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A Violent Reconciliation: Exploring the Rule of Law, Violence, and States of Exception Through John Ford's *The Man Who Shot Liberty Valance* and Christopher Nolan's *The Dark Knight*

Nathan Donarum
Bard College

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A Violent Reconciliation:

Exploring the Rule of Law, Violence, and States of Exception Through John Ford's *The*

Man Who Shot Liberty Valance and Christopher Nolan's *The Dark Knight*

Senior Project Submitted to

Division of Social Studies

of Bard College

by

Nathan Donarum

Annandale-on-Hudson, New York

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INTRODUCTION

I. The Question

Is it possible for extralegal action, or violence, to be reconciled with the rule of law? This is a question that intrudes upon the idea that, as Aristotle stated, “Law should govern.”¹ In essence, the rule of law is supposed to exist to prevent, or to transition from, the arbitrary use of power and deployment of force. In the classical conception, per Aristotle,² if the rule of law exists, then there need not be arbitrary action. If we think of the rule of law in the foundational sense, then the foundation of a rule of law system can allow a society to transition from a state of nature, as we might think in the Hobbesian sense,³ to a state of order. This is not to suggest that violence ceases to exist, but that violence opposes the rule of law. The idea is that transitioning from a state of nature to a state of order allows society to rid itself of violence as a required aspect of the enforcement of the rule of law. What we must question is whether this is indeed the case.

We can then think of the rule of law as an establishing principle of an ordered state. In other words, “when a society chooses to rule through law, it also chooses to subject itself to the constitutional principles of the rule of law... Law presupposes rule of

¹ Aristotle establishes a classical conception of the rule of law, that a set of legal principles and ideas, without arbitrariness, should govern society. This is one way in which the rule of law can be understood on a base level. We can read more into this idea, especially when speaking of the difference between rule *by* law versus rule *of* law. It can be argued that Aristotle’s concept of the rule *of* law is no more than what David Dyzenhaus would consider the rule *by* law. *Politics: A Treatise on Government* (Gloucester, UK: Dodo Press, 2007), 3.16

² Aristotle, *Politics*

³ Thomas Hobbes, *Leviathan* (Oxford: Oxford University Press, 2008)

law..."⁴ The rule of law, then, is a framework by which a society orders itself around the law, a set of rules of principles.⁵ This is, in some ways, the principle upon which liberal democracies have been founded, and upon which liberal constitutionalism has operated. In the words of Montesquieu, "We are free because we live under civil laws."⁶

A critical background assumption exists with respect to the rule of law: it is antithetical to arbitrary action,⁷ and as a subset of such action, by extension violence. This is a contrast that is no better expressed than by the following: "Our world affords no starker contrast than that between societies where peace generally prevails and those where violence is commonplace. The former are generally blessed with the rule of law; the latter cursed by its absence."⁸ The rule of law exists to curtail such things. In other words, "it is commonly argued that individual violence is prima facie immoral" because "it violates the prima facie obligation to obey the law."⁹ In an ordered society, the assumption one lives by is to obey the law, and by extension, the rule of law. Violent or arbitrary action works in opposition to that obedience.

We first must admit that the rule of law and violence are intrinsically connected. In the very real-world sense, the rule of law is commonly instituted through violent action: revolution, war, violent collective action, etc. If we use the United States as an example, we can look not only at the Revolutionary War, but also subsequently the

⁴ David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Berkeley: Cambridge Univ. Press, 2006), 254.

⁵ We can further see this as the case when looking at A.V. Dicey's framework for the rule of law, which uses a set of principles upon which to think of the rule of law and its purpose.

⁶ Montesquieu, *The Spirit of the Laws*, (New York: Cambridge University Press, 2006).

⁷ This idea is summed up nicely by F.A. Hayek in his *Road to Serfdom* when he notes that the rule of law "means that a government in all its actions is bound by rules fixed and announced beforehand -- rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge." Friedrich A. Hayek, *The Road to Serfdom: Text and Documents*, (Chicago: University of Chicago Press, 2007), 112.

⁸ Martin Krygier and Whit P. Mason, "Violence, Development and the Rule of Law," *UNSW Law Research Paper No. 2008-8* (March 2008), 1-35.

⁹ Jeffrie Murphy, "Violence and the Rule of Law," *Ethics* 80 (1970): 319.

American Civil War. Yet even accepting the use of violence as a *means* to the rule of law, we are left to question its existence within a supposedly normal state. It is within this context that I turn to the question of states of exception, for it is through states of exception that we can see the connection between, and extension of, the very problem and question I have previously posed, as to whether it is possible for the rule of law and violence to be reconciled.

II. The Rule of Law Through the State of Exception

In the most basic sense, the state of exception stems from a concept that dictates that in times of crisis, the sovereign authority can suspend the constitution – and with it normal rule of law protections – in order to save the state. Thinking again in the American context, the oft-cited example is that of Abraham Lincoln, bravely doing everything in his power to “save the union,”¹⁰ including suspending the right of habeas corpus and raising an army without the consent of Congress.

This inevitably leads to the idea that exceptional times call for exceptional measures, so to speak. And it is here that the rule of law and arbitrary action, or in this case, extralegal action, logically intersects. For at what time does the threat of arbitrary action become seemingly justifiable if not within an emergency, or crisis situation? And at what time does the rule of law face arguably justifiable exceptions? I will speak at more length of the state of exception later within Chapter 1, but suffice it to say that much of the current conversation concerning the relationship of arbitrary action to the rule of law takes place within the realm of state of exception literature.

It would seem antithetical to the concept of liberal constitutionalism that suspending the constitution – in essence, violating it – could allow you to in fact *save* the constitution. And yet theorists like Clinton Rossiter, Carl Schmitt, and arguably others

¹⁰ Lincoln said, in a letter to Horace Greeley on 22 August 1862, that, “My paramount object in this struggle is to save the Union, and is not either to save or to destroy slavery. If I could save the Union without freeing any slave I would do it, and if I could save it by freeing all the slaves I would do it; and if I could save it by freeing some and leaving others alone I would also do that.” Another quote, likely apocryphal but nonetheless attributed to Lincoln, states something quite similar: “These rebels are violating the Constitution to destroy the Union. I will violate the Constitution if necessary to save the Union...” This was reportedly what Lincoln told then-Secretary of Treasury Salmon Porter Chase at one point.

like Bonnie Honig, believe that this is so.¹¹ Schmitt in many ways provoked these ideas in his books *Die Diktatur* and *Political Theology*, arguing that liberalism and democracy are inadequate to dealing with constitutional crises.¹² As such, he argued, a single sovereign dictator is required to respond to, and deal with, such crises. There are thinkers, however, that disagree with this assessment. Some, like David Dyzenhaus, argue that there is a certain adequacy to the rule of law in a normal, ordered state.¹³ In other words, the argument goes, we need not violate the rule of law in order to preserve the rule of law, even in exceptional or emergency times.

These are all issues that I will elaborate upon further, later in this thesis. As I will argue, there exists a background assumption that the rule of law first replaces violent or arbitrary action, and that second, that with an established rule of law system, such action is no longer required. But perhaps a better way to think of the relationship between the rule of law and violence may be as one of supplement. Jacques Derrida, in his famous essay *Force of Law*, speaks to the issue of the viability and enforceability of the law.¹⁴ Without some sort of backing, some sort of *force* behind the law, it is meaningless. In times of emergency and crisis, this idea is simply exacerbated by virtue of the fact that that during such times, the rule of law tends to be on such tenuous, shaky ground. Maybe it is that the rule of law is actually not in opposition to extralegality, but also that it in fact

¹¹ Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (S.I.: Rossiter Press, 2008).

Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Chicago: University of Chicago Press, 2005), *The Concept of the Political* (Chicago: Univ. Of Chicago Press, 2008), *Dictatorship* (Cambridge: Polity, 2010).

Honig, *Emergency Politics: Paradox, Law, Democracy* (Princeton: Princeton University Press, 2009)

¹² I will speak more to this point in Chapter 1, but the basic argument surrounds the idea that “exceptional times call for exceptional measures,” and that the normal legal tools are inadequate to dealing with circumstances in crisis situations.

¹³ David Dyzenhaus, "Emergency, Liberalism, and the State," *Perspectives on Politics* 9 (2011): 69.

¹⁴ Jacques Derrida, *Force of Law: The “Mystical Foundation of Authority,”* 1990

requires some form of extralegal action in certain circumstances, even within a state with an established system of the rule of law.

III. The Argument

This problem, one of the possible requirements of violence or extralegality in order to back the rule of law, even outside of a so-called “state of nature” situation, is one that theorists from Clinton Rossiter to Giorgio Agamben have struggled with, only to seemingly come to no proper solution.¹⁵ Although I do not claim to come up with a solution, per se, I do believe that exploring avenues outside of simply examining the philosophical texts themselves is helpful to perhaps understanding and elucidating the issues at hand. Furthermore, I think that by exploring other places in which the relationship of the rule of law to states of exception is discussed and expressed can be an important complement to the straightforwardly philosophical texts, as well as perhaps enlightening the ways in which these issues face us in the world today.

This is especially true given the fact that since September 11, 2001, the United States has struggled with attempting to navigate the tricky position of balancing civil liberties and the rule of law with the argued need for exceptional measures. In this way, these themes of the rule of law, states of exception, and arbitrary action, though always of concern within liberal democratic states, is only the more so today. There is a timeliness to the discussion of such things.

Political and legal theorists regularly debate these issues, but the fact of the matter is that such writings are not the only method by which ideas about the rule of law, and states of exception, are explored. Film, for instance, is one such place. Thus, following

¹⁵ See: Rossiter, *Constitutional Dictatorship*, Giorgio Agamben, *State of Exception* (Chicago: University Of Chicago Press, 2005).

the lead of philosophers and political theorists like Robert Pippin and Joshua Dienstag,¹⁶ I turn two films in order to look more deeply at the interconnection between the rule of law and violence: John Ford's late masterpiece, *The Man Who Shot Liberty Valance* (1962),¹⁷ and Christopher Nolan's recent superhero film, *The Dark Knight* (2008).¹⁸ Within them, we can see that in essence, if the transition to, or re-instating of, an ordered state *requires* a lawless act, or acts, *inherently*, then no stark dichotomy between the rule of law and violence can possibly exist.

¹⁶ Robert B. Pippin, *Hollywood Westerns and American Myth: The Importance of Howard Hawks and John Ford for Political Philosophy* (New Haven Conn.: Yale University Press, 2010).

Joshua Foa Dienstag, "A Storied Shooting: Liberty Valance and the Paradox of Sovereignty."

¹⁷ John Ford, Director, *The Man Who Shot Liberty Valance*, Paramount, 1962.

¹⁸ Christopher Nolan, Director, *The Dark Knight*, Warner Bros., 2008.

IV. *The Dark Knight and Liberty Valance: My Reasoning*

These two movies, in their own respective ways, delve deep into the ideas, as well as the questions, concerns, and ultimate problems surrounding states of exception and the rule of law that I have so far spoken of, as well as others that I will later speak about. In the approximately two-hour running time of each film, they do so with as much or more depth and nuance as many books on the subject. This alone should be reason enough to use them as the bases of this paper. And yet I realize that this approach is not traditional, and so requires justification. For this point, I turn mainly to Robert Pippin, a prominent Hegel scholar who in recent years has turned to film to explore the workings of political psychology in the United States. Pippin, I argue, offers a compelling argument for the use of film as a tool to dissect important issues of politics.

Novels and films and other artworks are essential, not incidental or merely illustrative, elements of such a task. Most controversially of all, such interpretive work, in raising the question of the political actuality within which political philosophy would have a point, is itself philosophical work, not illustrative or merely preliminary ... I shall assume that many twentieth-century films are the equal in aesthetic quality of any of these works in their ability to represent the fundamental problems of the human condition, especially our political condition and its psychological dimensions.¹⁹

It seems to me apparent that great films like Stanley Kubrick's *2001: A Space Odyssey*, Orson Welles's *Citizen Kane*, and Francis Ford Coppola's *Apocalypse Now*, among many others, have a cultural significance and relevance that transcends the idea that film is simply an art for the masses used as a tool of entertainment, to become a medium through

¹⁹ Pippin, *Hollywood Westerns and American Myth*, 15-17.

which we can enlighten ourselves to the world around us. Art like film can be as instructive and enlightening as the best writing of Plato, the greatest plays of Shakespeare, and I believe must be treated as such. Stanley Cavell makes a similar argument in his own exploration of “living a moral life.” He uses films to explore the issue of morality in our everyday lives, and stating that, “I take my examples of moral issues most systematically from their manifestation in the art of film.”²⁰ I intend on doing much the same with regard to examples of the operation and mechanisms of the rule of law.

