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“Anticipatory Self-Defense” and Other Stories

Jeanne M. Woods* and James M. Donovan**

I. PROLOGUE

April 2003: confidential complaints are made about American treatment of Iraqi prisoners by the International Red Cross; May 2004: torture scandal is exposed in the pages of the *New Yorker*;[1] August 2004: the last of four devastating investigative reports is issued.[2] The lurid details of Abu Ghraib appalled the world. As the United States waged a relentless “war against terrorism” and sought to install American-style democracy worldwide, photographic images of American soldiers subjecting Iraqi prisoners to cruel and sadistic abuse, much involving sexual humiliation, circulated around the globe. These revelations, as one commentator observed, “contradict everything this administration has invited the public to believe about the virtue of American intentions and America’s right, flowing from that virtue, to undertake unilateral action on the world stage.”[3]

Even as more incriminating details emerge, the ultimate cause of these gross deviations from domestic and international law remains obscure. Nothing more than “‘Animal House’ on the night shift”?[4] Random acts of bored and unsupervised grunts? Few are satisfied with such explanations.

This Essay posits an interpretive framework within which to understand these events. We argue that the specious justification for the invasion of Iraq—a war based on a pretext of anticipatory self-defense—necessarily exacerbates the inherent tendency of war to dehumanize and humiliate the enemy. This tendency is particularly evident in the variant of anticipatory self-defense that we have denominated as “capacity preemption,” a type of claim that by definition depends upon characterizations of the opponent as utterly inhuman.

The process of dehumanization begun in the preparatory stages of this type of war leads inevitably to the torture chambers of Abu Ghraib. It was launched in May 2002, when President George W. Bush announced a bold new National Security Strategy, proclaiming: “We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries.”[5] In these words, a poignant story unfolds: *A valiant people are confronted by ruthless, cunning enemies. An urgent summons is issued, heralding a struggle of epic proportions. A rousing appeal for a*

new strategy is trumpeted. Yet the call is tempered—framed not as a radical departure from prevailing norms, but as merely a prudent adjustment to a new reality. The Bush Doctrine tells a timeless story of self-defense.

This story is shaped by an identifiable and predictable narrative structure, one that is able to transform the morally outrageous—an unprovoked aggressive war—into the legally reasonable. Utilizing the theoretical tools of anthropological structuralism, our analysis examines the rhetorical use of the anticipatory self-defense narrative to veil hidden agendas of domination and conquest.

II. THE TYPOLOGY OF SELF-DEFENSE

"[S]torytelling can change the world."[6]

The story that President Bush invoked in his National Security Strategy builds upon the conceptual confusion that surrounds self-defense discourse generally within international law. Commentators typically bifurcate the concept of self-defense, distinguishing only between a use of force to repel an armed attack and a use of force to intercept an attack before it actually occurs.[7] This classification, however, fails to encompass the type of claim advanced in the Bush Doctrine. A more accurate and useful typology constructs self-defense claims on a continuum of three distinct, yet overlapping categories: 1) threat interruption; 2) threat preemption; and 3) capacity preemption.

Threat interruption—a response to an active threat—is the prototypical example of the self-defense claim,[8] embodied in the customary rule preserved in Article 51 of the United Nations Charter.[9] *Capacity preemption*, at the other end of the continuum, seeks to extinguish the ability of a potential adversary to pose a threat in the future; as a legal proposition, it is virtually bereft of legitimacy as a justification for the use of force.[10] *Threat preemption*—a claim based on the need to eliminate an imminent but not yet actuated threat—lies intermediate between threat interruption and capacity preemption, and as such occupies conceptual space between and within both categories.[11] This type of claim is illustrated by the classic *Caroline* formulation of "a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation."[12]

The bivocality of threat preemption obscures the fragile boundaries separating the self-defense categories, providing ample space for rhetorical manipulation. Because the typological differences between capacity preemption and threat preemption are of degree and not of kind, the former can be cloaked in the presumptive

legality of the latter by telling the story in the right way.

But at the level of consequentialist outcomes, capacity preemption is radically different in kind, not degree. While objective standards exist for threat interruption (the armed attack) and threat preemption (the imminent threat), capacity preemption relies on a purely subjective assessment based on predictions about some future eventuality. Because it is justified by perceptions not susceptible to objective verification, capacity preemption has the potential to unleash unrestrained violence subject to no inherent limitation.[13] Moreover, as capacity preemption has no principled stopping point, the logic that makes it applicable in any one circumstance can apply to any other, at any time, creating a Hobbesian state of international affairs.[14]

Rhetorically, those seeking to justify an act of capacity preemption must exploit its close typological relationship to the more acceptable category of threat preemption. In the absence of any intrinsic criteria, the legitimacy of resort to military force depends upon the ability of the narrative to forge the appropriate links.[15]

III. WEAK BOUNDARIES SEPARATE THE SPECIES OF SELF-DEFENSE

"We will disrupt and destroy . . . the threat before it reaches our borders."[16]

Although it remains a contested legal norm,[17] the threat preemption claim offers rich potential for exploitation in the persuasive discourse required to legitimate acts of capacity preemption. Threat preemption's conceptual ambiguity facilitates the rhetorical transformation of an illegal act into one permitted under international law.[18] Once the middle ground on the continuum has been occupied, the characterization of an act can move toward either extreme, without risk of a logical *non sequitur*. This is illustrated by the narrative of the Iraq invasion, a tale couched solidly in terms of threat preemption: *An evil, mad villain possessed nuclear, chemical, and biological weapons of mass destruction that he could deploy quickly, indeed—in one telling—in as little as forty-five minutes. A jittery post-9/11 world could not wait for indisputable verification. A courageous leader acted swiftly to curtail an imminent threat. Mission accomplished.*

As facts began to unravel the story,[19] the narrative blurred incrementally, morphing from threat preemption to capacity preemption.[20] The President countered that "Baghdad had possessed 'the *intent* and *capability* to inflict great harm.'"[21] Next, the allegation that Saddam Hussein harbored intent to do the United States harm was abandoned: "He's a dangerous man. He had the ability to make weapons, at the very

minimum."[22] Ultimately, any distinction between Iraq's actual possession of weapons of mass destruction and its desire eventually to acquire them is deleted from the narrative.[23] The rhetorical regression from threat preemption to capacity preemption could be accomplished with at least the veneer of reasonable discourse because the story began by occupying the ambiguous middle ground.

IV. The Ideology of Conquest

"[W]e are ultimately fighting for our democratic values and way of life."[24]

Resort to capacity preemption is rooted in the ideology of conquest, the worldview of domination and exploitation of the lands, resources, and markets of vulnerable populations. This ideology is inextricably woven into the international legal imagination. The birth of international law corresponds to the era of European colonial expansion; thus, one of the first tasks of the law of nations was to develop the rules of engagement for the conquest of Asia, Africa and the "New World" by the rival empire-building powers.[25]

Western theorists from the 15th through the 19th centuries crafted and articulated the ideological justifications for the conquest of "uncivilized" peoples.[26] "Civilized" was defined in accordance with the religious beliefs, cultural traditions and political organization of European society.[27] A social structure that was not organized around the ownership of private property, and did not conform to the accepted definition of a "state"—namely, one whose territory was not formally demarcated, whose population was nomadic, or whose government was not centralized—was *ipso facto* uncivilized, with all the consequences that such a judgment entailed. As Justice Joseph Story noted, "[a]s infidels, heathens, and savages, they were not allowed to possess the prerogatives belonging to absolute, sovereign, and independent nations."[28]

Central to the legal discourse that legitimized the colonial project were the doctrines of discovery and conquest. These doctrines were constructed on notions of racial and cultural superiority, assumptions of a "civilizing mission" by Christian Europe, and innocuous-sounding liberal theories of property rights.

Leading figures in the Church aggressively promoted the forcible dispossession of indigenous peoples' lands in the "New World." In *Inter Caetera*, or the Bull of Demarcation, issued shortly after Columbus' voyage to the Americas, Pope Alexander VI proclaimed the newly "discovered" lands to be the property of the Spanish and the Portuguese, allocating the territory between the two countries. In 1516, Thomas More

asserted a right to wage war "[i]f the natives won't do what they're told," especially if they deny settlers their "natural right to derive nourishment from any soil which the original owners are not using themselves."[29]

Dominican scholar Franciscus de Victoria sought to mitigate the harsh rhetoric used by the religious and secular authorities of the time to claim rights to seize land, to pillage, and to enslave the native population. While recognizing the formal equality of the Indians under natural law, however, Victoria posited a law of nations establishing universally binding norms that operated to dispossess the indigenous peoples. These norms included the right of Europeans to travel and reside in Indian lands;[30] to engage in trade and make a profit in their territory;[31] to exploit their gold and other natural resources;[32] to acquire citizenship;[33] and to proselytize.[34] Since "civilized" (European) nations accepted these norms, the consent of the native peoples was unnecessary; indeed, dire consequences attended any failure to acknowledge these rights: "[W]hen the Indians deny the Spaniards their rights under the law of nations they do them a wrong. Therefore, if it be necessary, in order to preserve their right, that they should go to war, they may lawfully do so."[35] Pursuant to the rights of war, the Europeans could lawfully seize the natives' lands and enslave them.[36]

Thus, while purporting to reject the prevailing theory that territory could be acquired by discovery, Victoria actually augmented that theory with the principle that discovering nations acquire an exclusive right vis-à-vis other nations to subdue and conquer the natives, encouraging more violence against them. He even claimed a right to conquest in the name of humanitarian intervention:

> If the Indians . . . prevent the Spaniards from freely preaching the Gospel . . . the Indians would be doing an injury to the Spaniards . . . and these would have a just cause of war. [A]n obstacle would [also] be put in the way of the Indians themselves. . . . Therefore, in favor of those who are oppressed and suffer wrong, the Spaniards can make war . . . seizing the lands and territory of the natives. . . .[37]

And, conjecturing that the natives, being "dull and stupid," might resist their own salvation, Victoria argued that the Spanish aggression would constitute legitimate self-defense.[38]

Writing at the height of the Thirty Years War, Dutch jurist Hugo Grotius revived and refined the Augustinian just war doctrine relied on by Victoria. He confirmed the legality of the conquest of territory by force,[39] while calling for "moderation" in the methods of war.[40] In his seminal treatise, often hailed as the first

comprehensive exposition of international law, Grotius elaborated a theory of the origins of private property that was grounded in the seizure, occupation, and use of land,[41] and asserted a right of foreigners to take possession of uncultivated lands.[42]

A century later, while eschewing conquest as a violation of the principle of the consent of the governed,[43] John Locke rationalized the conquest of Native American lands in his theory of property and appropriation. Similarly grounding rights to land in its improvement and cultivation,[44] Locke would deny such rights to "the wild Indian, who knows no enclosure, and is still a tenant in common."[45] Indeed, within his thesis, any parcel of their land could be appropriated by improving it, even without the consent of the native inhabitants.[46] Thus, consent was not a universal value, but attached only to the "civilized" Europeans.[47]

