, a matter of confusing epistemology and ontology, or the limits of human understanding and the existence of a real world. See *id.* Norris specifically relates his critique to war representation by centering it in Baudrillard’s postmodern evaluation of the hyperreality of the Gulf War. See *id.* at 122. For a critique of the perceived excesses of postmodernism as applied to the study of war, see Jane Caputi, *Book Review*, 47 AM. Q. 165 (1995) (reviewing WILLIAM CHALOUPEK, *KNOWING NUKES: THE POLITICS AND CULTURE OF THE ATOM* (1992)); see also Cathy Caruth, *The Claims of Reference*, 4 YALE J. CRITICISM 193 (1990) (analyzing de Man’s treatment of the concept of referentiality in literary theory).

49. On the problem in Blanchot of embracing constructive political action with a purportedly apolitical deconstructive method, see STOEKL, *supra* note 10, at 22-36.

victory over meaning by validating the communicative misfires and slippages that render so difficult the faltering human effort toward consensually shared rather than externally imposed values and order. These are important concerns. But what if we turned away from arguments thus bounded by a reactive framework? What would it mean instead to invert theory's premises, and to pursue its questions by turning them inside out? Is language violent because it names, or is violence released precisely when language fails to name effectively? As we shall see, force assiduously defends its right to be arbitrary against the concretized discursive structures that challenge and attempt to constrain it. Excessively pliable hermeneutics, therefore, might very well play into the cultural logic of violence. In the sections that follow I will investigate this possibility by looking at discursive strategies and language artifacts which, like photographic negatives of theory's dismantling of referentiality, depend upon and celebrate language's capacity effectively to refer and which demand of their readers a "less moveable" hermeneutic practice.⁵⁰

III

Theories of language that bear upon the fragility of meaning and the breakdown of intersubjective consensus are, at their extreme, intimately connected to theories of war. Elaine Scarry has called war a "crisis of substantiation," a conflict in which previously shared meanings have become so derealized and confused that they can no longer be resolved through argument and negotiation.⁵¹ When language and the agreements dependent upon it are divested of force (such force being based upon the broad consensual agreement to *perceive* the language as a form of force), then violence becomes, typically, the first resort in reaching clarity and agreement. One primary response to the historical ascendance of force over discourse, as we have seen, has been to treat language as frail and suspicious. An alternative response has been to seek methods of employing language that make it more likely to resist derealization,⁵²

50. For a case study of such a relation between language theory and political praxis, see RICHARD WEISBERG, *VICHY LAW AND THE HOLOCAUST IN FRANCE* 386-429 (1996).

51. SCARRY, *supra* note 23, at 127.

52. For examples, see ELAINE SCARRY, *Introduction to LITERATURE AND THE BODY: ESSAYS ON POPULATIONS AND PERSONS* at vii (1988); SCARRY, *supra* note 23, at 192, 269-70. Scarry writes on the work of stabilizing language:

In this closed world [of torture] where conversation is displaced by interrogation, where human speech is broken off in confession and disintegrates into human cries, where even those cries can be broken off to become one more weapon against the person himself or against a friend, in this world of broken and severed voices, it is not surprising that the most powerful and healing moment is often that in which a human voice, though still severed, floating free, somehow reaches the person whose sole reality had become his

and also to reinscribe violence itself within the bounds of language, to make war (a state of transitionality or suspension of meaning—literally, meaninglessness) into a site of unalterable meanings, agreements, and definitions. It is to this realm of covenants and rights that I now turn.

*Silent enim leges inter arma.*⁵³ Cicero's maxim translates: "In time of war the law is silent" (*leges*, or literally, any set form of words). War impairs the human power to describe, define, or narrate. At the broadest level, war interrupts history. Is the Confederate soldier a patriot or a traitor? History-as-description can only recommence after the conflict, when war's "reality duel" or "contest to out-describe" has ceased, and the victor can promulgate the official version.⁵⁴ War interrupts intersubjective evaluation and, at the most personal level, interrupts self-narration.⁵⁵ What is the moral significance of reprisal executions of prisoners designed to prevent further executions of one's own captured soldiers? Or the bureaucratic decision to bomb a munitions factory in a civilian-dense area? And what moral code can guide *my* behavior? Am I "good" to kill a man ("brave," "heroic") and "bad" to show mercy ("cowardly," "treacherous")? Familiar moral codes cease to apply at the outbreak of hostilities. Many interpret this absence of a guide as a license to act without restraint. The impossibility of describing an event (good or bad, legal or illegal, heroic or treacherous) is the enabling condition of war's entropic cruelty. *Silent enim leges inter arma.*

Shortly after he assumed control of Atlanta, Union General

own unthinkable isolation, his deep corporeal engulfment. . . . [I]n acknowledging and expressing another person's pain, or in articulating one of his nonbodily concerns while he is unable to, one human being who is well and free willingly turns himself into an image of the other's psychic or sentient claims, an image existing in the space outside the sufferer's body, projected out into the world and held there intact by that person's powers until the sufferer himself regains his own powers of self-extension.

Id. at 50. See also Hayden White, *Historical Emplotment and the Problem of Truth, in PROBING THE LIMITS OF REPRESENTATION* 37, 44-47 (discussing BEREL LANG, ACT AND IDEA IN THE NAZI GENOCIDE (1990)).

53. MARCUS TULLIUS CICERO, *THE SPEECHES OF CICERO: PRO T. ANNIO MILONE* 6, 16 (N.H. Watts trans., Harvard Univ. Press 1953).

54. SCARRY, *supra* note 23, at 130, 131.

55. Blanchot emphasizes our inability to understand traumatic experiences in the moments of their occurrence, as well as our inability to integrate them into a personal history of serial "present" moments. He writes:

The disaster does not put me into question, but annuls the question, makes it disappear—as if along with the question, "I" too disappeared in the disaster which never appears. The fact of disappearing is, precisely, not a fact, not an event; it does not happen, not only because there is no "I" to undergo the experience, but because (and this is exactly what presupposition means), since the disaster always takes place after having taken place, there cannot possibly be any experience of it.

BLANCHOT, *supra* note 24, at 28.

William T. Sherman ordered the expulsion of all Southern families from the city. "War is cruelty," he declared in a public letter directed to Mayor James Calhoun and his two councilmen, "and you cannot refine it."⁵⁶ In a bitter response to Sherman's then unprecedented decision to make civilians into targets of the war, Confederate General J.B. Hood asserted: "[T]he [mass expulsion] you propose transcends, in studied and ingenious cruelty, all acts ever before brought to my attention in the dark history of war."⁵⁷ The forced exodus, he argued, contradicted the customs of war and "the laws of God and man."⁵⁸ Sherman countered by characterizing all of war's brutalities as "inevitable": "You might as well appeal against the thunder-storm as against these terrible hardships of war."⁵⁹ "If we must be enemies," he writes, "let us be men, and fight it out as we propose to do, and not deal in such hypocritical appeals to God and humanity."⁶⁰ Often cited as natural truths of war, Sherman's brutal aphorisms are better described as a statement of deliberate policy, as mystifications of agency designed to justify the *choice* to make the theater of war a site of maximal moral chaos and lawlessness. Earlier in the war, in a private letter to General Halleck, his superior at the time, Sherman found it necessary to argue strenuously in favor of amplifying and exaggerating the hardships of war. The magisterial declaratives of his Atlanta declaration are now replaced by a series of conditionals and subjunctives:

In accepting war, it should be "pure and simple" as applied to the belligerents. I would keep it so, till all traces of the war are effaced; till those who appealed to it are sick and tired of it, and come to the emblem of our nation, and sue for peace. I would not coax them, or even meet them half-way, but make them so sick of war that generations would pass away before they would again appeal to it.⁶¹

56. WILLIAM TECUMSEH SHERMAN, MEMOIRS OF GENERAL W.T. SHERMAN 601 (Library of America, 3d ed. 1990) (1875).

57. *Id.* at 593.

58. *Id.* at 595.

59. *Id.* at 601.

60. *Id.* at 594-95. For more on the debates during the Civil War over what was appropriate conduct, see JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 501-02, 778, 794, 811 (1989). One of the war's great ironies is that Sherman saw his lawlessness in war as serving the cause of law and order in peace. See SHERMAN, *supra* note 56, at 135-43, 382.

