

CHAPTER ONE

NECROPOLITICAL LAW

1.1 INTRODUCTION: DISCOUNTED LIVES

Osama bin Laden was killed by US Special Forces in his home in Pakistan on May 1, 2011 (Obama 2011) and later buried at sea in accordance with Muslim rites – or so goes the official US account (Wilson et al. 2011). Renowned journalist Seymour Hersh has written that his body was hacked into bits and flung out of a helicopter over the Hindu Kush mountains (2016: 47). According to YouTube clips, bin Laden is still living.¹ And news of very uncertain provenance reports Edward Snowden saying that he is doing it in luxury on CIA money in the Bahamas.² This proliferation of competing accounts distracts us from three crucial elements in the bin Laden narrative. First, at least four others were killed in the raid on bin Laden's home (CNN 2013). These killings were discounted as incidental to the killing of bin Laden, their legality barely questioned by media and artfully elided in the official announcement of the death of bin Laden by the US state (Obama 2011).³ “A small team of Americans carried out the operation

¹ At www.youtube.com/watch?v=oGPatAC_TTc; www.youtube.com/watch?v=bHhalz3iy7g.

² At <https://worldnewsdailyreport.com/bin-laden-is-alive-and-well-in-the-bahamas-says-edward-snowden/>; www.snopes.com/fact-check/snowden-bin-laden-alive/.

³ The category “civilian,” in the course of the long War on Terror, has become especially contested, leaving unclear the role played by the others who were killed. We have no reliable information, for example, as to whether these others were armed. Some reports do note the killing of these four others in the raid, but the legality of these killings is generally not questioned; for example, CNN (2013) and Marks (2018).

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with extraordinary courage and capability,” said President Obama. “No Americans were harmed. They took care to avoid civilian casualties.” Second, the extraterritorial, extrajudicial killing of bin Laden took place outside of law’s conventional sites, processes, and actors, such as courts, trials, and judges. Third, and perhaps most crucial, starting with bin Laden, each such extraterritorial, extrajudicial killing in the War on Terror has been celebrated publicly in the United States as the realization of justice and the delivery of security.⁴ All but unacknowledged are the unnamed and uncounted others who have died and been maimed alongside the targeted individuals. Despite law’s seeming absences, the invocations of justice and security legitimize the discounting of these lives so that others – implicitly, American nationals – may live. How, then, proceeding through this unending War on Terror, are we to make sense of law in relation to the valuing of life?

This book argues that texts, images, and events emanating from the United States discount life by eclipsing the values and institutions of rule of law while fostering the secretive, belligerent values and institutions of the long War on Terror.⁵ By discounting life, I mean in the first instance “life” in the straightforward sense of the distinction between life and death. But this book also shows how lives are discounted by the US state along a continuum, from the brute violence of intentional killing to the less obvious violence of lives actually or potentially stripped of dignity, sociality, and rights.⁶ In opposition to

⁴ See, for example, President Biden’s authorization of killings of alleged ISIS-K terrorists that resulted in the killing, by drone strike, of ten civilians in Afghanistan, including seven children (Aikins and Rahim 2021), and the Trump administration’s February 2020 announcement on the killing in Yemen of Qassim al-Rimi, the leader of Al Qaeda in the Arabian Peninsula (Helsel 2020). While the details remain murky, it seems probable that a US drone attack in late January is what killed al-Rimi, along with uncounted others who were in the building that was bombed; see Helsel (2020) and Al Jazeera (2020). In January 2020, Trump announced the killing of Iran’s Quds Force leader, Qassem Suleimani (Trump 2020). Ten others were killed in the drone strike that killed Suleimani (Entous and Osnos 2020). In October 2019, Trump announced the killing of ISIS leader Abu Bakr al-Baghdadi (Trump 2019). In the al-Baghdadi raid, at least nine others, including two women and a child, were also killed by US forces (Syrian Observatory for Human Rights 2019).

⁵ Rule of law is discussed below at Section III.B. As elaborated in Section IV, this book makes its argument by reading for law across legislative, policy, and popular cultural texts.