In *The Law of Nations* (1758), Emmerich de Vattel built on Lockean property rights theories to expand the concept of *terra nullius*, whereby uninhabited land "belonging to no one" could lawfully be annexed. Vattel extended this concept to include inhabited territory which was uncultivated by its indigenous inhabitants:[48] "[I]n speaking of the obligation of cultivating the earth, ...when the nations of Europe ... come upon lands which the savages have no special need of ... they may lawfully take possession of them and establish colonies in them."[49]

Critiquing this expansion of *terra nullius*, Sir William Blackstone (1723-1780) observed:

> So long as [colonial settlement] was confined to the stocking and cultivation of desert uninhabited countries, it kept strictly within the laws of nature. But how far the seising on countries already peopled, and driving out or massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in custom, in government, or in colour; how far such a conduct was consonant to nature, to reason, or to Christianity, deserved well to be considered by those, who have rendered themselves immortal by thus civilizing mankind.[50]

And the legacy of conquest persists today. Notwithstanding contemporary norms of sovereign equality and self-determination enshrined in the United Nations Charter and numerous interpretive declarations, the formerly colonized peoples have yet to be accorded full sovereignty. As James Gathii points out, "decolonization did not imply complete self-determination ... in part because the process of decolonization was subject to a regime of international law complicit in the subjugation of non-

European people."[51] Postmodern conquest need not entail the permanent acquisition of territory or political sovereignty.[52] It is enough to secure unfettered access to vital—and finite—natural resources as well as domination over commodity and financial markets. Thus, the post-colonial discourse of conquest has been modernized: the "democratization imperative" has become the new civilizing mission; globalization has replaced the doctrine of discovery. Implemented by the West in accordance with rules rigged to further its own enrichment, this agenda is held out as the last hope for development of the "backward" peoples of the world not yet fully ensconced within the neoliberal fold. Ideally, this can be accomplished through ostensibly non-coercive instrumentalities such as the International Financial Institutions.[53] However, the ideology of conquest continues to influence the forms and discourses of international law, including those addressing the *jus ad bellum.* Thus, the discourse does not eschew the violence that has been integral to international law since its inception. The threat and use of military force remains an option to expedite the implementation of neoliberal strategies. The doctrine of anticipatory self-defense offers a means to exercise this option; it allows conquering states to cloak naked aggression in benign motives. Through this façade, deeds of conquest can be re-framed as legitimate, necessary, even laudable actions.[54]

This transformative work is accomplished through discursive strategies that reframe capacity preemption as threat preemption, thereby placing an act of aggression into an ambivalent, and at least arguably acceptable, category. The narrative remains the familiar saga of the "civilized" state, recognizable from centuries past. This narrative builds upon a collective mythology that extols the presumed virtues of the conquerors. The antagonist emerges as an alien, savage "other" with vices diametrically opposed to those of the noble invader. This is the same self-other dichotomy—a facet of the Western individualist paradigm—that provided the normative foundation for the colonial project.[55] This "other" lacks the basic human competencies of rationality and free will. Without reason, without the freedom to choose, the mere capacity to pose an imaginable threat necessarily results in its eventual realization. Thus effectively dehumanized,[56] the "other" is open to preemptive destruction that is made to appear justified, moral, and legal because military capacity has been recast as an imminent threat whose elimination is justifiable under the exigencies of threat preemption.

Through structuralist analysis we explain this metamorphosis of the dubious category of capacity preemption into the more palatable category of threat preemption. The structuralist method of interpreting myths penetrates through the surface layers of explanatory texts, revealing deeper meanings and commonalities. A fundamental feature of this method is the binary oppositions that are coded into text.[57] These

oppositions transmute the "other" into a polarized version of one's own national self-image—thus making him less than human—while demarcating the primary dimensions relevant to telling the capacity preemption story. Using modern texts to outline the form of this narrative, we apply this interpretive framework to an earlier—normatively defining—invocation of capacity preemption to illustrate the timeless application of these dehumanizing storytelling techniques, motivated by the profits of conquest and empire.

V. THE DEHUMANIZATION OF THE ENEMY

"[There are] a small number of rogue states that ... reject basic human values and hate the United States and everything for which it stands."[58]

The capacity preemption story must demonstrate that the mere capacity to wage war can be rationally construed as an imminent threat of attack.[59] To accomplish this, the narrative must close the lacunae between having the capacity to produce a weapon and having a weapon, and between possessing a weapon and using a weapon. The plot must establish that the antagonist has embarked upon a road from which he cannot veer. An alternative outcome—such as having but not using the weapon—cannot be a plausible scenario. Inverting the maxim that "ought implies can," the capacity preemption story insinuates that "can implies must."

This illusion of inevitability is achieved by a process of dehumanization. The enemy is defined, for example, as irrational (*e.g.*, President Bush's characterization of Saddam Hussein as a "madman"). Because he is not rational, his actions are neither predictable nor foreseeable, and thus his stratagems cannot be defended against by traditional means of diplomacy, intelligence gathering, negotiation and "containment," or even by forceful responses to direct provocations.

But the story must go further; it must convince the listener of the inevitability that the threat will be consummated: to have the means entails, for people like "them," the irresistible desire to use them, culminating in their actual use. For this tale to remain coherent, the character of the enemy must be radically different from that of the protagonists, the "civilized" peoples who think logically, strategically, and can be bargained with.[60]

The lack of alternative outcomes is therefore a central theme of the capacity preemption story. If the antagonist possesses free will, then the mere possession of weapons cannot foreshadow an attack. If an opponent could choose to act otherwise, the hero would then bear the burden of trying to dissuade him from their deployment.[61]

So long as this option remains open, the launching of a preemptive attack could never be warranted.[62] Therefore, the capacity preemption story depends upon depicting the enemy as incapable of acting other than belligerently, and it can accomplish that only by dehumanizing him to the point of being unable to choose to act otherwise.[63] The enemy becomes the personification of evil, overwhelmed by base and unfathomable drives rather than a fellow human being guided by rational thought and different, perhaps, but nonetheless comprehensible motives.[64]

The focus of the present study is on the narrative dimensions of self-defense claims. We identify three rhetorical strategies to dehumanize the enemy. The most direct approach is merely to attach to the opponent an inhuman label, such as "animal," "beast," or "demon." An example of this strategy comes from the experience of American soldiers as captives of the Japanese during World War II:

> Before the Japanese performed medical experiments on human guinea pigs in World War II, they named them maruta—logs of wood. The hostile imagination systematically destroys our natural tendency to identify with others of our species. . . . A full-bodied imagination would lead us to the recognition that those we are fighting against are like ourselves.[65]

By equating the prisoners with inanimate objects ("logs of wood"), the jailors removed from the captives their presumption of humanity, and thereby any rights or protections associated with that status, including decent treatment.

A second rhetorical strategy of dehumanization is to deny to the enemy essential attributes of humanness, and therefore implicitly the status of human. Sometimes this approach is as straightforward as denouncing the opponent as "irrational." As rationality is, in Western philosophical systems, the hallmark of human nature,[66] the lack of that ability stigmatizes the object as nonhuman. A third such strategy is the denigration of the enemy's religion, culture and forms of social organization as "primitive" or "uncivilized."

If discourse can persuade that the other side is "uncivilized," it becomes unnecessary to prove that an attack is actually being planned. Threat preemption already allows a response if an attack is imminent. The transmuting story of capacity preemption adds the certainty—the enemy being the kind of people that they are—that an attack is indeed forthcoming, even when there is no specific intelligence to that effect.

When most convincing, the capacity preemption story will appear to the listener indistinguishable from ordinary threat preemption claims; nevertheless they are

distinguishable by what counts as a relevant detail to be included in the tale. Threat preemption tells a story of events: A *did* this (*e.g.*, amassed troops at the border). Capacity preemption relates a story of character: A *is* this (*e.g.*, a madman). Facts are recounted in the latter story only to the extent that they illustrate the nature of the enemy, not as essential elements of the narrative. The Iraq invasion story tells of Saddam Hussein gassing the Kurds not because it was a *casus belli* (the U.S. did not object at the time), but because of the ghastly visions conjured up of a monster who brutalizes (read cannibalizes?) his "own people."

If a pivotal fact in a tale of threat preemption is disproved, then the justification evaporates. In contrast, if an event in a tale of capacity preemption is proven false, this does not impugn the character analysis, which can simply be illustrated with a different example. Invocations of capacity preemption cannot be defeated with counterevidence about facts, because the claim is not based on facts.[67] The only way effectively to undermine a capacity preemption claim would be to discredit the presumption of the enemy's alien, uncivilized, and inhuman nature.[68]

VI. The Structural Transformation of Capacity Preemption into Threat Preemption

A. The American Mythos

> *"[America's] unprecedented—and unequaled—strength and influence in the world [is] sustained by faith in the principles of liberty and the values of a free society."*[69]

Demonization and dehumanization of the opponent are essential to the successful capacity preemption myth. That negative characterization typically makes explicit claims about the opponent state's character, for example, branding it as an "evil empire," "axis of evil," or "rogue state." Even when hyperbole about the enemy's national character is lacking, the narrative builds upon such assessments of national personality implicit in ideas about the narrator's *own* state personality. In this sense, the enemy has no definition other than to be the negative, inverted mirror-image of "us," always the template of civilized people.[70] The capacity preemption tale therefore includes specific references to the narrator's own sublime virtues, to become the foil for the depravities of the opponent.

The attempt to define the personalities of disparate nations was at one time a major focus of anthropology. "Culture and personality" was an early movement that

enjoyed significant stature from the founding of American anthropology by Franz Boas in the late nineteenth century, to about the mid-nineteen fifties, a period that coincides with the apex of the colonial project.[71] The theory's underlying premise was a conviction that the personality of individuals was a predictable function of their surrounding cultures.[72] One theme within the culture and personality school was the concept of the "national character," which held that if culture and psychology interact to form the individual personality, then persons in the same culture should possess largely the same personality type.[73] Although the thesis of national character has fallen into disrepute as a theory of anthropology, it still resonates at the level of folk psychology, allowing sweepingly broad generalizations about "us" and "them" to be framed in terms of entire nations.

Not surprisingly, self-generated sketches of national character are invariably positive. In one representative study in this genre, the American "us" was identified as possessing ennobling traits such as "romantic individualism," a conviction of the coincidence of morality and reason, and a valuing of "equality of opportunity."[74] Our enemies would be depicted in the inverted terms of this mythos of the American national character. Accordingly, Arthur Schlesinger describes the premise of Cold War foreign policy as the conviction "that the United States is infinitely virtuous and that the Soviet Union is infinitely wicked."[75] This process of inversion is essentially a Levi-Straussian structural transformation of a cultural myth.