But I am not interested in this context in providing meta-analysis of film, and the importance of film as a philosophical or political art form. I am primarily interested in two specific films, and in using them to elucidate the question I have posed. Accepting that they can – and should – be used for such purposes is what I ask of the reader.

Having established that film as an art form must be considered, especially in this case, I now turn to the question at hand: why do I choose to use these two specific films? Both *Liberty Valance* and *The Dark Knight* explore concepts related to both the rule of law and states of exception, such as the relationship of law to violence, the attempt to balance the rule of law with the need for security, and the nature of establishing and maintaining a rule-of-law system in the face of extra legality, among others. *Liberty Valance* is a hard case, in the sense that it does not deal directly with a traditional concept of the exception. It is concerned with the lawless zone of the frontier, a society more akin to Hobbes’ state of nature than to a proper state of exception in which the rule of law is being scaled back. However, the oppositional relationship at work between the Frontier and the States to the East offers a picture very similar in nature to the oppositional

²⁰ Stanley Cavell, *Cities of Words: Pedagogical Letters on a Register of the Moral Life* (Cambridge, Mass.: Belknap, 2005), 9.

framework of the state of exception to that of the state of normalcy. By using this oppositional framework, the film establishes itself as a foundational myth of American history, and moreover, it explores the issues surrounding the establishment of a rule of law system from a system in which none previously existed.

The Dark Knight, by contrast, offers an easier case in that it paints a clear picture of the exception as it is traditionally thought, as well as elucidating the operation of the rule of law within such a state. It extends and in some ways expands upon the ideas set forth in *Liberty Valance*, but it further applies those ideas to the modern world. *The Dark Knight*'s clear focus on post-9/11 politics offers insight into my question as it relates to today's world, rather than yesterday's, as is the case with *Liberty Valance*. However, the combination of the two give a glimpse into the idea that once founded, the law is thought to replace violence. They further raise the question of whether the law does, indeed, replace violence. But more than *The Dark Knight*'s thematic relation to modern politics, the film forces us to ask the question of whether, having established a rule of law system, violence and extralegal measures must still in some circumstances be used, and in which circumstances they should be used. Finally, to put it in more succinct terms, "the film reflects a major challenge facing our democracy in a post-9/11 world – balancing the need for public safety with the protections of civil liberties."²¹ After all, this is the essence of the state of exception and the efficacy of the rule of law within it. *The Dark Knight* explores these themes deeply as a piece of blockbuster entertainment as well as a piece of filmic art.

²¹ Nickie D. Phillips, "The Dark Knight: Constructing Images of Good vs. Evil in an Age of Anxiety," (Bingley: Emerald, 2010), 30.

V. Robert Pippin's Argument

I do not believe that the answer to my questions lies specifically within the writings of a few political theorists and reporters. I believe that, just as the conventional wisdom on thinking of the rule of law may not be adequate to understanding it, the conventional approach to learning about it may not be, either. Rather, I believe that it is within the realm of art, specifically of film, and more specifically, of the American Western, that we can truly begin to answer the questions I have posed here. In arguing this point, I have chosen to adopt, and to extend upon, the arguments made by Robert Pippin, who in his book *Hollywood Westerns and American Myth*,²² argues that the Western can not only be used to explore the political identity of the American polity, but furthermore, that it can be used to discuss the foundation of the American political. He states that “Being an American is essentially a political identification (political ideals are all that holds us together as a nation), but what is the content... of such an identification?”²³ He explores certain aspects of this question throughout the book, and I set out to do the same to some extent. One of the distinct aspects of the Western is the idea of taming the Wild West, of bringing law and order to a lawless society. But within that, the concept that violence and illegality are inherent to that transition is a theme found throughout the Western. On the most basic level, everyone is familiar with the “Western revenge tale,” the showdown on the main street of town, or the shootout between the law and the outlaws. Yet these themes run deeper than the surface would suggest.

²² Pippin, *Hollywood Westerns and American Myth*.

²³ Pippin, *Hollywood Westerns and American Myth*, 63-64.

VI. Extending on Pippin: The Frontier as the Exception

Pippin uses the Western to explore American identity, but in his examination of the Western, he is more concerned with a broad understanding of what the Western means for the United States as a polity. What he does not do, however, is directly confront the idea that the frontier can be thought of as analogous to a state of exception. Pippin does not concern himself with analyzing the intricacies of the Western as it relates to what can essentially be deemed a state of exception.²⁴ If we understand the state of exception to be a state in which the legal principles and rule of law framework either ceases to exist, or does not exist as is commonly understood in a state of normalcy, then it is not a stretch to understand the frontier of the mythological American West to be in such a state. This is so because, as I will later elaborate in Chapters 1 and 2, the frontier of the West exists not only outside a normal legal order, but also in opposition to the legal order established in the East. Although the exception is most commonly described as being a mode in response to an emergency, i.e. war with a foreign power, the frontier as we see it in the great Westerns like *The Searchers*²⁵ and *The Man Who Shot Liberty Valance* is positioned in opposition to the Eastern states. This is especially true in *Liberty Valance*.

Moreover, there is a direct understanding that with statehood comes a legal framework that is simply not in place in the frontier environment. Yet as we see clearly in *Liberty Valance*, that lack of a normal legal framework is placed in direct opposition to the “state of normalcy” established in the East. In this sense we see a contrasting

²⁴ He does speak to the idea of one theme of the Western being “the end of the frontier,” but does not engage this directly, nor associate it specifically with states of exception conceptually.

²⁵ John Ford, Director, *The Searchers*, Warner Bros. Pictures, 1956.

framework just as we do between a state of normalcy and one of emergency. We further see the attempt at transitioning from that frontier, or exceptional state, to one of order and rule of law, as comes from the East. Giorgio Agamben makes an astute point in his *State of Exception* when he discusses the border between the legal and the political. In the same sense that the state of exception itself can (and perhaps should) be understood based around the metaphorical border between the legal and the political,²⁶ then the very real border of the frontier against the state, and the legal and political ramifications of the two in relation to each other become all the more clear, and all the more compelling.

But in order to look at these ideas within the films as I have laid out, we must first understand the state of exception as it is conventionally understood.

²⁶ Agamben, *State of Exception*.

CHAPTER 1

“A PHILOSOPHICAL EXAMINATION”

1.0 What is the State of Exception?

What is the state of exception? In essence, it is a time in which the State faces some threat of mortal peril, and so uses *exceptional measures* to restore order, or the state of normalcy. Some famous cases from the United States include Abraham Lincoln’s suspension of habeas corpus during the civil war.²⁷ In a nutshell, the state of exception can be thought of in these terms:

The situation in which a state is confronted by a mortal threat and responds by doing things that would never be justifiable in normal times, given the working principles of that state. The state of exception uses justifications that only work *in extremis*, when the state is facing a challenge so severe that it must violate its own principles to save itself.²⁸

This idea of the state of exception boils down to one basic idea: sometimes, governments face great peril. In those times, the normal working order cannot handle the emergency facing said government, and as a result, must employ methods that they would not

²⁷ In a Letter to Horace Greeley on August 22, 1862, Lincoln wrote that, “If I could save the Union without freeing any slave I would do it, and if I could save it by freeing all the slaves I would do it; and if I could save it by freeing some and leaving others alone I would also do that. What I do about slavery, and the colored race, I do because I believe it helps to save the Union; and what I forbear, I forbear because I do not believe it would help to save the Union.” It is arguable that, based on this, the actions Lincoln took were first and foremost done to save the union. Suspending habeas corpus was one such action.

²⁸ Kim Lane Scheppele, “Law in a Time of Emergency: States of Exception and the Temptations of 9/11,” *Journal of Constitutional Law* 6, no. 5 (2004): 1001.

otherwise use. As one simple example: the use of torture is normally considered inherently antithetical to an ordered state and the rule of law. Yet within a state of exception, such action may not only be required, but is also considered legitimate *because* the situation is one of emergency.

The concept of the state of exception has arguably been around since the seeds of Republican government in the Roman Empire. In his book *Constitutional Dictatorship*, Clinton Rossiter looks through history at the various ways in which governments have used so-called “constitutional means” to suspend their democratic values and appoint dictators in times of emergency.²⁹ Of particular interest is Rossiter’s chapter on “The Roman Dictatorship.” The Roman Dictatorship was in essence a constitutionally appointed dictator who had power specifically during times of emergency or rebellion in the state. As Rossiter explains, “Aristotle tells in his *Politics* of an elective tyranny designed to restore law and order in a state which has been weakened by factional strife or depredations of a neighboring power.”³⁰ The Romans had a rule in their Republic that specifically allowed for a Consul to appoint a dictator, given unilateral power, to deal with such situations of “strife or depredations of a neighboring power.” In time of rebellion, or war with a foreign foe, there was in place a mechanism by which the Romans could suspend their own government in favor of complete executive authority. The caveat was that such a dictator could only stay in power for six months, until the emergency had been dealt with, or until the Consul who appointed him resigned his own post. “The Roman dictator was appointed in a time of grave emergency to address the

²⁹ Rossiter, *Constitutional Dictatorship*

³⁰ Rossiter, *Constitutional Dictatorship*, 15.

concrete specifications of that crisis and no other,”³¹ and “as soon as his commission was carried out his office similarly came to an end.”³² This is what Carl Schmitt would later refer to as “commissarial dictatorship,” which I will later elaborate further. In this sense, the idea of a suspension of normal legal frameworks when an existential emergency befalls the state has existed at least in theory, if not in practice, since the advent of early pseudo-liberal governmental systems.

³¹ John P. McCormack, “The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers” In *Law as Politics: Carl Schmitt's Critique of Liberalism* (Durham NC: Duke University Press, 1998), 218.

³² Friedrich, *Constitutional Government and Democracy* (Ginn and Company, 1950), 237.

1.1 A Brief History of the Exception

It is also clear that in the formulation of modern liberal democracies, mechanisms for emergencies of various types in various cases have also been implemented. This is especially true of the twentieth century. One example is the French *État de Siège* [State of Siege], which is their equivalent of the state of emergency. It was originally conceived during the French Revolution, and since has been evoked or reformulated through the years, from the Directorial law of August 27, 1797 to Napoleon's decree of December 24, 1811, up through to the Twentieth Century when, as Giorgio Agamben explains, "On August 2, 1914, President Poincaré issued a decree that put the entire country in a state of siege, and this decree was converted into law by parliament two days later. The state of siege remained in force until October 12, 1919."³³

Furthermore, the Fifth French Republic adopted its Constitution in 1958, which had explicit guidelines for the state of siege. Article 36 of the Constitution of 1958 has provisions for how the government is supposed to act during such a time, but Article 16 gives the President greatly expanded powers.³⁴ Although the State of Siege has rarely been invoked, one time in which it was done officially was in 1961 during the Algerian

³³ Agamben, *State of Exception*, 12.

³⁴ As it states in Article 36, "*Lorsque les institutions de la République, l'indépendance de la Nation, l'intégrité de son territoire ou l'exécution de ses engagements internationaux sont menacés d'une manière grave et immédiate et que le fonctionnement régulier des pouvoirs publics constitutionnels est interrompu, le Président de la République prend les mesures exigées par ces circonstances, après consultation officielle du Premier ministre, des Présidents des Assemblées ainsi que du Conseil constitutionnel.*" ["When the institutions of the Republic, the independence of the Nation, the integrity of her territory or the execution of her international commitments are threatened in a grave and immediate manner and the normal functions of the public constitutional powers are interrupted, the President of the Republic can take exceptional measure as a result of these circumstances after official consultation of the Prime Minister, the Presidents of the Assembly, and the Constitutional Council."]

War.³⁵ Regardless of whether it is rarely invoked, the overall point one can draw from this is twofold.

Firstly, the power exists within what is considered a liberal democratic state to suspend the liberal democratic framework of the state in a time of emergency, granting the President expanded authority. Additionally, because the power has been invoked, if even once, and if even for a short period of time, the precedent is in place for such action to take place in the future. In the words of David Dyzenhaus, “with a continuing tendency in all of the Western democracies, the declaration of the state of exception has gradually been replaced by an unprecedented generalization of the paradigm of security as the normal technique of government.”³⁶

England has a history with the state of exception as well, though slightly different. The comparison made between the state of exception and England is its policy of *martial law*. As Clinton Rossiter notes however, comparing *martial law* to France’s state of siege, a crisis government of the nature of “the state of siege is now an accepted element of the British Constitution.”³⁷ He goes on to describe the way in which emergency government had operated for most of English history. The earliest example of expanded executive authority in England is perhaps the Riot Act of 1714, which many know by its colloquial usage, “reading the Riot Act.” What the act allowed the government (through the name of the King) to do was proclaim that rioters disperse. If they refused to do so after an hour, the government could then arrest and jail them. But this was a simple preamble to the

³⁵ As stated on *Vie Publique*, “*C’est à la suite du putsch de quatre généraux en Algérie que le général de Gaulle a décidé d’utiliser ses pouvoirs de crise.*” [“Following the coup of four Generals in Algeria, General de Gaulle decided to use his emergency powers.”] <http://www.vie-publique.fr/decouverte-institutions/institutions/approfondissements/pouvoirs-exceptionnels-du-president.html#>

³⁶ Agamben, *State of Exception*, 14.