⁶ These two senses of life are explicated by Agamben in *Homo Sacer* (1998 [1995]) as prefiguring and conditioning bare life. In holding open the possibility of a socially

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positivist notions of law's apartness as a sphere of specialized knowledge and activity, I make my argument by delving into texts, images, and events because, like all cultural artifacts and dynamics, these hail us into our ways of being and knowing.⁷ Animated by Robert Cover's seminal argument on culture as the medium for "the creation of legal meaning" (1983: 11), by Lawrence Rosen's important elaboration of law as culture,⁸ "creating the categories of our experience . . . knit[ting] together disparate ideas and actions . . . to fabricate a world of meaning" (Rosen 2006: 4), and by Renisa Mawani's theorizing of law as archive, to highlight the key roles played by law's record, power, and dominant narratives in simultaneously justifying and obscuring law's violence (Mawani 2012), this book traces the discounting of life legitimized and globalized via cultural texts emanating from the United States after 9/11.⁹ Through this tracing, I show how law values (and discounts) life. The texts, images, and events that pervade our everyday existences¹⁰ reveal the way relations and ideologies of sovereignty,

and politically empowered human life, even in the context of states of exception, I draw, first, on Bonnie Honig's excavation of the possibilities for democratic politics in emergency contexts; possibilities, she notes, that work against the closures and indistinguishability between these two forms of life in Agamben's bare life (2009: xv); and, second, on Jinee Lokaneeta's demonstration, against Agamben's totalizing conception of bare life, of the compelling presence of resistance in states of exception (2017: 81).

⁷ Some influential scholarship on how everyday life and ordinary culture hail us into being in relation to all things social (power, law, language, affect, media, and shared infrastructures and environments) includes Kahn (1999); Sarat and Kearns (1998); Hall (1980); Althusser (1970); Williams (1959).

⁸ James Boyd White is widely credited with introducing this heuristic of "law as . . ." in his original readings of law as literature (White 1973), literature as law (White 1984), and more, writing, "I could imagine a course not in law and history, or sociology or economics or anthropology, but law as each of those things" (White 1990: 19). Also influential is Sally Falk Moore's compelling study *Law as Process* (1978). More recently, in addition to Rosen's *Law as Culture* (2006) and Renisa Mawani's theorizing of law as archive (2012), the ongoing, multipart "Law As . . ." project led by Christopher Tomlins has revitalized the heuristic to grapple with law's inextricable enmeshments with multiple facets of the social.

⁹ At the risk of stating the obvious, expressions and sites of culture include but far exceed texts, images, and events such as those I analyze. I keep my focus on texts, images, and events because of my methodological reliance on interpretive socio-legality and close textual reading as found in *Critical Discourse Studies* (discussed at Sections 1.3.2 and 1.4.2).

¹⁰ Section 1.3 details and discusses law's compound and contested meanings, attributes, and relations.

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nationalism, and imperialism – all inextricably enmeshed with law – condition us to discount some lives so as to value and secure others.¹¹

In relation to law, life is discounted via a double move, in which liberal legality's insistence on rule of law, nation-state sovereignty, and the valuing of all human life as equal is notionally upheld even as an exceptionalist narrative of the War on Terror scripts justification for departures from these same principles. The exceptionalism narrative is a version of the state of exception (Schmitt 2005 [1922]; Agamben 2005 [2003]), the state in which, as Hansen and Stepputat write, by suspending "rules and conventions . . . a conceptual and ethical zero point [is created] from where the law, the norms, and the political order can be constituted" (2005: 301). In de-centering and disrupting dominant notions of law, this book contributes to scholarship on sovereignty that contests received understandings of the concept as being coterminous with nation-state sovereignty. I highlight Hansen and Stepputat's definition of the state of exception in part because their foregrounding of sovereign power in relation to violence resonates with critical approaches to law, in which violence is understood as foundational to law and inextricably enmeshed with it (Derrida 1992; Benjamin 1996 [1921]). And, as Renisa Mawani points out in her important essay on law in relation to contestations over "power" and "truth," law, understood as "an expansive and expanding locus of