B. The Structural Analysis of Myth

"Language is the perfect instrument of empire."[76]

The most developed approach to the phenomenon of linguistic inversion was achieved by French structuralism.[77] This school builds upon Saussurean linguistics,[78] which held that the link between a word and its referent is arbitrary.[79] Words derive meaning from their place in a larger network; each element must be placed within the context of its neighboring elements, allowing them to mutually define, delimit, and explain one another.[80] Thus, meaning follows from "structure." This insight marked a break from previous linguistic studies in that it suggested that meaning did not emerge from diachronic sociohistorical processes, or from a referent's essential properties; instead, meaning was to be sought in a word's synchronic relationship with other words. Language contains two levels: a surface structure of specific speech utterances (*parole*), and a deep structure of rules (*langue*). The deep structure could not be studied directly, but only by study of the surface examples the rules generated.

Thus, an important facet of the structuralist approach is that in order to understand fully the multidimensional meaning of any phenomenon one must examine it in various permutations, because only then is it possible to observe the full scope of operation of the underlying rules.[81]

Some anthropologists believed that these insights applied not only to language, but to other aspects of culture as well. The meaning of any specific cultural datum was to be sought in its relationship with other synchronic data and viewed as a manifestation of deeper, but not directly accessible cultural rules. The principles encoded in these rules "characteristically take the form of oppositions: nature versus culture, male versus female, left hand versus right hand."[82]

Claude Lévi-Strauss extended Saussure's approach to language to the analysis of culture more generally, and applied his structural techniques to varied elements of cultural life, most prominently kinship[83] and mythology.[84] Lévi-Strauss's work with myths offers the key to render intelligible the deep structure of anticipatory self-defense stories.[85] In keeping with his structuralist perspective, he reasoned that "[i]f there is a meaning to be found in mythology, this cannot reside in the isolated elements which enter into the composition of a myth, but only in the way those elements are combined."[86] For him, the master metaphor for understanding myths was the musical score. Myths could be read diachronically, which is to say episodically and linearly, or synchronically like a musical score,[87] with multiple levels or parts sounding simultaneously.[88]

By using this method, Lévi-Strauss believed that the "basic logical processes which are at the root of mythical thought" would be revealed.[89] One such process, he concluded, was that "mythical thought always works from the awareness of oppositions towards their progressive mediation,"[90] reflecting his interest in the dialectic. Structuralism holds that thinking is innately binary, and that by inverting its terms the elements of a myth outlined the important axes of natural thought.[91] The critical data are not the details of any individual account, but instead the poles around which they revolve when inverted from one variant to another. For this reason the anthropologist must work with more than one variation of a myth.[92]

While all cultural phenomena presumably yield to the structuralist method, anticipatory self-defense myths are particularly susceptible. These stories are repeated with special frequency, by definition, during times of perceived heightened vulnerability. Such moments lay bare the rhetorical infrastructure beneath those justifications: "Whenever societies are under stress, they draw on all their semantic resources in ritual and in myth to interpret the situation. Culturally defined mediators are then revamped and surcharged, as it were, with all the semantic resources possible, to face the emergency."[93]

C. Applying Structuralism to the Bush Doctrine: The West Point Commencement Address

> *"[I]n an age where the enemies of civilization openly and actively seek the world's most destructive technologies, the United States cannot remain idle while dangers gather."*[94]

President Bush's June 1, 2002, commencement address at the West Point Military Academy provides an opportunity to apply structuralist principles to anticipatory self-defense storytelling.[95] "The meaning of an assertion," according to structuralism, "hinges on the attributes by which the given item differs from those over which it was chosen. The attributes are identified by contrasting the given element with what else it might have been, and by considering what elements out of that set normally would be expected to go into that syntagmatic slot."[96] To understand the deeper meaning of Bush's policy statement, then, we must examine what was said, and compare that with what could have been said, and would normally have been expected to be said. The deeper meanings of the text will be marked by the systematic deviations from those expectations.

Table 1 sets forth the oppositions within the text of this ceremonial launching of the policy of preemptive self-defense, known as the Bush Doctrine.[97]

TABLE ONE:

TERMS USED TO DESCRIBE AMERICANS	TERMS USED TO DESCRIBE AMERICA'S ENEMIES
Power	Weak
Soldiers	Terrorists
Good	Evil
Hope	Deluded
No utopia to establish; Firm moral purpose	Radical
Defense	Blackmail
Innocent	Guilty
Liberty	Joyless conformity
Freedom	Totalitarian, dictators, tyrants
Great	Small
Moral clarity	Unbalanced, mad

Peace	Violence
Homeland	Caves, dark corner of the world
Civilized	Brutal
Nations	Regimes
Right	Wrong
Justice	Cruelty
Noble	Lawless
Honorable	Ruthless

President Bush outlined the American idealized self-image using the terms in the first column. In the second column are the traits of the enemy described in his speech. What ties the two portraits together is the structural transformation: the second column is the inverse of the first. While President Bush could have chosen any descriptive words he wished, he operated almost exclusively with dichotomous oppositions. Such rhetoric, however, is not what would reasonably be expected from a policy statement of this nature. A reasoned argument regarding a major national security threat facing the country might have sought to persuade the audience that America needed to defend itself against attack, against weapons. Scrutiny of the narrative reveals, however, that it does not describe weapons systems so much as enemy personalities. The threat does not arise from the nuclear, chemical, or biological weapons themselves (which the United States and many other nations possess in vast quantities), but from those weapons being in the hands of those kinds of people. And those people are not just strategic opponents; they are wild, uncontrollable, irrational madmen, rendering their mere possession of such weapons a crisis (whereas the same weapons in the hands of "civilized" governments is normal, even comforting). Analysis reveals that despite a nod to the language of threat preemption, President Bush's true purpose was to claim a right to capacity preemption based upon the myth of the alien and inhuman nature of the enemy,[98] a claim that cloaks the true purpose of empire-building.[99]

By applying the method of structuralist inquiry, we are able to isolate the deeper meaning of this speech's surface claims. Other variants of the capacity preemption myth, according to Lévi-Straussian structuralism, aid in the complete understanding of that myth. The narrative of King Philip's War illustrates the historical depth of this story-telling technique in the Western tradition. Given the centrality of Native American peoples and lands to the early elaboration of

international legal norms, this story is a particularly compelling example of our exegesis of the intersection of the doctrines of preemption and conquest.

VI. King Philip's War (1675)

"The only good Indian is a dead Indian."[100]

Few events have shaped the destiny of the United States more than the 1675 war of the Plymouth colonists with the Wampanoag sachem King Philip.[101] Until that conflict, the relationship between the indigenous population and the English colonists had been strained but manageable. After this war, however, the English would nurture a deep and unrelenting paranoia about their native neighbors, which would, over time, lead to the latter's almost total annihilation, not infrequently through preemptive assaults.[102] The war's immediate precipitating event was the trial of three Indians for the murder of a fourth Indian.[103] The victim, John Sassamon, had been a "Praying Indian," or one who had converted to Christianity and embraced European values; the accused were councilors to the sachem (or "chief") Philip. The trial ended in the conviction and execution of all defendants. Philip's subsequent attempt to unite the neighboring tribes against the colonists led to repeated skirmishes that ended over a year later with the Indians' complete defeat.

This murder trial was only one irruption of the larger problem of native sovereignty, especially as it related to their ownership of the land "discovered" by English explorers: "[I]n English colonizing legal theory a savage [sic] could never validly exercise sovereignty over land, for sovereignty, by its very definition, was a power recognized to exist only in civilized peoples whose laws conformed with the laws of God and nature."[104] Lacking sovereignty over land, the native peoples were easily denied freedom in other matters, including criminal jurisdiction.

Native Americans operated under a legal principle of personality, while the colonists adopted the English common law doctrine of territoriality.[105] Because no Englishman was involved in the murder of Sassamon, Philip believed that this was an internal matter to be resolved according to Wampanoag law. The colonists, however, presumed that because the crime took place within the boundaries of the Plymouth Colony, they had jurisdiction, and forced this decision upon the natives. "By insisting that the death of a Wampanoag Indian, supposedly at the hands of other Wampanoags, be resolved in a colonial court, the Plymouth magistrates ... denied to the Wampanoags the last shreds of their sovereignty as a people and a culture,"[106] a threat

King Philip could not ignore. "The Sassamon case stands, therefore, at a crucial point in the transition from legal coexistence to legal imperialism."[107]

One contemporary text, *A Brief and True Narration of the Llate Wars Risen in New-England* (1675), recognized this deeper relationship between land, law, and war. According to the narrative, the English arrived to find "a howling Wilderness," which lands the colonists "advanced the value of."[108] The lands became so much improved, in fact, that "possibly ... some Indians repent[ed] the sale of them."[109] In this rendition, the "Indian-givers" wanted their land back after the English had made it profitable, and went to war to drive the colonists out. It would later become an admitted strategy to provoke wars with Indians "in order to force a land cession" after the colonists won.[110]

A different contemporary account by Increase Mather, in an effort to frame the wars against the Indians within accepted legal principles, explicitly refutes the war-for-land thesis contained in *A Brief and True Narration.* Mather, who deemed the colonies to be "Land the Lord God of our Fathers hath given to us for a rightfull possession,"[111] reported that "the said War doth appear to be both just and necessary, and its fast rise only a Defensive War."[112] The war was unjustly instigated—as the subtitle to *A Brief and True Narration* indicates—by "the Quarrelsom disposition and Perfidious Carriage of the Barbarous, Savage and Heathenish NATIVES There."[113] The colonists cast their actions in terms straddling the blurred line between threat preemption and capacity preemption. As Mather put it: "whilst they and others that have been in hostility against us, remain unconquered, we cannot enjoy such perfect peace as in the years which are past."[114]

The efforts of Mather and other contemporary colonial apologists to blame the Indians for the war were critically summarized by Francis Jennings in terms that echo the themes of the present discussion:

> The few intelligent racists' problem was to put a good face on a war of intended conquest by the Puritans that was met with desperate resistance by the Indians. That they concocted elaborate rationalizations to present Puritan aggression as anticipatory defense—to borrow a phrase from the twentieth century—is not strange. Puritans had long known the power of propaganda presented as history. In their scheme of predestination, invention was the mother of necessity. Roger Williams had made the wryly proper assessment of a Puritan justification for aggressive war: "All men of conscience or prudence ply to windward, to maintain their wars to be defensive."[115]

Jennings (and even Williams in the seventeenth century) apparently recognized a relationship between conquest and pleas of anticipatory self-defense. This relationship is characterized by an objectively discernible narrative structure utilizing specific language to spread the myth that supports the claim.