³⁷ Rossiter, *Constitutional Dictatorship*, 133.

development of a number of acts, laws, decrees and statutes that eventually led to the concept of martial law through English common law.

Just as the state of siege in France arose through the threat of invasion or insurrection, so too did martial law. “The same procedures are followed: suspension of civil rights, institution of military courts for civilian crimes, substitution of the military arm for the regular police.”³⁸ Rossiter, however, does not continue the comparison, noting the differences in the two political and governmental systems that gave rise to each institution in their respective countries.

Furthermore, as Carl Schmitt notes, “Despite the name it bears, martial law is neither a right nor a law in this sense, but rather a proceeding guided essentially by the necessity of achieving a certain end.”³⁹ Martial law, however, is quite a nebulous institution. It is not, as with the state of siege, directly legislated through the constitution. Rather, it exists through an amalgamation of acts, decrees, and precedent in common law. One such act is the Emergency Powers Act, which was passed during World War I.

Article 1 gave the King or Queen the authority to “declare that a state of emergency exists”⁴⁰ Article 2 expands that authority further, giving the executive the “powers and duties... necessary for the preservation of the peace.”⁴¹ The concept of emergency powers is more vague, but nonetheless established, in England. Precedence in the country accepts the idea that desperate times call for desperate measures, so to speak.

³⁸ Rossiter, *Constitutional Dictatorship*, 139.

³⁹ Schmitt, *Dictatorship*, 172 (through Agamben, *State of Exception*, 18.)

⁴⁰ Article 1 of the Emergency Powers Act of October 29, 1920.

⁴¹ Article 2 of the Emergency Powers Act of October 29, 1920.

As Sir Matthew Hale stated, “It is not a law, but something rather indulged than allowed as a law... and that only *in cases of necessity*.”⁴²

Arguably the most important example in this brief rundown of modern states of exception is the Weimar Government in Germany. More specifically, Article 48 of the Weimar Constitution. It is notorious largely for being considered the precursor to Nazi Germany. Carl Schmitt, a Nazi and a lawyer who argued vociferously for the idea of emergency powers, the state of emergency, essentially wrote the playbook for the Nazi use of such action, tied to his writings on the subject to Article 48. As Agamben argues, “it is impossible to understand Hitler’s rise to power without first analyzing the uses and abuses of this article in the years between 1919 and 1933.”⁴³ I am not concerned with the rise of Nazi Germany, and simply use this as an illustrative point for the way in which Article 48 was used, as well as its notoriety and connection to the state of exception. Further, it was illustrative of the rule of law’s place within the exception from a practical standpoint. The theoretical aspects of the exception can be directly tied to this. Article 48 states the following:

If security and public order are seriously disturbed or threatened in the German Reich, the president of the Reich may take the measures necessary to reestablish security and public order, with the help of the armed forces if required. To this end he may wholly or partially suspend the fundamental rights established in Articles 114, 115, 117, 118, 123, 124, and 153.⁴⁴

⁴² Matthew Hale and Charles M. Gray, *The History of the Common Law of England*, (Chicago: University of Chicago press, 1971), 27.

⁴³ Agamben, *State of Exception*, 14.

⁴⁴ Article 48 of the Constitution of the Weimar Republic of Germany, translated by David Dyzenhaus

It is abundantly clear simply from reading this passage how inevitable, at least in hindsight, the eventual abuse of the article was. It literally gives full power to the president, or executive, to decide whether there is an emergency, and upon deciding so, to *fully suspend fundamental rights* afforded through the constitution. As a result, the rule of law ceases to operate as it normally should, or traditionally does in a liberal constitutional democracy. These points cannot be emphasized enough.

Although in the other examples I have given from France and England show some room for maneuver, as well as giving limits based on the separation of powers inherent within each respective system, in the Weimar Republic, because of Article 48, no such limits technically existed. If the President decided that an emergency was in place, he could simply revoke citizens' fundamental rights, blatantly trampling the very essence of the rule of thought as it is traditionally thought to exist. To compare this to the United States, imagine if, when Congress gave George W. Bush "all necessary force" against those he deemed responsible for 9/11, that declaration *constitutionally* enabled him to suspend the Bill of Rights. Furthermore, it is perhaps prudent to consider Carl Friedrich's point concerning martial rule, stating,

The concept of martial rule is understandable only in terms of the rule of law which it replaces. Where this rule of law is taken to be the core of the legal system, because it alone guarantees a calculable stability of legal relationships, an emergency is essentially a condition of things which threatens the continued maintenance of this rule of law.⁴⁵

This is the heart of the problems we face when considering the concepts of states of exception and emergency measures. Emergency measures in the vein of martial law, state

⁴⁵ Friedrich, *Constitutional Government and Democracy*, 239.

of siege, or other similar policies, “replace,” or supersede the rule of law’s normally sustained protections.

We are essentially asking ourselves to consider the replacement of legal norms with something else. What that “something else” is depends on a number of factors, but the end result is the same. The rule of law no longer applies in the exception as it does in the norm. Weimar, and these questions as a whole, forces us to consider the lengths to which emergency powers can be appropriated to disrupt the rule of law.

1.2 Investigating the Theories

Although I do not wish to minimize the amount to which variation exists within the literature on the state of exception, I will, for the purposes of this thesis, classify thinkers based on a simple analytic dichotomy. In some ways, we can think in terms of either siding with Schmitt, or against Schmitt. Although I understand that Schmitt is not as simplistic and this might suggest, the thrust of my point is this: Schmitt's writings on the state of exception have essentially shaped the way in which thinking and literature on the exception has been dealt with. What we must then ask is: does a given writer approach the concept of the exception under Schmittian terms or not? A capitulation to Schmitt, in essence, equals an acceptance of his basic framework.

As a basic example of my overall point, let us look at Clinton Rossiter. His book *Constitutional Dictatorship*, does not seriously engage Schmitt, but although it is a legal history, not specifically a text of political philosophy, Rossiter is inadvertently working within Schmitt's framework. Within the book, he proposes an "emergency constitution" that would enable a dictatorial regime during an emergency. In this sense, he accepts that the exception is against the norm. Otherwise, why propose a constitution for emergency times *as well as keeping* a constitution for normal times?

By contrast, thinkers like Giorgio Agamben argue that the exception *has become the norm*. And in the same basic respect, David Dyzenhaus believes that one need not enable exceptional measures to deal with emergency times.⁴⁶ Although not a direct

⁴⁶ He makes explicit that he believes in the use of traditional rule-of-law mechanisms over those of exceptional circumstances, believing that the mechanisms in place within the norm are sufficient to dealing with problems that may arise within the exception. "My own position," he states, "is that a liberal democratic state adopt a liberal-legalist approach to emergencies, one which requires not only that all

acceptance of Agamben's overall point, it is certainly related to the point *I* am making here, which is that there is a blurred line between the exception and the norm, and as such, the rule of law and violence do not exist in such an oppositional framework as one might at first believe.

1.3 A Basic Framework: Looking at Schmitt and Rossiter

Schmitt famously stated that, “the sovereign is he decides on the exception.” The exception, according to Schmitt, was the ability of the sovereign to suspend the rule of law if crisis were to befall the state. He saw this as intrinsic to modern democratic systems. If a liberal state suspends the rule of law during an emergency, Schmitt theorized, it inherently ceased to be a liberal state. This is arguably the most troubling point of all, because given the historical dependence of emergency measures by liberal democracies throughout the Twentieth century, and now even more so in the Twenty-first, Schmitt’s assertion, if true, would dismantle the very concept of our very own political system as that which we believe it to be: free.

From a liberal-legalistic standpoint, David Dyzenhaus sums up Schmitt succinctly when he notes that for Schmitt, “even when liberals recognize that an emergency is a state of exception to regular norms and principles, they do not have the theoretical resources to cope with such an exception,” and goes on to summarize that,

On his account, liberalism, to remain consistent, must refuse to countenance an extralegal measures model. As a result, when a liberal state responds to existential threats, protections for individual liberty associated with the rule of law will become ever more attenuated, until the point where the rule of law is reduced to the executive’s claim that it has a valid or purely formal authorization for its actions. At that point, liberal legalism ceases to be liberal.⁴⁷

Most modern political theorists have for the most part accepted Schmitt’s claim, even if they do not directly reference his theories with regard to him (Clinton Rossiter, for

⁴⁷ Dyzenhaus, *Emergency, Liberalism, and the State*.

example, seems to simply gloss over Schmitt⁴⁸), and so we must consider and engage his ideas.

But what makes those ideas so troubling comes from the fact that he essentially accepts the idea that within a state of exception, the law has no proper place. In Schmitt's own words, the state of exception "subtract[s] itself from any consideration of law."⁴⁹ This is the crux of the discussion on the state of exception: if the exception is used to preserve the state, yet exists outside of the legal norms of the state, how can the state in fact be preserved if its own norms must be violated to preserve it? In other words, is it possible to violate the constitution in order to *preserve* the constitution? Is not dictatorship antithetical to the idea of a democratic state? Schmitt's argument rests on what would appear to be a paradoxical claim. And yet that paradoxical claim has been widely accepted, not only by modern political theorists, but also in the practices of modern democratic governments. In Schmitt's first writing on the dictator and the state of emergency, *Die Diktatur*, he seems to endorse the idea of using the dictatorship as a means to an end. He holds the Roman emergency model in high regard, differentiating between "commissarial" and "sovereign" dictatorship.

Commissarial dictatorship is the Roman model, as I have spoken of previously, in which a consul appoints a dictator when an emergency situation befalls the state, and then subsequently steps down upon the resolution of the emergency. Sovereign dictatorship is different in Schmitt's mind, and he takes issue with the conflation of the two. To him,

⁴⁸ Rossiter's account of Schmitt is brief, only mentioning him twice within his entire book, *Constitutional Dictatorship*, and in those cases only to state Schmitt's basic opinion on Article 48 of the Weimar Constitution. He does not engage the substance of Schmitt, nor does he speak to the idea that Schmitt's framework is essentially the one in which he himself is working from. This is problematic to say the very least.

⁴⁹ Schmitt, *Dictatorship*, 137.

sovereign dictatorship is differentiated from commissarial in the fact that a sovereign dictator has *absolute authority*, and does not exist as a means to an end. Whereas a commissarial dictator is appointed by another, his power checked, and his appointment temporal – in the Roman framework, a maximum of six months of time, a sovereign dictator has no such checks or limits. His power is as he proclaims it to be. The sovereign dictator can be thought of in a modern sense as that of a modern-day dictator, such as Hitler and Stalin. “Dictatorship hence suspends that by which it is justified, the state of law, and imposes instead the rule of a procedure interested exclusively in bringing about a concrete success... [a return to] the state of law.”⁵⁰ Schmitt’s original conception of the exception was the standard framework of *returning to the “state of law”* after the emergency has subsided. But later, Schmitt’s reformulation of his theory seemingly reveals him siding with the idea not of commissarial dictatorship, but sovereign dictatorship. His famous words, “the sovereign is he who decides on the exception” from *Political Theology* reveal a clear shift in his thinking on the subject.

Furthermore, John P. McCormack points out, “Schmitt explicitly and deliberately conflates the two decisions: the sovereign ‘decides whether there is an extreme emergency *as well as* what must be done to eliminate it’” (emphasis added).⁵¹ In essence, the dictator becomes the sole decider and the sole executor of the powers of the government. McCormack notes Schmitt’s shift, laying out the following:

–*Die Diktatur* (1921)
exception: dangerous, not good; must be met with technical exactitude and temporal finitude by a defined quasi-charismatic commissarial dictator

⁵⁰ Schmitt, *Dictatorship*, as quoted by McCormack.

⁵¹ McCormack, *Law as Politics*, 224.

normal order: rule of law; normatively valued; worth restoring.

–*Political Theology* (1922)

exception: dangerous but good because an occasion for revivification; must be met by ambiguously sovereign dictator

normal order: formally scientific legality; abstract and lifeless; worth restoring but in need of reenlivening.⁵²

What this shows us is a deeper understanding of the state of exception, and furthermore, the operation of the rule of law *within* the exception. Even though we see a shift in Schmitt's own thinking, it is of little true concern to me. What is of concern, however, is the way that we see Schmitt regards the exception in relation to the rule of law.

Essentially, through the exception, we are able to see deeper aspects of the rule of law than can normally be seen within a state of normalcy. In the normal state, it is supposed to exist in a traditional conception,⁵³ but the exception reveals the feebleness that the rule of law actually holds, per its intrinsic connection to violence.