61. SHERMAN, *supra* note 56, at 365. While Sherman was very blunt about the aims of war when discussing policy, he often resorted to obfuscation when representing violence. This was a tendency Clausewitz resisted on all levels. Describing his aims in *On War*, he writes: "We also sought to strip away the vague, ambiguous notions commonly attached to them, and tried to make it absolutely clear that the destruction of the enemy is what always matters most."

Sherman was aware of the rhetorical subterfuge of his Atlanta declaration. He was also aware that the subterfuge was likely to work, that civilians would be poorly equipped to resist the superimposition of his particular narrative model—that is, his invasion is more like a “thunder-storm” than like a “crime.”⁶² Civilian vulnerability to the strategic narrative manipulations of warfare is due primarily to the essential epistemological confusion of war, but also to the paucity of publicly-sanctioned, alternative narrative models available to the disempowered populace. The tyrannical violence of war in its emergency disrupts borders and epistemological categories; it also mutes the human creativity that enables us continually to reconceptualize our world in ways that make it amenable to our shaping.

As Hood’s rejoinder to Sherman illustrates, one primary response to this narrative bewilderment, as old as war itself, has been the attempt to regulate conduct in war through pre-established customs and agreements—that is, to transform war into a self-narrating event by establishing inviolable categories of persons and actions that can stand as a guide to the incidents of war. Posed against war’s chaos is the human will to order, manifest most dramatically in what are called “the laws of war.” In instances when such laws are publicly validated and accessible, resistance is possible. In the context of an intersubjective consensus on normative discourse, the act of articulation becomes an experience in constraint. “Moral talk is coercive,” as Michael Walzer argues.⁶³ It forces us to tell a very special story to justify our actions, a story that is vulnerable to all the rules of evidence and credibility. An invasion that is called just is not, to paraphrase Walzer, an invasion that simply enjoys approbation; it is an invasion that enjoys approbation for particular reasons, and anyone asserting its “justice” is required to provide particular sorts of evidence.⁶⁴ Moral talk constrains what we can say, even in the face

CARL VON CLAUSEWITZ, *ON WAR* 577 (Michael Howard & Peter Paret trans., Princeton Univ. Press 1976) (1832).

62. Sherman employed this metaphor frequently. See, e.g., GERALD F. LINDERMAN, *EMBATTLED COURAGE: THE EXPERIENCE OF COMBAT IN THE AMERICAN CIVIL WAR* 209 (1987).

63. MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 12 (1977).

64. See *id.* at 12-13. Moral articulation motivates in a positive manner as well, as Charles Taylor explains:

Moral sources empower. To come closer to them, to have a clearer view of them, to come to grasp what they involve, is for those who recognize them to be moved to love or respect them, and through this love/respect to be better enabled to live up to them. And articulation can bring them closer. That is why words can empower; why words can at times have tremendous moral force.

CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 96 (1989).

of what might be our overwhelming and unrelenting power. One year before the sacking of Atlanta, Dr. Francis Lieber had drawn up for the Union army the first national manual outlining the laws of land warfare. Article 22 reads: “[T]he unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.”⁶⁵ Article 23 continues: “[T]he inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant.”⁶⁶ The details of regulations throughout are accompanied by the language of moral responsibility: “As Martial Law is executed by military force, it is incumbent upon those who administer it to be strictly guided by the principles of justice, honor, and humanity—virtues adorning a soldier even more than other men, for the very reason that he possesses the power of his arms against the unarmed”;⁶⁷ “Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.”⁶⁸ Resistance for the citizens of Atlanta was thus possible.⁶⁹ Overlapping vocabularies between North and South opened up a space for argument, a language event which much like violence can forcibly bring about outcomes in the world but which does so, unlike violence, without the use of injury.⁷⁰ Argument can function, moreover, to vivify normative values: One reinforces the legitimacy of particular moral obligations even if one enters into rational discourse only to assert, disingenuously, that one has not violated them. At the conclusion of Sherman’s public epistolary debate with Hood (the letters were published in Macon newspapers), the Northerner was forced to acquiesce.⁷¹ He did so partially, tersely, and negatively—cruelty

65. Francis Lieber, *Lieber Instructions 1863*, reprinted in *THE LAWS OF ARMED CONFLICTS* 3, 7 (Dietrich Schindler & Jiri Toman eds., 1981).

66. *Id.* at 7.

67. *Id.* at 4.

68. *Id.* at 6.

69. Explicit public formulation of submerged norms does not only clarify but also changes a group’s moral relationship to its actions. The Nuremberg Trials are a testament to the capacity of intersubjective evaluative persuasion. By the end of the trials many of the architects of the Holocaust publicly apologized for their activities and expressed a sense of surprise over what they had done. See, e.g., ALBERT SPEER, *INSIDE THE THIRD REICH* 375, 519-20 (Richard & Clara Winston trans., Avon 1970).

70. Argument ideally conceived is illuminated by Stanley Cavell’s distinction between the moralist and the propagandist, between convincing and persuading. The former, Cavell argues, appeals to a person through reasons normatively conceived and attempts to make her see a particular position while also respecting her autonomy as a moral agent. The latter is concerned only with causing a certain set of actions or behaviors, and uses reasons as well as “appeals to his fears, your prestige, or another’s money” without distinctions in legitimacy. STANLEY CAVELL, *THE CLAIM OF REASON* 278 (1979).

71. During the debate, Sherman attempted to justify his assertion that any action he might take was permitted by conflating two distinct moral traditions: *jus in bello*, or the justice of

could be refined; he was not free to do anything—by acknowledging the potentially “binding” power of the laws of war in a denial that he had violated the requirements of the texts. “I was not bound by the laws of war to give notice of the shelling of Atlanta, a ‘fortified town, with magazines, arsenals, founderies, and public stores;’ you were bound to take notice. See the books.”⁷² With all the power of an absolute dictator, Sherman was forced to retreat, to abandon his previously abstract characterizations of war and respond to the precise, publicly accessible charges of his enemy.⁷³

The international laws of war have a long history, dating back to the religious contracts of the Middle Ages and the birth in Europe of international law with writers like Giovanni da Legnano and Hugo Grotius. Their appearance as we know them, in the shape of binding multilateral agreements like the Geneva Conventions, is much more recent. In 1862 Henry Dunant published *Un Souvenir de Solferino*,⁷⁴ a harrowing account of his experiences attending to the thousands of French and Austrian wounded from the battle of Solferino. The book detailed the primitive, haphazard conditions of field medicine, and exposed to the public the disastrous consequences of the Napoleonic Wars, which had brought to an end the customary practice of treating enemy wounded and medical personnel as neutral parties. Now they were simply easy targets: Armies regularly shelled field hospitals and fired upon doctors and stretcher-bearers.⁷⁵ Medical personnel thus often were forced to retreat at the approach of the enemy, leaving the wounded to lie where they fell, untended and helpless. Dunant’s exposé, and the necessary reforms indicated

particular conduct during war, and *jus ad bellum*, or the justice of particular causes for war. Because the Southern cause was unjust, Sherman implied, their rights were revoked. See SHERMAN, *supra* note 56, at 594. Hood responded by reminding Sherman that the causes for war (*jus ad bellum*) were the concerns of statesmen; battle commanders could only concern themselves with conduct during war (*jus in bello*). See *id.* at 596. The mayor of Atlanta followed this with a suasive appeal detailing the varieties of human degradation the expulsion would cause. However briefly (and inconsistently), the Southerners invoked a moral “proceduralism” that has been central to the development of modern human rights, a proceduralism that enfolds within itself the implied substantive value of the equal, inalienable moral worth of all humans in all circumstances, regardless of ideological or moral taint or positioning.

72. SHERMAN, *supra* note 56, at 602.

73. For an analysis of the opposing views and practices of *jus in bello* during the Civil War, see LINDERMAN, *supra* note 62, at 181-213.

