
Volume 43 | Issue 1

2010

Lawfare: A Rhetorical Analysis

Tawia Ansah

Follow this and additional works at: <http://scholarlycommons.law.case.edu/jil>



Part of the [International Law Commons](#)

Recommended Citation

Tawia Ansah, *Lawfare: A Rhetorical Analysis*, 43 Case W. Res. J. Int'l L. 87 (2010)
Available at: <http://scholarlycommons.law.case.edu/jil/vol43/iss1/6>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

LAWFARE: A RHETORICAL ANALYSIS

Tawia Ansah*

This Article offers a rhetorical analysis of the term “lawfare.” It examines the term within the context of its historical genesis, and reviews its evolving definition. Drawing upon insights from non-legal disciplines, the Article argues that rhetorically, “lawfare” indicates alternative and critical ways to think of law in relation to war.

I.	INTRODUCTION.....	87
II.	WAR BY LAW	92
	A. Law as War	92
	B. Law of Empire	96
III.	LAWFARE AS BORDER CONCEPT: EVOLVING MEANINGS AND SIGNIFICATIONS.....	103
	A. Lawfare in 2001	103
	B. Lawfare in 2009	107
IV.	LAWFARE AS PASSAGE CONCEPT (A BRIEF PSYCHOANALYTIC INTERPELLATION).....	111
V.	CONCLUSION	117

I. INTRODUCTION

In an essay published shortly after the events of 9/11 and the U.S. responsive attack on Afghanistan, Colonel (as he then was; now Major General) Charles J. Dunlap Jr., U.S. Air Force attorney (JAG), introduced the term “lawfare” within the discourse on law and war.¹ In Dunlap’s essay, the term had the specific meaning of indexing law itself as a weapon and a

* LL.B. (Toronto), Ph.D. (Columbia). Visiting Professor, Case Western Reserve School of Law. Professor of Law, New England Law Boston. I am grateful to Professor Michael Scharf for inviting me to moderate a panel at the “Lawfare!” conference at Case on September 10-11, 2010. I thank Dean Robert Rawson for a summer stipend. My thanks to Professor Jessie Hill for reading an earlier draft and for her invaluable comments and critiques; to Professor Bob Strassfeld for helpful discussions on the Article’s themes; to Ms. Kirsten Resnick for research assistance; and to the student editors at JIL, whose detailed comments improved the quality of the prose.

¹ See generally Colonel Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts* (Nov. 29, 2001) (unpublished paper presented at Harvard University, Carr Center, Humanitarian Challenges in Military Intervention Conference, available at <http://www.duke.edu/~pfeaver/dunlap.pdf>).

strategy of war.² But Dunlap's use of "lawfare" also implied various significations having to do with the broader issue of the parameters of law in relation to war, and of both law and war in relation to the exercise of governmental power. Several years later, in an essay published in 2009, Dunlap "refined" his own definition of the term "lawfare,"³ taking account of the subsequent career of the "war on terror."⁴

In this brief essay, I propose a rhetorical analysis of lawfare.⁵ I will be concerned with both Dunlap's intended meanings and the textual implications and latent significations within the discourse on law and war from which the term "lawfare" evolves and which it references. That is, I want to know what ideas attach to law and to war as specific human products, and how lawfare expresses ideas about each of them, and to ideas about their interrelationship. At its simplest, a rhetorical analysis suggests that lawfare might express a certain expansiveness of law in relation to war, and vice versa. Lawfare might also index the limits of law's idiom as war, as well as war's representation of law. Rhetorically, then, "lawfare" projects the will to expansion between law and war, *inter se*. And linguistically, it subtends the point at which "law" and "war" are contained within, and constrained by, each other.

² *Id.* at 2.

³ The second article was published in a military law journal. See Major General Charles J. Dunlap, Jr., *Lawfare : A Decisive Element of 21st Century Conflicts?* 34 JOINT FORCE QUARTERLY 54 (3rd quarter 2009), at 35.

⁴ The term itself is not without controversy. See, e.g., Peter Baker, *Obama's War Over Terror*, N.Y. TIMES, Jan. 4, 2010, at A3, <http://www.nytimes.com/2010/01/17/magazine/17Terror-t.html?pagewanted=all> (Rather than seeing terrorism as the challenge of our time, Obama rejects the phrase "war on terror" altogether, hoping to recast the struggle as only one of a number of vital challenges confronting America. The nation is at war with al-Qaeda, Obama says, but not with terrorism, which, as he understands it, is a tactic, not an enemy). See also, e.g., Conor Gearty, *The Superpatriotic Fervour of the Moment*, Review Article of Bruce Ackerman's *Before The Next Attack, Preserving Civil Liberties in an Age of Terrorism* (citation omitted), 28 OXFORD J. LEGAL STUD. 183 (2008) at 183 ("The attacks on New York and Washington on 11 September, 2001 have provided the *casus* for this phantom *belli* and repetition of the supposed fact of this war by senior officials in the Bush administration, including the President himself, has gradually—in true post-modernist style—made it true."). Gearty posits a strong opposition both to the "war on terror," the war paradigm it encapsulates, and the consequent conception of law as "excluded" thereby. Gearty posits a strong opposition both to the "war on terror," the war paradigm it encapsulates, and the consequent conception of law as "excluded" thereby. Gearty posits a strong opposition both to the "war on terror," the war paradigm it encapsulates, and the consequent conception of law as "excluded" thereby.

⁵ See, e.g., Peter Brooks, *Reading Law Reading; Or, Literature as Law's Other* (Princeton Mellon Seminar, Spring 2009), available at <http://www.law.harvard.edu/faculty/faculty-workshops/brooks-reading-law-reading.pdf> (last visited June 1, 2010) at 12 (explaining that a rhetoric or "poetics" of lawfare might "force [one] to confront the textuality and rhetoricity of the law, the ways in which it makes meaning as well as the meanings it makes.").

The dual themes, then, in this rhetorical analysis of lawfare are expansion and containment. The working thesis is that conceptually, we think of war as an alternative to law, a deeply felt mythology captured in Cicero's famous saying in *Pro Milone*, "inter armes silent leges," or "during war, law is silent." Likewise, we think of law as a constraint upon the sovereign's power to declare and conduct war. In that mythology, war is violent and irrational, while law is pacific, deliberative, and rational. But of course the relationship between law and war is more complicated: war is itself a "construct" of law,⁶ just as much as war, ontologically, tests the basis and the limits of law.⁷

At any given historical moment, these ideas and mythologies are given greater or lesser expression. Lawfare indexes a specific shape to the ideas we harbor about the relationship between law and war. Thus, "lawfare" as a term of art has its own specific, intended, and, indeed, doctrinal definitions, and the literature on lawfare within the past decade certainly attests to this.⁸

What this Article hopes to contribute is a sense of the implied meanings and projected significations beyond doctrinal definition. The deployment of lawfare registers the extent to which a conception of law as formalistic and instrumental to war has become normative. The point of a rhetorical analysis of lawfare is to index a recognition of this and to interrogate the consequences for law outside of the war context. The object is to treat lawfare as a "threshold" concept between law and war, and thereby excavate the potential for alternative meaning-production. The object is to think through lawfare as a term that captures a certain meaning of law in order to apprehend alternative ways of thinking, more objectively and less naively (mythically) about law in relation to war.

Lawfare's doctrinal meaning, as described in Parts I and II, suggests a bounded, or enclosed, conception of law within which law's relationship to war subtends law's capture and colonization by war: the more "war" is indexed as metaphor in legal discourse, and the more this reflects the entrenchment of a war paradigm governing legal thought, the more law be-

⁶ Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT'L L. 1 (2004).

⁷ See, e.g., CARL SCHMITT, *THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF THE JUS PUBLICUM EUROPAEUM*, (G.L. Ulmen trans., Telos, 2006)(discussing origins of law in relation to different forms of war; e.g., "The essential point is that, within the Christian sphere, wars among Christian princes were bracketed wars. They were distinguished from wars against non-Christian princes and peoples," etc., at 58).

⁸ See, e.g., Brooke Goldstein, Aaron Eitan Meyer, *Legal Jihad: How Islamist Lawfare Tactics are Targeting Free Speech*, 15 ILSA J. INT'L & COMP. L. 395 (2009); Tung Yin, *Boumediene and Lawfare*, 43 U. RICH. L. REV. 865 (2009); Colonel Kelly D. Wheaton, *Strategic Lawyering: Realizing the Potential of Military Lawyers at the Strategic Level*, ARMY LAW., Sept. 2006.

comes pregnant with war value. Lawfare, doctrinally, represents the loss of a sense of law as other in relation to war. In the alternative, however, lawfare imagined as a threshold concept might point to the recognition of a conception of law that maintains a relationship—contingent, provisional, historical, and imperfect—with war rather than a seamless collapse within it.

At stake, then, in a rhetorical analysis of lawfare is both a critique of the war paradigm that it represents and enforces, and a recognition of the contingency of law in relation to the paradigm, whatever that paradigm is, within which it is situated. What I hope to establish in this Article is the relational aspect of law. Lawfare as projection and the case study, so to speak, of the “war on terror,” makes stark how important it is to remember that law is never pure, is always contextual. Law cannot be divorced from its milieu. Thus, a rhetorical analysis of lawfare allows us to look at law more objectively, to see what has happened to law, under the aegis of war.

In Part II, I review the nexus of law and war from a historical and doctrinal perspective and I analyze the discourses of power contemporaneous to lawfare’s early deployment within the context of the “war on terror.” The question here will be how much lawfare imports, and reflects its pre-2001 history. In Part III, I review Dunlap’s evolving definitions of the term. In Part IV, drawing upon analytical methodologies outside law (e.g., theology and psychoanalysis) to underline the concept of law as relational both within and beyond the war model, I see lawfare as a threshold concept and as a “passage.” This enables me to look at the conflicting desires and investments harbored by the term in its deployment as an instrument of war and of law.

In the result, I conclude that lawfare represents a traditionally bounded or “determinate” view of law in relation to war. This view renders the law-war nexus dyadic and inevitable: expansion and constraint on the continuum between war and the criminal justice system ratifies law as the legitimation and the formal/instrumental expression, merely, of different forms of violence. A critique of lawfare from a rhetorical perspective submits a relational view of law,⁹ a view that requires thinking of law as always and already “related” to an outside or a beyond of the law/war nexus. Whence, what will “constrain” or attenuate the resort to war (and the ac-

⁹ This will be explored in Part III and the Conclusion. For an idea of a “relational” theory of law, I borrow from Ahsan Mirza’s review of *Foucault’s Law*, Ahsan Mirza, *Book Note*, 47 OSGOODE HALL L.J. 617 (2009) (reviewing PETER FITZPATRICK & BEN GOLDBER, *FOUCAULT’S LAW* (2009)). Mirza notes that contrary to the popular “expulsion” theory of law in Foucault’s thought, law in Foucault’s modernity is “‘the uneasy, ambivalent relation’ between ‘law as a determinate and contained entity’ and ‘law as thoroughly illimitable and as responsive to what lies outside or beyond its position for the time being,’ ‘law as a law of possibility, contingency, and liability.’” *Id.* at 618.

quiescence in a “war paradigm”¹⁰ to resolve conflicts) may not be law in the traditional sense of an opposition between the war paradigm and crime paradigm.¹¹ Rather, war—or, perhaps more precisely, dehumanizing violence,¹² including the violence of the law—may be constrained by a conception of law that embodies relational thought.