¹¹ In reading cultural texts of imperialism for the co-constitution of the valuing of some lives in tandem with the discounting of others, I draw on a tradition which, from Edward Said's groundbreaking studies, *Orientalism* (1978) and *Culture and Imperialism* (1993) onward, understands cultural texts forged in the crucible of Euro-Atlantic imperialism as producing knowledge, shaping subjectivity, and disseminating ideologies that reinscribe the racialized relations of domination and subordination inherent to imperialism and neo-imperialism. Also pertinent to this book's concern with legitimations of US imperialism, a critical body of scholarship illuminates the simultaneous figuring of the United States as "nation" in relation to its "foreign" other. For example, Melani McAlister focuses on "the cultural politics of encounter" (2005: xvii) through a reading of representations across genres (news media, films, popular novels) to show how the "uncoordinated conjunctures" of cultural products "have the knitted-together power of a discourse" (2005: 307) to shape US responses to 9/11 (2005: 268). And Amy Kaplan's influential analytic insight, again through a reading of US cultural texts across genres (including Supreme Court judgments, domestic manuals, films, and novels), has been that "international struggles for domination abroad profoundly shape representations of American national identity at home" [such that the] idea of the nation as home . . . is inextricable from the political, economic, and cultural moments of empire" (Kaplan 2002: 1).

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juridico-political command,” cannot be disaggregated from “struggles over sovereignty, authority, violence, and nonviolence” (2012: 337). Mawani’s examination of the entwining of sovereignty, law, and violence provides a foil to the more positivist notion of law in Schmitt’s now-canonical formulation of the sovereign as “he who decides on the exception” (2005 [1922]: 5), with the decision empowering the sovereign to step outside and beyond the law of “ordinary legal prescription” (Schmitt 2005: 6).

Departing from Schmitt, and in line instead with critical, sociolegal, and cultural understandings of law as a compound and relational social fabric, with violence and sovereign power inevitably part of the weave, this book approaches law as plural, everyday, and embodied. Understood in this way, law is discernible in sovereign power’s plural, everyday, and embodied expressions. It may “be spectacular and public, secret and menacing, and also can appear as scientific/technical rationalities of management and punishment of bodies” (Hansen and Stepputat 2005: 3). Put differently, because law is articulated in part through the intersections of power and violence, in states of exception it cannot disappear or be discarded. Law is, rather, reconstituted and reconfigured by the exception. In part, contingent and socially constructed and in part the product of deeper histories, ideals, and politics, law is always present, no matter the state, condition, or fragmentation of sovereign power.

In *Discounting Life*, I depart from doctrinal law’s dominant frameworks for thinking about sovereignty, law, and exception by foregrounding Achille Mbembe’s crucial contribution to thinking on the state of exception. In his book *Necropolitics*, Mbembe illuminates the large-scale discounting of life that is inherent to the state of exception by understanding sovereignty, not according to the legal fictions of nation-state sovereignty or “supranational institutions and networks” (2019: 197) but instead in terms of the visceral and totalizing “power and capacity [of the sovereign] to dictate who is able to live and who must die” (Mbembe 2019: 66).¹² Alert to formal, legal, and

¹² *Necropolitics*, the book, includes an almost identical version of the 2003 essay, “Necropolitics,” as well as a detailed “reflection on today’s planetary-scale renewal of the relation of enmity and its multiple reconfigurations” (2019: 1–2). Mbembe draws, in part, on Foucault’s analysis of biopower and the sovereign right to kill (Foucault 2003: 240) as a major launching point for his argument on necropolitics. Both in *Necropolitics* (2019) and in other work, Mbembe has emphasized that