74. J. HENRY DUNANT, A MEMORY OF SOLFERINO (1939).

75. See FRITS KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR 8 (1987). W.B. Gallie argues that the Napoleonic Wars initiated a new epoch in war-making. Previously wars had been accepted as part of the unchangeable international landscape. The unprecedented atrocities of the Napoleonic Wars, Gallie argues, forced communities to interrogate their necessity; thereafter, “Why war?” seemed an inevitable question. See W.B. GALLIE, UNDERSTANDING WAR (1991).

therein,⁷⁶ had a prodigious influence in mid-nineteenth-century Europe. With Dunant's leadership it took less than two years to form an international committee for treatment of the wounded (later renamed the International Committee of the Red Cross, or the ICRC) and to convene an international diplomatic conference that quickly adopted the first of the Geneva Conventions. The 1864 "Convention for the Amelioration of the Condition of the Wounded in Armies in the Field" was an international watershed: It reestablished the neutrality of medical personnel, dictated that all wounded soldiers be collected and cared for equally, and introduced the custom of distinguishing medical personnel from combatants with the use of flags and armbands bearing a red cross on a white ground.⁷⁷

Two humanitarian imperatives, corresponding to two legal traditions, have developed out of the original conventions. The law of Geneva concerns the targets of attack, or whom one can legitimately aim at: It dictates that a distinction be drawn between combatants and persons "hors de combat" (civilians, wounded, etc.) and requires that every effort be made to spare the lives of the latter. The law of the Hague concerns the method of attack: It prohibits, for instance, the use of weapons that "uselessly aggravate"⁷⁸ the suffering of the enemy or that "render their death inevitable."⁷⁹ Since 1864 these principles have been expanded and reaffirmed in a series of conventions that have increased limitations on methods of attack and augmented protections for non-combatants. By the mid-1950s, four major Geneva Conventions had been passed (dealing with the wounded and sick on land, the wounded, sick, and ship-wrecked at sea, prisoners of war, and protected civilians), and the law of the Hague had been expanded with bans on chemical and bacteriological weapons and a convention for the protection of cultural property during wartime.⁸⁰

76. See DUNANT, *supra* note 74, at 86-95.

77. For a concise history of the modern development of the laws of war, see KALSHOVEN, *supra* note 75, at 8-23.

78. *Id.* at 22.

79. *Id.* at 12.

80. Language is deployed to construct the boundaries within which war is waged. On the creation of a public sphere, Hannah Arendt writes:

The law originally was identified with this boundary line [between one household and another], which in ancient times was still actually a space, a kind of no man's land between the private and the public, sheltering and protecting both realms while, at the same time, separating them from each other. The law of the *polis*, to be sure, transcended this ancient understanding from which, however, it retained its original spatial significance. The law of the city-state was neither the content of political action . . . nor was it a catalogue of prohibitions . . . It was quite literally a wall, without which there might have been an agglomeration of houses, a town (*asty*), but not a city, a political

The originary principle of *jus in bello* laws of war is, as the ICRC summarized it in 1965, that “the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited.”⁸¹ The radical, counter-intuitive nature of this formulation is underscored when juxtaposed to more familiar arguments of “realists” like Clausewitz, who wrote in the early 1800s: “Attached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it.”⁸² Importantly, it has been a widely shared philosophical premise for the Geneva Conventions that the protections granted to soldiers and civilians are *rights* inhering in the individual rather than indulgences granted out of the pity or benignity of states.⁸³ The law is not formulated to maximize a particular conception of social welfare, but rather to respect the obligations of justice. It is not a matter of pursuing the good, but rather of demanding the right. This is, for many, the premise of all international human rights law, which posits itself (again, outside of the positivist tradition) as a series of binding norms that transcend state interests rather than as a series of agreements derived from the consent of the states involved.

Prior to World War II, international law had affirmed the notion that we are, in Walker and Mendlovitz’s phrase, citizens first and humans second⁸⁴—indeed, that our status as humans is in some way contingent upon membership in a state.⁸⁵ The galvanization of the universal human rights movement after the atrocities of World War II led to a radical rethinking of the scope of international law and to a new imagination of the organizing principles of the world’s people. The notion of the world as a collection of reified, absolutely independent states fiercely protective against encroachments upon their sovereignty began to be replaced by the idea of a society of

community.

HANNAH ARENDT, *THE HUMAN CONDITION* 63-64 (1989). Arendt goes on to trace the Greek roots of the word for law, pointing out its relationship both to dwelling space and the idea of a hedge or boundary line. *See id.*

81. KALSHOVEN, *supra* note 75, at 22.

82. CLAUSEWITZ, *supra* note 61, at 75. “If war was an act of force, Clausewitz could discern no logical ‘internal’ or self-imposed limits on the use of force.” Peter Paret, *Introduction to id.* at 20.

83. Against this view of binding transnational norms and customs is the tendency, instantiated in the Charter of the United Nations, to view the world as morally organized and organizable only through the unit of the nation-state. *See* DANIEL PATRICK MOYNIHAN, *ON THE LAW OF NATIONS* 68, 103-04 (1990).

84. *See* R.B.J. Walker & Saul H. Mendlovitz, *Interrogating State Sovereignty, in* *CONTENDING SOVEREIGNTIES: REDEFINING POLITICAL COMMUNITY* (R.B.J. Walker & Saul H. Mendlovitz eds., 1990).

85. *See, e.g.*, HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 290-99 (new ed. 1973).

societies, a community of mutually dependent states institutionally imbricated through a variety of international bodies (anticipated in the post-World War I League of Nations). This modern invention of transnationally binding human rights has generated two very different views of the potency and relevance of international law. Judge Antonio Cassese, President of the International Criminal Tribunal for the Former Yugoslavia, writes that universal human rights (in conjunction with the doctrine of the self-determination of peoples) “have subverted the very foundations of the world community, by introducing changes, adjustments and realignments to many political and legal institutions.”⁸⁶ Like a “powerful corrosive,” rights theory must over time dissolve the “pillars of traditional power.”⁸⁷ Raymond Aron, however, characterizes the force of human rights law differently. International society, he argues, is “an anarchical order of power” where violence settles questions of what is right.⁸⁸ Treaties lacking enforcement mechanisms are irrelevant to global processes. Or as Thomas Hobbes wrote: “Covenants without the Sword are but Words, and of no strength to secure a man at all.”⁸⁹ It is precisely this radical disparity between viewpoints that makes international law so relevant to the considerations of literary theory. It is the limit case of the relationship between words and actions, between discursive structures and the dictates of physical violence.

In *The Bridge on the River Kwai*,⁹⁰ a classic representation of the treatment of prisoners of war and an unparalleled film study of the relationship between unrestrained force and unenforceable law, a captured British company is brought to a Japanese prison camp in the heart of an impenetrable forest. When the camp commander, Colonel Saito (Sessue Hayakawa), orders the British officers to perform manual labor alongside their men, the British commander, Nicholson (Alec Guinness), confidently informs him that such a directive is expressly forbidden by the Geneva Conventions. He hands to Colonel Saito his own well-worn copy of the Conventions as evidence. Colonel Saito patiently reads it, rolls it up and strikes Nicholson in the face with it, throws it into the dirt, and orders his soldiers to shoot Nicholson and his fellow officers on the count of three. The line of blood which runs down the center of Nicholson’s face physically doubles the bright red spine of his copy of the

86. ANTONIO CASSESE, HUMAN RIGHTS IN A CHANGING WORLD 22 (1990).

87. *Id.* at 23.