I borrow from theology and psychoanalysis to suggest that the more formal or bounded view of law already harbors this juridical desire in relation to war, but that the war paradigm suppresses and elides it—again, and as such, as an aspect of the paradigm itself. Thinking of lawfare, then, beyond its definitional limits to its linguistic and cultural significations—that is, figuring lawfare as a border¹³ concept between law and not law, war and not war—gives us a sense of its potential discursive deployment as critique of the war paradigm.¹⁴

¹⁰ Ganesh Sitaraman notes that the “war paradigm” must be inclusive of “a hybrid model of law, between war and crime, that is better tailored to terrorists’ tactics.” He suggests that the paradigm include counterinsurgency, the current strategy in the war in Afghanistan. See Ganesh Sitaram, *Counterinsurgency, the War on Terror, and the Laws of War*, 95 VA. L. REV. 1745, 1833 (2009).

¹¹ *But cf.* Gearty, *supra* note 4, at 7 (As an alternative to the war paradigm, “What does exist is a framework of criminal law which is informed by principle certainly and controlled to some degree . . . by a range of more or less embedded rights but which is nevertheless always on the move, the substance of the crimes themselves and the procedural framework for their determination and punishment being in a perpetual state of flux.”).

¹² This aspect of warfare was vividly presented in a recent PBS, *Frontline: The Wounded Platoon* (PBS May 17, 2010), on soldiers returning from the war zone and suffering from PTSD (post-traumatic stress disorder). The soldiers reported randomly killing civilians on the slightest pretext. As one soldier put it: “It didn’t matter whether they were armed or not. They were simply ‘hajjis,’ they weren’t human.” A psychologist advised the soldier that, “You had to dehumanize the enemy in order to kill him . . . What you’re suffering is a ‘normal’ response to an ‘abnormal’ situation. Thaw was abnormal; this is normal.”

¹³ See, e.g., Simon Addison, Book Review, 21 J. REFUGEE STUD. 414 (reviewing BORDERSCAPES: HIDDEN GEOGRAPHIES AND POLITICS AT TERRITORY’S EDGE (Prem Kumar Rajaram & Carl Grundy-Warr eds. U. of Minnesota P., 2007) (the border is “a relational practice for the production of otherness. The border. . . is a multivalent and constantly contested process through which the limits of sovereign power and the boundaries of political community are negotiated.” Addison notes further that to analyze the border “only in terms of law ‘repeats the ruse of sovereign control and rationality integral to the maintenance of sovereign power.’”).

¹⁴ Critiques of the war paradigm include Amos Guiora, *Self-Defense: from the Wild West to 9/11: Who, What, When*, 41 CORNELL INT’L L.J. 631 (2008); Kathryn L. Einspanier, Note, *Burlamaqui, the Constitution, and the Imperfect War on Terror*, 96 GEO. L.J. 985 (2008); Christina D. Elmore, Comment, *An Enemy Within Our Midst: Distinguishing Combatants from Civilians in the War against Terrorism*, 57 U. KAN. L. REV. 213 (2008) (war paradigm based on an “antiquated state-based model,” at 231); Mark R. Shulman, *The Four Freedoms: Good Neighbors Make Good Law and Good Policy in a Time of Insecurity*, 77 FORDHAM L. REV. 555 (2008) (“state-centeredness of a war paradigm” gives “higher profile and more opportunities” to al-Qaeda, at 577). *But cf.* David Glazier, *Playing By the Rules: Combating Al Qaeda Within the Law of War*, 51 WM. & MARY L. REV. 957, 983 (2009) (“A principle advantage of the war paradigm is that it is self-limiting. There are formal legal prerequisites

II. WAR BY LAW

Lawfare as a border concept expresses and projects conflicting desires concerning the relationship between law and war. In this first part, I review the historical context of lawfare's origins (as a legal term). Here, I look at the doctrine of the international laws of war, and the debates around American power before 9/11. As I will argue in Part III, lawfare expresses a strict view of the war as separate from international legal limits (law "and" war), but also continuous with, and legitimated by, domestic law as such. This latter view maintains the basic rubric of lawfare as paradigmatic of the war framework.

A. *Law as War*

There has been much criticism of the war paradigm (or the war framework) used to characterize the 9/11 events and the subsequent U.S. response. One element of the critique was that the 9/11 terrorist attack was not an "act of war" but rather a "crime," whence the Bush Administration's resort to a "war" rather than the criminal justice paradigm in pursuing its remedies was fatally flawed.¹⁵ Following what the critics consider this original error, the problem of how to characterize and adjudicate those captured by U.S. forces in Afghanistan and other places where the terrorists were sought led to a protracted debate about how to treat the detainees.¹⁶ The debate centered on whether the detainees should be treated as war criminals, thereby according them prisoner of war status under the laws of war, or whether they should be granted all the procedural protections of ordinary criminals under the domestic and international criminal justice laws.¹⁷

It was within this context that Dunlap introduced the term "lawfare," and this seemed to index the newness of the legal matrix or pressure in relation to this war, or this extension of the modern definition of warfare. Nathaniel Berman, however, notes that whilst the relationship between law and war is ancient, what does seem new is the extent to which the recent events—in which he includes the "fourteen year conflict with Iraq"—have destabilized the traditional legal bases for determining the border between

under both domestic and international law for its lawful invocation."); *See also*, Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365 (2008) (making a similar argument to Glazier's).

¹⁵ *See, e.g.*, Johannes van Aggelen, *The Consequences of Unlawful Preemption and the Legal Duty to Protect the Human Rights of its Victims*, 42 CASE W. RES. J. INT'L L. 21, 86 (2009) (report from the High Commissioner for Human Rights concluding that "the U.S. paradigm, by conflicting and confusing acts of terrorism with acts of war, is legally flawed and sets a dangerous precedent.").

¹⁶ Q&A: What next for Guantanamo prisoners?, BBC NEWS, JAN. 21, 2002, <http://news.bbc.co.uk/2/hi/americas/1773140.stm>.

¹⁷ *Id.*

war and not war.¹⁸ With this destabilization, other separations (i.e., this is a war; this is not a war but a revolution; etc.) are both unsettled and become available to strategic instrumentalization by all sides. I will describe Berman's theory.

Berman's answer to the question, "what is war?" counters the popular view that law—whether conceptualized as the criminal justice system or as the international prohibition against "wars of aggression"—is designed to constrain war. On the contrary, Berman argues, law has always facilitated "certain forms of officially sanctioned violence."¹⁹ He writes:

First, law's role in relation to war is primarily not one of opposition but of construction—the facilitation of war through the establishment of a separate legal sphere immunizing some organized violence from normal legal sanction and, inevitably, privileging certain forms of violence at the expense of others. Secondly, the forms of this legal construction of war are highly contingent, the subject of historical variation and political contestation. Thirdly, the legal construction of war as a separate sphere has been considerably destabilized in our time, in particular by the strategic instrumentalization of the legal categories by state and non-state participants in violence. Both the "war on terror" and the fourteen year conflict with Iraq provide paradigmatic instances of these phenomena.²⁰

Berman notes the distinction internal to the laws of war are drawn between the right to go to war, the justness of the cause, "jus ad bellum," and the conduct of the war once a war has begun, the "jus in bello."²¹ These two have different aims and historically were meant to be separate. The "jus ad bellum" prohibits certain kinds of violence altogether (a war of aggression, for instance).²² But even if one party begins such a war, both parties must conduct themselves according to "jus in bello," also known as "international humanitarian law."²³ "Jus in bello" does not depend upon the justness of the war; it referred only to the conduct, and was based on the moral equality of belligerents, whereupon prisoners captured by either side had a right to an immunity (privileged combatants).²⁴

In the second instance, as Berman notes, the line between the "lex specialis" of war and the "lex generalis" of the criminal justice system, whether international or domestic, was also "destabilized" by the events of the last decade.²⁵ Specifically, was terrorism an "act of war," bringing a

¹⁸ Berman, *supra* note 6.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 3.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 9.

²⁵ *Id.*

state's reaction to it within the laws of war ("jus in bello")? Or was it a "criminal act," requiring a state's response to be more like a police action than a declaration of war?²⁶

Third, the shifting back and forth between the criminal paradigm and the war paradigm exacerbated the destabilized categories—both within "lex specialis" and between the laws of war and the criminal justice system. Berman's argument is that neither the destabilization nor its strategic instrumentalization for partisan advantage by all parties is anything new.²⁷ As such, Berman writes, "Construction, contestation, instrumentalization—these are the key challenges for understanding the role of law in relation to war in our time."²⁸

Of particular interest here is the last term: Berman notes that a greater problem than contesting the boundaries is their instrumentalization.²⁹ It is here that lawfare makes its entrance, i.e., as one form of instrumentalizing the contested borders between legal spheres ("lawfare campaigns," to use Dunlap's phrase³⁰), as well as a descriptive term for the strategic exploitation of the legal construction of war. As discussed further in Part III of this Article, lawfare expresses this constructive sense of legal encompassment, of occupying the entire discursive field of the definition of war—and not war—including the fact of divisional instability. Lawfare also projects a strategic expansiveness, as if to counter the instrumental "lawfare campaigns" of the other side.

Despite the legal construction of war and the posit that law is therefore not "opposed" in any juridical sense to war, there is a sense in which society reposes such a desire in law, and that this constitutes a powerful mythology of law's relation to war. Thus, Berman notes that "jus ad bellum," especially in the Kellogg-Briand Pact of 1928, prohibiting war, is often interpreted as giving expression to such a desire.³¹ Berman cautions,

²⁶ *Id.* at 7–8.

²⁷ *Id.* at 7 (Some may view this destabilization of the legal construction of war as tending to produce a synthesis between the laws of war and not-war; others may view it as tending towards the abolition of one or the other sphere. By contrast, I argue that recent trends would better be viewed as making the distinction between the two spheres available for strategic instrumentalization. Rather than contesting the line between war and not-war, those engaged in such instrumentalization employ the distinction itself for partisan advantage—seeking to achieve practical or discursive gains through shifting back and forth between war and not-war.”).

²⁸ *Id.* at 8.

²⁹ *Id.*

³⁰ Dunlap, *supra* note 1, at 36.