The language used to characterize the colonists' enemy indeed reveals the transformational hallmarks of a capacity preemption story.[116] Religious and cultural imagery were the primary structural axes along which the Indians were dehumanized.[117] Mather described the Indians as: "The Heathen People," "these barbarous Creatures," "the profane Indians" who murdered Sassamon "out of hatred against him for his Religion," "the Indians, whose cruel habitations are the dark corners of the Earth," "those bruitish men, who are only skilful to destroy, to deal worst with those who have done most for them."[118] In the end, "they [are] the perfect children of the Devill," the "Uncircumcised."[119] "To the English [the Indian] stood proudly and defiantly against all that they stood for, all that was good and Christian and civilized. The Indian, in their lights, was immoral, pagan, and barbarous."[120]

The imagined bestial nature of the Indians[121] allowed the English to commit upon them atrocities that would have been unthinkable against another "civilized" group,[122] freeing them to aggressively pursue their true objective of land acquisition. At one point, according to Mather, the colonists discovered an Indian settlement and set afire the wigwams, incinerating over one thousand people, mostly women and children.[123] In this single attack the English killed more Indians than the total number of colonists killed by the Wampanoag throughout the entire course of the war.[124] Yet, according to Mather, it was the Indians who "delighted in exercising cruelty."[125]

After King Philip's War, the pieces to construct an unending tale of capacity preemption lodged themselves as permanent parts of the English colonists' sensibilities.[126] A pervasive belief emerged "that all Indians, because they embodied qualities deemed to be characteristically Indian, were too dangerous and different to be allowed to remain in contact with white society."[127] Shortly after the war, in a legislative act of capacity preemption, Massachusetts "passed an act confining all friendly Indians to a *cordon sanitaire* and offering bounties 'for every [hostile] Indian, great or small, which they shall kill, or take and bring in prisoner.'"[128] The target of these sanctions was anyone with the status of "Indian" (and thus a potential challenger to land title), not only those individuals or groups who had actually fought against the colonists. This failure to distinguish between groups defined by some essential property (*e.g.*, nationality, religion, or race) and those guilty of some threatening act

parallels the critical contrast between the grounds for capacity preemption and threat preemption, respectively.

The mythology of conquest that emerged from the American colonial period is even enshrined in the Declaration of Independence, wherein the English King is indicted for "excit[ing] domestic insurrections amongst us, and ... bring[ing] on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes, and conditions."[129] As Jennings points out, "[t]he net effect of all these policies in America has been the myth of the Indian Menace—the depiction of the Indian as a ferocious wild creature, possessed of an alternately demonic and bestial nature, that had to be exterminated to make humanity safe."[130] The strategy of cloaking military acts of capacity preemption as provoked reactions of threat preemption would continue to characterize the history of Anglo-Indian relations.[131]

This early version of the capacity preemption story parallels the variant embodied in President Bush's West Point speech. A comparison of the two versions confirms the enduring stability and efficacy of the strategy of dehumanization characteristic of this discourse. As Table 2 demonstrates, the language used by President Bush to characterize America's contemporary enemies echoes that used by Mather to justify the colonists' own acts of preemptive aggression:

TABLE TWO:

TERMS USED TO DESCRIBE AMERICA'S ENEMIES TODAY	TERMS USED TO DESCRIBE NATIVE AMERICANS CIRCA 1675
Brutal	Brutish
Terrorists	Savages; Barbarous
Ruthless	Merciless
Violent	Undistinguished destruction; Skilful to destroy
Cruelty	Delight in cruelty
Dark corner of the world	Dark corners of the Earth
Deluded	Immoral; Heathen, Hatred for religion
Evil	Children of the Devil; pagan
Lawless	Perfidious
Radical	Profane

Unbalanced; mad	Hostility; Quarrelsom[e] disposition

Thus the pieces to construct an unending tale of capacity preemption have become a permanent part of the American legal tradition. Although Bush and Mather tell the story in different contexts separated by almost four centuries, their rhetorical techniques are strikingly similar. Their method is characterized by generating fear of opponents that necessitates control over them. The resulting acts of conquest are in turn justified by a rhetorical dehumanization of the opponent, initiating a transformation of capacity preemption into legal threat preemption. In each case the state launches an aggressive preemptive blow, but seeks to justify its resort to war by blaming the target, pointing to its provocatively inhuman character. These narrative variants also share the principle axes around which the structural inversion of virtues cluster: rational vs. bestial; moral vs. immoral; honorable vs. cruel. These elements are the indispensable components of the capacity preemption story.

VIII. Identifying the Narrative In Related Discourse

"Moral truth is the same in every culture, in every time, and in every place."[132]

The ethnocentric basis for capacity preemption is discernable in recent scholarship purporting to offer a moderation of the political extremism of the Bush Doctrine.[133] Allen Buchanan and Robert Keohane posit a "Cosmopolitan Institutional" approach whereby proposals for preemptive war could be endorsed by a selectively composed international community. If the asserted justification for preemption proves true, then dissenters would incur a greater proportion of the financial costs of the attack; if the pre-attack justification proves unwarranted, the attacking state and its supporters would be liable for compensation.[134] Like Victoria's refinement of the doctrine of discovery, however, the suggestion that preemptive aggression can be tempered through procedural safeguards would institutionalize and perpetuate this dangerous policy.

In this proposal, the theme of the civilized state re-emerges: only democracies "hav[ing] decent records regarding the protection of basic human rights" could participate in this process.[135] Such nations are rational: presumptively "more reliable decision-makers."[136] As in Victoria's thesis, the norm of sovereign equality—never

expressly abdicated—would be rendered nugatory by the undemocratic imposition of universally binding, Western-style governance norms.[137]

The assertion of a universal moral code is indispensable to the capacity preemption narrative. The potential to demonize the enemy "other" is undermined to the extent that moral truth can be embodied in more than one model. Today, the neoliberal civilizing mission is the "spread of democracy" through "regime change," in pursuit of global domination of resources and markets. The structural axes of dehumanization remain centered on the religious traditions, cultural practices and political organization of the irrational, alien "others" who refuse to submit to their own salvation. The story of the "civilized" state is being retold as an epic "clash of civilizations," which, through the extreme and dangerous policy of preemptive warfare, could become a self-fulfilling prophecy.

IX. Epilogue: Reflections On Abu Ghraib

The essential element of the capacity preemption narrative is the dehumanization of the enemy; when defending against nonhumans, capacity preemption becomes acceptable, even preferred foreign policy. If the "other" is nonhuman enough to kill with impunity in an unprovoked war, why would mere torture be objectionable upon capture? This is the background against which the degradations of Abu Ghraib should be viewed. And, while mistreatment of captives by the U.S. military has not been limited to Iraq,[138] the capacity preemption rationale similarly undergirds the Bush administration's "war on terror."

The surface motive for the Abu Ghraib abuses may well have been "a decision by Secretary Rumsfeld to step up the hunt for 'actionable intelligence' among Iraqi prisoners," as suggested in a Human Right Watch Report.[139] Toward this end, according to the Report "[t]he commanding general in Iraq issued orders to 'manipulate an internee's emotions and weaknesses,' resulting in Interrogation Rules of Engagement "that violate the Geneva Conventions and the Convention against Torture and Other Cruel, Inhuman Degrading Treatment or Punishment."[140] Nevertheless, the particular forms of abuse employed compel a deeper analysis.

The record offers a clear example of dehumanization by denial of essential human qualities. The Taguba Report documents behaviors beyond physically or mentally debilitating punishments. The guards also "[f]orcibly arrang[ed] detainees in various sexually explicit positions for photographing," "[f]orc[ed] naked male detainees to wear women's underwear… [and] groups of male detainees to masturbate themselves while being photographed and videotaped."[141] Recalling the proposition

that meaning is based in large measure upon the ways in which a text departs from what would have been normally expected,[142] the question to be asked is why these particular abuses were chosen. Torture typically entails physical abuse; the forced transvestitism and homosexual acts, however, are unusual, and it is thus in these deviations that the deep meaning of these events will be found.

Seymour Hersh, the *New Yorker* reporter who investigated the Abu Ghraib scandal, suggests that the chosen forms of torture were neither accidental nor spontaneous, but were the product of an assessment of the presumed unique psychological features of an alien "other":

> The notion that Arabs are particularly vulnerable to sexual humiliation became a talking point among pro-war Washington conservatives in the months before the March, 2003, invasion of Iraq. . . . In their discussions . . . two themes emerged—one, that Arabs only understand force and, two, that the biggest weakness of Arabs is shame and humiliation.[143]

These abuses were selected to break the prisoners through shame. The calculus at work is easily discerned: "[S]ome prisoners would do anything—including spying on their associates—to avoid dissemination of the shameful photographs to family and friends."[144]

The military could expect "shame and humiliation" to succeed where more routine torture techniques would not because "[w]hile terror and distress hurt, they are wounds inflicted from the outside which penetrate the smooth surface of the ego; but shame is felt as an inner torment, a sickness of the soul."[145] Shame, in other words, dehumanizes because it strips the victim of his or her identity, which is the repository of the conscious awareness of one's humanity.[146] To the extent that humanness is a creation of social interaction, shame is dehumanizing because it severs the flow of communication out of which social bonds and personal identities are forged, leading to the dissolution of the "self" and the reduction of the person to a mere object.[147]

Justification for the war in Iraq had already portrayed the Iraqis as lacking essential human traits such as rationality and free will. The step to deprive them of other human traits such as personal identity was thus a small one. As illustrated in the historical example of King Philip's War, a nonhuman enemy frees the aggressor from many of the constraints that have evolved to reduce the pain of conflict between the "civilized" nations. Having at the outset defined the enemy as inhuman, the unthinkable becomes the necessary. In a war in which Iraqi casualties are not even

counted, if the soldiers at Abu Ghraib treated prisoners as the animals that the Bush administration declared them to be, is there any question as to where the ultimate responsibility lies?[148]

Notes

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1. *See infra*, note147.
2. *See* Article 15-6 Investigation of the 800th Military Police Brigade (also known as The "Taguba Report" on Treatment of Abu Ghraib Prisoners in Iraq) (Feb. 26, 2004), *available at* http://www.npr.org/iraq/2004/prison_abuse_report.pdf; Detainee Operations Inspection(July 21, 2004), *available at* http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/DAIG%20Detainee%20Operations%20Inspection%20Report.pdf; Article 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade (Aug. 23, 2004), *available at* http://www4.army.mil/ocpa/reports/ar15-6/AR15-6.pdf; and Final Report of the Independent Panel to Review DoD Detention erations (August 24, 2004), *available at* http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf.
3. Susan Sontag, *Regarding the Torture of Others*, N.Y. TIMES, May 23, 2004, at 25.
4. Eric Schmitt, *Abuse Panel Says Rules on Inmates Need Overhaul*, N.Y. TIMES, Aug. 25, 2004, at A1 (quoting James R. Schlesinger, Chair of Department of Defenses' (DoD) Independent Panel to Review DoD Detention Operations). The alleged "ringleader" of the abusive soldiers, Spc. Charles Graner, was court-martialed and convicted under the Uniform Code of Military Justice of conspiracy to maltreat detainees; dereliction of duty for willfully failing to protect detainees from abuse; cruelty and maltreatment of detainees; assaulting detainees; and committing indecent acts. *See* http://news.findlaw.com/hdocs/docs/iraq/graner51404chrg.html (last visited Jan. 15, 2005). Graner was sentenced to ten years in prison. Four other soldiers have pleaded guilty in the scandal. Prosecutors depicted Graner as a sadistic "rogue soldier" who enjoyed inflicting suffering, telling jurors: "It was for sport, for laughs." *See* Associated Press, *Graner Convicted in Iraqi Prisoner Abuse*, *available at* http://abcnews.go.com/US/wireStory?id=414144 (last visited Jan. 15, 2005). Graner defended against the charges by asserting that he was ordered to "soften up" detainees for interrogators.
5. The National Security Strategy of the United States of America (2002) at 15 [hereinafter Security Strategy].