88. Raymond Aron, *The Anarchical Order of Power*, in CONDITIONS OF WORLD ORDER 25, 25 (Stanley Hoffmann ed., 1968).

89. THOMAS HOBBS, LEVIATHAN 223 (Penguin Books 1968) (1651).

90. THE BRIDGE ON THE RIVER KWAI (Horizon Pictures 1957).

Conventions. In this moment the man has become the document, but the document no longer represents the accumulated weight of national wills. It is, instead, disposable paper. "Do not speak to me of rules," Colonel Saito says with contempt. "This is war. This is not a game of cricket." In short, the laws of war are widely regarded as a laudable exercise at the same time that they are seen in practice as essentially futile and perhaps even pathetic. The effectiveness during wartime of any pre-war convention is certainly open to question, for in war it is precisely this right to mandate law that is being struggled for through violence. While Sherman may have been philosophically and morally wrong to claim that one cannot refine the cruelty of war, he may have been for all practical purposes empirically right. The record of modern war's infamy is compelling argument. Yet the salience of violations (the decision to torture a prisoner, execute the wounded, shell a civilian neighborhood) combined with the general non-reportability of instances of self-enforcement (the decision not to harm a prisoner, to show mercy to the wounded, to circumvent a civilian neighborhood) creates a distorted picture.⁹¹ Furthermore, the tortured lengths to which state governments go in order to argue that they are *not* in violation of the laws of war evidence the effective pressure of these laws, if only negatively.⁹² In an early 1950s conflict between the Netherlands and Indonesia, for example, the Netherlands defended its refusal to apply the Prisoners of War Convention of 1949 to captured Indonesian infiltrators because, as it argued, *both* nations chose not to recognize the dispute as an armed conflict. The law stated that the Convention should apply "even if the state of war is not recognized by one of [the parties]"—it did not say "*one or more*."⁹³ This revision was made shortly after the Indonesian conflict, as the language struggled to keep pace with the efforts to obfuscate it.⁹⁴ In the end, at the ICRC's insistence (an insistence entirely lacking in any enforceability), the Dutch government retreated from its position and began to apply the Convention to Indonesian prisoners. Why? Why would any nation

91. On the occurrence of altruism in war, see J. GLENN GRAY, *THE WARRIORS: REFLECTIONS ON MEN IN BATTLE* 100 (1973).

92. H.L.A. Hart points out:

What [international laws] require is thought and spoken of as obligatory; there is general pressure for conformity to the rules; claims and admissions are based on them and their breach is held to justify not only insistent demands for compensation, but reprisals and countermeasures. When the rules are disregarded, it is not on the footing that they are not binding; instead efforts are made to conceal the facts.

H.L.A. HART, *THE CONCEPT OF LAW* 214-15 (1961). Relatedly on rules, see JACK KNIGHT, *INSTITUTIONS AND SOCIAL CONFLICT* 66-73 (1992).

93. Geneva Convention III, *supra* note 12, art. 2, 6 U.S.T. at 3318, 75 U.N.T.S. at 136.

94. See KALSHOVEN, *supra* note 75, at 27. For more on the attempt linguistically to camouflage war, see JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 89 (1995).

struggling for its vital interests and even survival inhibit itself at the request of a disinterested and completely powerless third party? The power of the laws of war is the power, small and defiant, of speech in the face of overwhelming physical force. The documents of international jurisprudence, and the extreme pressure brought to bear upon them by the outbreak of war, thus reveal much not only about the relationship between language and physical violence, but also about the interior structure of each.

IV

The laws of war are derived from the notion that language, deployed in a particular fashion, can be made equivalent to force—or rather, can so effectively inhibit the reflex toward violence that disputes instead can be resolved, as Jürgen Habermas has put it, through the “unforced force of the better argument.”⁹⁵ As a reference point of communal judgment, the Geneva Conventions achieve effectiveness in a variety of ways: binding nations to certain behaviors by standing as a reminder of their consent to be bound thus, for instance,⁹⁶ or providing interested parties with universally accepted standards and vocabularies for mounting critiques (critiques that implicitly threaten resistance by and ostracism from the community of nations).⁹⁷ As isolated textual artifacts rather than as tools of institutionally imbricated communal interaction, however, the Conventions rely upon far different strategies of self-realization: namely, a structure of repetition, and a style of comprehensiveness and referential clarity.

95. JÜRGEN HABERMAS, *THE PHILOSOPHICAL DISCOURSE OF MODERNITY* 107 (Frederick Lawrence trans., MIT Press 1987) (1985).

96. Quoting John Adams, Hannah Arendt emphasizes that when language artifacts are instantiated through intersubjective dialogue and consent, they acquire palpable force: “A Constitution is a standard, a pillar, and a bond when it is understood, approved and beloved. But without this intelligence and attachment, it might as well be a kite or balloon, flying in the air.” HANNAH ARENDT, *ON REVOLUTION* 145 (1963) (quoting ZOLTÁN HARASZTI, JOHN ADAMS AND THE PROPHETS OF PROGRESS 221 (1952) (quoting John Adams)). On consent and the uses of language, see Elaine Scarry, *The Declaration of War: Constitutional and Unconstitutional Violence*, in *LAW’S VIOLENCE* 23 (Austin Sarat & Thomas R. Kearns eds., 1992).

97. The Federal Republic of Germany’s 1992 military manual for all land-, sea-, and air-based forces lists thirteen primarily treaty-based means for inducing obedience to international law, none of which requires a transcendent violent enforcement mechanism. They include, for instance, consideration of public opinion, fear of payment of compensation, international fact-finding, and activities of protecting powers. See Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 *DUKE J. COMP. & INT’L L.* 11, 18 (1995). For more on the role of fact-finding commissions, see *id.* at 33. For an analysis of various compliance and redress mechanisms, see generally MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998); MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY AND THE LAW* (1997).

A paradigmatic requirement of the Geneva Conventions is the directive that the text of the Convention itself be posted in prisoner-of-war camps, “in the prisoners’ own language, in places where all may read them.”⁹⁸ Such imperatives, a genre of command that might be called the “communicative directives” of the Geneva Conventions, are among the most common of its requirements. They are also the least immediately intrusive and costly, and thus the least plausibly disobeyed on economic grounds—contrast, for instance, the regulation requiring medical inspections each month for each prisoner. In Article 41 the language seeks to assure only its own reproduction, to repeat and multiply itself like tangling verbal weeds in the field of war—in effect acknowledging its simple visibility as a primary source of its own enforcement. During war language is censored, encrypted, and euphemized; imperatives replace dialogue, and nations communicate their intentions most dramatically through the use of injury rather than symbol; talks are broken off, individuals are reduced to silence by traumatic experience, and witnesses are exterminated. War’s violence shrinks language and damages communication; this diminishment of discourse (arguments, pleas, justifications, appeals for sympathy) in turn enables further violence. The Conventions thus prioritize the basic forms of language itself, defending the rights of communication of prisoners,⁹⁹ for instance, or insinuating themselves into the behavior of belligerents by requiring exercises in language (trials, warnings) to precede exercises in force (executions, bombings).¹⁰⁰ The Conventions replace discourse-as-coercion—as threats, intimidation, or lies—with morally coercive discourse. They use language to interfere with force, to create gaps and pauses that break up the momentum and self-amplification of

98. Geneva Convention III, *supra* note 12, art. 41, 6 U.S.T. at 3350, 75 U.N.T.S. at 168.

99. Jean-François Lyotard writes: “Let us take it that the capacity to speak to others is a human right, and perhaps the most fundamental human right.” JEAN-FRANÇOIS LYOTARD, *The Other’s Rights*, in *ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES*, 1993, at 135, 140-41 (Stephen Shute & Susan Hurley eds., 1993). Robert Graves in his war memoirs recounts his belief that language (chants, or bits of song) could actually protect him from violence. See ROBERT GRAVES, *GOOD-BYE TO ALL THAT: AN AUTOBIOGRAPHY* 179, 195 (Richard Perceval Graves ed., 1995). Martin Amis, conversely, chillingly describes the capacity of nuclear weapons to defeat human articulation. See MARTIN AMIS, *EINSTEIN’S MONSTERS* 22-23 (1987).