³¹ Berman, *supra* note 6, at n.9 (jus ad bellum “enshrined in the League Covenant, the Kellogg-Briand Pact, and the UN Charter” designed to oppose war, but “[t]he modern rules of jus ad bellum, no less than those of jus in bello, thus effect a constructive channeling of violence, rather than simply opposing it,” citing to the work of Carl Schmitt and Thomas Franck).

however, that even the intervention of the courts in adjudicating the “terrorism” cases may simply highlight the acquiescence of the “constraint” model—the criminal justice system—in relation to the war paradigm, at its height.³²

Even the intervention of the courts, at the height of the government’s instrumentalization of the unstable border between war and crime, largely took the form of judicial acquiescence as the courts expanded the parameters of the war paradigm at cost to the “criminal justice” model.³³ Whence, what comes clearest from Berman’s analysis of the historical and doctrinal relationship between law and war is a strong counter-myth: the desire invested in law as “constraint” of war almost vanishes with the attenuation of judicial review of the political decision.³⁴

Parallel to the contentious political debates around the status of “enemy (non)combatants” during the last decade, there has also been a kind of introspective political discourse on the nature and extension of American power in the age of globalism. Much of this debate circulated around the idea of America as a new imperial power, and questioned what this might mean for how to conceptualize the relationship between law and war. The buzzwords in the 1990s and the 2000s—e.g., “hegemony,” “unilateralism,” “exceptionalism”—could be considered variations on the theme of what it meant to be the sole superpower, with the rubric of empire³⁵ indexing a

³² Of the “unprivileged combatants,” the subject of this litigation, Berman notes that: [this]category and its attendant controversies are thus symptoms of the fact that the legal construction of war is both indispensable and never more than provisional—that *jus ad bellum* both must be and cannot be neutrally separated from *jus in bello* and that those entitled to the rules of *jus in bello* both must be and cannot be defined in a way that will command the assent of all parties to some of the most important conflicts.

Id. at 57.

³³ *Id.* at 60 & 70 (“Examination of these cases reveals courts deeply engaged in preserving and transforming the legal construction of war in the face of partisan efforts that seek either to engage in an unprecedented expansion of its contours or to subject its doctrines to strategic instrumentalization.”). The only court to “block” the government’s attempt to expand of the contours of the legal construction of war is the *Padilla* circuit court. But see also *Boumedienne* and the other “terrorism” cases: whilst the Supreme Court declared the Military Commissions Act of 2006 a violation of the Suspension Clause of the Constitution and declared that the detainees at Guantanamo Bay were entitled to the habeas corpus writ, the Court did not specify “whether” or “how an applicable guarantee can be enforced”: see Christina Duffy Burnett, “A Convenient Constitution? Extraterritoriality After *Boumedienne*,” 109 COLUM. L. REV. 973 (2009).

³⁴ *Id.* at 59 (the courts take various approaches, which Berman labels “formalist,” per the sovereign declaration; “factualist,” where war is defined according to “objective” criteria; and “functionalist,” where the designation of war did or did not make juridical sense. Thus, there is a hint in all this that a more robust judicial review would have indexed “law” as “constraint” to the strategic expansion of the war paradigm without limit).

³⁵ See, e.g., Jed Rubenfeld, “Unilateralism and Constitutionalism,” 79 N.Y.U.L.REV. 1971, 1973 (2004), quoted in Henry J. Steiner, Philip Alston, and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morality* (3rd ed.) (Oxford, 2007), at 54: “In other

comparison to similar historical unipolar precedents, such as Rome or Great Britain.

B. Law of Empire

Before and during the time in which “lawfare” was regenerated as a legal term of art in relation to the laws and conduct of war, the various views on the extension of U.S. power around the globe, particularly in its wars—the “humanitarian” wars in the 1990s and post-9/11 Afghanistan and Iraq—coalesced around the view of America as a new imperial power.³⁶ The closest historical analogue to the U.S. version was the British Empire, and scholars and commentators looked closely for similarities and differences, as well as lessons learned. John Fabian Witt³⁷ reviewed four recent books on this topic, all centered on the question of law in relation to empire. As Witt notes, “Old-fashioned empire is suddenly everywhere. . . . Hard power is back, and so too are a set of difficult constitutional questions: about the Constitution and foreign affairs, about the significance of international law, and about the relationship of foreign affairs authority to domestic rights and powers, to mention only a few.”³⁸

Witt reduces the “law of empire” in relation to war, or the use of force, whether British or American—or “Anglo-American”—to two formulations along ideological lines: the first submits war as external to law, the second as internal to law. He writes:

[T]he Anglo-American law of empire has remained strikingly similar over the past 150 years, its landmarks remarkably little changed by the winds of

words, we were bestowing on the world the gift of American law and the American way. . . . The second motivation was to increase American wealth and power Hence America’s internationalist crusade after 1945 was in part intended to establish throughout as much of the world as possible, a stable legal, political and economic order in which American commerce would flow freely and American military power would reign supreme. Both these sets of motives could be described as ‘imperialist.’” However, “As European integration progressed and as the Soviet fall from world power turned into utter collapse, the ‘international community’ became more discontent[ed] with American power. It came to see international law as a vehicle for restraining the ‘hyperpower,’ and it became increasingly less tolerant of American ‘exceptionalism.’”

³⁶ MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* 182 (Harv. Univ. Press) (2002) (“The U.S. Constitution, as Jefferson said, is the one best calibrated for extensive Empire. We should emphasize once again that this Constitution is imperial and not imperialist. It is imperial because (in contrast to imperialism’s project always to spread its power linearly in closed spaces and invade, destroy, and subsume subject countries within its sovereignty) the U.S. constitutional project is constructed on the model of rearticulating an open space and reinventing incessantly diverse and singular relations in networks across an unbounded terrain.”).

³⁷ See generally John Fabian Witt, *Book Review: Anglo-American Empire and the Crisis of the Legal Frame (Will the Real British Empire Please Stand Up?)*, 120 HARV. L. REV. 754 (2007).

³⁸ *Id.* at 754–55.

time. Like their nineteenth-century British predecessors, American constitutionalists now debate the allocation of foreign affairs powers between the legislative and executive branches. They debate the extent to which such allocations of power are susceptible to judicial review. They debate the merits of emergency exceptions to constitutional systems.³⁹

However, within these debates, the claim of a unilateral executive seemed more unique to the United States., due to differences in the constitutional cultures of the two empires. These differences led to a more polarized ideological debate.⁴⁰ Within that context, the desire reposed in law to constrain power took on an ideological cast.⁴¹

Witt notes, however, that imperial law was always “indeterminate and ambiguous,” with one commentator suggesting that its ambivalences “stemmed from a deep tension in British imperial practice ‘between the rule of law and the expansion of rule.’”⁴² The former, properly understood, would not be subject to ideological instrumentality, but would operate as an ideal, or rational, opposition to war as such. Witt, following R.W. Kostal, expresses it thus:

[T]he legal frame in nineteenth-century Britain was not so much a set of substantive answers to the questions raised by empire as it was a forum in which debate about empire took place. The law functioned not as a body of rules or commands, but rather as a stock of discursive moves available to the contending parties in the debate over empire. Law created the linguistic field on which the differing sides debated the Empire.⁴³

Witt adds a caveat: “Yet for all their agreement, for all their shared premises, it was not always clear that the legal frame could give meaningful shape to their arguments.”⁴⁴ Sometimes, indeed, “law talk”⁴⁵ failed to permit the

³⁹ *Id.* at 756–57.

⁴⁰ *Id.* at 757 (“There is at least one critical difference between the constitutionalisms of the twenty-first and nineteenth centuries: the culture of American foreign affairs constitutionalism is radically more polarized than the constitutionalism of the nineteenth-century British Empire; it includes claims of unilateral executive authority, on one hand, and judicially enforceable individual constitutional rights, on the other. Its British predecessor, by contrast, rejected both executive unilateralism and judicially enforceable constitutional rights in favor of a model that placed virtually all questions in the hands of Parliament.”).

⁴¹ *See id.* at 757. The political right, during the Bush years, supported the enhancement of the unilateral executive at the expense of the judges; the political left wished for more judicial review to protect the individual liberties of the terrorism detainees.

⁴² *Id.* at 767 (quoting DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830* 10 (Thomas A. Green, Hendrik Hartog, & Daniel Ersnt. eds. Univ. of North Carolina Press) (2005)).

⁴³ *Id.* at 791. *See also* R.W. KOSTAL, *A JURISPRUDENCE OF POWER: VICTORIAN EMPIRE AND THE RULE OF LAW* (Oxford Univ. Press) (2005).

⁴⁴ Witt, *supra* note 37, at 791.

means for parties to connect with each other at all, and debate over the law of empire “began to spill over into political and ideological [arguments].”⁴⁶

The clear picture that emerges from Witt’s analysis of the law of empire is of its historical contingency and its “constraint” to the imperatives of empire/expansion. However, Witt wants to recuperate an ideal of law as rational discourse in relation to the irrationality and violence of war— notwithstanding war as the “construct” of law. Thus, he writes that, “However muddled and messy, however indeterminate and awkward, the legal frame’s modest virtue is its historical association with relatively less repressive forms of global power.”⁴⁷ Following Kostal, he notes also that, “the persistence of the legal frame in the British Empire helped to constrain empire’s excesses, even in places like [the 1865 revolt in the Jamaican town of] Morant Bay.”⁴⁸

This expresses law’s historical contingency, but also speaks to a popular conception of law, one that severs law “as such” from the political process, and reposes in law the capacity to express the moral values of a community. Indeed, the “legal imagination” represented by legal discourse “produces a particular form of community. The choice to engage in law talk is the choice to engage in a kind of discourse with its own internal morality—a morality that rests on reason and that entails the dignity of the individuals who make claims on it.”⁴⁹ Witt’s emphasis, by repetition, of the word “choice” presupposes a departure from force as the expression of instinctual desire, a suppression of the force of desire as such.

Daniel Williams, however, critiques this Rationalist or Enlightenment view of law as repository of the rational discourse of a centered self, which Witt wishes to reclaim in the midst of the fraught and polarized contemporary debate. Again within the context of America’s “imperialist” ambitions pursuant to its “war on terror,” Williams posits law as coextensive with, rather than extrinsic to, the violence of war.⁵⁰ Williams suggests that the line is thin between law’s construction of war as limited to “lex specialis,” on the one hand, and on the other a rationalistic law of empire internally conflicted between the desire for unlimited expansion and the desire for self-restraint.⁵¹ Williams locates the source of both within what he terms the

⁴⁵ *Id.* at 783 (“The deep penetration of law talk into the debates on the Morant Bay affair made law, in Kostal’s words, the ‘forum for negotiation of the basic terms of political power’ in the Jamaica debate.”) (quoting R.W. KOSTAL, *supra* note 43, at 464).

⁴⁶ *Id.* at 791.

⁴⁷ *Id.* at 796.

⁴⁸ *Id.* at 796–97.

⁴⁹ *Id.* at 784.

⁵⁰ See generally Daniel R. Williams, *After the Gold Rush—Part I: Hamdi, 9/11, and the Dark Side of the Enlightenment*, 112 PENN. ST. L. REV. 341 (2007).

⁵¹ *Id.*

“dark side”⁵² of the Enlightenment tradition. The distinction is manifest in the deference, in a substantive sense, of the judiciary to the political branches in the conduct of the “war on terror.”