According to Schmitt, the normal order is not constructed in such a way as to allow for a proper and adequate response to any given emergency. "A regime with institutional diversity... what is more generally known as the separation of powers... inevitably paralyzes a state in the face of an exception because it obscures who is sovereign, who must decide and act at that moment."⁵⁴ In his own words, he asks, "Who assumes authority concerning those matters for which there are no positive stipulations...? In order words, who is responsible for that for which competence has not

⁵² McCormack, "The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers," 226.

⁵³ I explained this idea briefly in the introduction, but as a quick reminder, the traditional concept of the rule of law in a normal state of being is one in which established codes and principles of the law are used and applied without prejudice to all citizens equally.

⁵⁴ McCormack, "The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers," 226.

been anticipated?”⁵⁵ Democracy then, with its checks and balances, is *inherently inadequate* for dealing with emergency situations. They are not able to respond swiftly enough to sudden or unexpected emergencies that befall the state. Rossiter makes the same basic argument when speaking of the American governmental system, believing that because it works so slowly, if and when emergencies befall the United States, there is no adequate way of responding.

Do Schmitt and Rossiter have a point? It is certainly true that separation of powers in the United States makes things move much slower than they might otherwise. But are we to understand that those checks and balances work *against*, rather than *in favor of*, democracy? Rossiter’s point boils down to the fact that the executive already uses emergency powers. Why should we not make such powers constitutionally legitimate? At least then we would have a way of managing, or checking, the power of the executive. But the reason behind his book is to argue that dictatorship can and *should* be a part of liberal democratic states. He makes us ask, if the “dictatorship” is constitutionally enabled, is it not also democratically legitimate? Rossiter, in approaching the question in such a way, inadvertently (and yet inevitably) capitulates to Schmitt’s claim. Although he would argue that because such a dictatorship is constitutionally enabled, it avoids the trappings of creating lawlessness from lawfulness, I would question such a stance.

Bruce Ackerman, in his book *Before The Next Attack*, raises the same questions that Rossiter does, but from a post-9/11 position.⁵⁶ Civil liberties are regularly ignored, suspended, or destroyed during emergency situations. What can we do to prevent that

⁵⁵ Schmitt, *Political Theology*, 10.

⁵⁶ Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism*, (New Haven: Yale University Press, 2006).

from happening? Ackerman's proposal is an emergency constitution that would allow for the executive to act with a certain sovereign authority, but that over time that authority would be diminished in order to return to a state of normalcy. Does such a plan in fact solve for the problems inherent within the state of exception? Or does it, as Dyzenhaus might argue, lead us down the road to more abuses and an extended period of "exceptional times"?

And what of the rule of law's relation to these questions? Would an "emergency constitution" solve for the relation the rule of law has to violence? And if that violence is seen as working *against* the rule of law, does such a proposal in fact make much of a difference? Perhaps it would be better to think of these questions not as ones that have answers, but as ones that raise the need for a deeper and more nuanced understanding of the rule of law as it relates to our own political lives.

1.4 The Friend-Enemy Distinction: The Rule of Opposition

The last point to be made about Schmitt concerns that of the “friend-enemy distinction.” It is within this concept that we can perhaps better formulate an idea not only of why Schmitt attaches himself to the concept of emergency dictatorship, but also as to why there is such a clear and consistent capitulation to Schmitt’s terms across the spectrum of political theorists. Schmitt argues that we can define the political, and by extension define the state, based upon an idea of contrasts and opposites. Who do we define ourselves *against*? This, in essence, is the “friend-enemy distinction.”⁵⁷ He further argues that “the friend and enemy concepts are to be understood in their concrete and existential sense, not as metaphors or symbols... An enemy exists only when, at least potentially, one fighting collectivity of people confronts a similar collectivity.”⁵⁸ Schmitt is not concerned with the idea one might make that “poverty is the enemy,” or hunger, or some other abstract concept. What is of importance to him is the idea that a nation would, and should, define itself in opposition to something else. “In its entirety the state as an organized political entity decides for itself the friend-enemy distinction.”⁵⁹

What we can take from this is twofold. Firstly, a state defines *its own* “enemy.” Secondly, the friend-enemy distinction is definitional of a political entity. A state without such a distinction ceases to be a political entity. The importance of this concept is far-reaching in today’s political sphere, from the way in which the United States approaches

⁵⁷ Schmitt draws on Hegel in making his point, stating that “Let us assume that in the realm of morality the final distinctions are between good and evil, in aesthetics beautiful and ugly, in economics profitable and unprofitable. The question then is whether there is also a special distinction which can serve as a simple criterion of the political and of what it consists.” *The Concept of the Political*, 26.

⁵⁸ Schmitt, *The Concept of the Political*, 27-28.

⁵⁹ Schmitt, *The Concept of the Political*, 29-30.

the “War on Terror” to the way that we as citizens define ourselves in the world. The obvious application of the friend-enemy distinction is during a war. Take World War II, in which there was a clear enemy – The Nazis, Fascists, and Imperialists. Or even during the Civil War, in which the North defined itself in opposition to the South, and vice-versa. The Cold War is another, in which the United States positioned itself as the champion of democracy and capitalism, in opposition to Communism. Moreover, even if not explicitly a policy of Western democracies, there was a clearly geographical opposition between the West and the East. The question becomes how we define ourselves since the Cold War. Some believe that since the end of the Cold War, we have been searching for a new “enemy,” and the “war on terror” in a response to that.⁶⁰

This is not a concept only espoused by Schmitt, and is one that has been applied in the realm of international relations. Engaging fully with the international relations literature on this count is beyond the scope of this project. Nonetheless, some of the theories with regard to this specific line of thinking are directly relevant to my point above. As David Campbell argues in his book, *Writing Security*, “Identity is an inescapable dimension of being. No body could be without it. Inescapable as it is, identity – whether personal or collective – is not fixed by nature, given by God, or planned by intentional behavior. Rather, identity is constituted in relation to difference.”⁶¹ How we

⁶⁰ One example of this argument is the following: “Though the Cold War ended decisively more than a decade before 9/11, the United States never reformulated its guiding ideas about how to manage serious threats. As a result, confronted with a new enemy after 9/11, the Bush administration fell back into Cold War habits, even though the present threat and the present world situation are very different.” Scheppele, “Law in a Time of Emergency: States of Exception and the Temptations of 9/11,” 1002.

⁶¹ David Campbell, *Writing security: United States Foreign Policy and the Politics of Identity* (Minneapolis: University of Minnesota Press, 1998), 9.

Campbell goes on to describe the following, “But neither is difference fixed by nature, given by God, or planned by intentional behavior. Difference is constituted in relation to Identity. The problematic of identity / difference contains, therefore, no foundations that are prior to, or outside of, its operation. Whether we are talking of ‘the body’ or ‘the state,’ or of particular bodies and states, the identity of each is

define ourselves is directly related to what we feel we are opposed to. Politics, like anything else in life, can be thought of in a simple oppositional relationship. Good vs. evil, right vs. wrong, beautiful vs. ugly, smart vs. stupid.⁶² Or even, as George W. Bush stated, “you’re with us or against us.” Campbell’s point, therefore, is a logical extension of Schmitt’s in the sense that it engages the essence of the political based on an oppositional relationship of the nation to an “other.” Campbell is directly engaging Schmitt’s friend-enemy distinction, even if he does not directly invoke Schmitt’s name.

performatively constituted. Moreover, the constitution of identity is achieved through the inscription of boundaries that serve to demarcate an “inside” from an “outside,” a “self” from an “other,” a “domestic” from a “foreign.” This precise thinking is tied directly to the Schmittian theory of the friend-enemy distinction, as well as a direct extension on it. Just as Schmitt draws on Hegel’s idea of difference being definitional (in aesthetics, beautiful/ugly), and that definition being intrinsic to the political, Campbell here uses the “difference” factor to elucidate how a difference to an “other” defines a polity.

⁶² Hegel establishes this same dichotomy in his “Lectures on Aesthetics” (1818-1829), where he formulated the idea that there are six arts: The first: architecture, the second: sculpture, the third: painting, the fourth: dance, the fifth: music, and the sixth: poetry. It has been since argued that cinema is, in fact, the seventh art, and deserves to be thought of as such.

1.5 Black Holes and Grey Holes: Dyzenhaus and the Rule of Law

Before I go on a tangent however, let us turn to David Dyzenhaus, whom I have cited above. Dyzenhaus, a legal and political scholar, has written at length on the state of exception. He is also quite clear in his objection to the standard mode of thinking on the subject, saying, "...a response to emergencies, real or alleged, should be governed by the rule of law."⁶³ This point is clear. He believes that even in an emergency, the mechanisms of the norm are sufficient to handling and dealing with said emergency. There is no real need to create a "constitutional dictatorship" as Clinton Rossiter proposes, and in fact, Dyzenhaus is quite critical of such a proposition. But Dyzenhaus uses Rossiter as a means to an end, explaining, "Rossiter's difficulties here illustrate rather than solve the tensions in the idea of constitutional dictatorship."⁶⁴

The problem that Dyzenhaus correctly identifies is the apparent need during emergencies to take measures outside of the norm, and yet at the same time uphold the rule of law. In response to both Rossiter and Ackerman, Dyzenhaus states that, "Even as they attempt to respond to Schmitt's challenge, they seem to prove the claim that Schmitt made... that law cannot effectively enshrine a distinction between constitutional dictatorship and dictatorship."⁶⁵ If this is true, then how does Dyzenhaus deal with what he feels others have either failed to deal with, or have done to an inadequate degree? He has two arguments that I am going to specifically address. The first is his distinction

⁶³ David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Berkeley: Cambridge Univ. Press, 2006), 2. Also, see: Footnote 46.

⁶⁴ Dyzenhaus, *The Constitution of Law*, 37.

⁶⁵ Dyzenhaus, *The Constitution of Law*, 42.

between what he calls “legal black holes” and “legal gray holes.”⁶⁶ The second is his contrast between rule *of* law and rule *by* law. Both of these arguments rely on a certain subtlety, as well as a certain parsing of concepts, but both provide essential insight into how we may deal with the apparent need for rule of law protections while at the same time recognizing the need for extenuating circumstances.

A “legal black hole” is essentially, the way in which the state of exception is commonly thought of existing. In other words, there is no proper or functioning legal apparatus to speak of. The rule of law simply ceases to be, and arguably even conceptually, it is nothing more than an afterthought. In comparison, “a grey hole is a legal space in which there are some legal constraints on executive action – it is not a lawless void – but the constraints are so insubstantial that they pretty well permit government to do as it pleases.”⁶⁷ Although one might at first believe that having even *some* legal constraints on the executive would be a good thing, Dyzenhaus actually argues that grey holes may be worse, simply because they “permit the government to have its cake and eat it too,”⁶⁸ allowing the executive to not only infringe upon civil liberties and subvert the rule of law, but give the façade that rule of law protections are in fact still in place. An example from recent memory would be that of Guantanamo Bay, in which the Bush Administration not only detained individuals indefinitely, but argued that it was doing so legally, and within the parameters of not only the constitution, but the spirit of the law. Does this mean that it is better to have no protections than *some* protections? He does state that “grey holes cause more harm to the rule of law than black

⁶⁶ Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency*.

⁶⁷ Dyzenhaus, *The Constitution of Law*, 42.

⁶⁸ Dyzenhaus, *The Constitution of Law*, 42.

holes,”⁶⁹ but I am not sure that he would argue that it is better to have no protections. Rather, the dangers inherently in a system in which a *façade* of legality exists is more insidious than one in which we accept that legality *does not exist*. Regardless, what is important in this distinction between black and grey holes is that they are two distinct ways of thinking about the state of exception.

We can then say that a black hole is “a space devoid of rule-of-law controls,” and a grey hole being “a space in which there are some rule-of-law controls.”⁷⁰ Dyzenhaus argues that although it may be common sense to think that a black hole, with no rule of law controls, would be a greater problem, in fact a grey hole, where there are *some* is worse. Why? The explanation is simple: they have the potential to lead (perhaps even quite easily) to making the *exception* normal. It could, in fact, lead to a *perpetual* state of exception. This is the point to keep in mind when I later discuss Agamben, as it is in this concept of a “perpetual state of exception” that Dyzenhaus and Agamben align.

The second point to which I draw on Dyzenhaus is in his distinction between the rule *of* law and the rule *by* law. If we think of the rule *of* law as a rule not only backed by the legislative, executive, and judicial authority, but also through the spirit of the law, and the concept of the constitution of the state, then the rule *by* law is one in which law, as a physical legislative authority, rules. It is a subtle distinction, and Dyzenhaus uses it to speak of judicial decisions, the way in which a judge decides on a given case. But I believe the concept of differentiating the two has further reaching applications.

Are the laws that we abide by in the spirit of the constitution and the rule of law as a philosophical and cultural concept? This question directly ties into the films I will be

⁶⁹ Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency*, 50.