100. For more, see Elaine Scarry’s notion of the deliberative process as an impediment to external violence. See Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms*, 139 U. PA. L. REV. 1257 (1991); see also ARENDT, *supra* note 80, at 26-27 (discussing speech’s displacement of violence); CHRISTOPHER NORRIS, *UNCritical THEORY* 59 (1992) (discussing how unconstrained public debate can work against the impulse to war); JOHN RAWLS, *POLITICAL LIBERALISM* 110-18, 223-27, 340-48 (1993) (discussing how internal violence can be prevented through amplification and structuring of opportunities for discourse); JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY* (1984) (discussing the disintegration and reconstitution of language in a context of violence).

violence. Examples abound. One provision, important because it is so minutely prescriptive, requires that a belligerent publicly declare if a certain locality is non-defended, requires in turn that the enemy acknowledge receipt of this declaration, and requires finally that this same enemy make a public declaration if it later ceases to interpret this locality as non-defended.¹⁰¹ In a sense what is most important about the Geneva Conventions is not their substance but rather their procedure: in other words, not their catalogue of rights but rather their interior mechanisms for guaranteeing their own discursive proliferation. Their effects derive from their magnification of language and multiplication of opportunities for discourse. Thus, as important as any specific declaration they make about the rightness or wrongness of conduct during war, is their exhortation that the text as a linguistic artifact be disseminated and repeated both in wartime¹⁰² and in peace.¹⁰³ For their repetition as a whole reproduces on a larger scale the micro-function of accumulating bits of language in any particular theater of action. Hence the article, repeated identically in each of the four Conventions, which demands that contracting states “disseminate the text of the present Convention as widely as possible”¹⁰⁴—as if through unrelenting visibility the Conventions finally could be internalized in belligerents, like a reflex; as if through the sheer weight of verbal repetition the Conventions could achieve material force.¹⁰⁵

Self-actualization proceeds not only through repetition and procedural deceleration but also through clarity, or rather clarity as

101. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol One), June 7, 1977, art. 59, 1125 U.N.T.S. 3, 30 [hereinafter Protocol I].

102. Geneva Convention III, *supra* note 12, art. 41, 6 U.S.T. at 3350, 75 U.N.T.S. at 168.

103. *Id.*, art. 127, 6 U.S.T. at 3418, 75 U.N.T.S. at 236. See, e.g., PRACTICAL GUIDE FOR NATIONAL RED CROSS AND RED CRESCENT SOCIETIES ON METHODS OF DISSEMINATION OF INTERNATIONAL HUMANITARIAN LAW AND THE PRINCIPLES AND IDEALS OF THE RED CROSS (Danuta Zys ed., 1983).

104. Geneva Convention I, *supra* note 12, art. 47, 6 U.S.T. at 3146, 75 U.N.T.S. at 62; Geneva Convention II, *supra* note 12, art. 48, 6 U.S.T. at 3248, 75 U.N.T.S. at 114; Geneva Convention III, *supra* note 12, art. 127, 6 U.S.T. at 3418, 75 U.N.T.S. at 236; Geneva Convention IV, *supra* note 12, art. 48, 6 U.S.T. at 3616, 75 U.N.T.S. at 386.

105. For relevant material on building the structure of *social* reality, see SEARLE, *supra* note 5, at 13. For more on the emphasis on implementation through education rather than criminal prosecution, see Roberts, *supra* note 97, at 16. Written as a critique, the following words by Mills also point to a potential hope for effectively internalizing restrained rules of engagement that can limit the barbarity of war:

The military world bears decisively upon its inhabitants because it selects its recruits carefully and breaks up their previously acquired values; it isolates them from civilian society and it standardizes their career and deportment throughout their lives. . . . [I]t is clearly a total way of life which is developed under an all-encompassing system of discipline. Absorbed by the bureaucratic hierarchies in which he lives, and from which he derives his very character and image of self, the military man is often submerged in it.

C. WRIGHT MILLS, *THE POWER ELITE* 194 (1956).

visibility, as a form of pure intelligibility epitomized in the Conventions' tendency toward producing discrete physical signs and distinctive emblems—a red cross on a white ground (for medical personnel),¹⁰⁶ three orange circles placed on the same axis (for protected objects),¹⁰⁷ an equilateral blue triangle on an orange ground (for civil defense).¹⁰⁸ These sign systems establish inviolable categories of persons, actions, and objects, thereby standing against the confusion and border-disruption of war. Moreover, they create a universally accessible, morally coercive language that works to counter war's disarticulations, silences, and translation barriers.

The Geneva Conventions are a collection of definitions, a dictionary of war with tirelessly detailed and comprehensive explanations of seemingly self-announcing states and objects. A "mercenary," for instance, is a belligerent who is recruited from an uninvolved party and is rewarded financially—the definition as written in the Convention, however, extends to sixteen lines.¹⁰⁹ Other typical definitions include "shipwrecked" (an eight-line definition), "religious personnel" (twelve lines), "medical units" (ten lines), "medical personnel" (sixteen lines), and "wounded" (eight lines).¹¹⁰ Through their plethora of definitions the Conventions work directly against the object-confusion of war. For instance, they place special focus upon establishing the principles that distinguish civilian objects (tools) from military objectives (weapons)—hence discriminating between a munitions depot and a food storage center, or even between a bridge used for offensive purposes and a bridge used for civilian purposes.¹¹¹

At the center of the Geneva Conventions are these clear, comprehensive definitions¹¹²—definitions that, importantly, *precede* moral injunctions. The institutionalization of definitions is an attempt to maximize language's fixed continuity with the material world. The Conventions, writes Frits Kalshoven, do not offer "protection against the violence of war itself, but against the arbitrary power which one belligerent party acquires in the course of

106. See Geneva Convention I, *supra* note 12, art. 38, 6 U.S.T at 3140, 75 U.N.T.S. at 56.

107. See Protocol I, *supra* note 101, art. 56.7, 1125 U.N.T.S. at 28-29.

108. See *id.*, art. 66.4, 1125 U.N.T.S. at 34.

109. *Id.*, art 47, 1125 U.N.T.S. at 25.

110. *Id.*, art. 8, 1125 U.N.T.S. at 10-11.

111. See KALSHOVEN, *supra* note 75, at 89-91.

112. Max Weber describes how law attempts to construct its own foundations, as if to make interpretation impossible. He analyzes this search for a constructed "law without gaps." MAX WEBER, *Bureaucracy*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 196, 216-21 (H.H. Gerth & C. Wright Mills trans. & eds., Oxford Univ. Press 1946). For more on the discursive strategies used by international law to establish its own foundations, see DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* (1987).

the war over persons belonging to the other party.”¹¹³ The Conventions set themselves up against arbitrary or unprincipled power: in other words, against power unconstrained by the limits of definitions—hence their harsh treatment of “perfidy,” “feigning,” and especially spies, who, because they disrupt the clarity of signifiers upon which the law depends, are denied many of the protections granted to prisoners of war.¹¹⁴ With their hundreds of pages of definitions and explanations—clarified, expanded, and repeated time and time again over the decades—the Geneva Conventions offer themselves as a sort of unmovable textual monument.¹¹⁵

These points about rights language would be triumphantly clear if, in contrast, the language of war consisted only of grunts and staccato commands. But war broadly construed, as a cultural event that extends beyond the battle theater to include domestic practice, is decidedly full with rich and complex language, with indoctrination, elaboration, justification, and propaganda. It might be argued here that the Conventions, in fact, borrow from the structure of propaganda (a discourse type essential to the theory of Blanchot). There are important distinctions between the two, however, that are related not only to the discursive procedures which produce them but also, and more importantly, to the discursive procedures which they in turn produce. War language and rights language differ both in their treatment of certain widely recognized, minimal moral norms, and in their treatment of three key features of communicative legitimacy: intersubjectivity, objectivity, and referentiality. The Geneva Conventions might thus best be viewed as producing a counter-language to war, distinct for three reasons: first, because it is directed toward establishing an overlapping vocabulary between belligerents rather than simply enforcing linguistic conformity within a community (intersubjectivity, or susceptibility to non-exclusionary argument); second, because it is not instrumental to the actualization of policy but is rather anterior to policy (objectivity, or partial situational independence); and third, because it signifies consistently, clearly, and narrowly rather than freely as the dictates of the

113. KALSHOVEN, *supra* note 75, at 40.

114. Protocol I, *supra* note 101, art. 37, 1125 U.N.T.S. at 10-11; Geneva Convention IV, *supra* note 12, art. 5, 6 U.T.S. at 3520-22, 75 U.N.T.S. at 290-92. On the moral basis for the illegality of disguises in war, see WALZER, *supra* note 63, at 183.