For Williams, law is “nothing more than a facet of human striving,” which itself is “more about desire and fantasy than it is about rationality.”⁵³ Whence, the rationalism of law is already subject to the exigencies of desire, indeed, it is a construct of desire.⁵⁴ When, therefore, desire itself is construed according to imperial imperatives (the “rule of expansion,” in Witt’s phrase),⁵⁵ then legal constraints, such as in the *Hamdi v. Rumsfeld* judgment,⁵⁶ that required the executive to defer to Congress, are no more than a further suppression of law (in the sense of constraint, expressed as the authority of the judiciary over the political branches) in relation to politics. After *Hamdi*, the executive sought from Congress passage of the 2006 Military Commissions Act (MCA).⁵⁷ Williams describes this Act as an “expansion of sovereignty through legislative manufacturing of a rights regime outside the established framework of the Constitution,” and “a process of legality that manufactures ‘law’ to suit the state’s global ambitions.”⁵⁸

Williams’ view of law as the “legality” that characterizes and legitimates the “war on terror” is essentially unconstrained by law as “reason,” and conforms to the “law-as-war” model, whereby even Witt’s (rational) space for legal discourse is so captured by the war paradigm that law and war are indistinguishable.⁵⁹ Williams takes Berman’s argument to an extreme: with the instauration of a war paradigm to adjudicate what might otherwise be criminal acts (i.e., acts of terror), the “law” or justice model is co-opted and ceases to function outside of the war framework or, put other-

⁵² *Id.*

⁵³ *Id.* at 344.

⁵⁴ *Id.* (“The war against terrorism, when rhetorically decoded, is packaged as a fight against the dark side, a fight to preserve our Enlightenment heritage by averting the onset of a new dark age.”).

⁵⁵ Witt, *supra* note 37, at 767.

⁵⁶ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

⁵⁷ Kate Zernike, *Senate Approves Broad New Rules to Try Detainees*, N.Y. TIMES, Sept. 28, 2006, at A1.

⁵⁸ Williams, *supra* note 50, at 351–52 (The “legality” in question is what he describes as “process jurisprudence.”) (“This fearsome sort of legality is largely shielded from our view (that is, from the view of Americans—the ones wielding this legality) with the veil of democracy, knitted together with the thread of process jurisprudence.”).

⁵⁹ *Id.* at 385 (discussing how “necessity” produces law) (“The birth of the War on Terror thus came in the form of *law*. It is in this sense that necessity is not outside of law, or suspends law, but instead creates the conditions for a new legal regime to bloom through the acts of the sovereign. Necessity is the soil for the seeds of law to take root. Necessity does not exempt. It produces.”).

wise, outside of war-thought.⁶⁰ The Supreme Court's post-9/11 jurisprudence has developed merely to ratify this view.⁶¹

Another critique of the law of empire and the metaphor of war from James Forman⁶² also struggles with the parameters of law as expansion or as constraint, and like Williams, comes to settle upon the view that "law is war" under the hegemony of the Bush doctrine and the judicial acquiescence therein. Forman's view is from the perspective of domestic law, rather than from the view of international law. Like Witt, Forman writes from the internal perspective of law's Enlightenment promise as vehicle of rationality and repository of equality and justice. But like Williams, Forman seems less sanguine than Witt about the potential for law to live up to this promise. Rather than the popular conception of the war on terror as exceptional, as a "sharp break from the past, with American values and ideals 'betrayed,' American law 'remade,'" the truth "is more complicated."⁶³ Instead, Forman argues, "the war on terror is an extension—sometimes a grotesque one—of what we do in the name of the war on crime."⁶⁴

Forman's article is devoted to charting the various strategies and attitudes, particularly one of complacency, of an American public toward the most punitive aspects of the domestic "war on crime." In essence, "We have come to accept. . . excesses as casualties of war—whether on crime, drugs, or terror."⁶⁵ And these excesses, which have become normative domestically, are exported as unexceptionable in the war on terror.

Furthermore, Forman cautions that to conceive of domestic law as the bearer of virtue, as the norm in relation to an "aberrant" legal system in Guantanamo Bay or Abu Ghraib, is to elide the extent to which the latter is in fact the norm within domestic law.⁶⁶ "It lets some people—We the

⁶⁰ Williams, *supra* note 50 (following Giorgio Agamben in arguing that the war paradigm is a "state of exception" that "suspends" the criminal process and creates an alternative "legality," a "law of detention" at the behest of the sovereign) ("[O]ur so-called war on terror is 'transformed into a reality indefinitely extended into the future, controlling not only the lives of prisoners and the fate of constitutional and international law, but also the very ways in which the future may or may not be thought'" (quoting JUDITH BUTLER, *PRECARIOUS LIFE: THE POWER OF MOURNING AND VIOLENCE* 54 (Verso) (2004)).

⁶¹ *Id.*

⁶² See generally James Forman, Jr., *Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible*, 33 N.Y.U. REV. L. & SOC. CHANGE 331 (2009).

⁶³ *Id.* at 332.

⁶⁴ *Id.* at 332–33.

⁶⁵ *Id.* at 333.

⁶⁶ *Id.* at 337–38 ("America suffers no lack of enthusiasm for the greatness of its legal system. Instead, our failure is to see our flaws. Convinced that our system is the most rights-protective in the world, we are insufficiently self-reflective. For the same reasons, we are often highly suspicious of comparative or international reform models. These tendencies have stunted the development of our criminal justice system. Worse, they have left us in the unenviable position of having one of the most punitive systems in the world while believing we have one of the most liberal." And further on, Williams notes: "My discomfort comes

People—off the hook.”⁶⁷ As such, Forman’s aim is in “exploring continuities in places where the prevailing wisdom has been to emphasize discontinuity. I [Forman] want to understand why we as a nation have allowed certain things to go on in our name, even, in some cases, after we learned the truth about abuses in the war on terror.”⁶⁸

In short, Forman’s argument is that an increasingly normative approach to criminal justice as harsh has formed the backdrop to “America’s punitive approach to fighting the war on terror.”⁶⁹ The law’s role in this is central, one key element being to limit the role of the judiciary in relation to the political branches.⁷⁰ Another is to undermine the role of defense counsel in the war on terror. He writes: “Lawyers representing those locked up in the war on terror have been accused of waging ‘lawfare’: ‘the growing use of international law claims, usually factually or legally meritless, as a tool of war . . . to gain a moral advantage over your enemy in the court of world opinion.’”⁷¹

“Lawfare” is used here in the sense of a continuity between war and law, whereby “law” is fully captured by war. Jettisoned is the idea of law as the repository of value, reason, or truth. That is, lawfare is a distortion of law itself within the “metaphor”⁷² of war and its aims. Implicit here, as in Williams, is the “promise” of law as more than its punitive manifestation within the war paradigm. Implicit is the desire for law to function as a constraint upon power. As such, Forman’s critique of the law as merely instrumental to war is basically reformist: the only way to change the operation of law-as-war is to fully apprehend and appreciate law’s reduction at home to an instrument wielded, not by an overreaching executive, but by the public at large in its acceptance of—and sometimes its call for—a law of crime model that posits the war “metaphor” as paradigmatic of justice.

Ultimately, Forman’s call, like Williams’ and Witt’s, is for a return of law to a lost, prelapsarian state of grace, when law was inclusive (Witt’s

from the fact that in contrasting the aberrant (Guantanamo) with the normal (our domestic criminal justice system) we become blinded to the profound abnormality of our domestic criminal system. One of my goals in this Article is to counter this tendency by raising questions about our domestic criminal system by turning a mirror back on it.”).

⁶⁷ *Id.* at 338.

⁶⁸ *Id.* at 339–40.

⁶⁹ *Id.* at 347.

⁷⁰ *Id.* at 361 (“As these examples make clear, in the war on crime the legislative and executive branches moved jointly to expand their own authority at the expense of the judiciary.”); *See also* Military Commissions Act of 2006, Pub. L. No. 109–366, 120 Stat. 2600 (2006).

⁷¹ *Id.* at 363 (quoting David B. Rivkin, Jr. & Lee A. Casey, *Lawfare*, WALL ST. J., Feb. 23, 2007, at A11).

⁷² *Id.* at 373 (“Throughout this article, I have attempted to show how, in some important ways, 9/11 did not change everything. . . There is one final analogy that is worth our consideration, one which might help explain all the others. It concerns the very metaphor of war.”).

19th century metropolitan “law talk”); when law was rational (Williams on the call to law’s Enlightenment heritage); when law was just (Forman’s call to a robust judiciary constraining the worst instincts of a populace enervated by its “war on crime”). In each case, law represents a rationalist desire for self-restraint in tension with the drive toward untrammelled and expansive power.

Each of these critiques of the law of empire, and the war model it appears to project, implicates a sense of law as broader than the war paradigm and the law’s constitutive function. But the breadth is confined to the parameters of law discourse *sensu stricto*: law’s promise, law’s justice, even law’s grace. In an almost theological turn, the discourse on law and war seems to follow from an originary and traumatic loss. But what lies behind these laments is an even more complicated elision: of law as always and already incomplete, contingent, impure. These authors therefore index how much the law of empire depends upon a binarity, which in turn constrains the juridical category, or juridical thought, in its capacity to think relationally, or to think in other than juridically bounded terms (law is a “contained entity,” in the positivist sense).⁷³ As such, within the paradigm of war, law moves from contingency to formality.

I shall return to the theme of “relational” thought in Part IV of this Article. Here, however, in this brief review of what is a broad and multifaceted debate, I have suggested that these historically situated views reduce to two potential roles for law: either as part of the war mechanism or “discourse,” or as separate from it. The perspective that comes through is of a very limited role for law, on the one hand, in light of the expanded political authority to extend American power globally (through its wars), and on the other, an expansive instrumentality of law (or “legality”) to justify those political and ideological ambitions. In the result, law “as” war, as well as law “and” war, represent conflicting desires—and different forms of expressing them—on a continuum *within* the imperial war imaginary. The discursive opposition is between law as positing the desire for self-restraint, and law as legitimating the desire for expansion (the law-as-war model).

In the following analysis, I wish to explore the implications of thinking about lawfare as expressive of this bounded view of law inherent to the above critical perspectives that circulated around the time of lawfare’s coinage, as well as expressive of a relational view beyond its historical sources. As noted, Dunlap’s conception of lawfare enters the frame as both an instance of the instrumentalization of the unstable border between war

⁷³ See, e.g., Mirza, *supra*, note 9, at 618 (“The law is not a contained entity, as described in positivist accounts, but is in a condition of ‘perpetual hyphenation,’ as indicated by Foucault’s coinage of terms: ‘politico-juridical,’ ‘epistemologico-juridical,’ ‘scientifico-legal,’ and ‘juridico-anthropological.’”).

and not war.⁷⁴ I examine Dunlap's 2001 essay on lawfare, coming as it does directly in the wake of 9/11 and the war in Afghanistan.⁷⁵ I then look at Dunlap's 2009 "refined"⁷⁶ definition. It is in the latter that a more relational critique of law comes to view, not through the specific definitional criteria Dunlap outlines, but within the textual figures and rhetorical significations. I suggest, then, that lawfare, as a border concept, looks backwards to law as a "contained entity," i.e., law's ineluctable nexus with war as tending toward a "war paradigm," and forwards to law as a relational concept, sensitive to "influences from things which are other to it, and ever-absorbing these in its 'vacuity.'"⁷⁷

III. LAWFARE AS BORDER CONCEPT: EVOLVING MEANINGS AND SIGNIFICATIONS

In this Part, I will chart Dunlap's changes in the definition of "lawfare" between 2001 and 2009. I suggest that in the first definition, "lawfare" seems to represent not only the "bounded" view of law, but the law's radical delimitation to purely formal instrument of the military aims contemporary with the term's inauguration. In Dunlap's later definition, the term opens itself up to an alternative, more contingent perspective, which in turn intimates an extrajudicial critique of law within the confines of the law of empire as the law of war.