⁷⁰ Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency*, 30.

discussing, specifically the idea of justification – or lack there of – for that which seems illegal. Can an action be upheld by the rule of law, even while it disregards the rule *by* law? Furthermore, if the law no longer operates properly as it does in a state of normalcy, and devolves into a legal black hole, in what way should we approach it? Should the rule *of* law be the guiding principle, or is the rule *by* law sufficient to a well-ordered society? Rule *by* law seems to hold with it an inherently arbitrary undertone. Laws can be made that are unjust and do not, in essence, follow the rule *of* law. Is it possible that some actions, despite working against the rule *by* law, can work in the spirit of the rule *of* law? In thinking of these questions, Giorgio Agamben might be helpful, mostly because of the frightening, but compelling point he makes regarding the state of exception in modern times. If the exception has become the norm, where does that leave us?

1.6 Giorgio Agamben and the Exception as the Norm

Agamben's basic argument boils down to two main points: the exception has become the norm, and as such, the state (as applied to most modern democracies) has become a "permanent state of exception." As he himself notes, "the state of exception tends increasingly to appear as the dominant paradigm of government in contemporary politics."⁷¹ He argues that, whereas originally, specific exceptional cases were applied in order to deal with crises of the state, those exceptional cases have been instituted not only as legal precedents, but also as orders that carry the "force of law,"⁷² thus blurring the line between the exception and the norm. It is frightening because this is applicable to most modern democracies across the world, including the United States. Agamben makes this point clear at the outset with regard to the USA Patriot Act, "What is new about President Bush's order is that it radically erases any legal status of the individual [suspected of terrorism], thus producing a legally unnamable and unclassifiable being," but that further more, "they are the object of a pure de facto rule."⁷³ They are not governed by the rule of law outside of a "de facto" rule of law. This connects directly to Agamben's point concerning decrees and dictates that hold the *force of law*.

He differentiates between legislative law, and executive orders that, in essence, carry the same power and weight that a legislative act is supposed to carry. Think, for example, when Franklin Roosevelt said in his inaugural address that in order to deal with the Great Depression

⁷¹ Agamben, *State of Exception*, 1.

⁷² Agamben's main point here regards the idea that an executive decree, although not a legislative act, can still hold the power of a law, and thus be as legally binding as any act passed by the legislature.

⁷³ Agamben, *State of Exception*, 3.

With this pledge taken, I assume unhesitatingly the leadership of this great army of our people dedicated to a disciplined attack upon our common problems... I am prepared under my constitutional duty to recommend the measures that a stricken nation in the midst of a stricken world may require. These measures, or such other measures as the Congress may build out of its experience and wisdom, I shall seek, within my constitutional authority, to bring to speedy adoption. *But in the event that the Congress shall fail to take one of these two courses, and in the event that the national emergency is still critical, I shall not evade the clear course of duty that will then confront me. I shall ask the Congress for the one remaining instrument to meet the crisis--broad Executive power to wage a war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe.*⁷⁴

Agamben's point is that such a statement, although not itself law, acts as such, and carries the force of such, if not in the strictly physical sense, then at least in the symbolic one. Furthermore, although he makes clear that President Lincoln arguably had no authority to suspend habeas corpus, and certainly none to raise an army, that his decrees to do so acted as such. As a result, what under normal circumstances would be meaningless, in a state of exception acts no differently than a Congressional act.

Agamben's original point that the exception has become the norm is even more compelling in light of this fact, when coupled with the context of the United States. Think of such simple, now-routine executive powers such as executive orders and signing statements. Certainly George W. Bush used signing statements to completely ignore acts of Congress. Furthermore, even if Congress chooses to fund certain programs, an executive order can easily force the executive offices (such as the FBI, EPA, DHS, etc.) to simply not use funds allocated for certain functions. "But law-decrees now constitute the normal form of legislation... this means that the democratic principle of the

⁷⁴ Franklin D. Roosevelt's First Inaugural Address, emphasis added.

separation of powers has today collapsed and that the executive power has in fact, at least partially, absorbed the legislative power.”⁷⁵ What we see as a result of all of this is a complete confusion of the rule of law within modern American government. If we accept Agamben’s point at face value – and certainly, it is compelling enough to do so – then we are in troubling times indeed.

In his *State of Exception*, Agamben goes into great detail about Carl Schmitt’s theories. I have examined some of that through this chapter, especially in opposition to thinkers like Schmitt and Rossiter. But one point upon which I have not touched strongly is that of the *force of law*, which Agamben uses by drawing upon Jacques Derrida’s famous essay.⁷⁶ Derrida makes a point that is intricately connected to my question, posing the following:

How are we to distinguish between this force of the law, this “force of law”... and the violence that one always deems unjust? What difference is there between, on the one hand, the force that can be just, or in any case deemed legitimate, not only an instrument in the service of the law but the practice and even the realization, the essence of *droit*, and on the other hand the violence that one always deems unjust? What is a just force or a non-violent force?⁷⁷

Derrida realizes the inherent problem within concepts of law and justice, and acknowledges the paradox at stake. The law requires a force, the force requires some kind of violence, and violence is thought inherently unjust. Agamben confronts Derrida’s claim by discussing the applicability of the law. He argues that the “force of law” is

⁷⁵ Agamben, *State of Exception*, 18.

⁷⁶ Derrida’s *Force of Law*, in which he explains the way in which law carries force, can be enforced, and has efficacy and applicability. For example, he states that, “law is always an authorized force, a force that justified itself or is justified in applying itself, even if this justification may be judges from elsewhere to be unjust or unjustifiable,” 925.

⁷⁷ Derrida, *Force of Law*, 927

something “mystical,” and that it is “an indeterminate element that can be claimed both by the state authority... and by a revolutionary organization...”⁷⁸ The application of such force within the exception is what confounds Agamben, and his summary is slightly more confounding still:

In this sense, the state of exception is the opening of a state in which application and norm reveal their separation and a pure force-of-law realizes (that is, applies by ceasing to apply) a norm whose application has been suspended. In this way, the impossible task of welding a norm and reality together, and thereby constituting the normal sphere, is carried out in the form of the exception, that is to say, by presupposing their nexus. This means that in order to apply a norm it is ultimately necessary to suspend its application, to produce an exception. In every case, the state of exception marks a threshold at which logic and praxis blur with each other and a pure violence without *logos* claims to realize an enunciation without any real reference.⁷⁹

Agamben’s rhetoric is confusing, but it is not impossible to understand the overall point he is espousing. It is ultimately impossible to apply a norm of the law without suspending its application. In other words, there is an intrinsic connection between the norm of the law and the exception to the law. In this sense, Agamben fully realizes the overall message: the line between norm and exception are blurred, and their connection, or “nexus” is inherent. Only after understanding this can we begin to understand how the law operates within the exception. This is specifically the case with, as Agamben argues, the *applicability* of the law, not simply its existence.

⁷⁸ Agamben, *State of Exception*, 38-9.

⁷⁹ Agamben, *State of Exception*, 40.

1.7 Transitioning from the Exception to the Frontier

Based on what I have thus explained, we can see the complicated aspect that the state of exception plays in understanding and illuminating the rule of law. It reveals the apparent need for an exception to normal rule of law protections. Yet even though we see such a revelation within the exception, we are left asking what the cost of allowing such exceptions mean for us. Is there a compromise of sorts to be found? Is there even a need for a compromise? Are the exception and the norm so interrelated as to basically be indistinguishable? And does the rule of law's tenuous position within the exception give us a better picture of its actual place within a normal, ordered society?

The main thrust of this exploration of the state of exception, however, has been to illustrate the way in which the exception allows us to see a deep connection between the rule of law and arbitrary action or violence. We can see blurred lines between the exception and the norm, as well as the requirement of a *force* to back up the rule of law, to name just a couple of concepts I have discussed previously that elucidate the connection between violence and the law. If we accept that arbitrary action takes place in the exception, but is not *supposed to* in the norm, then a blurring of lines between the two makes clear that the connection between them is more explicit than it otherwise would be. If a *force* is needed to back up the rule of law, then where does that force come from? And even in times of so-called normalcy, what is that *force*? What gives the rule of law its legitimacy?

In exploring these questions, I now turn to John Ford's *The Man Who Shot Liberty Valance*. Its placement on the frontier, coupled with its narrative of the American

re-founding after the civil war, allow us to look more deeply at the connection between the rule of law and violence. The characters, as well as the way the film opens and ends, reveal an aspect to the rule of law not regularly discussed within the philosophical literature, that of “printing the legend.” With that, I turn to the Western and *The Man Who Shot Liberty Valance*.

CHAPTER 2

“*LIBERTY VALANCE*: ‘WESTERN’ LAW AND PRINTING THE LEGEND”

2.0 Defining the Concept of the Western

What is the Western as a genre of film? Jim Kitses describes in great detail how film criticism has directly tied the genre to its landscape,⁸⁰ whether it be to analogize America’s push westward, or to create a dichotomy between masculine and feminine. (Although, to be fair, the sprawling “Wild West” landscape does not come into as much play in *The Man Who Shot Liberty Valance*, a film that largely takes place in one town, and in a strange, almost artificial confinement.) As André Bazin stated in his essay on the Western, “Gallop ing horses, fights, strong and brave men in a wildly austere landscape could not add up to a definition of the genre nor encompass its charms.”⁸¹ In order to get a fuller understanding of the Western from a genre standpoint, let us look to three distinct authors and their interpretation and take on the American Western: Robert Pippin, Jim Kitses, and André Bazin.

Bazin, the noted French film critic, did much to give the Western legitimacy as a filmic art, and not simply as a kind of pop media that in the early and mid-Twentieth century it was viewed as being. As he argues,

⁸⁰ Jim Kitses, *Horizons West: Directing the Western from John Ford to Clint Eastwood* (London : Bfi Publishing, 2004).

⁸¹ André Bazin, *What Is Cinema? Volume II: "The Western: Or The American Film Par Excellence"* (Berkeley: University of California Press, 1971), 140-148.

The building of the great railroads are less important perhaps than the establishment of justice and respect for the law. The relations between morality and law, which in our ancient civilization are just a subject for an undergraduate paper, were half a century ago the most vital thing confronting the youthful United States.⁸²

In his eyes, part of what makes the Western not only America's greatest cinematic achievement, but a singular genre achievement of its own, separate from others, is its focus on the concept of the political and the conception of the United States itself.

The central questions confronted by the Western are ones concerned with the rule of law, the formation of the legality of the state, and the concept of justice. The Western is recognizable by its "epic themes of nationhood and identity, its stress on honour and law, its focus on freedom and rebirth, the issues of violence and justice..."⁸³ What we see is a political framework that is at once concerned with questioning and exploring, if not concluding on, these ideas. What does it mean to be an American? What is our past and where does it come from? Through what means have we established the legal order, and the concept of justice that now embodies our political beliefs as a nation?

Certainly Pippin agrees that the Western is at once concerned with such grand ideas.⁸⁴ According to Kitses, these themes are especially true in John Ford's Westerns, stating that, "His main theme was the birth of America, the establishing of nationhood, the shining City on the Hill."⁸⁵ In speaking of *My Darling Clementine*⁸⁶ he notes that, "the film proposes that the violent elimination of anarchy is the final act in a historical

⁸² Bazin, "The Western: Or The American Film Par Excellence," 145.

⁸³ Kitses' main point here is one of relating the Western to masculinity, but his outline of what defines the genre is nonetheless important out of the context of the full quote itself. *Horizons West: Directing the Western from John Ford to Clint Eastwood*, 18.

⁸⁴ He states that, "Moreover, within the ambitious Westerns' sweeping, mythic explorations of the fate of politics in America, there is often a reflective, distancing, uneasy 'resolution that is not really a resolution.'"

⁸⁵ Kitses, *Horizons West*, 33.

⁸⁶ John Ford, Director, *My Darling Clementine*, 20th Century Fox, 1946.

process that initially involves the establishment and defence of law, culture and religion.”⁸⁷

Even past the idea of “making America,” so to speak, we find the Western thought of as the American mythic tale. The Western is to America what the Greek myths and tragedies are to Greece. Bazin speaks to this point, saying that, “The epic and tragic hero is a universal character. The Civil War is part of nineteenth century history, the western has turned it into the Trojan War of the most modern of epics. The migration to the West is our Odyssey.”⁸⁸ Pippin echoes this argument throughout his book.⁸⁹ Kitses is just as clear about connecting the Western to some concept of an American myth, using that phrase many times throughout his chapter on the “Practice and Theory” of the Western.⁹⁰

What becomes clear about the Western is that it is thought of in epic terms; it is a purely American epic. I contend that in much the same way that the Greeks have Heracles, and the Romans Achilles, Americans have their “Man With No Name,” and the comic book superhero.⁹¹ Furthermore, the relation of the epic hero to that of the American superhero, and furthermore, to the heroic gunslinger of the Western is quite close. If we think of the epic hero, such as Achilles, we see men with superhuman powers; almost invincible, capable of feats beyond normal human ability, we see a direct correlation to the mythic gunslinger. Able to shoot targets from a great distance, and

⁸⁷ Kitses, *Horizons West*, 57.