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philosophical notions of sovereignty, Mbembe refuses the tendency in “late modern political criticism” to overlook the fact that “modernity is at the origin of multiple concepts of sovereignty” (2019: 66–67). Repudiating “the romance of sovereignty, . . . defined as a twofold process of *self-institution* and *self-limitation*” (2019: 67–68), Mbembe looks instead at “politics as the work of death” and “sovereignty defined as the right to kill” (2019: 70). His focus is on “those figures of sovereignty whose central project is . . . *the generalized instrumentalization of human existence and the material destruction of human bodies and populations*” (2019: 67–68).¹³ These figures of sovereignty, he writes, “constitute the *nomos* of the political space in which we continue to live” (2019: 68). Tracing how the long *durée* for racialized,¹⁴

sovereignty expressed as power over bodies, territories, resources, and populations need not necessarily be the sovereignty of state power. Such sovereignty might be exercised by corporations, private armies, neighboring states, and religious organizations (Mbembe 2000).

I draw on Hansen and Steputtat’s succinct definition of the state in exception (quoted above) in part because Hansen and Steputtat hold in common with Mbembe an acute attention to sovereignty articulated through violence over peoples (2005: 2). Hansen and Steputtat review a vast literature on sovereignty (2006) and theorize sovereignty in relation to postcolonies (2005) to offer their definition of the state of exception, which is shaped by an “ethnographically informed look at the meanings and forms of sovereignty in postcolonial zones” with particular attention to “historically-embedded practices and cultural meanings of sovereign power and violence” (2005: 3). Importantly, these ethnographies show how, in practice, sovereign power may be “exercised by a state, in the name of the nation, or by a local despotic power or community court [and] is always a tentative and unstable project whose efficacy and legitimacy depend on repeated performances of violence and a “will to rule” (2005: 3; see also Greenhouse and Davis 2020). Additionally, while their theorizing of postcolonial sovereignty builds on zones conventionally understood as former European colonies, Hansen and Steputtat draw on Hardt and Negri’s influential framing of contemporary globalized imperialism as a network of power with “no outside” (2005: 2). In other words, we are all postcolonial today.

¹³ In *Necropolitics*, elaborating on terror and killing as “the means of realizing the already known telos of history” (2019: 74), Mbembe traces politics as the work of death, and sovereignty as the right to kill, with regard, first, to slaves in the contexts of the plantation system (74–76); second, to sovereignty as “colonial terror” over colonized “savages” (76–78); and, third, to sovereignty as violent territorialization and fragmentation in apartheid South Africa and in the West Bank and Gaza (79–83).

¹⁴ As an analytic category, racialization signifies an ideological process “that produces race within particular social and political conjunctures” (HoSang and LaBennet 2014: 212).

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imperialized violence finds its contemporary expression through the long War on Terror, Mbembe argues that “the state of exception and the relation of enmity have become the normative basis of the right to kill” (2019: 70).¹⁵ Drawing on this scholarship, and grounding analysis in texts, images, and events, *Discounting Life* asks what law, norms, community, and political order have been constituted from the zero point of the War on Terror’s state of exception? What bearing does this particular confluence of law, norms, community, and political order have on the manner in which we value life?

Scholarship on the relationship of law to the state of exception in colonies, in postcolonies, and under imperial power (past and present) details the manner in which ostensibly rule-of-law states have deployed the state of exception to centralize state power, reinforce the state’s coercive apparatus, and amplify executive prerogative (e.g., Jayasuriya 2001, 1999; Hussain 2003; Hansen and Stepputat 2005; Johns 2005; Hussain 2007; Lokaneeta 2011; Rajah 2012; Khalili 2013; Saito 2021). As these studies show, when “the exception becomes the norm” (Jayasuriya 2001), law, far from being suspended (as posited by Schmitt 2005) or emptied of its connection to life (as posited by Agamben in his bleak genealogy of the state of exception),¹⁶ may be intensified and amplified. This amplification can take the form of hyperbolic and excessive legality “constraining or avoiding experiences of the exceptional” (Johns 2005: 615), or the hyperlegality of proliferating new laws “in an ad hoc or tactical manner” while repurposing

¹⁵ Because *Necropolitics* draws on Foucault’s thinking on biopower, Mbembe’s use of “normative” invites associations with Foucault’s arguments on the “prescriptive character of the norm” in effecting disciplinary normalization through the apparatuses of security that shape contemporary society (Foucault 2007 [2004]: 57). That killing on the basis of War on Terror enmity has become simultaneously “normal,” valued as desirable, and no longer treated as abnormal or unlawful speaks to these compound meanings imbuing Mbembe’s “normative.”