115. Some might argue that the exceedingly non-dramatic language of the Conventions makes them less effective in promoting conformity to their dictates. Similar criticisms were made of the textual strategies of Justice Robert Jackson during the Nuremberg Trials. In contrast to Jackson's decision to compile Nazi records and allow these to speak for the prosecution, the Soviet prosecutor Roman Rudenko chose to allow an almost therapeutic outpouring of vivid witness testimony.

moment demand (referentiality, or interpretive constraint through the prioritization of pre-established external criteria).¹¹⁶ The Conventions, importantly, are a porous discourse: They set boundaries to the play and “motion” of meaning but, at the same time, avoid consolidating an impermeable epistemic power. That is, they remain adaptive to context and susceptible to change both in their application (by creating a communicative structure within and between belligerent parties where alternative interpretations can be tested¹¹⁷) and in their development (by establishing a tradition of revisability that is based upon a consensus-oriented dialogue between nations)—but they do so within a practice of referential fixity.

The Geneva Conventions, like battle commanders attempting to control the uncertainty of the future with a painstaking matrix of controlled language in the present,¹¹⁸ establish in expansive detail what it means to be a combatant, attack, civilian or prisoner, as if with this multitude of definitions they can render the chaos of war susceptible to the control of language. Unlike battle commanders, however, the Conventions do not seek to control the development of war by controlling a synchronic array of disconnected speech-acts, but by controlling the constitutive language system of the warmakers. If we call the Germans “enemy,” “criminal,” or “animal” we enable ourselves to feel about and act towards them in a certain way; if we instead call them “combatant,” “prisoner of war” or “civilian” (agent-neutral terms that could easily be used to describe us or our own families), we are forced by the pressure of our own lexicon to think about and act toward them in a drastically different fashion. Those like Sherman who would point to the emptiness of any concept of law in war argue that people in danger are naturally selfish, frightened, and murderous. War devolves into savagery because humans, stripped naked and freed from the constraints of civilization, are essentially vicious.¹¹⁹ The culture of laws, in contrast,

116. The full question of the legitimacy of “minimal moral norms” (how these norms are produced and whether or not it might be considered a matter of uncontroversial general utility that they benefit from these strategies of repetition, clarity, and comprehensiveness) is, of course, a question far beyond the scope of this Article. I would provisionally suggest, along Habermasian lines, that one can distinguish between legitimate and illegitimate moral norms by looking at how they align with the three discursive criteria I have listed above, both in terms of their development and their communicative legacies.

117. See, e.g., Geneva Convention III, *supra* note 12, arts. 99-108, 6 U.S.T. at 3392-3400, 75 U.N.T.S. at 210-18 (establishing the requirements of judicial proceedings).

118. See JOHN KEEGAN, *THE FACE OF BATTLE* 266 (1977).

119. David Grossman, quoting Gwinne Dyer, argues in contrast that “*Conditioning*, almost in the Pavlovian sense,” is necessary to overcome our deep-rooted resistance to intraspecific violence. The laws of war can be conceived of as counter-conditioning to a training that makes soldiers “kill without hesitation.” DAVID GROSSMAN, *ON KILLING: THE PSYCHOLOGICAL*

depends upon no strong theory of human “nature.” The institutional discourse of rights, like any ideology, is a lived relation to the real; it provides a structure of intelligibility to experience that is increasingly naturalized as the persuasive force of representations accumulate. It is thus the premise of the Geneva Conventions, in a contrast to Sherman’s “realism” which is not, importantly, idealistic, that war devolves into savagery not because savagery is the nature of humans, but rather because war *confuses* us. In war we are strangers in a strange land, bereft of language and of the borders that regulate social meaning. The routine human rights violations of war, an attorney of international law might argue, are thus in many cases not so much viciousness as they are *mistakes*—mistakes born of the same epistemological disruption and reversals that allow soldiers to understand killing an enemy as “ending the war” and that allowed American commanders successfully to conceptualize the bombing of civilian neighborhoods in Japan as “saving American lives.”¹²⁰

The laws of war are about avoiding conflation and making clear distinctions; they are about the moral imperative to discriminate and about the morality enabled by the act of discrimination.¹²¹ In 1968 the General Assembly of the United Nations adopted Resolution 2444, which endorsed what it considered to be the three most fundamental, incontrovertible principles of the laws of war.¹²² Two of the three concerned the “principle of distinction”: namely that combatants are required to discriminate between military objectives and civilians and are prohibited from targeting the latter.¹²³ This principle received its most recent restatement in Article 51 of the 1977 Geneva Protocol I:

The civilian population as such, as well as individual civilians, shall not be the object of attack . . . Indiscriminate attacks are prohibited. Indiscriminate attacks are . . . those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each

COST OF LEARNING TO KILL IN WAR AND SOCIETY 18 (1995) (quoting Gwinne Dyer) (emphasis in original).

120. Jean Elshtain emphasizes the words of Marisa Masu in describing this tendency to represent killing as “defense, preservation, life saving”: “Each Nazi I killed . . . shortened the length of the war and saved the lives of all women and children.” JEAN BETHKE ELSHTAIN, *WOMEN AND WAR* 179 (1987). She continues: “Gary Cooper’s Sergeant York, in the 1941 movie, says the same thing when he is asked about his record-breaking German sniping and prisoner taking. He did it to try to hasten the end of the thing and to save lives. The sooner it stops, the sooner the killing stops.” *Id.*

121. For a discussion of the doctrine of discrimination and in particular non-combatant immunity, see ROBERT PHILLIPS, *WAR AND JUSTICE* 20-70 (1984).

122. G.A. Res. 2444, U.N. GAOR, 23d Sess., *reprinted in* 12 UNITED NATIONS RESOLUTIONS 164, 164-65 (Dusan J. Djonovich ed., 1975) (1968).

123. *See id.*

such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.¹²⁴

Any attack is by nature indiscriminate that disrupts the conceptual borders established in the law, either by treating “as a single military objective a number of clearly separated and distinct military objectives,” or by causing excessive “incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof.”¹²⁵ This Protocol restatement is actually a radical revision of the inherited principle of distinction.¹²⁶ Earlier formulations centered upon the concept of *aiming*, thus prohibiting the subjective intent directly to harm particular categories of non-combatants. In other words, you were permitted to kill civilians as long as you could successfully argue that you had not consciously intended to make them a direct target of your assault. It had been the strategy of lawmakers since the inception of the ICRC and the Geneva Conventions to eschew the murkiness of such subjectivity, to resist slipping into an idiom of culturally specific appellations and subjective evaluations by instead constructing a language of universal categories and objective measurements (hence part of the controversy around introducing to the later Protocols the category of mercenaries, a group that can only be distinguished by its members’ unique internal motivations for going to war).¹²⁷ The revision in Article 51 ingeniously overcame distinction’s vexed problem of subjectivity by pointing to the “method and means of combat” rather than the intent of the combatant as the relevant evidence in determining the threshold of discrimination.¹²⁸ The attacking soldier

124. Protocol I, *supra* note 101, art. 51, 1156 U.N.T.S. at 26.

125. *Id.*

126. On the doctrine of distinction and its moral basis (particularly in relation to nuclear weapons), see WALZER, *supra* note 63, at 200, 203, 280.

127. One possible critique of international law would focus upon its attempt to achieve departicularization. Consider Seyla Benhabib’s critique of neo-Kantian political theory, which, she argues, elevates abstract categories of the self over personalized identities and stories. See Seyla Benhabib, *The Utopian Dimension in Communicative Ethics*, 35 NEW GERMAN CRITIQUE 83. Václav Havel, in a different context, writes of the destruction of referentiality:

A typical example is how reality can be liquidated with the help of a false “contextualization”: the praiseworthy attempt to see things in their wider context becomes so formalized that instead of applying that technique in particular, unique ways, appropriate to a given reality, it becomes a single and widely used model of thinking with a special capacity to dissolve—in the vagueness of all the possible wider contexts—everything particular in that reality. Thus what looks like an attempt to see something in a complex way in fact results in a complex form of blindness. For if we can’t see individual, specific things, we can’t see anything at all.

VÁCLAV HAVEL, *On Evasive Thinking, in OPEN LETTERS: SELECTED WRITINGS, 1965-1990*, at 13 (Paul Wilson ed. & A.G. Brain trans., Vintage Books 1992) (1989).