6. Juniper Glass, *Tales of the Ethnosphere*, 122 UTNE READER 62 (March-April 2004) (quoting anthropologist Wade Davis).
7. This tendency was prominently in evidence at the 2004 ASIL meeting's panel on "The Bush Administration Preemption Doctrine and the Future of World Order." None of the three panelists defending the Bush Doctrine went beyond the straw man contrast between waiting to suffer the first blow, or a legal (and to many of the speakers, apparently boundless) right to anticipatory self-defense. As the first was deemed patently absurd, this lent presumptive legitimacy to the only remaining alternative. *See, e.g.*, Elisabeth Zoller, Remarks at the ASIL Panel (2004) (on file with author). Only one panelist, who presented the perspective of the nonaligned nations, noticed the relation between anticipatory self-defense and an imperialistic agenda promoted under the guise of spreading American-style democracy. *See* Antony Anghie, Remarks at the ASIL Panel (2004) (on file with author).
8. The 1991 Gulf War provides a recent example of a collective self-defense claim. On August 2, 1990, Iraq invaded the neighboring country of Kuwait. Prior to the attack, Saddam Hussein had demanded the return to Iraq of the Rumahiah Oil Field and $2.4 billion in compensation, a demand that Kuwait rejected. In response to the attack, the U.N. Security Council immediately passed Resolution 660 by a vote of fourteen to none (Yemen did not participate). S.C. Res. 660, U.N. SCOR, 2932nd mtg (1990). Res. 660 condemned the invasion, and demanded the withdrawal of Iraqi forces. When this failed to happen, Res. 661 imposed economic sanctions, including an embargo on all Iraqi and Kuwaiti products. S.C. Res. 661, U.N. SCOR, 2933rd mtg. (1990). Further resolutions annulled any claim of Iraq to the annexation of Kuwait. S.C. Res. 662, U.N. SCOR, 2934th mtg. (1990). On November 29, upon the initiative of the United States, the Security Council asked members to use "all necessary means" to uphold the body of resolutions beginning with Res. 660. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963rd mtg. at 27, U.N. Doc. S/RES/678 (1990). The first war against Iraq began with air strikes on January 16, 1991.
9. Article 51 provides: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs. . . ." U.N. CHARTER art. 51. Recently, however, some commentators such as Michael Glennon argue that Article 51 is no longer an obligatory limitation on state actions. Because he finds certain "corollaries" of Article 51 to be unpalatable, Glennon concludes "that Article 51, as authoritatively interpreted by the International Court of Justice, cannot guide responsible U.S. policy-makers in the U.S. war against terrorism in Afghanistan or elsewhere." Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL'Y 539, 541, 549-50, 558 (2002). This includes its prohibition on a state's unilateral preemptive military actions. *See also* Anthony Clark Arend, *International Law and the Preemptive Use of Military Force*, 26(2) THE WASHINGTON QUARTERLY 89, 101 (2003) ("For all practical purposes, the UN Charter framework is dead.").
10. *See, e.g.*, MARY E.O'CONNELL, THE MYTH OF PREEMPTIVE SELF-DEFENSE 2 (American Society of International Law Task Force on Terrorism, ed., 2002), *at* http://asil.org/taskforce/oconnell.pdf ("Preemptive self-defense ... is clearly unlawful under international law."). The Israeli bombing of the Osiraq Nuclear Facility was predicated on a capacity preemption claim. On June 7, 1981, Israel, using fourteen U.S.-built military aircraft, flew into

Iraqi territory and destroyed the Iraqi nuclear reactor in Osiraq. Iraq had made no threat against Israel, although the two countries were long-time antagonists, nor had Iraq produced any nuclear weapons. By no standard, then, was Israel under an imminent threat of nuclear attack from Iraq. Nevertheless, Israel invoked the claim of anticipatory self-defense. *See* W. Thomas Mallison & Sally V. Mallison, *The Israeli Attack of June 7, 1981, upon the Iraqi Nuclear Reactor: Aggression or Self-Defense*, 15 VAND. J. TRANSNAT'L L. 417, 435 (1982). It asserted this claim despite the fact that while it kept its own nuclear program secret, and allowed no international inspections, Iraq had opened its nuclear facilities to the International Atomic Energy Agency. Further, while Israel had refused to join the Treaty on the Non-Proliferation of Nuclear Weapons, Iraq was a signatory to that instrument. Against this background, "[t]he Security Council obviously did not accept Israel's claim to be acting in legitimate self-defense." TIMOTHY L.H. MCCORMACK, SELF-DEFENSE IN INTERNATIONAL LAW: THE ISRAELI RAID ON THE IRAQI NUCLEAR REACTOR 17 (1996). The international community responded with a unanimous Security Council Resolution that "strongly condemn[ed] the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct." S.C. Res. 487, U.N. SCOR, 2288th mtg. (1981).

McCormack's examination of the Security Council deliberations revealed that nine of the fifteen members did not explicitly mention the right of self-defense in their remarks. Spain and Mexico "stated their belief that Article 51 does not permit pre-emptive self-defense in any form. Ireland and Niger thought a right of anticipatory sêlf-defense might exist under Article 51 but were uncertain about it. Even states that accept a right of anticipatory self-defense (such as Uganda and the U.K.) rejected this brazen attempt to invoke it to eliminate a potential nuclear rival in the region. MCCORMACK at 31-32.

11. The Six Day War was justified by Israel as a preemptive attack in purported self-defense. In response to rumors of an Israeli troop mobilization, Egyptian President Abdel Nasser had moved 100,000 troops and 1,000 tanks to Israel's southern border, and ordered U.N. personnel to leave the vicinity. On May 17, President Nasser closed the Strait of Tiran, a vital shipping conduit for Israel. On June 5, 1967, Israel launched a massive preemptive attack against Egypt, Jordan, and Syria, asserting that the Arab states were positioning for a devastating invasion. Israel succeeded in conquering the Sinai Peninsula from Egypt, the Golan Heights from Syria, as well as the West Bank and East Jerusalem from Jordan. In his broadcast to Israeli citizens, Prime Minister Levi Eshkol characterized the attack as an act of self-defense. *Broadcast to the Nation by Prime Minister Eshkol* (June 5, 1967), *at* www.us-israel.org/jsource/History/67broad.html.

Subsequent developments called into question the legitimacy of Israel's actions: "Israel stated that it had convincing intelligence that Egypt would attack and that Egyptian preparations were underway. We now know that the Israel acted on less than convincing evidence. Thus, the 1967 Arab-Israeli war does not provide an actual example of lawful anticipatory self-defense." O'Connell, *supra* note 10, at 9. The ongoing occupation of the territory set aside for a Palestinian state suggests that the motive was the quest for land and resources.

12. Imminency was established as a prerequisite to offensive use of force in the 19th century *Caroline* dispute, recorded at 29 BRITISH AND FOREIGN STATE PAPERS 1129, and 30 BRITISH

AND FOREIGN STATE PAPERS 195. The accepted legal standard was articulated by then-United States Secretary of State Daniel Webster as "a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation."

13. O'Connell notes that capacity preemption can eliminate limits on the inhumanity of war:

> Preemptive self-defense not only undermines the restraint on when states may use force, it also undermines the restraints on *how* states may use force. Today states measure proportionality against attacks that have occurred or are planned. What measure can be used to assess proportionality against a possible attack? The state acting preemptively is making a subjective determination about future events and will need to make a subjective determination about how much force is needed for preemption.

O'Connell , *supra* note 10, at 19.

14. For an argument that the Bush Doctrine of preemptive self-defense will be counterproductive even by its own standards, *see* Amy E. Eckert & Manooher Mofidi, *Doctrine or Doctrinaire—The First Strike Doctrine and Preemptive Self-Defense under International Law*, 12 TUL. J. INT'L & COMP. L. 117 (2004). An early precursor of what the future may hold was given when Iran, invoking the American precedent in Iraq, warned that it, too, might launch preemptive attacks against other nations, especially Israel. *Iran Could Hit Israel First*, ATLANTA J-CONST., Aug. 20, 2004, at A10. At the same time, the U.S. is arming Israel in case it should decide to launch its own preemptive strike against Iran. *See* David Wood, *U.S. Arms Israel as Iran Fears Grow*, ATLANTA J-CONST., Sept. 23, 2004, at A3.

15. For additional insights into how the rhetoric of force influences the legality of that force, *see* Tawia Ansah, *War: Rhetoric & Norm-Creation in Response to Terror*, 43 VA. J. INT'L L. 797, 799 (2003) ("the resort to the language of war, as 'natural' and 'starkly simple' as it is, nevertheless has a profound impact on how the law's intervention is shaped, or how the laws governing the transnational use of force are interpreted to accommodate a 'war' on terrorism.").

16. Security Strategy, *supra* note 5, at 6.

17. The outlines of this debate are delineated in George K. Walker, *Anticipatory Collective Self-Defense in the Charter Era: What the Treaties Have Said*, 31 CORNELL INT'L L.J. 321, 322-326 (1998).

18. The typological differences of degree separating threat interruption from threat preemption, and threat preemption from capacity preemption, takes the form that philosophy calls the "sorites paradox." The reference is to the problem of knowing when a pile of seeds constitutes a "heap." Begin with an unambiguous heap of seeds, and take one seed away, and then another. At some point the collection of seeds will cease to be a heap, but it is not clear when that happened. Despite the fact that the initial condition is clearly a heap, and the end condition is not, there is no one seed whose presence or absence marks the difference between the pile being a heap and its not being a heap. The sorites paradox describes the transition between threat interruption and threat preemption because the "armed attack" that traditionally provides the criterion to justify threat interruption is usually required to be a sustained attack, and not a

single cross-boundary engagement. For example, the Osiraq incursion, *supra* note 10, would not rise to the level of an armed attack, entitling Iraq to invade Israel, because the fighters crossed the border, completed one mission, and then exited. If a single foray is not sufficient to rise to an armed attack, what about two? Three? And how far apart must they be to count as separate incidents rather than as part of an ongoing attack? At some point the forays constitute an attack, even if no individual instance alone would be adequate. This is one of the senses in which classic self-defense shades gradually into anticipatory self-defense, as the state seeks to head off future forays.