A. *Lawfare in 2001*

Dunlap delineates law, in relation to lawfare, according to three criteria of analysis: as adherence, as strategy, and as valuation. In each, Dunlap's earlier definition of "lawfare" is essentially in the negative, a caution against the limitative or constraining influence of law in war. Dunlap is critical of those commentators who call for more, rather than less, law. He argues that adherence, particularly to the international laws of war, could limit the military in its attempt to achieve its aims.⁷⁸ Embedded in his formulation of lawfare is the view that law bears society's values and aspirations. As such, in times of crisis, the "value" in security and survival trump any rights and liberties a society might value under a "different" model of law. Dunlap fully embraces the war paradigm, and "lawfare" represents that embrace.

Dunlap begins his article with the following questions:

Is lawfare turning warfare into unfair? In other words, is international law undercutting the ability of the U.S. to conduct effective military interven-

⁷⁴ Dunlap, *supra* note 1, at 60 & 70.

⁷⁵ *Id.*

⁷⁶ Dunlap, *supra* note 3, at 35.

⁷⁷ Mirza, *supra* note 9, at 618.

⁷⁸ *See* Dunlap, *supra* note 1.

tions? Is it becoming a vehicle to exploit American values in ways that actually increase risks to civilians? In short, is law becoming more of the problem in modern war instead of part of the solution?⁷⁹

A central concern is with adherence to law to the extent that it does not interfere with the war aims. These aims are furthered by new, technological methods of warfare—particularly aerial war methods. Dunlap cautions against adherence to the laws of war, or the “laws of armed conflict” (LOAC), when these conflict with the U.S.’s war aims.⁸⁰

This theme is carried through in Dunlap’s discussion of international law as such. Pursuant to the theme of law as repository of value, he notes that LOAC necessarily expresses an abstract, universal value that may be unconnected to the values of a specific culture or national entity.⁸¹ He underlines this point by noting how much closer LOAC is to European values than it is to American ones: a case in point is the different valuation Europeans place in their armed forces compared with Americans’ attitude toward the same.⁸² Thus, both as bearer of value and as limited to furthering the war’s aims, lawfare reduces law to the legitimation of war aims: law “as” war.

A second salient emphasis in the article is the definition of “lawfare” to reference the strategy of the enemy. Hence, “lawfare” “describes a method of warfare where law is used as a means of realizing a military objective.”⁸³ In the hands of the enemy, this means that, “Though at first blush one might assume lawfare would result in less suffering in war (and sometimes it does), in practice it too often produces behaviors that jeopardize the protection of the truly innocent.”⁸⁴ This is because lawfare, as a weapon of war, is designed to “make it appear that the U.S. is waging war in violation of the letter or spirit of LOAC.”⁸⁵ As noted above, Dunlap defends the

⁷⁹ *Id.* at 1.

⁸⁰ *See id.* at 15 (“When interpretations of LOAC look as if they are disconnected to humanitarian values, support for the law inevitably wanes.”).

⁸¹ *Id.* at 17 (discussing universal versus particular values).

⁸² *Id.* (“Despite the existence of an all-volunteer force, Americans in and out of uniform generally do not consider those who serve as anything other than citizens of equal or more value as any enemy combatant or noncombatant. Europeans, however, have a history of populating their militaries with long-term professionals and legions of hired foreigners. This seems to create a certain sense that the armed forces are more tools of the state than citizenry in uniform. To me, this produces a collective societal ethic that gives the impression that military personnel are expendable assets.” Dunlap makes the point that because of these differences, LOAC does not represent “universal” values.)

⁸³ *Id.* at 4.

⁸⁴ *Id.*

⁸⁵ *Id.* (noting that lawfare is described as “increasingly foes of the United States see this development [i.e. the instant news cycle and imagery overwhelming a government’s capacity to explain itself] as a *vulnerability* to be exploited. No longer able to seriously confront—let

commander's non-adherence to LOAC to the extent that international law does not conform to U.S. values. In the result, "lawfare" indexes a highly skeptical attitude between law and war, one that reduces the former to the latter.

The instrumental emphasis of law is furthered in Dunlap's definition of "lawfare" as a "technique"⁸⁶ deployed by the United States and her allies. Lawfare lends moral and legal "cover" to the commander in the field.⁸⁷ Thus, to diminish the effectiveness of lawfare strategies of the enemy, Dunlap proposes a form of law as pervasive but seamless with the war aim. Citing to the U.S.'s obligation, pursuant to Operation Enduring Freedom, to "engage in extensive negotiations and diplomatic strategies to obtain legal rights for the basing and overflight of military aircraft" and the resulting "threat that lawfare will make obtaining like commitments even more troublesome in the future," Dunlap proposes more "permanent solutions" to the problem of lawfare.⁸⁸ "In my view one of these could be a greater militarization—indeed *weaponization*—of space."⁸⁹

Dunlap's development of lawfare cautions against adherence to law if this should "judicialize" the war effort.⁹⁰ In the wake of 9/11, popular sentiment seemed to support a robust executive with virtually unlimited powers.⁹¹ Compliance with the rule of law, at this early stage in what was

alone defeat—America militarily, they resort to a strategy that can be labeled 'lawfare'." (italics in original).

⁸⁶ *Id.*

⁸⁷ *Id.* at 6 ("Michael Ignatieff, who has written extensively about the role of law and lawyers in the Balkan conflict, provides real insight into the thinking of many senior officials. He maintains: '[Lawyers] provide harried decision-makers with a critical guarantee of legal coverage, turning complex issues of morality into technical issues of legality, so that whatever moral or operational doubts a commander may have, he can at least be sure he will not face legal consequences.' In short, the predominance of law and lawyers in U.S. military interventions is as much a concession to the verities of modern war as it is an altruistic commitment to human rights," (citing to MICHAEL IGNATIEFF, *VIRTUAL WAR* (Metropolitan Books 2000) at 199.).

⁸⁸ *Id.* at 16.

⁸⁹ *Id.* ("Among other things, orbiting armed space systems would obviate the need for foreign basing or overflight permissions. This would provide the U.S. with greater flexibility for unilateral military intervention if required. Of course, the weaponization of space will produce a host of legal and policy issues.")

⁹⁰ *Id.* at 19.

⁹¹ *Id.* at 18 ("Americans are much more concerned about finding and stopping the perpetrators of violence than they are about the niceties of international law. . . Stewart Baker, the former general counsel of the National Security Agency, concludes '[w]e have judicialized more aspects of human behavior than any civilization in history, and we may have come to the limit of that.' Consequently, in security matters contemporary American discourse is pervaded by the notion that '[t]he time for legal maneuverings, extraditions and trials is past.'" (citing Charles Krauthammer, *To War, Not Court*, WASH. POST, Sept. 12, 2001, at 29 ("An open act of war demands a military response, not a judicial one") and John Lancaster

named a “war on terror,” was to be purely strategic. For instance, if the enemy is using legal means in an asymmetrical war, how can we fight back? The answer was: adherence to LOAC to the extent that it reflects “our” values, and to the extent that it pragmatically supports the aims of war, as interpreted by the political branch.⁹² Dunlap expresses support for the “vastly greater powers” arrogated to the executive by the legislature “at the expense of what heretofore were accepted individual rights.”⁹³

A couple of observations can be made concerning the development of lawfare. Unlike Forman and the other critics of the “law of empire” as being continuous with the war paradigm, Dunlap embraces this continuity, “law as war,” as necessary in a time of war. Law must not only be reduced to its formal element but, even then, be dispensed with if it does not serve the aim of the commander: “[T]his paper is intended as a reminder that those interested in promoting law as an ameliorator of the misery of war are obliged to ensure it does not become bogged down with interpretations that are at odds with legitimate military concerns.”⁹⁴ Whence, “LOAC must remain receptive to new developments, especially technological ones that can save lives—even if that means breaking old paradigms.”⁹⁵ The paradigm in question is the already-attenuated delimitation of law in relation to imperial power and its wars of expansion.

The 2001 essay that inaugurated the term “lawfare” was thus not only on all fours with the Bush Doctrine⁹⁶—and, as commentators subsequently noted, was widely adopted by officials within the administration.⁹⁷ It also seemed to insist upon a moral element to the reduction of law to militarized instrument, albeit within the context of “war,” which itself depended upon a successful instrumentalization of the destabilized border between war and not war. It is this element, this valuative “center of gravity,” as Dunlap characterizes it in the subsequent essay,⁹⁸ which indexes an interest-

and Susan Schmidt, *US Rethinks Strategy for Coping with Terrorists*, WASH. POST, Sept. 14, 2001, at 9.)).

⁹² *Id.* at 19.

⁹³ *Id.* at 18.

⁹⁴ *Id.* at 20.

⁹⁵ *Id.*

⁹⁶ For a discussion on The Bush Doctrine, see Charlie Gibson’s Gaffe, THE WASH. POST, Sept. 13, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/12/AR2008091202457.html/>.

⁹⁷ See, e.g., David Luban, *Lawfare and Legal Ethics in Guantanamo*, 60 STAN. L. REV. 1981, 2021 (2008) (“Jack Goldsmith’s recent memoir of his service in the Bush administration confirms that the administration accepts the lawfare theory.”); See also, Major General Charles J. Dunlap, Jr. & Major Linell A. Letendre, *Military Lawyering and Professional Independence in the War on Terror: A Response to David Luban*, 61 STAN. L. REV. 417 (2008); see also, Michael P. Scharf, *International Law and the Torture Memos*, 42 CASE W. RES. J. INT’L L. 321 (2009).

⁹⁸ See Dunlap, *supra* note 1.

ing albeit counterintuitive dimension to lawfare as border concept. The radical reduction of law to pure strategic valuation registers law's inherent vacuity. As such, lawfare exposes its conception of law to an extra-legal "critique," so to speak. For the practical consequences of lawfare as weapon/strategy of war and as strategic adherence (instrumentalization) to the laws of war have one consequence: the demolition of value, i.e., the devaluation of the other as value.

In this early essay, Dunlap defines "lawfare" as a "legal" strategy to stabilize one paradigm (war) at the expense of another.⁹⁹ The latter, if anything, is cast as a source of weakness and vulnerability. In the result, the first essay presents an interpretation of lawfare specific to its historical context in two senses. First, it captures the moment of widespread disaffection with law. The failure of international law to "save" us from 9/11 led to a sense of impatience with international law and multilateralism, whereupon the decisive, unilateral, even "imperial" action, captured by the rubric of war, became attractive and resurgent. Lawfare expresses, indeed ratifies, that sense, suggesting the pure instrumentality and subservience of law to war.