128. Samuel Huntington emphasizes the evacuation of subjectivity from military thinking: In estimating the security threats the military man looks at the capabilities of other states rather than at their intentions. Intentions are political in nature, inherently fickle and

as thinking human becomes irrelevant, or rather, his thoughts are now deemed transparent, regarded as taking shape through the weapons that give his subjectivity content. This is a striking moment; it gives us the opportunity for a thought experiment: namely, to trace the logic of a literary theoretical critique of the law's language, and to evaluate its methods and results. In this almost imperceptible textual rupture, one might argue, the article mandating distinction proceeds by treating civilians and civilian objects *without* distinction: "military objectives and civilians or civilian objects"—and again, "or a combination thereof." Here the text seems vulnerable to hermeneutic practices instrumentally oriented toward the destabilization of referentiality. The easy substitutability and hierarchy-erasing nature of Article 51's "or" (a civilian or an object) reproduces its earlier "objective" elision of the combatant into the weapon. Thinning out the distinctions between humans and their objects, Article 51 describes the site of war by using categories so broad and inclusive (weapons of attack and objects of attack) as to be "indiscriminate." This rhetorical slippage points to an associated set of larger category crises in human rights discourse. Replacing the particular with the general, the private with the common, and the subjective with the objective, international law (it can be argued) invokes the participation of selves devoid of personhood, and of cultural and linguistic thickness. It therefore creates an ethics based on an achromatic duty rather than respect; it institutes an empty formalism that obliterates the space of difference, of the individual, the unique, and the context-dependent. Relatedly, international law's use of language and concepts abstract enough to be widely applicable and inclusive of widely divergent cultures and cultural formulations (a universalism of the lowest common denominator) works counter to its effort to reify moral borders through precise and impermeable classification and specification. Here, in Article 51, the law's "universality" bears the traces of the grotesque. The battleground is a junk heap of objects and weapons that deploy themselves, as in a scene from Hemingway. And the individual will is displaced as arbiter of meaning by the consequences deemed inherent to the equipment there employed. The logic of war *against which* the Conventions set themselves is this very tendency to devalue individual subjectivity, to make humans into collectible,

changeable, and virtually impossible to evaluate and predict. The military man is professionally capable of estimating the fighting strength of another state.

SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE* 66 (1985). Thomas C. Schelling writes that in the conduct of war punitive measures (i.e., threats) must be indexed against visible deeds and quantifiable actions rather than against intentions. See THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 40-41 (1980).

countable, and disposable things. And yet here, unexpectedly, a strange confluence is revealed between the two. For a striking and suggestive moment, the Conventions seem to operate not so much athwart as within the assumptions of war. The humanitarian treaties and organized butchery work together: War's instrumentalization/dehumanization and law's universalization/departicularization both serve to *objectify* (to make into an object; to make objective). Violence and its other, in a word commingled, achieve grotesque synthesis.

There is, indeed, a long history to international law's kinship with its infractions. The contemporary international laws of war spring in a large part from the early Christian Church's effort to codify a notion of "the just war." This essentially theological tradition of *jus ad bellum* laws, dating from the works of St. Ambrose and St. Augustine, establishes rigorous standards for determining when it is justifiable to enter into a war.¹²⁹ The *jus ad bellum* tradition is generally characterized as a matter of prohibiting certain forms of war—a humanitarian endeavor, by all accounts. Analyzed in the context of the Church's earliest history, however, it must be seen that the tradition developed instead as a means of *permitting* and even *facilitating* certain types of warfare.¹³⁰ Early Christianity was strictly pacifist: Believers, Origen wrote, were permitted to fight for the King only "by offering . . . prayers to God."¹³¹ It was only after Emperor Theodosius I declared that Catholic Christianity was the state religion of the Roman empire, only after the formerly marginalized believers found themselves repositioned at the center of the state apparatus, that Christian thinkers adulterated their pacific beliefs—essentially in order to make themselves amenable to the needs of a militaristic empire.¹³² The laws of war from their inception functioned as much to justify violence as to prohibit it. Centuries later, things are much the same. The United States, for instance, managed to quell much of the criticism and dissent against its war with Iraq by asserting through selective video evidence that its use of "smart" weapons complied fully with Geneva restrictions: indeed, complied to such an unprecedented extent that the war could be imagined as "clean" and almost casualty-less.¹³³ The Conventions

129. See MAURICE H. KEEN, *THE LAWS OF WAR IN THE LATE MIDDLE AGES* 65 (1993).

130. On Christianity's evolution to a state-oriented, war-making religion, see ROBERT PHILLIPS, *WAR AND JUSTICE* 5-9 (1984).

131. ORIGEN, *CONTRA CELSUM* 557 (H. Chadwick ed. & trans., 1953), *quoted in* SHELDON BAILEY, *PROHIBITIONS AND RESTRAINTS IN WAR* 3 (1972).

132. On the possible collusion between just war ethics and the perpetuation of war, see DAVID SMOCK, *RELIGIOUS PERSPECTIVES ON WAR* at xvii (1992).

133. For more on the legitimating function of the laws of war during the 1990-91 Gulf War,

can be turned into a weapon for any military's propaganda arsenal.

More radical critiques argue, however, that it is not the strategic *misuse* of the laws of war but rather their essential nature that facilitates violence. Clausewitz argued that war executed without pity or hesitation achieved "absolute perfection."¹³⁴ His aesthetics of war, produced with the painstaking moral neutrality of the pure observer, nonetheless encloses within itself a counter-intuitive ethical argument: Were all wars fought with the merciless speed of Bonaparte, he implies, they would be both shorter and scarcer.¹³⁵ Echoing Clausewitz, Sherman wrote:

If the people raise a howl against my barbarity and cruelty, I will answer that war is war, and not popularity-seeking Indeed, the larger the cost now, the less will it be in the end; for the end must be attained somehow, regardless of loss of life and treasure, and is merely a question of time.¹³⁶

Sherman denied the notion of civilian neutrality and treated the Confederacy instead as a "nation-in-arms." Using starvation as a weapon and taking the war to civilians, the logic goes, broke the will of the Confederacy and, by ending the war early, saved the lives of thousands of conscripted and confused young men. After the Vietnam War, American frustrations and anxieties over the notion of limitations in war manifested itself in a plenitude of diverse cultural texts. Among the most widely disseminated was Star Trek's "A Taste of Armageddon" television episode: Here, explorers encounter a civilization that has circumscribed so radically the conduct of one particular war that, despite its inordinate casualties, it is no longer perceived as unbearable and so is never brought to a close. This popular allegory of the Geneva Conventions trenchantly contrasts honest, *human* barbarism with the measured and bloodless scientific detachment of those aliens who would quantify "appropriate" levels of carnage.¹³⁷ Frits Kalshoven, legal adviser of international affairs to the Netherlands Red Cross Society, acknowledges this concern:

Does . . . the very existence of the humanitarian law of armed conflicts perhaps contribute to perpetuating the phenomenon of war? Would war made "unbearable beyond endurance" make

see Roberts, *supra* note 97, at 11, 48-49. For a discussion of the computerization of modern war and the decoupling of human sacrifice from war, see CHRIS HABLES GRAY, *POSTMODERN WAR: THE NEW POLITICS OF CONFLICT* (1997).

134. CLAUSEWITZ, *supra* note 61, at 21.

135. *See id.* at 580-81.

136. SHERMAN, *supra* note 56, at 585, 367.

137. I am thankful to Kenneth Anderson here, as elsewhere, for introducing me to this material.

mankind realize that the situation cannot go on unchanged and that war in all its manifestations, no matter how just its cause, must be effectively banned from the face of the earth?¹³⁸

The rhetorical slippage in Article 51 between persons, tools, and weapons emblemizes war's continuing disruption of epistemological and linguistic borders. The disturbing referential destabilization and category dissolution of wartime experience manifests itself not only in the particular shreds of language we have analyzed, but also in the larger purposes of the Conventions themselves. Just as any tool may become a weapon, so may law become propaganda, and so may a treaty of peace become an instigator of war. The unpredictably multiple functioning of all artifacts, including these treaties, forces the question: Are the Conventions tools to minimize violence, or weapons to justify it? Is there, finally, any way to tell the difference?