⁸⁸ Bazin, “The Western: Or The American Film Par Excellence,” 148.

⁸⁹ Pippin regularly refers to the Western as “mythic” and “epic,” and continues to do so throughout his book, and at one point making direct correlation between Ford’s *Stagecoach* (1939) and Aeschylus’s *Oresteia*. The epic and mythic nature of the Western on the American psyche is practically a given for Pippin.

⁹⁰ One point he makes, for example, is “The *national myth* rehearses a foundational violence necessary to the frontier’s resolution of problems, a promise of rebirth and redemption through conquest.” *Horizons West: Directing the Western from John Ford to Clint Eastwood*, 21.

⁹¹ Batman, for example.

outdraw opponents with an inhuman speed and accuracy, as well as the mysterious “otherness” associated with him. In cases such as *Stagecoach* (1939)⁹² with John Wayne’s Ringo Kid, as well as Sergio Leone’s “Man With No Name” movies with Clint Eastwood, we see the heroic gunslinger as a mysterious individual who possesses an “otherness,” or a dark and/or unknown past. As will become more clear later in Chapter 3, this same thematic quality is apparent in the comic book superhero like that of Batman. Along with superhuman powers - and although he has no *actual powers*, his skills certainly qualify as “superhuman” - we find the character as a mysterious outsider, plagued by a dark past.

Not all Westerns can be said to embody the complexities I have discussed here. “One sometimes hears that the great thing about Westerns is their moral clarity: black hats and white hats, bad guys and good guys, and morally uplifting tales of the victory of good guys over bad guys,” but is this the case? Pippin does not believe so, arguing that “This might have been true of TV shows like *Gunsmoke* and 90 percent of the ‘B’ Westerns,” going on to say that, “it certainly is not true of the work of directors like Ford⁹³... In fact, just the opposite is often true. Their Westerns are more like noirs than children’s adventure stories or action pictures.” I would agree with this assessment, as well as the following point he makes that “What *is* true is that their presentations of conflict, hesitations, ambiguity, and crises largely concern characters trying to resolve

⁹² John Ford, Director, *Stagecoach*, United Artists, 1939.

⁹³ Pippin’s list of directors is longer than just Ford. The full quote: “Ford, Hawks, Mann, Boetticher, Daves, Zinneman, Wyler, King, Fuller, Walsh, Vidor, Peckinpah, or Ray.” *Hollywood Westerns and American Myth*, 99

issues of right, justice, responsibility, honor...”⁹⁴ This is what separates the normal, or “B-Western” from what Pippin and others refer to as the *Great Western*.⁹⁵

The Great Western, then, is deeply rooted in the American past: the foundation of the United States as we know it today. It connects itself to the grandiose themes of Manifest Destiny, a push Westward from the East. As such, much of the genre takes place on the frontier, in what can only be considered a lawless zone where the gun rules and legalistic forms of justice are, if not completely nonexistent, then struggling for survival.

⁹⁴ Pippin, *Hollywood Westerns and American Myth*, 99.

⁹⁵ Pippin is hardly the only person to make this distinction. Scott Simmon argues for what he calls the “A-Western,” stating that, “The A-Western is conscious, pompously conscious, of its responsibility to represent America’s essence. Its falsifications of history’s details claim to be at the service of a grander national truth.” *The Invention of the Western Film: A Cultural History of the Genre’s First Half-Century* (Cambridge: Cambridge Univ. Press, 2003), 114.

2.1 The Frontier as a State of Exception

This is the key feature of the Western that Robert Pippin does not engage to a great degree: the idea that the frontier represents what essentially amounts to a state of exception. I will be engaging with this idea in the following. Although Pippin discusses this to some degree – such as his references to “prefounding lawlessness”⁹⁶ – he does not engage in the literature of states of exception, nor consider the deeper implications that the exception, in its literal and philosophical sense, has on American identity. Furthermore, he does not engage directly with the implications of the rule of law as a result of the frontier’s zone outside normalcy. The simple nature of a tenuous relationship between the law and violence in the frontier is only one small piece of the larger puzzle. It is how the people *respond* to that relationship – the actions they take, the consequences of those actions, etc. – that is most important to understanding the frontier as a state of exception. Although it is indeed true that in the normal understanding of the state of exception, it is placed in opposition to the state *before* the exception – one of normalcy – when put in the context of films like *The Man Who Shot Liberty Valance*, the idea of the frontier as the exception becomes clearer.

The frontier has been used to represent many things depending on the movie - though all are very connected to the idea of the American myth, through the great push westward - but what I find most important for the purposes of this thesis is the idea of the frontier as a zone outside of legality. As *The Man Who Shot Liberty Valance* displays quite adeptly, the frontier is a place that is at odds with ordered society. One of the main pieces of the film’s narrative concerns bringing law and order to the town of Shinbone.

⁹⁶ Pippin, *Hollywood Westerns and American Myth*, 144.

This battle between law and anarchy, and the question of how one brings order to a society that inherently has none is one of the common themes of the great American Western. If no system is in place to control chaos, then chaos reigns, just as the outlaw Liberty Valance (Lee Marvin) makes clear to Ransom Stoddard (James Stewart). Yet as horrible and anathema to legal order as Valance may be, one would be right to question Tom Doniphon (John Wayne) as well. Not only does Doniphon encourage Stoddard to carry and use a gun to deal with outlaws like Liberty Valance, but in the end it is he who shoots Valance, which in turn leads to law and order in the town and by extension statehood.

Even if one is to admit that because the society is lawless, such actions are not “above the law,” that by no means excuses the action of what is essentially cold-blooded murder. This is also present in John Ford’s *Stagecoach* (1939), again with John Wayne’s character, who spends the movie seeking out and waiting to shoot someone and get revenge for a past wrong. The message is clear: if the legal order does not exist to an adequate degree, then the law must be taken into one’s own hands. Where then does this leave the concept of the rule of law? Does the rule of law simply cease to exist, or does the action of Wayne’s character in both films signal that there is in fact some concept of the rule of law, just one that *must exist* when “normal legal means” have been suspended or are nonexistent?

Moreover, even if one’s issues of the legality of such action are pushed to the side, it is more difficult to dismiss the moral implications of such actions. Even if we accept that the “way of the gun” is the legal order of the frontier, there are undeniably moral implications associated with taking action that would be considered reprehensible in a

state of normalcy. Furthermore, by giving in to such action, one must ask oneself whether it simply exacerbates the status quo of the state's legality, or lack thereof. The question of morality is one that complicates these matters. As Pippin states with regard to *Stagecoach*,

Ford's film is a compelling visual alternative, a picture of an aspiration to equality that Tocqueville did not seem to understand well--a claim to *moral* equality, the equal dignity and worth, the "inestimable" value of each individual as such, as Kant put it, following Rousseau. For all the inequalities in talent and accomplishment, no human life can be said to be worth more than any other, because no price or measure of value can be fixed on human worth.⁹⁷

Yet if every human life has an "inestimable" value, and no human life is worth more than any other, how can one justify the actions of Tom Doniphon in *Liberty Valance*? Perhaps if one makes the argument that the end justifies the means, then such an outlook is immediately defensible.

I would argue, however, that such a point is not only short-sighted, but falls into the trap of pure Schmittian logic. To Schmitt, the moral implications are secondary to the survival of the state. Yet I question the assumption this logic makes. Does not a well-ordered society, especially a "healthy" democracy, depend upon a moral basis to the rule of law? Without a moral grounding, can the rule of law exist in any reasonable fashion, or does it instead lead to a Schmittian system where legal rights and the rule of law only exist if it is convenient to the sovereign? As I will explore in more depth later, a moral agent of some kind, even if his actions seem to work *against* the rule of law, can rather

⁹⁷ Pippin, *Hollywood Westerns and American Myth*, 7.

work to *prop up* the rule of law, and by extension give it a *force* that it did not otherwise have.

One of the key themes of *Liberty Valance* is the idea of creating a state of lawfulness, of nationhood. We have the main protagonist of the film, Ransom Stoddard, as attempting to bring the law to a lawless society. He wants to bring statehood to the frontier so that it may live under the rule of law. On the blackboard in his classroom are the words, “education is the basis of the rule of law.” In this small detail we see the message Ford is conveying, as well as the intentions of Stoddard. Education is seen here as a means to a specific end. To educate is not simply to give knowledge and power to the people, but it is a way in which the law can be established, and as a result, allow the rule of law to thrive. In this we see that Stoddard’s character is most concerned with the lack of legal order in the town of Shinbone. This is understandable, given the beatings he endured at the hands of Liberty Valance.

Symbolically however, it operates as a way to draw a distinct line between a state of normalcy, or legality, and a state of exception, or one that lacks legal order. This relates directly back to Schmitt’s friend-enemy distinction, and the idea of political definition. The frontier need not have been in a state of legal order previous to its current lack of such in order to be analogous to the state of exception. The frontier’s definitional feature as being opposite the rule of law is sufficient. Furthermore, if we think of the frontier in Lockean terms,⁹⁸ we can see that the frontier is analogous to a state of nature, opposite statehood’s state of order and reason.

⁹⁸ In which the government, or a similarly positioned agent, can “act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it.” Locke’s overall point is concerned with the idea that even within a democratic system of rules and laws, sometimes those rules and laws *must be broken* in order to *preserve* them in the long run. This fits in nicely with the model I have

If the exception in the traditional sense is thought of as suspending the rule of law for the sake of eventually re-establishing the rule of law, then the frontier-aspect of the Western can easily adopt a slightly different understanding: rather than *re-establish* the rule of law, the frontier simply must *establish* the rule of law. It is important to note here is that the *conditions* of the state of exception apply themselves quite forcefully to the Western concept of the frontier. With these ideas in mind, let us look at *The Man Who Shot Liberty Valance* in greater depth.

2.2 *The Man Who Shot Liberty Valance*: A Political Exploration

John Ford's *The Man Who Shot Liberty Valance* is arguably one of the most important films as it relates to a discussion of the political identity of the American people. Although the Western as a whole is definitional as a true American cinema, and a concretely American art, *Liberty Valance* represents a culmination of the Western to the point it was released in 1962. The film is told mostly in flashback. The film both looks back at the founding of the United States and its movement West, as well as leaving open the country's ambiguous future. If the Western mythologized the founding of the country, then *Liberty Valance* argues that the myth is required. It also squarely confronts the issue of whether violence is required to establish a rule of law and legal order.⁹⁹

As the film opens, it is "present day," with James Stewart's Ranse Stoddard, a Senator, riding into the small town of Shinbone on a train. He is there to go to the funeral of a man, Tom Doniphon, who is known to no one, and whose life seems meaningless to the townspeople. Why would a big Washington Senator travel to go to the funeral of such an unknown man? Journalists gather to find out why; the presence of these men, in contrast to what the viewer is soon shown, establishes clearly that law, order, and the American constitution have come to this town. We see a freedom of the press not found in the "past," though such a freedom struggles and pushes to break through. By contrast, it is alive and well in the "present." But the film never once strays from asking the question, "at what cost?" The film forces us to confront the idea that violence is a requirement in establishing a rule of law system. "The film's action is not the generic

⁹⁹ David W. Livingstone states that, "*The Man Who Shot Liberty Valance*, dramatizes the difficulties inherent in establishing a political order based on the rule of law." "Spiritedness, Reason, and the Rule of Law: John Ford's *The Man Who Shot Liberty Valance*," *American Political Science Association*.

dramatization of the violent process by which America was civilized. Rather, it is the revelation of the kind of violence that was required, and its personal and political consequences.”¹⁰⁰ This is the heart of my argument, and the core of *Liberty Valance*’s importance to understanding it. In the case of the foundation of a rule of law system, violence plays an inherent part; but the basic ideas of violence having a role, in its simplicity, ignores the larger implications of what that means for society.

The film’s opening and its ending are, as I see it, the most important aspects of the film. It is not that what comes between these bookends is not important, but the implications raised in how the film begins and then how it ends, are arguably what give it the power and political intrigue that it is known for. Thus, I will focus on these two points in the film, as well as the characters that have the most relevant purpose within the film’s bookends.

When the film shifts to flashback – and it must be noted, Ranse Stoddard’s version of events – we see him traveling from the East to Shinbone, a town outside of the United States. He is a lawyer, traveling to the town of Shinbone to establish a law practice. However, before he gets to the town, an outlaw named Liberty Valance and his gang hold up the coach and demand the belongings of the travelers. Stoddard stands up to Valance. “What kind of men are you?” he demands. “This kind, dude,” the outlaw responds, slapping him to the ground and retorting, “what kind of man are you, dude?” The most important part of this exchange, however, comes when Stoddard mentions he is a lawyer and plans to see Valance in jail. Sending the coach on its way, he takes Stoddard’s legal books and rips them up, declaring “Lawyer, huh? Well I’ll teach you law – *Western law*.” Valance then proceeds to violently whip Stoddard.