¹⁶ For Agamben, the state of exception is “an empty space, in which a human action with no relation to law stands before a norm with no relation to life” (2005: 86). Agamben’s understanding of the category “law,” here and in *The Sacrament of Language* (2010), seems to be squarely *state* law. It is interesting to note that while in *Homo Sacer* Agamben uses the category “juridico-political,” pointing perhaps to law, politics, and the social as enmeshed and co-constituting, in his other work, he also segregates law from politics and the social. In *Emergency Politics* (2009), Honig interrogates Agamben’s reading of both “law” and “politics” in *State of Exception*, pointing out Agamben’s failure to perceive plural legalities of “popular law and popular justice, both formed and formless . . . as elements of a democratic state of exception” (Honig 2009: 89).

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older law (Hussain 2007: 741), or the “aggressive hyperlegality” designed to narrow law’s protections for vulnerable parties and expand law’s accommodation of excess state violence (Lokaneeta 2011: 70).

This scholarship also shows how, in relation to the state of exception in colonies, in postcolonies, and under imperial power, law – a compound category – becomes disaggregated and reconfigured in particular ways. Framed by narratives of “nation” and “security,” this disaggregated law is liberal in some arenas of life (typically commerce) and illiberal in others (typically civil and political rights).¹⁷ Similarly, within the United States, when narratives of “nation” and “security” herald exception to (re)constitute law and normalize emergency, civil and political rights are also eroded, while state secrecy, executive power, and the excesses of hyperlegality are amplified (e.g., Margulies 2006; Lokaneeta 2011; Chesney 2014; Dudziak 2015; Abel 2018a and 2018b; Saito 2021;). I extend this scholarship by analyzing texts that demonstrate how the long War on Terror, as a state of exception, evidences a point from which law, norms, community, and the political order are constituted, rather than suspended (Schmitt) or rendered meaningless (Agamben).

If exception *constitutes* law, then much depends on how the concept and category “law” is understood. In this book, I draw on scholarship that perceives law and its attributes – such as ordering society and social relations through norms, rules, and notions of community, alongside assertions of authority and legitimacy – as pervasive in social life. For those on the receiving end of the long War on Terror’s pervasive necropolitical law, there is a painfully acquired expertise in how “[c]ulture, law, politics, and theory . . . [e]ach significantly informs the other” (Bayoumi 2015: 17). Section 1.3 addresses the many meanings, dynamics, and sites of law this book grapples with. For now, it is important to highlight that I approach law as both state law and beyond state law, and as inextricably enmeshed with and discernible in politics, society, and culture. From a reading of and *for* law (reading for law as a methodology is detailed in Section 1.4.2), this book argues that the apparent zero point generated by war-on-terror exceptionalism has scripted a law invested in the discounting of some lives so that others may live, that is, necropolitical law.

¹⁷ Scholarship understanding law in this disaggregated way (e.g., Jayasuriya 1999, 2001; Rajah 2012) owes much to Ernst Fraenkel’s *Dual State* (1941).

1.1.1 Necropolitical Law

In naming necropolitical law, I conjoin Achille Mbembe's highly influential theorizing of necropolitics to interdisciplinary understandings of law as that which orders society by expressing norms, legitimacy, and authority, both through state law and through ostensibly nonlegal texts, images, and events.¹⁸ Necropolitics fosters not life but death, and it does so selectively, on a *relational* basis, in that the designation “enemy” justifies killing (Mbembe 2019: 70). Through the lens of necropolitical law, the extraterritorial, extrajudicial¹⁹ killing that is such a hallmark of the long War on Terror²⁰ becomes its own rationality. The right to murder enemies constituted by war-on-terror exceptionalism makes sense of the elisions and discounting of human life embedded in the category “collateral damage” and in the practice of targeted killing.²¹ The celebratory tone and language deployed by the US state when it triumphs in the extrajudicial killings of its war-on-terror enemies (Obama 2011; Trump 2019, 2020) become platforms for the necropolitical legitimation of these murders. Exalting American virtue, valor, and superiority through accounts of how exceptionally brave American armed forces risk themselves so as to protect the United States and the world from “evil terrorists,” these narratives of