Many in the human rights community perceive theory as a threat.¹³⁹ But has not this theoretically generated analysis identifying the possible prolongation of atrocities through the laws of war shown otherwise? Could not a recognition of the radical heterogeneity of signification enable a deep-structure critique of certain unquestioned discourses that might actually be contributing to human rights violations? A compelling defense for a selectively deployed theory might be made along these lines. Although I believe the substantive argument and the textual distortions that generated it are unacceptable and unsound (both as method and as morals), a revised form of their interior logics need not be. Theory as social practice might be conceived minimally as a plea for humility, and as an injunction to continually re-expose our assumptions to critical analysis. Theory, as thought experiment, is the pause between consideration and judgment. But is not such a "disposable" theory just a version of Ernest Gellner's "Enlightenment rationalism"¹⁴⁰ in rhetorical disguise?

A difference remains. As humanists we may wish for the theoretical pause to be as long and rich as possible, but in the end a judgment must be made. Provisional foundationalists and antifoundationalists alike, of course, accept this last point.¹⁴¹ They

138. KALSHOVEN, *supra* note 75, at 2.

139. See, e.g., Eric Blumenson, *Mapping the Limits of Skepticism in Law and Morals*, 74 TEX. L. REV. 523, (1996); Jean Bethke Elshtain, *The Right Rights*, NEW REPUBLIC, June 15, 1998, at 11; Lilla, *supra* note 22.

140. GELLNER, *supra* note 6, at 86.

141. It is important to distinguish between dogmatic foundationalism and provisional foundationalism. Provisional foundationalists (that is, the rationalist mainstream) do not believe that they have found Truth, but rather that they have put together a chain of moral

disagree, however, in their *characterization* of this act of judgment. Antifoundationalists assert that judgments across cultures can have no moral or philosophical *legitimacy*, insofar as this connotes universal reason or an evaluative standpoint above the conditions of its own enunciation. In the end, such judgments must instead be conceived of as questions of force rather than of right: Can we force “them” to be like “us,” and is it worth it?¹⁴² The ambiguity of “force” here is deliberate—it incorporates the wide spectrum of persuasion, manipulation, and coercion. This blending generates resistance from human rights activists, justifiably, for their project depends upon taking very seriously the distinctions among the three.¹⁴³ A deeper critique from rights-thinkers, however, argues that the antifoundationalist theory of judgment is incompatible with almost *any* particular antifoundationalist’s system of belief. Antifoundationalists do not merely experience belief; they *endorse* their beliefs. In other words, antifoundationalists do not feel compelled to abhor atrocity because they recognize it as incompatible with the values of their contingent cultural indoctrination (an indoctrination they can recognize but not rise above) but rather because they *believe* it to be wrong.¹⁴⁴ If antifoundationalists are comfortable with an incompatibility between their beliefs and their beliefs about their beliefs, which Simon Critchley has called “an impossible psychological *bi-cameralism*,” then human rights activists are not, if only because such ironic determinism is a “recipe for political cynicism” rather than for action and sacrifice.¹⁴⁵

Is the naming function of language recognitional or coercive? The

justification, composed of widely accessible reasons, that goes further than other systems into the infinite regress of knowledge’s pursuit.

142. On this complex issue, see HARPAM, *supra* note 15, at 27-30 (pointing to the instability of Stanley Cavell’s distinction, previously discussed, between the moralist and the propagandist, between convincing and persuading).

143. On the blending of the multiple conceptions of force, see STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 519-20 (1989).

144. As Ronald Dworkin writes of antifoundationalists in law:

They say there are no right answers but only different answers to hard questions of law, that insight is finally subjective, that it is only what seems right, for better or worse, to the particular judge on the day. But this modesty in fact contradicts what they say first, for when judges finally decide one way or another they think their arguments better than, not merely different from, arguments the other way; though they may think this with humility, wishing their confidence were greater or their time for decision longer, this is nevertheless their belief.

RONALD DWORKIN, *LAW’S EMPIRE* 10 (1986).

145. Simon Critchley, *Deconstruction and Pragmatism—Is Derrida a Private Ironist or a Public Liberal?*, in *DECONSTRUCTION AND PRAGMATISM*, *supra* note 6, at 19, 25. For more on beliefs about beliefs, see Gerald Cohen, *Beliefs and Roles*, 66 *PROC. OF THE ARISTOTELIAN SOC’Y*, 1966-67, at 53-66.

bulk of this Article has been devoted to identifying and justifying the urgent sense in the human rights community that collective goals of the highest priority, which center around the protection of the most vulnerable, depend upon a concerted and continuous effort to stabilize our most basic moral categories along with the language that constitutes them. Whether or not one finally accepts these moral categories as foundational or rationally required, grounded procedurally in the workings of our autonomy as Kant argued or in the structure of discourse as Habermas argues,¹⁴⁶ it is at the very least in our collective self-interest to treat them as if they were real.¹⁴⁷ As

146. Karl Mannheim argues against the reestablishment of foundational truths, no matter how benign, insofar as they depend upon a false naturalization. He writes:

To find people in our day attempting to pass off to the world and recommending to others some nostrum of the absolute which they claim to have discovered is merely a sign of the loss of and the need for intellectual and moral certainty, felt by broad sections of the population who are unable to look life in the face.

MANNHEIM, *supra* note 15, at 77; *see also id.* at 85-86. Habermas argues that his foundationalism offers an alternative to deconstruction without reproducing Enlightenment errors. He writes:

A different, less dramatic, but step-by-step testable critique of the Western emphasis on logos starts from an attack on the abstractions surrounding logos itself, as free of language, as universalist, and as disembodied. It conceives of intersubjective understanding as the telos inscribed into communication in ordinary language, and of the logocentrism of Western thought, heightened by the philosophy of consciousness, as a systematic *foreshortening* and *distortion* of a potential always already operative in the communicative practice of everyday life, but only selectively exploited.

HABERMAS, *supra* note 95, at 311. He continues:

This communicative rationality recalls older ideas of logos, inasmuch as it brings along with it the connotations of a noncoercively unifying, consensus-building force of a discourse in which the participants overcome their at first subjectively biased views in favor of a rationally motivated agreement. Communicative reason is expressed in a decentered understanding of the world.

Id. at 315. Habermas argues that theorists who use argument as a means of disproving rationality or any other of the premises of argumentation are caught in a "performative contradiction." Jurgen Habermas, *Discourse Ethics: Notes on a Program of Philosophical Justification*, in *THE COMMUNICATIVE ETHICS CONTROVERSY* 60, 78 (Seyla Benhabib & Fred Dallmayr eds., 1990). From this he derives his notion of discourse ethics as foundational to the structure of human communication. *See, e.g.*, Fred Dallmayr, *Introduction to THE COMMUNICATIVE ETHICS CONTROVERSY*, *supra*, at 1, 8-9. Against Habermas, *see* BUTLER, *supra* note 1, at 86-87, 92-93, 161.

147. In his later work even Derrida has appeared to adopt positions increasingly similar to Habermas's original position on discursive ethics as a non-deconstructable foundation. *See* Jacques Derrida, *Remarks on Deconstruction and Pragmatism*, in *DECONSTRUCTION AND PRAGMATISM*, *supra* note 6, at 77, 82. Stanley Fish, in contrast, argues that we need to retain and reaffirm concepts such as justice, fairness, and dignity only for pragmatic reasons. In abandoning them, he argues,

We would suffer a loss, not just because justice, fairness, and human dignity will have been lost—I believe them to be rhetorical constructions just as Posner does—but because we will have deprived ourselves of the argumentative resources those abstractions now stand for; we would no longer be able to say "what justice requires" or "what fairness dictates" and then fill in those phrases with the courses of action we prefer to take. That, after all, is the law's job—to give us ways of redescribing limited partisan programs so that they can be presented as the natural outcomes of abstract impersonal imperatives.

FISH, *supra* note 15, at 222. For a historical philosophical analysis of premises arguably related to Fish's antifoundationalism, *see* MACINTYRE, *supra* note 28, at 16-22 (discussing emotivism).

William James would have argued, it is the act of treating them as real that makes them real. Lacking the signatures of belief and reaffirmation, words do indeed require Hobbes's sword for actualization. But treated as real in the overlapping consensus of a non-exclusionary intersubjective discourse, they become real: real without coercion, and with the key feature of susceptibility to argument.