19. David Kay, the former head of the U.S. team tasked to find the alleged WMD's, bluntly told Congress that "we were almost all wrong" about claims of Saddam Hussein's purported weapons stash. Katherine Pfleger, *No WMDs in Iraq, Top Inspector Says*, ATLANTA J-CONST., Jan. 29, 2004, at A1. Members of the Bush administration responded by suggesting that, given time, the threat preemption rationale would yet prove to be true. For example, Donald Rumsfeld, the Secretary of Defense, has responded to David Kay's conclusion that Iraq no longer had any WMDs at the time of the invasion by saying that Kay's was only one "hypothesis," and that "the American-led team still searching for illicit weapons in Iraq might eventually find them." Douglas Jehl & Eric Schmitt, *Rumsfeld and Tenet Defending Assessments of Iraqi Weapons*, N.Y. TIMES, Feb. 4, 2004, at A1.

20. After the U.S. toppled the Baathist regime in Baghdad, no weapons of mass destruction of any kind were found. *See* the CIA "Duelfer Report," which found that "ISG did not discover chemical process or production units configured to produce key precursors or CW agents." *Comprehensive Report of the Special Advisor to the DCI on Iraq's WMD* at Chemical -2 (Sept. 30, 2004), *at* http://www.cia.gov/cia/reports/iraq_wmd_2004/Comp_Report_Key_Findings.pdf. Similar negative results for biological and nuclear weapons were reported by the administration's weapons search team. Whereas Bush, in his 2003 State of the Union address and other public statements, assured the nation and the world that he had clear and convincing evidence of Iraq's advanced research and massive weapons stockpiles, just one year later he could refer only to "weapons of mass destruction-related program activities." President George W. Bush, State of the Union Address (2003 and 2004). On January 12, 2005, the White House announced that its task force on weapons of mass destruction in Iraq was officially calling off its search. No stockpiles were found. *See* http://www.npr.org/templates/topics/topic.php?topicId=10 (last visited Jan. 15, 2005).

21. Bob Deans, *Bush Says Saddam Was Threat, President Downplays Weapons*, ATLANTA J-CONST., Feb. 5, 2004, at A4 (emphasis added).

22. Dana Milbank, *Bush Ratchets Down War Rationale*, ATLANTA J-CONST., Feb. 8, 2004, at A16. CIA Director George Tenet would only go so far as to claim that Saddam Hussein had an intent "to reconstitute a nuclear program," and an intent "to develop biological weapons," and "the intent and capability to quickly convert civilian industry to chemical weapons production." At no time does he, or any Bush Administration official, argue that Hussein had an intent to use this alleged future weapons capability against the U.S. *In the Words of the C.I.A. Director: "Why Haven't We Found the Weapons?"* N.Y. TIMES, Feb. 5, 2004, at A12.

23. *Primetime:* (ABC News television broadcast, Dec. 16, 2003) (DIANE SAWYER: (You) stated

as a hard fact, that there were weapons of mass destruction as opposed to the possibility that he could move to acquire those weapons still— PRESIDENT BUSH: So what's the difference?).

24. Security Strategy, *supra* note 5, at 7.
25. Indeed, some scholars argue that colonialism was the constitutive impetus of international legal discourse. *See, e.g.*, SIBA N'ZATIOULA GROVOGUI, SOVEREIGNS, QUASI SOVEREIGNS AND AFRICANS: RACE AND SELF-DETERMINATION IN INTERNATIONAL LAW 55 (1996) (arguing that European colonial rivalries "determined the doctrinal ... formulation ... which established the key principles of international law: communal sovereignty, freedom of trade, and guaranteed right to private property). *See also* Antony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, 5 SOCIAL & LEGAL STUDIES 321, 322 (1996) (arguing that international law was created by the Spanish encounters with the Indians).
26. *See* GERRIT W. GONG, THE STANDARD OF 'CIVILIZATION' IN INTERNATIONAL SOCIETY 239 (1984) ("The standard of 'civilization' thus became a symbol of the early years of formal relations between the European and non-European countries.").
27. *See* FRANCIS JENNINGS, THE INVASION OF AMERICA: INDIANS, COLONIALISM, AND THE CANT OF CONQUEST 8 (1975) ("[T]he civilized-uncivilized distinction is a moral sanction rather than any given combination of social traits susceptible to objective definition. It is a weapon of attack rather than a standard of measurement.").
28. Joseph Story, *Commentaries* § 152, *reprinted in* M.F. Lindley, The Acquisition and Government of Backward Territory in International Law 29 (1926).
29. THOMAS MORE, UTOPIA 79-80 (Penguin Books, 1965).
30. FRANCISCI DE VICTORIA, DE INDIS ET DE IVRE BELLI REFLECTIONES 151 (Ernest Nyes, ed. , John P. Bate, trans., 1917) (1557).
31. *Id.* at 152-53.
32. *Id.* at 153.
33. *Id.*
34. *Id* at 156.
35. *Id.* at 154.
36. *Id.* at 155.
37. *Id.* at 157.
38. *Id.* at 154-55.
39. *See* HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRE TRES bk. III, ch. VI (Francis W. Kelsey trans., Oxford Univ. Press, 1925) (1625).
40. *See. id.* bk. III, chs. XI-XVI.
41. *See id.* bk. II, ch. II, § II.
42. *See id.* bk. II, ch. II, § XVII.
43. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT ¶175 (1960), *available at* http://www.ecn.bris.ac.uk/het/locke/government.pdf.
44. *Id.* ¶ 31.
45. *Id.* ¶ 25.
46. *Id.* ¶¶ 27, 32.
47. *See* Grovogui, *supra* note 25, at 73 (discussing the application of this presumption to communally owned land in Africa).

48. *See* EMMERICH DE VATTEL, THE LAW OF NATIONS bk I, ch. XVIII, §§ 205-08 (Charles G. Fenwick trans., The Carnegie Institution, 1916) (1758).
49. *Id.* § 209.
50. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND bk. II, ch. I, at 7 (18th ed. 1830).
51. James Thuo Gathii, *International Law and Eurocentricity*, 9 EUROPEAN J. INT'L L. 184, 187 (1998).
52. *Cf.* Peter Liberman, *The Spoils of Conquest*, 18(2) INT'L SEC. 125, 150 (1993) (arguing that due to the rise of nationalism and other factors, the costs to imperial adventures today outweigh the benefits). Antonia Juhasz of the International Forum on Globalization argues that despite the appearance of a transfer of power in Iraq, Americans still control the economy through the orders of Paul Bremer that will be "virtually impossible to overturn." Antonia Juhasz, *The Hand-Over that Wasn't*, LOS ANGELES TIMES, Aug. 5, 2004 at 15. These laws "forbid[] Iraqis from receiving preference in the reconstruction while allowing foreign corporations—Halliburton and Bechtel, for example—to buy up Iraqi businesses, do all the work and send all of their money home. They cannot be required to hire Iraqis or to reinvest their money in the Iraqi economy. They can take out their investments at any time and in any amount, [while] foreign contractors [are granted] full immunity from Iraq's laws." *Id.*
53. For an incisive analysis of the role of institutions such as the International Monetary Fund, the World Bank, and the World Trade Organization, *see* Antony Anghie, *Time Present and Time Past: Globalization, International Financial Institutions, and the Third World*, 32 N.Y.U J. INT'L L. & POL. 243 (2000).
54. Interestingly, the Massachusetts Bay Colony incorporated into its seal the image of a Native American saying, "Come over and help us." *See* JENNINGS, *supra* note 27, at 229.
55. *See generally* EDWARD SAID, ORIENTALISM (1979) (arguing that the "Orient" was constructed by the West as its negative mirror-image).
56. *See, e.g.*, Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181, 1192 (2001) ("Because the Western definition of what makes one human depends on the notion of agency and the ability to make rational choices, to thrust some communities into a world where their actions are determined only by culture is deeply dehumanizing.").
57. "The content of the typical binary oppositions (frequently not logical opposites) is not coded into the human mind, but the predisposition to perceive the realities of the outside world in terms of such oppositions, instead of as continua, is." Bernard S. Jackson, *Towards a Structuralist Theory of Law*, 2 LIVERPOOL L. REV. 5, 7 (1980).
58. Security Strategy, *supra* note 5, at 13-14.
59. *See* the Caroline Dispute, *supra* note 12.
60. Isabelle Gunning has labeled this characterization of the "other" by the "I" as "arrogant perception":

> A key aspect of arrogant perception is the distance between "me" and "the other." The "I" as arrogant perceiver is a subject to myself with my own perceptions, motivations, and interests. The "other," in arrogant perception

> terms, is unlike me. The "other" has no independent perceptions and interest but only those that I impose. Any evidence that the "other" is organized around her own interests is evidence of defensiveness in the "other." The arrogant perceiver falsifies and simplifies. In other words, there is a falsification and oversimplification in the assumption of the distance and difference between self and dependent "other" as well as the conclusion that any evidence that contradicts the assumption of distance and difference is an example of fault in the "other."

Isabelle R. Gunning, *Arrogant Perception, World-Traveling, and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189, 199 (1992).

61. This limitation on the claim to self-defense was noted by Pufendorf: "[W]here it is quite clear that the other is already planning an attack upon me, even though he has not yet fully revealed his intentions, it will be permitted at once to begin forcible self-defense, and to anticipate him who is preparing mischief, *provided there be no hope that, when admonished in a friendly spirit, he may put off his hostile temper.*" 2 SAMUEL VON PUFENDORF, DE OFFICIO HOMINIS ET CIVIS JUSTALEGEM NATURALEM LIBRI DUO [TWO BOOKS ON THE DUTY OF MAN AND CITIZENS ACCORDING TO NATURAL LAW] 32 (Frank Gardner Moore trans., 1927) (emphasis added).

62. It is in this sense that "[Dick] Cheney was 'terrified' because once the diplomatic road [with Iraq] was opened up, it might work." BOB WOODWARD, PLAN OF ATTACK 157 (2004).

63. Another way of putting this argument comes from John Rawls. Rawls said that, in order for a person to be counted a full and equal member of society in questions of political justice that person must possess two powers: "the capability for an effective sense of justice," and "the capacity to form, to revise, and rationally to pursue a conception of the good." John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 525 (1980). The targets of capacity preemption are necessarily argued to lack the second moral power, whose essential attribute is an ability to choose one's actions. Lacking this power, such beings are not full and equal members of society, and thus are not entitled to the benefits of that membership, such as the full protections of the law, and a presumption of moral worth. They can, in other words, be attacked for the benefit of the attacker, regardless of the price to the attacked.

64. The relationship between dehumanization and preemption has also been noted in the context of domestic criminal confinement in much the same terms as discussed here for state use of force:

> [A] regime that deprives people of liberty based on what they will do rather than on what they have done shows insufficient respect for the individual. On this view, preventive detention is, in effect, either an assertion that the person does not possess the capacity to choose the good or an assertion that, having such capacity, the person will not do so. Both assertions, the dehumanization objection posits, are deeply denigrating to the person's status as a self-governing, autonomous human being.

Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 27 (2003).