¹⁸ While Mbembe does not use the category “law” in his essay on necropolitics, he does trace a genealogy of sovereignty that unpacks sovereignty's multiplicities, and he does identify norms, beliefs, and historically enacted evidence of psychologies, which, I would argue, amount to a deconstructive reading of law's reliance on founding myths, beliefs, and conventions, and well as of law's attributes and operations.

¹⁹ The term “extrajudicial” points to a paradox that arises in reading for law through culture and events, as well as through the institutions and discourse of conventional state law. In highlighting the extrajudicial nature of these killing, I am highlighting departures from conventional law that need to be scrutinized and interrogated for the manner in which publicly sanctioned violence has been enacted in the long War on Terror. I am grateful to Ian Hurd for prodding me to articulate the implications of “extrajudicial” in this project.

²⁰ In his history of targeted killing, Markus Gunneflo traces the intensifications of extrajudicial, extraterritorial killings by drones after the events of 9/11 (2016). Struggling to compile data and able to offer only a partial accounting, the Bureau of Investigative Journalism estimates that in the course of the War on Terror, as of the end August 2021, between 8,858 and 16,901 people have been killed through drone warfare alone in Pakistan, Somalia, Yemen, and Afghanistan. Of these an estimated 910–2,200 are civilians and 283–454 are children.

²¹ Collateral damage is unpacked below at Section IV.C. Targeted killing is addressed in Chapters 3, 4, 5, 6 and 7.

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legitimation weave together belligerent patriotism, American exceptionalism, and discourses of security to constitute an unbounded territorial sovereignty for America's right to kill, alongside an unbounded jurisdictional sovereignty to formulate, enact, and enforce necropolitical law. Crucially, it is only by seeing law through an interdisciplinary lens, and by grappling with the role of narrative, images, and affect in making and disseminating law, that it becomes possible to perceive how law's compound meanings have been represented, reconfigured, and globalized to justify and authorize the long War on Terror's discounting of life through a unidirectional ennobling of violence. This book excavates and defines this process of discounting life as necropolitical law to make visible an occluded and coded legal transcript of US state power and state-sanctioned violence. Put differently, necropolitical law is being expressed and enacted all around us, while we, distracted by narratives of exception, fail to recognize these norms, practices, relations, and legitimations *as law*.

Our failure to perceive necropolitical law is unsurprising, in that *deception* is central to necropolitics, which engages “a force of separation . . . that, while pretending to ensure the world's government, seeks exemption from it” (2019: 1).²² Through analytic attention to separation, deception, and exemption, Mbembe excavates “the contemporary ways in which the political, under the guise of war, of resistance, or of the fight against terror, makes the murder of the enemy its primary and absolute objective” (66). Understanding the role of culture in our processes of meaning-making thus becomes crucial to perceiving the workings and guises of necropolitical law (as argued in Section 1.4). This is especially the case because, as Melani McAlister writes, culture works in “sly” ways (2005: 269). Culture, unlike the presumed rationality and legibility of law in positivist thinking, “packs associations and arguments into dense ecosystems of meanings; it requires us to know a thousand things about politics, social life, and correct feeling in order to ‘get it’; and then, in a remarkable sleight of hand, it makes the reactions it evokes seem spontaneous and obvious” (269). And the “work of culture” after 9/11, Alex Lubin argues, has been to facilitate “actively forgetting US complicity in a global world order that made life across large parts of the globe unlivable . . . as the

²² This force of separation works against life by impeding “a relation with others based on the reciprocal recognition of our common vulnerability and finitude” (Mbembe 2019: 3).