¹⁰⁰ Kitses, *Horizons West*, 118.

The whole scene is blanketed in blacks and dark grays, a sharp contrast to the previous light, cold grays of the opening of the film. In fact, the contrast is a direct one between light and dark, as the opening takes place during the day and the flashback beginning in the dead of night. In the beginning then, Ford establishes that the film is not only a conflict between the East and West, but between the rule of law and anarchy. Cinematographically, the shift between cool grays and deep blacks bathes the flashback – the past – in a darkness no longer present.¹⁰¹

What we find is that Shinbone is a town still in the territories. It is not part of the United States, and as such, the law as it exists where Stoddard comes from has no value. Valance teaches Stoddard “Western law,” a law that abides by an overt terror, violence, and masculinity.¹⁰² Valance’s whip not only emasculates Stoddard, but it lowers him to the level of an animal. The camera cuts Stoddard out of the shot, simply lingering on Valance flailing his whip.¹⁰³ The law has very little importance and strength. In fact, the town of Shinbone itself has no real legal authority to speak of outside of perhaps Tom Doniphon. There is a town marshal, Link Appleyard (Andy Devine), yet in one scene, Doniphon takes off the marshal’s hat and knocks it to the floor. Doniphon does so, we assume, because he knows how little power the marshal actually wields. Doniphon, even if he does represent some kind of rule of law mechanism, has no official authority. He is not a law officer, not even in a makeshift way, nor does he attempt to enact his authority in a legalistic manner. The gun is his law, and he makes that clear to Stoddard in his

¹⁰¹ See: Figures 1 and 2.

¹⁰² Many Westerns commonly show a dichotomy between masculine and feminine, the man and the woman, husband and wife. (See: Roger Berkowitz and Drucilla Cornell.) This is especially true in Ford’s films like *The Searchers* and *My Darling Clementine*, where a man taking a woman as his wife analogizes the taming of the West.

¹⁰³ See: Figure 3.

continual insistence that he get one. But Stoddard relents, and refuses, until the end of the film. The events leading up to that end stretch across a large number of the questions and concerns inherently raised within the sphere of state of exception literature. That the film is so deeply tied to America and its founding only makes the questions it raises even more compelling, especially when tied to the modern world.

2.3 Bookends of the Political

The beginning of the film establishes a clear basis for comparison to the state of exception. We have a town that is devoid of proper rule of law protections. The outlaws run rampant, and there is not a proper police force to restrain them. By positioning Shinbone in opposition to the East, where statehood has brought rule of law protections – as well as the striking difference between Shinbone in the “present,” and in the past – Ford establishes a clear differentiation between a society where law and order exist, and one where it does not. Even though the traditional understanding of the “state of exception” is one in which a crisis has befallen the state, and where the rule of law is suspended in some way, Shinbone acts as a state of exception in its construction. In other words, Shinbone works as an *environment of exception*.

The ending of the film bookends the beginning: Valance, fearing that Shinbone will in fact vote for statehood, decides to terrorize the town in an attempt to prevent the people from taking the vote. He ends up killing the town’s journalist, Peabody (Edmond O’Brien), which sends Stoddard into a rage in which he capitulates to Doniphon’s ideal and takes a gun in hand to kill the outlaw. The shootout happens, and Stoddard thinks that he won, killing Valance and freeing the people to vote for statehood. But we later learn that Doniphon, hiding in a dark corner, shot Valance at the same time as Stoddard, giving the illusion that Stoddard, and not he, had shot Liberty Valance.¹⁰⁴ Yet the credit is given to the lawyer from the East. There are a few points to be made with regard to this ending.

First, what do we make of Stoddard’s capitulation to violence as a way to solve the problems Shinbone faces? Secondly, the ending seems to imply that the death of

¹⁰⁴ See: Figure 4.

Liberty Valance allowed for a transition to law and order; can we agree that this was Ford's point? Thirdly, what can we make of the almost melancholic tone of the end of the film? Does Ford mean to say that such a transition to a state of legality comes at a high price? Is it simply an acceptance of what Agamben would argue is the normal state of being?¹⁰⁵

Ransom Stoddard's action at the end of the film is somewhat baffling at first thought. He starts out the movie a man obsessed with the traditional concept of the rule of law, declaring to Liberty Valance that he will see him in jail. In one iconic scene, he teaches the people of the town about the United States Constitution, the idea that "all men are created equal" in the Declaration of Independence, and of the concept of the rule of law – interestingly enough, Doniphon seems less than interested in such things. Stoddard's refusal to carry a gun and to live by "Western law" is a point of constant contrast with Doniphon. Given the assumed nature of the character, the fact that he picks up a gun and resorts to an act of violence is somewhat shocking. Yet is it? If we work under a Hobbesian framework, then his action is simply an acceptance of the "law of nature."¹⁰⁶ But I do not believe it to be so simplistic.

Turning to Pippin lends more nuance to the argument. "What this suggests is that the conditions necessary for law and political order and doubly morally problematic. First, there can be no law unless the lawless are eliminated, controlled, but given what the lawless are willing to do, this violent elimination cannot itself be just or fair, cannot play

¹⁰⁵ Interestingly, Livingstone takes a somewhat similar approach, but from a Hobbesian position. He argues that the violence used against Valance is nothing more than "an extension of the law of nature." This argument is not incompatible with mine. After all, if the state of exception is in fact the norm, and violence can be said to be the norm, then the events at the end of *Liberty Valance* simply justify the stance that the norm is not much different from the "exception."

¹⁰⁶ See footnote 105.

by the rules.”¹⁰⁷ The idea that Stoddard, so compelled to uphold the rule of law, could be driven to commit cold-blooded murder,¹⁰⁸ an act that is antithetical to legal order and the rule of law, speaks largely to this very point. “Violence before there is law is unavoidably lawless,” Pippin states, “but if it is for the sake of law the paradox can be lessened if not eliminated.”¹⁰⁹

I am not sure I agree with Pippin’s point that the paradox can be eliminated. After all, does this not simply mean that the end justifies the means? I believe that this paradox can *only* be eliminated by accepting the inherent part that violence plays within the founding of the rule of law. To restate myself: if the transition to, or re-instating of, an ordered state *requires* a lawless act, or acts, *inherently*, then no stark dichotomy between the rule of law and violence can possibly exist. Although it is true that law and order are conventionally viewed as oppositional to anarchy and lawlessness – and it is true that Ford has taken this position by placing Stoddard in opposition to Valance, a point I will later elaborate upon – that does not necessarily preclude violence from being a piece of the transition *from* lawlessness *to* the rule of law. The paradoxical aspect comes from the idea that a lawless act cannot possibly be used to foster an ordered society.

Yet although Ford clearly sees, accepts, and understands the oppositional framework of law and order to anarchy and lawlessness, he also seems to indicate that in times of crisis, when the rule of law ceases to exist in a normal form, a lawless or violent act may be required. Jacques Derrida, for example, argues that *no* liberal or parliamentary democracy can be founded without violence, stating that, “As means, all violence founds

¹⁰⁷ Pippin, *Hollywood Westerns and American Myth*, 80-81.

¹⁰⁸ Indeed, although Ransom knows in the end that it was Doniphon, not he, who killed Liberty Valance, Doniphon admits that what he did was, in fact, “Cold-blooded Murder.” Even without Tom Doniphon’s admittance to this fact, it is clear that such is the case.

¹⁰⁹ Pippin, *Hollywood Westerns and American Myth*, 81-82.

or preserves *droit*.¹¹⁰ Otherwise it would lose all value... every juridical contract... is founded on violence. There is no contract that does not have violence as both an origin and an outcome.”¹¹¹

Ford was no stranger to this framework, having used it before in his film *My Darling Clementine* years earlier. That film, which he made soon after World War II, deals with the Earps (including Wyatt, as played by Henry Fonda) moving into the town of Tombstone, which has little law and order to speak of. When Wyatt first comes to the town, he remarks at how little order exists. When his brother is murdered by outlaws, he decides to stay and become the marshal in order to enact revenge. “Ford insists on paradox: in order to achieve his violent personal revenge, Earp must first become the law.”¹¹² But it goes further than that. The film ends with the climatic gunfight at the O.K. Corral, after which Earp leaves, having rid the town of the Clanton family. As Jim Kitses notes, “Structurally and dramatically, the film proposes that the violent elimination of anarchy is the final act in a historical process that initially involves the establishment and defence of law, culture and religion.”¹¹³ *The Man Who Shot Liberty Valance* furthers this ideology, bringing it to an even more overt realization. But it is the characters in *Liberty Valance* that elucidate these points.

¹¹⁰ Derrida uses the word *droit* here in slightly ambiguous terms. The word is French for “right,” as in “the right to free speech,” but can also be used to invoke the concept of the *law*, on similar terms to the French word *loi*. We may be able to understand *droit* to be some form of rule of law system. He speaks at length about this in his paper *Force of Law*.

¹¹¹ Derrida, *Force of Law*.

¹¹² Kitses, *Horizons West*, 57.

¹¹³ Kitses, *Horizons West*, 57.

2.4 Stoddard, Doniphon, and Valance: Metaphors of Political Theory

Between the characters of Liberty Valance and Ransom Stoddard, we find an inherently oppositional nature. From the beginning of the film when Valance whips Ransom, the two are placed in opposition to each other; one represents the ideal of law, order, and morality, and the other the anarchy that exists without the rule of law. From the get-go, the film outlines itself in the same friend/enemy distinction raised by Schmitt. Even more, the two are placed in *geographical* opposition: East versus West. In this sense, we find not only a philosophical and metaphorical opposition between the two, but a physical one as well. They come from different worlds, abide by different rules. Yet it is clear that one represents the ideal of democracy and the rule of law, and the other anarchy and chaos. The established state of existence in Shinbone is one outside legal norms, at least norms as they are regarded where Stoddard comes from. In one scene, while he is working to pay for his upkeep, Valance trips him. No one responds, with the exception of Tom Doniphon. But his response seems motivated more by the fact that his steak was thrown to the ground than the fact that Valance is abusing Stoddard. “This town could use a little law and order,” a character remarks at one point.

Yet just as Pippin argues that Westerns like *Liberty Valance* are not as simplistic as a black/white, right/wrong dichotomy, the character of Tom Doniphon adds a third outlook on the state of the rule of law in Shinbone. Doniphon, unlike Stoddard and Valance, does not fit so nicely into the basic Schmittian dichotomy. Rather, he seems to exist outside, or at least to the side, of the other two. Though it is clear that he does not endorse Valance’s anarchic worldview, he still nonetheless endorses the idea of violence

as, if not a solution to the problem, then certainly a requirement of enduring it. Doniphon carries a gun with him, and encourages Stoddard to do the same. On that detail alone it is clear he capitulates to the idea of “Western law” that Valance introduces in the beginning of the film. In other words, although Doniphon does not prescribe to Valance’s anarchy, he still believes in the idea of violence as a prescription for wrongs. His presence makes what would otherwise be an open and shut case of right and wrong an ambiguous situation where right and wrong are no longer so cut and dry.

Does he represent some aspect of the rule of law? He certainly keeps Shinbone in some type of legal order. He appears to be the only thing preventing Liberty Valance from complete sovereignty. It is clear that he has some kind of restraint. He does not simply rape and pillage as he sees fit. One of the factors restraining him is Doniphon. For example, in the same scene in which Valance trips Stoddard, Doniphon stands up against Valance. And Valance backs down. The question we must ask is why he backs down. Why is Doniphon able to keep Liberty Valance in check, so to speak? Could it be that they are, in some sense, two sides of the same coin?¹¹⁴ If we accept that Valance and Stoddard are in opposition to each other, where precisely does Doniphon fit in? I believe that Doniphon essentially represents some form of rule of law mechanism. Although he certainly uses methods that can only be considered extralegal, or extra-constitutional,¹¹⁵ his actions at times still tend to uphold *some form* of order. It is possible that Doniphon

¹¹⁴ This is not an uncommon argument, and is supported by the film. At one point, Doniphon tells Stoddard: “I know those law books mean a lot to you. But not out here. Out here a man settles his own problems,” emphasizing the gun he has. Stoddard’s reply supports the Doniphon/Valance comparison when he says: “Do you know what you’re saying to me? You’re saying just exactly what Liberty Valance said.”