65. SAM KEEN, FACES OF THE ENEMY: REFLECTIONS OF THE HOSTILE IMAGINATION 25 (1986).
66. Joel Feinberg, for example, identified rationality as "the capability most commonly favored for this role." JOEL FEINBERG, SOCIAL PHILOSOPHY 91 (1973).
67. While the failure to find WMD in Iraq dissolves any threat preemption rationale the U.S. had for the second Gulf War, that revelation has proven largely irrelevant to undermine Bush's capacity preemption argument. When all else fails, supporters point out that Saddam Hussein was a bad man, and the world is better off without him in power—exactly the claim expected in a capacity preemption action, but one that is irrelevant if not nonsensical from the standpoint of the law.
68. "Front-line soldiers frequently report that when they come on an enemy dead and examine his personal effects—letters from home, pictures of loved ones—the propaganda image fades and it becomes difficult or impossible to kill again." KEEN, *supra* note 65, at 26.
69. Security Strategy, *supra* note 5, at 1.
70. For many societies the name they give themselves is simply the word for human in their language. *See e.g.* MARJORIE SHOSTAK, NISA: THE LIFE AND WORDS OF A !KUNG WOMAN 4 (1981).
71. *See* Grovogui, *supra* note 25, at 7-18, for a discussion of the roots of the European-non-European dichotomy that provided the philosophical framework for the colonial project.
72. Perhaps the most famous member of this school was Margaret Mead, whose book, COMING OF AGE IN SAMOA: A PSYCHOLOGICAL STUDY OF PRIMITIVE YOUTH FOR WESTERN CIVILIZATION (1928), may well have been the most influential work of any field in its time. This field of study grew to prominence during World War II, when the U.S. government commissioned a study of the Japanese character. The resulting book by Ruth Benedict, THE CHRYSANTHEMUM AND THE SWORD: PATTERNS OF JAPANESE CULTURE (1946), represents the pinnacle of the national character genre.
73. *See generally* Margaret Mead, *National Character*, *in* ANTHROPOLOGY TODAY 642-67 (A.L. Kroeber et al. eds., 1953). Interest in the comparative study of national character did not, of course, begin with formal anthropological inquiries. David Hume, the Scottish philosopher, wrote an essay on the topic, noting what he concluded to be both its contents and causes. David Hume, *Of National Character, in* ESSAYS: MORAL, POLITICAL, AND LITERARY 244 (T.H. Green et al. eds., 1907).
74. CLYDE KLUCKHOHN, MIRROR FOR MAN: THE RELATION OF ANTHROPOLOGY TO MODERN LIFE 228-39 (1949).
75. Arthur Schlesinger, Jr., *Foreign Policy and the American Character*, 62 FOR. AFF. 1, 5 (1983).
76. Attributed to Antonio de Nebrija, writer of the first grammar of a modern European language in 1492.
77. For a more detailed summary of structuralism and its application to legal discourse, *see* David Kennedy, *Critical Theory, Structuralism and Contemporary Legal Scholarship*, 21 NEW ENG. L. REV. 209, 248-59 (1985-1986).
78. *See* JONATHAN CULLER, FERDINAND DE SAUSSURE 28-33 (2d ed. 1986) (Ferdinand de Saussure first pointed out the essentially arbitrary nature of the sign. This rule refers to the fact that the

meaning of a sign is independent of the form of the sign. The link has arisen by historical accident.).

79. There does exist a small subset of language studies that focuses on "sound symbolism," which posits that some sounds are non-randomly associated with particular meanings, but this does not undermine the general soundness of Saussure's principle. As one example, the phonetic string that is *push* in English carries the meaning "to exert pressure or force against." WEBSTER'S NEW WORLD DICTIONARY 1093 (3d ed., 1988). There is nothing necessary about this relationship, however. In fact, in Portuguese, the verb *puxar* is phonetically almost indistinguishable from English *push*, but has the opposite meaning of "to pull." NOVO DICCIONÁRIO DA LÍNGUA PORTUGUÊZA E INGLÊZA 517 (4th ed., 1958-1961).

80. For example, it would be very difficult to define "red" (or any color) in isolation from all the other colors.

81. STANLEY R. BARRETT, ANTHROPOLOGY: A STUDENT'S GUIDE TO THEORY AND METHOD 142 (1996).

82. *Id.* at 142.

83. *See generally* CLAUDE LÉVI-STRAUSS, THE ELEMENTARY STRUCTURES OF KINSHIP (1969).

84. *See generally* CLAUDE LÉVI-STRAUSS, THE RAW AND THE COOKED (1983).

85. *See, e.g., id.*

86. Claude Lévi-Strauss, *The Structural Study of Myth,* 68 (270) J. AM. FOLKLORE 428, 431 (1955).

87. LÉVI-STRAUSS, *supra* note 85 (THE RAW AND THE COOKED, the first volume in Lévi-Strauss's study of mythology, is dedicated "To Music," and every chapter is titled with a musical theme: "Bororo Song," "Ge Variations," "The 'Good Manners' Sonata," and so forth.).

88. "The myth will be treated as would be an orchestra score perversely presented as a unilinear series and where our task is to re-establish the correct disposition. As if, for instance, we were confronted with a sequence of the type: 1,2,4,7,8,2,3,4,8,1,4,5,7,8,1,2,5,7,3,4,5,6,8 . . ., the assignment being to put all the 1's together, all the 2's, the 3's, etc.; the result is a chart:

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1 2   4     7 8
  2 3 4   6   8
1     4 5   7 8
1 2     5   7
    3 4 5
          6   8
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". . . . Were we to tell the myth, we would disregard the columns and read the rows from left to right and from top to bottom. But if we want to understand the myth, then we will have to disregard one half of the diachronic dimension (top to bottom) and read from left to right, column after column, each one being considered a unit." Lévi-Strauss, *supra* note 86, at 432-33.

89. *Id.* at 440.

90. *Id.*

91. Using this method, for example, he concluded that the meaning of the Oedipus myth "has to do with the inability, for a culture which holds the belief that mankind is autochthonous..., to find a satisfactory transition between this theory and the knowledge that human beings are actually born from a union of man and woman." *Id.* at 434.
92. *Id.* at 435.
93. Pierre Maranda, *Structuralism in Cultural Anthropology*, 1 ANN. REV. ANTH. 329, 342 (1972).
94. Security Strategy, *supra* note 5, at 15.
95. 38 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 944 (June 10, 2002) [hereinafter PRESIDENTIAL DOCUMENTS] (The West Point speech is the earlier enunciation of the Bush Doctrine, laying the foundation for the conclusions that, over a year later, the National Security Strategy could take as existing background assumptions. Stylistically, the graduation speech's character as an oral presentation to a boisterous supportive audience allowed many elements to appear that can be hidden within a formal, written document that few will ever read.).
96. David Kronenfeld & Henry W. Decker, *Structuralism*, 8 ANN. REV. ANTH. 503, 522 (1979).
97. *E.g.*, "If we wait for threats to fully materialize, we will have waited too long. . . . [O]ur security will require all Americans to be forward-looking and resolute, to be ready for preemptive action when necessary to defend our liberty and to defend our lives." PRESIDENTIAL DOCUMENTS, *supra* note 95, at 946.
98. At least one scholar deems Bush's argument to successfully bridge the gap from capacity preemption to threat preemption. *See* Jorge Alberto Ramirez, *Iraq War: Anticipatory Self-Defense or Unlawful Unilateralism?*, 34 CAL. W. INT'L L.J. 1, 22-23 (2003):

> The United States had invested much time in demonstrating that Hussein was not a rational actor that could be contained like Cold War adversaries of the past. Unlike the Soviet Union of years gone by, the United States argued that nuclear and chemical weapons in the hand of an unpredictable and perhaps unstable individual like Hussein met the international law test for use of force as laid out by the *Caroline* case.... Given [Hussein's] history and the lethal nature of the weapons Hussein was believed to have been developing, and the weapons' potential to wreak great devastation and suffering upon large numbers of people with little or no warning, the United States' action probably did meet the legal formulation for anticipatory self-defense set out by the *Caroline* case.

99. Ron Suskind, *Without a Doubt*, N. Y. TIMES MAGAZINE, Oct. 17, 2004, 44, at 51 (according to Ron Suskind, a senior advisor to George W. Bush, President Bush displayed rare candor when he admitted that "We're an empire now.").
100. Popularly ascribed to General Philip Sheridan. The actual quote is less lyrical: "The only good Indians I ever saw were dead."
101. *See* YASUHIDE KAWASHIMA, IGNITING KING PHILIP'S WAR: THE JOHN SASSAMON MURDER TRIAL 51-65 (2001) (Philip's Wampanoag name was Metacom. However, his older brother asked the Plymouth Court to give him and his sibling English names.).

102. "[P]opular prejudice against Indians . . . began in 1675 as a direct result of King Philip's War." *Id.* at 108. Arguing in much the same terms as those we present, however, Alden T. Vaughan dates the critical transition earlier, after the Virginia massacre of 1622: "After the assault . . . there emerged a policy of unrestrained enmity and almost total separation that reflected a persistent but often repressed contempt for the American natives." Alden T. Vaughan, *"Expulsion of the Salvages": English Policy and the Virginia Massacre of 1622*, 35 WM. & MARY Q. 57, 58 (1978). The Virginia colonists took so quickly to the doctrine of preemptive attack that "In 1624 the assembly ordered 'that at the beginninge of July next the Inhabitantes of every Corporatione shall falle upon theire adjonyine Salvages as we did the last yeere.' Such campaigns became so customary that the colonists were divided into four units, each to attack assigned targets every November, March, and July." *Id.* at 81.
103. Reaching further back than the Sassamon trial, Francis Jennings well recounts the war's extensive historical background. *See* JENNINGS, *supra* note 27, at 298. Jennings argues that all of the military actions of this period, including King Philip's War, were essentially pretexts to acquire land either from the Indians or other English colonies. His preferred term for King Philip's War, therefore, is "the Second Puritan Conquest." *Id.* at 295.
104. ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 215 (1990).
105. KAWASHIMA, *supra* note 101, at 71 (It may be noted that the English colonists invoked the principle of jurisdictional territoriality only when convenient. Had they applied the rule consistently, they would have felt themselves bound by the laws of the Native Americans whose territory they inhabited.).
106. *Id.* at x.
107. *Id.* at 153.
108. A BRIEF AND TRUE NARRATION OF THE LATE WARS RISEN IN NEW-ENGLAND OCCASIONED BY THE QUARRELSOM DISPOSITION AND PERSIDIOUS CARRIAGE OF THE BARBAROUS, SAVAGE AND HEATHENISH NATIVES THERE (London, Printed for J.S., 1675) [hereinafter Brief and True Narration] (the typesetting convention of changing the "s" to "f" has been modernized in quotations.).
109. *Id.*
110. WILLIAMS, *supra* note 104, at 274; *see also* Gerard Clarfield, *Protecting the Frontiers: Defense Policy and the Tariff Question in the First Washington Administration*, 32(3) WM. & MARY Q. (3d Ser.) 443, 445 (1975).
111. INCREASE MATHER, A BRIEF HISTORY OF THE WAR WITH THE INDIANS IN NEW-ENGLAND 1 (London, Chiswell 1676).
112. *Id.* at Postscript 6.
113. Brief and True Narration, *supra* note 108.
114. MATHER, *supra* note 111, at 49.
115. JENNINGS, *supra* note 27, at 298.
116. Indeed, as part of their strategy against Philip, the colonists launched unabashedly preemptive attacks against other native groups they feared might rally to his cause. *See* KAWASHIMA, *supra* note 101, at 136 (stating "[t]he colonists' war with the Narragansetts had been intended as a 'preemptive war.'").