As a consequence, lawfare's meaning and signification suppress elements of the wider and ongoing debate and historical critique around the manifestation of American power in a unipolar world: for example, the fraught relationship between law and the wars of the new empire. In the second sense, "lawfare" intimates, albeit by negation, the law as bearer of value, humanitarian and otherwise; it invokes the "law-and-war" model of constraint, but only as an alternative to be rejected. In this second signification, law bears "value," but this value inheres in the aims of war itself—pursuant to the war paradigm.

In Dunlap's subsequent definition of "lawfare" in 2009, he continues the three elements or significations of the term: adherence, strategy, and valuation.¹⁰⁰ But the temporal distance from the events of 9/11 have engendered some "refinements" in the meaning of "lawfare."¹⁰¹ As I will argue in the following section, although the meaning remains "bounded," its rhetorical figuration is more contingent. This indexes the competing societal desires reposed within the law as it relates to war, and lawfare is opened up to an alternative critique.

B. *Lawfare in 2009*

In 2009, Dunlap updated his definition of the term "lawfare" in part to respond to comments and critiques after the first article received wide

⁹⁹ *Id.*

¹⁰⁰ Dunlap, *supra* note 3, at 35.

¹⁰¹ *Id.* at 35.

circulation and attention. As noted in the previous section, his earlier definition went as follows: “[Lawfare is] the use of law as a weapon of war” and, more specifically, “a method of warfare where law is used as a means of realizing a military objective.”¹⁰² Today, he writes in the new article, “[T]he most refined definition [of “lawfare”] is ‘the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective.’”¹⁰³

Dunlap seems to be concerned with the transformative, i.e., evaluative, aspects of war and of law in his formulation of lawfare. He asks: “While recognizing the ever-present ethical responsibility to comply with the law, how does transforming adherence to law into a strategy serve the purposes of the warfighter?”¹⁰⁴ His answer: we should have more, rather than less, “lawfare.”¹⁰⁵ Hence, lawfare represents in the first instance this desire to transform adherence to law into law as a military strategy as such. Citing to Victor Davis Hanson, Dunlap notes that “the basis for the enormous success of Western militaries is their adherence to constitutional government and respect for individual freedoms, and constant external audit and oversight of their strategy and tactics. . . . In short, adherence to the rule of law does not present the military disadvantage so many assume.”¹⁰⁶

Dunlap invokes von Clausewitz¹⁰⁷ at three points within the text. The first instance recalls von Clausewitz’s well-known definition of war and relates it to lawfare: “Clausewitz’s famous dictum that war is a ‘continuation of political intercourse, carried on with other means’ relates directly to the theoretical basis of lawfare.”¹⁰⁸ This allows Dunlap to emphasize the importance of the apparent or “perceptual” adherence to law. The second mention of von Clausewitz comes shortly after the first, in a quotation from William Eckhardt as follows:

Knowing that our society so respects the rule of law that it demands compliance with it, our enemies carefully attack our military plans as illegal and immoral and our execution of those plans as contrary to the law of

¹⁰² Dunlap, *supra* note 1, at 2.

¹⁰³ The earlier definition is cited to: Dunlap, *Lawfare Today*, YALE J. INT’L AFF. (Winter 2008), at 146.

¹⁰⁴ Dunlap, *supra* note 3, at 35.

¹⁰⁵ *Id.* at 35–37 (“media events” to achieve military aims (Abu Ghraib, the detainee abuse case, is a primary vehicle for the launching of a thousand “lawfare campaign[s]”; legal process, such as contracts, lawsuits, and the “use [of] courts”; international “sanctions and other legal methodologies,” at 35; and “operational verification”).

¹⁰⁶ *Id.* at 37.

¹⁰⁷ Carl von Clausewitz was an 18th Century German military theorist who stressed moral and political aspects of war.

¹⁰⁸ Dunlap, *supra* note 3, at 35 (citing CARL VON CLAUSEWITZ, ON WAR (Michael Howard and Peter Paret, eds. and trans., Princeton University Press, 1989)).

war. Our vulnerability here is what philosopher of war Carl von Clausewitz would term our “center of gravity.”¹⁰⁹

The third mention of von Clausewitz comes further on in the text. In a discussion of the Palestine-Israel conflict as reported in a German paper, Dunlap writes: “Interestingly, *Der Spiegel* characterized the expected legal action in what are in effect lawfare terms in paraphrased Clausewitzian language as a ‘continuation of the war with legal means.’”¹¹⁰

All these, of course, speak to the use of, and adherence to, law as instrumental to war: as weapon, strategy, and substitution. But the conception of law as a “center of gravity” is interesting for what it harbors, implies, and irradiates. At the end of the article, Dunlap writes:

While it is true, as Professor Eckhardt maintains, that adherence to the rule of law is a “center of gravity” for democratic societies such as ours—and certainly there are those who will try to turn that virtue into a vulnerability—we still can never forget that it is also a vital source of our great strength as a nation.¹¹¹

The image of law as a center of gravity is both spatial—suggesting a centripetal pull of law—and temporal, referring to the mores and values of the society as a whole. It can be compared with other spatio-temporal images within the text, specifically the law and the war as separate “spaces” that must be overlaid and infused together, ensuring the sublimation of the individual will to the command of the general. The pull of the center (law) ensures that the command is a representation of “our values,” the source of “our great strength.” Thus, when the space of war becomes a “law-space,” as in the following, something more than the instrumentality of law to war seems to be at stake. Quoting Richard Schragger, Dunlap writes: “Law makes just wars possible by creating a well-defined legal space within which individual soldiers can act without resorting to their own personal moral codes.”¹¹²

Dunlap elaborates on the space metaphor, suggesting a (centrifugal) spread of law from a “center” to the further reaches of the war front: “[T]he commander [must] be concerned with legal preparation of the battles-

¹⁰⁹ *Id.* at 35 (citing William George Eckhardt, *Lawyering for Uncle Sam When He Draws His Sword*, 4 CHI. J. OF INT’L L. 431 (2003)).

¹¹⁰ *Id.* at 37 (citing Thomas Darnstadt & Christopher Schult, *Did Israel Commit War Crimes in Gaza?*, DER SPIEGEL, Jan. 26, 2009, <http://www.spiegel.de/international/world/0,1518,603508,00.html>).

¹¹¹ *Id.* at 39 (citing William George Eckhardt, *Lawyering for Uncle Sam When He Draws His Sword*, 4 CHI. J. OF INT’L L. 431 (2003)).

¹¹² *Id.* at 38 (citing Richard C. Schragger, *Cooler Heads: The Difference between the President’s Lawyers and the Military’s*, SLATE.COM, Sept. 20, 2006, available at <http://www.slate.com/id/2150050/?nav/navoa>).

pace.”¹¹³ This assures the troops of “the legal and moral validity of their actions,” Dunlap adds.¹¹⁴ Note here the transformative power with which Dunlap invests the law: from adherence as such to adherence as strategy, implicating a perceptual immanence of war within and through law. The collapse between law-space and war-space is characterized as an aesthetic project.

In the result, all three modalities of law in relation to war pursuant to the meaning and function of lawfare—law as component (weapon) of war; law as adherence by the subject to the command; and law as a spatio-temporal investment of the war-space with (moral) value—tend toward an formalization of law in relation to war. Whence, the more formalistic and aesthetic the category of law—as representing the value and legitimacy of power—the more persuasive would be adherence to law, and the deployment of law as military strategy, to justify the (military) exercise of power.

But while this latter definition remains embedded within the war paradigm that defined the earlier meaning of “lawfare” (law is instrumental to war), it subtly, and by indirection, intimates the desire for law to project an alternative matrix, one of juridical constraint. It does this, paradoxically, by defining lawfare as the delegitimation of the “value” of the other. Thus, if in the first instance lawfare delegitimizes “value” as such, then in theory it critiques the command as a purely political act not subject to the law’s review. That is, if law under the war paradigm has fully incorporated the aims of war and the voice of the commander as the vehicle of “my” value and “my” virtue, then lawfare implicitly critiques this—and thereby the war paradigm within which this view is inscribed—through its apophatic¹¹⁵ conceptualization of law as an instrument of de-valuation, or negation, as such.

This, at least, is the theory, i.e., that lawfare by a kind of negative imaging of law as value represents an alternative to the determinate view of law in relation to war. What is proposed here is not that Dunlap sets out to claim a distinction from the “necessity” of law’s suppression within war—Dunlap makes a much clearer statement along those lines in the first definition. Rather, an analysis of the rhetoric within which he “refines” his definition suggests that law, reduced to an aesthetic – or, in theological terms, an apophatic—category, registers its central valuative vacuity. As the critiques in the previous section (Part II) indicated, this delivers law to strategic instrumentalization by all parties for their own advantage. Lawfare is one such instance, deploying law as a weapon of war and an “instrument” of strategic adherence. But it also intimates an interruption to what seems an

¹¹³ *Id.* at 37.

¹¹⁴ *Id.* at 38.

¹¹⁵ Apophasis is a theological term, generally meaning a knowledge of God through negation (literally, an “un-saying”). THE NEW WESTMINSTER DICTIONARY OF CHRISTIAN SPIRITUALITY 117 (Philip Sheldrake ed., 2005).

inevitable construction of war by law. By implication, lawfare interferes with the desire for unlimited expansion characteristic of the law of empire in its transcription as the law of war (war paradigm). In short, the aestheticization of law by war, so to speak, confirms the conception of lawfare as border concept and, thereby, the potential for relation beyond the bounded and fixed confines of law and/as war.

What, however, does a “relational” concept of law involve, particularly as this would seem to implicate an “outside” of law? Is there such a domain? In the final section, Part IV, I entertain a thought experiment, whereby lawfare as a border concept is analogous to various threshold concepts in other domains,¹¹⁶ such as theology and psychoanalysis.¹¹⁷ In this way, I hope to show what lawfare, as a concept situated between law and war, as well as located outside of the discourse at the same time, might provoke in thinking about the parameters of the law/war matrix. I suggest such an experiment is already implied by lawfare as linguistic desire in relation to the new phase of the old wars that gave birth to the term, and in relation to other wars and occupations that the term might reference in the future.

IV. LAWFARE AS PASSAGE CONCEPT (A BRIEF PSYCHOANALYTIC INTERPELLATION)

Under the law-as-war paradigm, lawfare extends and enhances war’s juridical and moral legitimacy as such through the use of law to extend or contract the boundary between war and not-war. Likewise, the instauration of war-value as a “center of gravity” to lawfare—deployment of law within, and as, war—extends or contracts the boundary between law and not-law. Both discursive movements, i.e., extensions and contractions, inhere in a determinate, or bounded, view of the interrelationship and enmeshment between law and war. That is, law/war is, or is not, X, at a fixed point along a continuum, the border between them moving, like a chess piece, according to the success or failure of a strategic (and partisan) legal argument or military campaign.

¹¹⁶ Domains not discussed in this article might include, for example, sociology and anthropology. See, e.g., Scott Atran & Robert Axelrod, *Why We Talk to Terrorists*, N.Y. TIMES, June 30, 2010 (The authors counter the legal presumption, per the recent U.S. Supreme Court holding in *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705 (2010), that “any ‘material support’ of a foreign terrorist group, including talking to terrorists or the communication of expert knowledge and scientific information, helps lend ‘legitimacy’ to the organization.” The authors suggest that whilst this must sometimes be true, “American law has to find a way to make a clear distinction between illegal material support and legal actions that involve talking with terrorists privately in the hopes of reducing global terrorism and promoting national security.” The authors are from anthropology and political science, respectively).

¹¹⁷ But see, e.g., Susan R. Schmeiser, *Romancing the Family: Tribute to Eve Kosofsky Sedgwick*, 33 HARV. J. L. & GENDER 327, 336 (2010) (cautioning against “the quest for a more exalted discipline for the study of law”).

In a sense, Dunlap's project, i.e., "lawfare," suggests the extension of the war paradigm through the dilation, rather than the contraction, of the use of law, both in response to the enemy's lawfare campaigns (attempts to delegitimize the U.S.'s war aims and conduct), and as an expansion and legitimation of the war aims as such. The question then becomes whether lawfare can be conceptualized to effectuate an opposite strategy, thought, or result. I have argued that an analysis of Dunlap's meaning and the significations of the term lawfare would suggest that yes: lawfare, unlike the traditional law/war topology from which as language it derives, indexes something beyond the confines of that bounded discourse. I turn briefly, and by way of conclusion, to psychoanalysis, in an attempt to excavate that extra-discursive and relational sense projected by the term "lawfare."

Previously, I suggested that lawfare as a border concept enabled a view of its tertiary intimation, beyond "law" and "war" as a fixed, dyadic fatality. The metaphor I would suggest further, however, might be of lawfare as a passage. This gets to the sense of its projection beyond merely intimating a "third way," and highlights its potential as an escape or terminus, a result different from the war paradigm to which law is captive—or, put otherwise, the law paradigm through which war is constitutive. It is as passage that lawfare might borrow by analogy from the insights of psychoanalysis.

The irony, or paradox, is that the move from a bounded sense of law to a relational conception actually limits what law is. The bounded conception, with its signification of law at fixed points along a continuum, is characteristic of the expansive war paradigm as, according to Witt, the law of empire.¹¹⁸ A relational jurisprudence, as suggested by a radical reading of law through the lens of theology or psychoanalysis, has already limited itself by "relating" to, i.e., by requiring the appearance of, the other.

A relational theory does not deny the violence of law.¹¹⁹ To the contrary, relationality accepts, as Gillian Rose puts it, that both self and other are "equally enraged and invested" in the moment of law's mediation of

¹¹⁸ See also, HARDT & NEGRI, *supra* note 36, at 12 (by way of analogy, on war and empire, stating that "[t]he traditional concept of just war involves the banalization of war and the celebration of it as an ethical instrument, both of which were ideas that modern political thought and the international community of nation-states had resolutely refused. These two traditional characteristics have reappeared in our postmodern world: on the one hand, war is reduced to the status of police action, and on the other, the new power that can legitimately exercise ethical functions through war is sacralized.").

¹¹⁹ See, e.g., SLAVOJ ŽIŽEK, *VIOLENCE: SIX SIDEWAYS REFLECTIONS* 195 n.17 (Profile Books 2008) (referencing the German word *gewalt*, meaning both 'authority' or 'established power;' and the English phrase 'to enforce the law,' "which suggests that it is impossible to think about the law without referring to a certain violence, both at the origin, when the law is first created, and repeatedly, when the law is 'applied'").

desire.¹²⁰ The difference, then, between a determinate view and a relational view is one of recognition. We see law in relation to war more objectively, as a productive instrument, and so we can think law otherwise.

Kathryn Tanner, a theologian, expresses a similar problem within Christian thought. Tanner notes that in traditional theology, “[H]uman consciousness is the image of God all by itself, in an ideally self-enclosed self-sufficiency—e.g., when the self is knowing, loving, or remembering only its own pure productions.” Tanner then writes: “The alternative would be to consider human nature an essentially relational affair, indistinct apart from and clearly definable only in terms of its determination by what it is related to. Human beings would therefore become the image of God only in an actual relationship with God, bringing with it the only real correspondence with divine life and action to be found in human existence.”¹²¹

Relational theory suggests an essential malleability of thought. In theology, this is apposite to an uncertainty of how one comes to “know” God, as expressed within the apophatic tradition.¹²² If humans are made in His image, then the production of a self through the recognition of self as image of an incomprehensible other is already both a saying and an unsaying, an in-determination of the self in relation to knowing the unknowable. But this comes about through relation, rather than solipsism.¹²³ Tanner suggests this in the following terms: “[Humans] are the mirror of whatever it is upon which they gaze. They take their identities from the uses to which they

¹²⁰ Kathryn Tanner, *In the Image of the Invisible*, in *APOPHATIC BODIES: NEGATIVE THEOLOGY, INCARNATION, AND RELATIONALITY* 119 (Chris Boesel & Catherine Keller eds., 2010).

¹²¹ *Id.* at 119.

¹²² See, e.g., Mary-Jane Rubenstein, *Dionysius, Derrida, and the Critique of “Ontotheology,”* 24:4 *MODERN THEOLOGY* 725, 731 (Oct. 2008) (comparing apophaticism to deconstruction.). Although ultimately different, Rubenstein notes that central to both, and different then from the “kataphatic” tradition implied within ontotheology, is “the Dionysian God [as] triune [in a hierarchical sense]; that is, self-identical only by means of differentiation and relation.” Furthermore, apropos of relationality, Dionysius’ God “refuses to stand still like a good metaphysical lodestone; in fact, it defies the logic of rest and motion, internality and externality. This is the reason the soul must abandon itself as a knowing self before it can be lifted to union with God.” *Id.* at 728. The juxtaposition, then, is between relation as movement, and certainty as stasis, whereupon the apophatic God “refuses to be conceptualized. Rather than securing knowledge, he disables it; rather than affirming human subjectivity, he dismantles it.” *Id.* at 731.

¹²³ See, e.g., Véronique Voruz, “That which in life might prefer death”: From the death drive to the desire of the analyst, in *LAW AND EVIL: PHILOSOPHY, POLITICS, PSYCHOANALYSIS* 273 (Ari Hirvonen & Janne Porttikivi eds., 2010). For Kant—as described by Jacques-Alain Miller—“the subject is speaking to himself, enunciating a law that terrorizes him.” *Id.* Lacan looks to Sade for an explicit “distinction between subject and other.” *Id.* In short, “[t]he Kantian subject may be free from objective causality, the scientific determinism, but Lacan demonstrates that it is not free from the object-cause of the moral law that it gives itself.” *Id.*

put themselves, like vessels that gain their character from whatever they are made to carry.”¹²⁴

As previously noted, “lawfare” signifies law as a central valuative emptiness, a “center of gravity” as sheer strategy (law deployed as strategic adherence, as weapon, and as devaluation).¹²⁵ Although this conception endorses the war paradigm, it also functions as the basis of critique, since it is here that a methodology of relation might be articulated. Thus, the proposal is for a theory of intersubjective exchange¹²⁶ a process of subjectivation that takes account of situated experience. In the context of psychoanalysis, this involves the temporal and contingent “dialogue” between the analyst and the analysand at the level of desire—although not desire for each other. Lawfare as passage might, by analogy, involve a similar iteration at the level of valuation, with law as the medium of exchange.

Véronique Voruz describes Jacques Lacan’s development of an ethics of the psychoanalytic practice.¹²⁷ Voruz notes that for psychoanalysis to work, it must be conceived as potentially coming to an end, i.e., it must be “terminable.”¹²⁸ For this to occur, the analyst must substitute and “incarnate” the object-cause of the analysand’s (patient’s) desire with the “experienced”¹²⁹ or analyzed desire of the analyst. This process of incarnation,

¹²⁴ Tanner, *supra* note 120, at 123–24. Tanner adds that, “[h]uman nature adapts itself to the direction of thought and it changes according to whatever form it is inclined to by the impulse of free choice.’ This means . . . that [h]uman nature is in fact like a mirror, and it takes on different appearances according to the impressions of free will.’ . . . Reflective capacities of self-judgment mean humans can try to reshape in a self-critical fashion even those desires they cannot help having by nature.” *Id.* at 124 (quoting Gregory of Nyssa, *Fourth Homily, in COMMENTARY ON THE SONG OF SONGS* at 92 (Casimir McCambley trans. and intro., 1987)).

¹²⁵ Dunlap, *supra* note 3, at 35.

¹²⁶ See, e.g., Grant Kester, *Workshop Notes from the Monongahela Conference on Post-Industrial Community Development*, Carnegie Mellon University (Oct. 23–25, 2003), <http://moncon.greenmuseum.org/papers/kester.pdf> (last visited August 28, 2010) (opposing the hermeneutic tradition’s “arid proceduralism that exiles the physical, somatic, and non-verbal components of collaboration” with “the vulnerability of intersubjective exchange” as the basis for a concrete “dialogic interaction,” within the context (for Kessler) of the collaboration between artist and co-participants within collaborative projects).

¹²⁷ See Voruz, *supra* note 123.

¹²⁸ Voruz, *supra* note 123, at 275. After reduction of multiple to “fundamental” fantasy, “The analyst can then incarnate the object-cause of the analysand’s desire, a desire which like all desires is *structurally perverse*, and so expose the jouissance of the analysand: by incarnating the object-cause of the analysand’s desire, *and not of his or her fantasy*, the analyst incarnates *castration* in order to separate the analysand from his or her deleterious, mortifying jouissance. (Castration of course is to be understood as *a limit to jouissance*.)” (italics in original) (internal citations omitted). *Id.*

¹²⁹ THE SEMINAR OF JACQUES LACAN, BOOK VII, THE ETHICS OF PSYCHOANALYSIS, 1959–1960 300 (Jacques-Alain Miller ed., Dennis Porter trans., Routledge, 1992) *in Id.* at 260. The full quotation from Lacan comes at the beginning of Voruz’ essay as an epigraph: “What the analyst has to give, unlike the partner in the act of love, is something that even the most

with theological echoes (i.e., the body of Christ), creates the condition for the “castration”¹³⁰ or limitation of the analysand’s “jouissance.”¹³¹ The language is technical,¹³² but it points to a basic problem of how the analysand is to live with her “symptom,” the thing about her that makes her who she is, that shows itself repeatedly as marking her as “this” rather than “that” person. As Jacques-Alain Miller puts it, “A person’s symptom is his or her true identity.” He continues: “Lacan said that the symptom of certain persons could be the most real thing they possess. This illuminates for us how the symptom is associated with the real.”¹³³

beautiful bride in the world cannot outmatch, that is, to say, what he has. And what he has is nothing other than his desire, like that of the analysand, with the difference that it is an experienced desire.” *Id.*

¹³⁰ Voruz, *supra* note 123, at 275. After reduction of multiple to “fundamental” fantasy, “The analyst can then incarnate the object-cause of the analysand’s desire, a desire which like all desires is *structurally perverse*, and so expose the jouissance of the analysand: by incarnating the object-cause of the analysand’s desire, *and not of his or her fantasy*, the analyst incarnates *castration* in order to separate the analysand from his or her deleterious, mortifying jouissance. (Castration of course is to be understood as *a limit to jouissance*.)” (italics in original) (internal citations omitted). *Id.*

¹³¹ See, e.g., Jacqueline Rose, *Introduction—II*, in JACQUES LACAN, *FEMININE SEXUALITY: JACQUES LACAN AND THE ECOLE FREUDIENNE* 34 (Juliet Mitchell & Jacqueline Rose eds., Jacqueline Rose trans., 1985) (“For Freud . . . all instincts are characterized by their aggression, their tenacity or insistence (exactly their *drive*). It is this very insistence which places the drive outside any register of need, and beyond any economy of pleasure. The drive touches on an area of excess (it is ‘too much’). Lacan calls this *jouissance* (literally ‘orgasm,’ but used by Lacan to refer to something more than pleasure which can easily tip into its opposite.)” (italics in original). See also Voruz, *supra* note 123, at 267 (“[W]hen Freud apprehends the ethical concepts of conscience and morality, he does so in connection with the beyond of the pleasure principle. In so doing, he demonstrates the equivalence between the superego and the moral law, which are modalities of jouissance.”); Voruz, *supra* note 123, at 269 (“In *Seminar VII* Lacan ciphers the beyond of the pleasure principle in the equation *jouissance = mal* (the French term *mal* means both evil and suffering).” (italics in original)).