117. The present thesis has argued that dehumanization is critical in part because without it combatants might empathize with the enemy, and refuse to kill him. *See supra* text accompanying note 65. For a report on troubling outbreaks of empathy among U.S. soldiers toward their Indian opponents, *see* Thomas C. Leonard, *Red, White and The Army Blue: Empathy and Anger in the American West*, 26(2) AM. Q. 176, 178-84 (1974).
118. MATHER, *supra* note 111, at 1, 2, 12, 24.
119. *Id.* at 27, 30.
120. James Axtell, *The Scholastic Philosophy of the Wilderness*, 29(3) WM. & MARY Q. (3d Ser.) 335, 335 (1972).
121. At several points Mather likens the Indians unto a "dying Beast." *See* MATHER, *supra* note 111, at 43.
122. *See, e.g.*, KAWASHIMA, *supra* note 101, at 151 (stating that "[t]he Europeans would not dare employ such Mongolian tactics among themselves, in Europe or America, but they were willing to put them into practice fighting against the 'infidels' in North America."). This rationale was expressly invoked later in 1703, for example, to justify the use of dogs against Indians. *See* Axtell, *supra* note 120, at 343-44 (quoting "If the Indians were as other people," [The Reverend Solomon Stoddard of Northampton] began, "and did manage their warr fairly after the manner of other nations, it might be looked upon as inhumane to pursue them in such a manner").
123. MATHER, *supra* note 111, at 20. This was not the only attack that astonishes the modern senses. Mather reports that on May 18 soldiers "arrived at the *Indian Wigwams* betimes in the morning, finding them secure indeed, yea all asleep without having any Scouts abroad, so that our Souldiers came and put their Guns into their Wigwams, before the *Indians* were aware of them, and made a great and notable slaughter amongst them." *Id.* at 30. *See also* Axtell, *supra* note 120, at 343-44 (stating that the English used attack dogs and scalping in an "uninhibited style of Indian warfare").
124. According to one tally, during King Philip's War the colonists lost 600 men, while more than three thousand Indians were killed. *See* JENNINGS, *supra* note 27, at 324.
125. MATHER, *supra* note 111, at 26.
126. The deep embeddedness of the capacity preemption story template is illustrated by the fact that, despite the clear resort to capacity preemption against Native Americans, military historians confidently claim that "The historical record indicates that the United States has never, to date, engaged in a 'preemptive' military attack against another nation." Richard F. Grimmett, *U.S. Use of Preemptive Military Force: The Historical Record*, 7 U.S. Foreign Pol'y Agenda (2002), *at* http://usinfo.state.gov/journals/itps/1202/ijpe/pj7-4grimmett.htm. This result can be sustained either by refusing to recognize the Indian tribes as nations (which reiterates our earlier discussion on the ethnocentric criteria for membership as a "civilized" nation), by the successful transmutation of capacity preemption into threat preemption to the extent that we are no longer aware of the process, or some combination of both.
127. Richard R. Johnson, *The Search for a Usable Indian: An Aspect of the Defense of Colonial New England*, 64 J. AM. HIST. 623, 650 (1977). For example, fifty years after King Philip's War, a chronicler of the next phase of colonial wars against the Indians was able to echo: "I might . . . justly entitle this history, de miseria hominem, being no other than a narrative of tragical

incursions perpetrated by bloody pagans, who are monsters of such cruelty, . . . [w]ho are as implacable in their revenge, as they are terrible in the execution of it; and will convey it down to the third and fourth generation. No courtesy will ever oblige them to gratitude; for their greatest benefactors have frequently fallen as victims to their fury." SAMUEL PENHALLOW, THE HISTORY OF THE WARS OF NEW-ENGLAND WITH THE EASTERN INDIANS, OR, A NARRATIVE OF THEIR CONTINUED PERFIDY AND CRUELTY v (Boston, Fleet 1726) (recounting the conflicts of 1703-1713). This same author quickly addressed the "war for land" accusations: "Not that I am insensible that many have stigmatized the English, as chiefly culpable in causing the first breach between them and us; by invading their properties and defrauding them in their dealings; but to censure the public for the sinister actions of a few private persons, is utterly repugnant to reason and equity." *Id.* at 2. Penhallow fails to note the inconsistency in treating Indians as an homogenous group while demanding that English citizens be judged according to their individual merits. Unlike Mather, who denied acts of bad dealing, Penhallow admits they occurred, but attributes them to private persons, not to the colony itself, and thus the frauds served as no justification for aggressive retaliations by the natives. The rationale change from Mather to Penhallow illustrates the incremental normalization by conquest ideology of colonial America. The final step would be the national myth that colonists indeed waged a hard war for the new lands, but because of the inhuman occupants, this was a legitimate enterprise, one of Americans merely claiming their 'manifest destiny.'

128. Axtell, *supra* note 120, at 344.
129. THE DECLARATION OF INDEPENDENCE para. 29 (U.S. 1776).
130. JENNINGS, *supra* note 27, at 213.
131. *See, e.g.,* Leonard, *supra* note 117, at 185 (concluding that "By defining the Plains Indians as relentless and efficient warriors, the military justified its own ruthless strategy—and setbacks.").
132. PRESIDENTIAL DOCUMENTS, *supra* note 95.
133. Allen Buchanan & Robert O. Keohane, *The Preventive Use of Force: A Cosmopolitan Institutional Proposal*, 18 ETHICS & INT'L AFF. 1, 1 (2004).
134. *Id.* at 14.
135. *Id.* at 10. The authors' presumption that such nations will be democracies is complicated by analyses that show the relationship between democratic forms of government and the advance of human rights to be something less than an unambiguous positive correlation. *See* Christian Davenport & David A. Armstrong, *Democracy and the Violation of Human Rights: A Statistical Analysis from 1976 to 1996*, 48 AM. J. POL. SCI. 538, 538 (2004) (concluding that "below a certain level, democracy has no impact on human rights violations").
136. Buchanan & Keohane, *supra* note 133, at 10.
137. *See supra* text accompanying notes 30-36.
138. *See, e.g., Guantanamo Abuse Alleged*, ATLANTA J-CONST., Aug. 5, 2004, at A4 (detailing allegations of abuse at the United States terrorism detention center at Guantanamo Bay).
139. Human Rights Watch, *The Road to Abu Ghraib* 3 (June 2004), *available at* http://www.hrw.org/reports/2004/usa0604/usa0604.pdf.
140. *Id.*

141. Article 15-6 Investigation of the 800th Military Police Brigade 16 (2004), *available at* http://www.npr.org/iraq/2004/prison_abuse_report.pdf.
142. *See supra* text accompanying note 97.
143. Seymour M. Hersh, *The Gray Zone: How a Secret Pentagon Program Came to Abu Ghraib*, THE NEW YORKER, May 24, 2004, at 42 [hereinafter Hersh, *Gray Zone*]. *See also* SEYMOUR M. HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB 38-39 (2004) (stating that "[t]he photographing of prisoners . . . seems to have been not random, but rather, part of the dehumanizing interrogation process.").
144. Hersh, *Gray Zone*, *supra* note 143, at 42.
145. SILVAN S. TOMKINS, AFFECT, IMAGERY, CONSCIOUSNESS, Vol. II, 118 (1963).
146. *See, e.g.*, Frank Davidoff, *Shame: The Elephant in the Room*, 324 BRIT. MED. J. 623, 623 (2002) (stating that "shame is so devastating because it goes right to the core of a person's identity, making them feel exposed, inferior, degraded; it leads to avoidance, to silence.").
147. *See* Thomas J. Scheff, *Shame and the Social Bond: A Sociological Theory*, 18 SOC. THEORY 84, 92, 95 (discussing the work of Helen Lynd and Helen Lewis).
148. Legal memoranda drafted by top Justice Department officials and White House Counsel (now Attorney-General nominee) Alberto Gonzales implicate the Bush administration in the creation of a legal environment that encourages abusive treatment of prisoners. Gonzales was the author of a January 2002 legal opinion advising Bush that al Qaeda and Taliban detainees captured in the invasion of Afghanistan did not qualify for prisoner-of-war status under the Geneva Convention—a view that Bush embraced. Gonzales asserted that the war on terrorism presented a "new paradigm" that rendered the protections of the Geneva Convention "obsolete" and "quaint." The text of the January 25, 2002 memorandum is *available at*, http://msnbc.msn.com/id/4999148/site/ newsweek/. Subsequently, at Gonzales's request, the Justice Department issued a legal opinion on the permissible bounds of torture under international and domestic law. The August 2002 memorandum narrowly defined torture as treatment that would produce pain equivalent to that accompanying "organ failure, impairment of bodily function or even death." The memorandum also asserted that the President's Commander-in-Chief power supercedes congressional limitations on torture, and that if such limitations interfere with the prosecution of the war on terror, they are unconstitutional. *See Memorandum for Alberto R Gonzales, Counsel to the President, Re Standards of Conduct for Interrogation Under 18 U.S.C. §§2340-2340A* (August 1, 2002) *available at* http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf.

    On the eve of Gonzales's Senate confirmation hearings, the Justice Department repudiated much of the reasoning of the earlier document. However, the new statement does not address the radical claims in the Commander-in-Chief section, which Gonzales earlier declared were "unnecessary." *See Memorandum for James B. Comey, Deputy Attorney General, Re Legal Standards Applicable Under 18 U.S.C. §§2340-2340A* (Dec. 30, 2004), *available at* http://www.justice.gov/olc/dagmemo.pdf.

    Finally, in January 2005, it was disclosed that the White House lobbied congressional leaders to drop a proposal to impose restrictions on the use of torture by U.S. intelligence officers. According to the New York Times,

The restrictions would have explicitly extended to intelligence officers a prohibition against the use of torture or inhumane treatment, and it would have required the CIA as well as the Pentagon to report to Congress about the methods they were using....In a letter to members of Congress ... Condoleezza Rice, the national security adviser, expressed opposition to the measure on the ground that it "provides legal protections to foreign prisoners to which they are not now entitled under applicable law and policy.

The Bush administration has said almost nothing about the CIA operation to imprison and question terror suspects designated as high-value detainees, even as it has expressed disgust about abuses at the Abu Ghraib prison in Iraq.

Douglas Jehl & David Johnston, *Congress Killed Measures to Ban U.S. Use of Torture,* N.Y. TIMES, Jan. 14, 2005 at A-1.