¹³² “Castration” refers to the interruption of the analysand’s fantasy, which in turn subtends the analysand’s trauma. The trauma’s longevity is in some sense pleasurable, hence the word “jouissance” to refer to the conflicted relationship (pleasure/orgasm in pain) between patient and trauma. The “symptom” is borne of this conflict and leaves its mark on the patient, becomes part of who she is. Thus, in analysis, castration occurs when the analyst penetrates and interrupts the trajectory of the patient as fixated on the very source of her unconscious desire to prolong and enjoy her pain. This “limit” to the jouissance enables the patient to see, more objectively, what she is doing, who she “is,” in a sense, and to manage her symptom. This will enable her to live according to the risk of her desire, now recognized, rather than subject to her “symptom.”

¹³³ Jacques-Alain Miller, *The Symptom: Knowledge, Meaning and the Real*, THE SYMPTOM: ONLINE JOURNAL FOR LACAN.COM, http://www.lacan.com/symptom7_articles/miller.html (last visited Sept. 18, 2010).

As in theology, the concept of “incarnation” required by the analyst to interrupt the patient’s traumatic fantasy¹³⁴ involves a kind of imaging of the “incomprehensible”¹³⁵ other within analysis. Through the castration, the analysand’s symptom can then be managed, in its turn, as experienced desire rather than limitless fantasy. The analytical experience is contingent, uncertain, open to possibilities, and radically impure, because the (ethical) analyst inserts herself, introduces her own “jouissance,” her own desire for limitless pleasure—her own “way of life”—within the analysis. By extension, “value” at the center of law may likewise be conceptualized as impure and contingent, an interruptive variation on the formal-aesthetic category through which lawfare sees law as repository of value.

A second salient point concerning the “passage” metaphor between psychoanalysis and lawfare also hinges on this concept of incarnation: the sense in which the transformation inherent to the temporal experience is corporeal, involving bodies and flesh. Lawfare, as an expression of the asymmetry of modern war, is precisely the “weapon” of a weapon-less other—compared at least to a weaponized airspace/perimeter. Lawfare is both discursive, involving speech acts, and a concretized *de*-termination (unsaying) of the fate of the body in view (the enemy noncombatant; the detainee in Abu Ghraib; the civilian “collateral damage” at the border between an act of war and a crime; etc.). Whence, lawfare as critique of the war model, by analogy to the psychoanalytic experience, is the recognition of the body at the center of law’s vacuity. In a sense, the genesis of the term, even as it points to the normative reduction of law to formal instrument within the war paradigm, also points, like the “terminus” of the analytic experience, to the limits of war. It points to the carnal horizon of war’s meaning and value.

Thus, the end of psychoanalysis, through incarnation of the object-cause of the other’s desire, creates the condition for a “new modality of satisfaction” that is singular, i.e. specific to the analysand precisely because it is the analysand’s desire, and the superegoic jouissance at the core of her

¹³⁴ Voruz, *supra* note 123, at 267 (“In the monist perspective Lacan used the term ‘fantasy’ to ‘concentrate everything that pertains to libidinal satisfaction in Freud.’ All modalities of libidinal satisfaction (including masochism and sadism) are thus referred to the imaginized version of object *a* organizing the oral, anal, scopic and invocatory drives. This is why Lacan’s reflection on ethics in ‘Kant with Sade’ takes the fantasy as axiom of the subject’s satisfaction.”) (internal citations omitted).

¹³⁵ See, e.g., Tanner, *supra* note 120, at 118 (“The intent of this essay is to move theological anthropology away from this sort of fixation on a fixed human nature, this preoccupation with established capacities and given identities, by diagnosing its theological underpinnings, and by developing an alternative account of the way humans image God in conversation with early Christian thought. I show, thereby, how an apophatic anthropology is the consequence of an apophatic theology. If humans are the image of God, they are, as Gregory of Nyssa affirmed, an incomprehensible image of the incomprehensible.”).

fantasy.¹³⁶ Voruz writes: “Unlike what the neurotic secretly hopes for in analysis, the limitlessness of *jouissance* is the true horror, not castration, and it is the anxiety generated by that limitlessness that prevents the subject from *acting out of desire*.”¹³⁷

Although the analogy is not perfect, this idea of limitlessness and the anxiety it generates recalls the above discussion of lawfare’s projection of the war paradigm, and specifically a “war on terror,” as perdurable as empire. Lacan’s theory offers a way to think of “desire,” specifically of the analyst in relation to the patient, as capturing the capacity to reproduce lawfare as an alternative to the traditional law/war framework. Like the “neurotic” in Voruz’s example, we may secretly hope for “the limitlessness of *jouissance*,” the fantasy of unlimited power; this, certainly, was Forman’s concern in the immanentization of the war metaphor as it traversed the border between “*lex specialis*” and “*lex generalis*.”¹³⁸ Likewise, Williams critiqued a “war” against terrorism as a permanent state of emergency, reproducing law as (mere) “legality.”¹³⁹ And it was intimated in Dunlap’s solution to the problem of the lawfare campaign of the other: “[W]eaponization of . . . space.”¹⁴⁰ But through the ethical production of an “experienced desire,” we might come to see illimitable *jouissance* as the true horror.

V. CONCLUSION

This Article began as a rhetorical analysis of “lawfare”: Dunlap’s name for a certain kind of warfare characteristic of the modern, post-9/11 U.S. foreign military engagements. I understood Dunlap to mean specific things by this term: “lawfare” is a strategy of war, and this might take the form of deploying law as a weapon of war, or of the “perception” of U.S. military compliance with the relevant laws of war in order to combat the “lawfare campaigns” of the enemy (i.e., the enemy’s use of law to combat the allies in an asymmetrical armed conflict). As strategy, also, lawfare instrumentalized the idea of value at the center of legal adherence. I suggested further, however, that the term came out of a quite specific historical context, a period when the discourse on law and war recognized a certain insta-

¹³⁶ Voruz, *supra* note 123, at 275 (“As such, the analysand may hope to substitute his or her happiness in suffering/evil for a new modality of satisfaction, involving identification with his or her symptom that will provide a *jouissance* extracted from the fantasy.”).

¹³⁷ *Id.* at 275 (italics in original). For Lacan, the aim is to act “out of desire”—see, e.g., Žižek, *supra* note 119, at 195 (“The focus of Lacan’s interest rather resides in the paradoxical reversal by means of which desire itself (i.e. acting upon one’s desire, not compromising it, can no longer be grounded in any ‘pathological’ interest or motivation, and thus meets the criteria of the Kantian ethical act, so that ‘following one’s desire’ overlaps with ‘doing one’s duty.’”)) (internal citations omitted).

¹³⁸ See Voruz, *supra* note 123.

¹³⁹ Williams, *supra* note 50, at 381.

¹⁴⁰ Dunlap, *supra* note 1, at 16 (italics in original).

bility, as Berman described.¹⁴¹ That debate in turn was within the context of an analysis of American power in a unipolar world, the meaning of its interventions, and the categorization of its actions abroad, particularly against terrorism, as “war.”

The Article then looked at the meanings and significations ascribed to the term by its architect, Dunlap, in two essays divided in time by the beginning and the “end,” at least nominally, of the “war on terror.” I looked at the texts not only for what they signified explicitly, but what they implied, for their textual commentary on the discourses of war and law, and on the exercise of hegemonic power defined, by some commentators, as evidence of a new imperial enterprise or ambition (and pursuant thereto, hegemonic law as a law of empire). From my analysis, I concluded that lawfare seemed ostensibly to ratify the ascendancy of a war paradigm.

But within the textual interstices, so to speak, “lawfare” also seemed to represent something beyond its own semantic intentions. Indeed, lawfare suggested, in its neologistic form, something beyond the determinate law-war framework. My attempt in Part IV of the Article was to extract, through a thought experiment, what it would mean to use “lawfare” to think beyond “law and/as war” as a bounded and rather fixed discourse on violence.¹⁴² This was not intended to deny the violence of both law and of war as such, or inter se. Rather, the aim was to suggest that lawfare’s linguistic innovation signifies itself as a passage beyond its discursive confines. Within the psychoanalytic context (as well as theological, in a different register), thinking past the limitlessness of the self’s desire, or of the self’s desire as unlimited—thinking precisely into a condition of (self-) confinement, self-limitation—is the imaginative terminus of the self as discursive object. Put otherwise, it is the achievement of political (i.e., participatory) subjecthood.¹⁴³ By analogy, if “lawfare” expresses the tendency of law to “think” war, to *de-termin*e itself as war, then lawfare as passage adjacent to its intentional meaning posits the capacity for law to think otherwise, or relationally.

But the departure from a specifically juridical analysis of lawfare, a dialogic interaction with other disciplinary thought, is already an extra-judicial encounter that interrupts the bounded perception of law that, I suggest, pervades and perpetuates the status quo. Regarding a relational theory of law, Mirza writes:

¹⁴¹ See Berman, *supra* note 6.

¹⁴² See *supra* Part IV.

¹⁴³ Voruz, *supra* note 123, at 277 (“There is a very clear, absolutely crucial indication on the place of jouissance at the end of analysis in *Seminar XXIV*: jouissance is obtained through identification with one’s symptom. And ‘to know how to make do with one’s symptom, this is the end of analysis’ (16 November 1976).”) (quoting Lacan, on the inclusion of jouissance in the definition of the end of analysis) (internal citations omitted).

[L]aw emerges as central to the formation of knowledge and social organization—to the social bond—and as a ‘mold or model on the basis of which a series of other knowledges—philosophical, rhetorical, and empirical’—develop. Law’s responsive dimension and illimitability are the domains where aspects of society can be “interrupted and unmade, reiterated and made anew.”¹⁴⁴

The advocacy of this Article has been to think of, and indeed to deploy, lawfare as a means of interrupting and remaking the thought of law, within the shadow of the war paradigm under which we live.

¹⁴⁴ Mirza, *supra* note 9, at 618 (internal citations to Fitzpatrick and Golder omitted).