¹¹⁵ When I speak of “extra-constitutional,” I speak of it in the Aristotelian sense. Although the frontier, or territories, do not have a constitution so to speak, and have not adopted the American constitution, there is still arguably a constitution in the symbolic sense. Although laws may be passed, or no laws exist, individual actions may still work toward upholding the constitution in the truly political sense. A “constitutional hero,” such as Theramenes, is a good reference for this point.

represents the idea that Bonnie Honig raises in such “Catch-22” situations. Although no option is ideal, *something* must be done, *some* action must be taken. If you carry and use a gun, you are taking some form of extralegal action, and yet refusing to carry one leaves you open to abuse from someone like Valance. The inherent problems expressed here, and the different approaches of these three characters outlines the inherent legal, moral, and political implications of a state of exception.

David Livingstone takes a more classical approach to these three characters, interpreting them through the lens of “classical political philosophy,” and assigning each of them a piece of Socrates’ tripartite soul (reason, spiritedness, and appetite). He argues that, “Liberty Valance symbolizes the ‘anarchy of unruly passions,’ Tom Doniphon represents ‘the moral ambiguity of spiritedness,’ and Ransom Stoddard is the ‘symbol of reason and the rule of law.’”¹¹⁶ He makes his point by arguing against the idea that “the end of lawlessness... requires the end of heroism.”¹¹⁷ This point is well taken, but given the film’s ending, can it truly be said that the film does not in some way endorse the idea that violence, or violent actions, have a direct correlation to the founding of the rule of law? Even Livingstone concedes that this interpretation has been ascribed to the film,¹¹⁸ and as I have argued, this framework is not uncommon to John Ford’s Westerns.

Joshua Dienstag has an inspired approach to the whole film, as well as the paradox of legal order requiring violence.¹¹⁹ He too assigns the same basic metaphorical

¹¹⁶ Livingstone, “Spiritedness, Reason, and the Rule of Law: John Ford’s *The Man Who Shot Liberty Valance*,” 3.

¹¹⁷ Livingstone quotes Mary P. Nichols, “Heroes and Political Communities in John Ford’s Westerns: The Role of Wyatt Earp in *My Darling Clementine*,” who argues *against* that point.

¹¹⁸ He states that “Indeed, precisely this cynical conclusion is ascribed to Ford by several commentators and biographers.” It is clear that Livingstone does not agree with this assessment, but it is also equally clear that this assessment is a fair interpretation based on the events in the film.

¹¹⁹ From an unpublished conference paper entitled “A Storied Shooting: Liberty Valance and the Paradox of Sovereignty.”

positions that I do to the main characters of the film. He also assigns the concept of *demos*, or “the common people” to that of Hallie (Vera Miles). In Dienstag’s mind, “‘the man who shot Liberty Valance’... is really **both** Doniphon and Stoddard, neither one of them sufficient to the task by themselves.”¹²⁰ What he means by this boils down to the following: if Stoddard represents a strong legal foundation – a foundation of the rule of law – and Doniphon, extralegal power,¹²¹ then in order to transition to an ordered state, *both* things are needed, neither sufficient alone to establish a rule of law system. In this sense, Dienstag agrees with the “cynical” interpretation of the film that Livingstone somewhat rejects.

The required use of force and violence is only further emphasized when Liberty Valance is rejected by the townspeople in a vote to send delegates from the territory to vote for statehood. When Shinbone holds the vote, Valance shows up – and he can hardly be rejected, as in a pluralistic democracy like that of the United States,¹²² even someone like Valance is thought to deserve a voice – and subsequently attempts to threaten the townspeople into voting for him as a delegate. He fails, however, when the people reject his intimidation. It is here that Valance *does* follow through on his threats, wreaking more havoc upon the town and killing Peabody, Shinbone’s sole newspaperman. “At this point, neither man sees an alternative... For either Ransom or Tom to kill Valance would violate his principles (for Ransom, the principle of acting through law; for Tom, the principle to only act in self-defense); *but without the death of Liberty, the project of*

¹²⁰ Dienstag, “A Storied Shooting: Liberty Valance and the Paradox of Sovereignty,” 6.

¹²¹ In Dienstag’s words, “...(John Wayne as Tom Doniphon) represents an extralegal power...” “A Storied Shooting: Liberty Valance and the Paradox of Sovereignty,” 3.

¹²² As Dienstag notes, “This exchange is important because it highlights the central problem the townspeople face, one that Doniphon cannot solve: until their sovereignty and borders are secure, they cannot exclude anyone who claims to be a member of their community, no matter how inimical or hostile his presence is to the community itself.” “A Storied Shooting: Liberty Valance and the Paradox of Sovereignty,” 17.

sovereign law will fail” (emphasis added).¹²³ This directly confronts the view that the rule of law and violence are opposed to one another. If we take Dienstag’s argument at face value – and there is little reason not to – then the two cannot be opposed. In fact, they are intrinsically connected.

¹²³ Dienstag, “A Storied Shooting: Liberty Valance and the Paradox of Sovereignty,” 18.

2.5 Print The Legend

My final point on *The Man Who Shot Liberty Valance* concerns the idea of “printing the legend.” In the film, the audience begins by believing that Ransom Stoddard was the man who shot Liberty Valance. It is not until later that we find out that he did not, in fact, shoot Valance. Yet he is still thought of as the man who did. He still reaps the benefits, so to speak. He is known for having brought statehood to the territory, partially through this morally questionable and arguably extralegal measure. There are two questions that must be asked, knowing the facts of the story. First, what was the cost of bringing the rule of law to the territory through such means? Secondly, what does this concept of “printing the legend” mean for the polity of the United States?

It is difficult, if not impossible, I believe, to fully answer the first question. There are myriad answers. Maybe the right way of framing the question is not “what is the cost,” but “is there a cost?” For we certainly know that law and order came to Shinbone after the death of Liberty Valance, and it is difficult to imagine this taking place if not for Valance’s death. In this most basic sense, his death must have been a positive, correct? Then why is there such a sense of melancholy in the air, in the expressions of both Stoddard and Hallie in the beginning and end of the film? Why is the film bathed in cold greys? “The generally depressed atmosphere echoes a setting bereft of charm or dynamism,” notes Jim Kitses, going on to say “The last major Western of its era to be made in black and white, *Liberty Valance* creates a modern-day America as a grey, colourless world...”¹²⁴ Cinematically, we must accept that Ford does not intend us to look positively upon the way in which the rule of law came to Shinbone (and in the larger

¹²⁴ Kitses, *Horizons West*, 119.

symbolic sense, the United States as a whole). Yet he also seems to accept that something *had* to be done.

The sense I gather is that such action cannot be repudiated as wrong, for it was necessary, and yet at the same time, we must accept that something is amiss with the idea that liberalism and democracy exist because violence has allowed them to. The rule of law is only a stable piece of said democracy because it was initially violated. I believe that Ford uses such an aesthetic to get at the heart of the personal, moral cost for Stoddard himself. He is the only one that knows the truth of what happened (and perhaps Hallie, a subject for another thesis), and must live with that burden. But it is true that men like Liberty Valance no longer terrorize the area, and that – with the arrival of a train in the beginning versus a horse and carriage – modernity and a civilized order are flourishing. Stoddard is the man upon whose shoulders the burdens of action that *must* be taken have to rest. He is the “moral agent” of whom Bonnie Honig speaks.¹²⁵ But there is also a sense that the coldness of the “present day” scenes comes from a cynicism within Ransom Stoddard that did not exist in the past. After all, he enters Shinbone expecting to set up a law practice, establish the rule of law through purely *democratic and legal means*, but ends up at least partially throwing out his values on the subject for the sake of “the greater good.”

Has there been a cost, though? If violence is required to establish a rule of law system, has the establishment of that system actually changed anything? Or is it the case

¹²⁵ Honig speaks to the idea that because in situations of crisis, *something* must be done, and that even *inaction* is action, *someone* has to take the moral burden off the polity. Someone has to take responsibility of restoring order: a moral agent who takes action for the greater good so that the state may continue to exist in peace and normalcy. By the same token, Dienstag argues a similar point: “Ransom wins political office and power but has to live with the permanent consciousness of being an actor, as heavy a burden, in its own way.”

that, in establishing a “state of normalcy,” so to speak, we have simply put a mask over a state that is essentially unchanged, at least in the core merits of its institution? Is the modernity of the “present time” in *Liberty Valance* just a façade that we as a polity must afford ourselves in order to live with the consequences of the sacrifices it took to create an ordered state? Liberty Valance may be dead, but does that fundamentally change anything, or does it simply allow us to shield ourselves from the realities of living in a modern society? The answer may lie within the most famous line of the film: “print the legend.”

According to Dienstag, this line “represents... the complicated interrelation of law and violence in the formation of any state.”¹²⁶ This is indeed true. At almost the tail end of the film, after Stoddard has told the journalist interviewing him the truth of Liberty Valance’s shooting, the journalist takes his notes and rips them up. “You’re not going to print the story, Mr. Scott?” Stoddard asks. The journalist replies, “This is the West, sir. When the legend becomes fact, print the legend.” There are a number of possibilities to interpreting this line, but I believe that the most important point to be made is one of the myth of the American founding.

How can we live with ourselves as a polity, knowing the true violence it took to create what we come to consider a legal order? Knowing that we must abandon our principles in order to create a principled society, how can we continue? “Both fact and legend, the narrative of *The Man Who Shot Liberty Valance* creates us as the inheritors of a violent past that we can choose to acknowledge or, like the editor, choose to ignore.”¹²⁷ Although Joshua Dienstag believes that we, as a collective people, “can bear to live with

¹²⁶ Dienstag, “A Storied Shooting: Liberty Valance and the Paradox of Sovereignty,” 5.

¹²⁷ Dienstag, “A Storied Shooting: Liberty Valance and the Paradox of Sovereignty,” 26.

its memory if we come to believe that its origin was not selfish but shared and burdensome to those who perpetrated it,” it is here that I take a different approach, one that Pippin endorses. He argues that “everybody can think that Ransom Stoddard killed Valance and so can distinguish this act of violence from a personal one by associating it with Ransé’s ideals, can believe that the rule of law and democracy triumphed.”¹²⁸

Printing the legend, as it were, and passing it off as fact, relieves the burden of reality from the shoulders of we, the people. The sacrifices of one individual, Ransom Stoddard, allow us to view not the betrayal of the rule of law to achieve a legal order, but rather the triumph of democracy in the face of adversity.

This is, perhaps, a cynical outlook. But I do not think it is an unfair one. From the beginning of America’s founding, the idea of a nation founded on “we, the people” has never been entirely accurate. For what do we find when we look at institutions like the Electoral College and the Senate? They are oligarchical, not democratic, institutions. And yet we are not taught growing up that our country was not founded as a nation of true democracy and equality. We are taught the legend. Because the legend is easier to stomach, is easier to digest. It is easier to believe that we need not sacrifice our values to achieve something great. And yet what, we must rightly ask, has changed? Was the transition to a normal state, with normal rule of law protections, as great as we might think it is? If we have truly moved forward, then it is difficult to imagine in this day and age, in the Twenty-first century, that the concept of sacrificing our principles to restore or preserve legality need exist. And yet that is exactly what we see.

¹²⁸ Pippin, *Hollywood Westerns and American Myth*, 81.

2.6 From the Frontier to the City

The Man Who Shot Liberty Valance is a brilliant exploration of the themes of the rule of law, as well as how the rule of law operates in a place in which its relationship to violence is more overt and apparent than it normally appears to be. Although the rule of law seems to exist to some degree within the frontier, it does not have a force behind it that allows it to operate as it does in the East. But as I have demonstrated, it is not as though the rule of law simply ceases to exist. Through Ransom Stoddard, working to establish an ideal and classical rule of law system, coupled with the extralegal force of Tom Doniphon, it was possible to transition to an apparent *normalcy*.

Liberty Valance looks at the rule of law through what is, for all intents and purposes, a state of exception. Working through this framework, we can see that violent acts are not only a part of the exception, but also a requirement to transition to the “norm.” The relationship between violence and the rule of law is not one of paradox, but one of intimate connection.

But as I have explained, it is a hard case. It is not a strict state of exception situation. By contrast, *The Dark Knight* is. In much the same way that *Liberty Valance* uses characters to metaphorically examine rule of law mechanisms, so too does *The Dark Knight*. They are in this way very thematically similar, and as such, *The Dark Knight* provides a logical extension to that of *Liberty Valance*. But it also extends upon *Liberty Valance* with its post-9/11 lens.

As I will show in Chapter 3, *The Dark Knight* is a timely film, as it looks at many of the themes I have so far investigated with regard to *Liberty Valance*, but through the

context of a post-9/11 world. The comparisons it has drawn to George W. Bush's Presidential Administration are troubling, but as such require study. Furthermore, it comes to a similar conclusion and understanding as that of *Liberty Valance*, lending more force to the idea that "printing the legend" is, in fact, the way in which we can reconcile violence with the rule of law. Let us now look at Christopher Nolan's *The Dark Knight*.

CHAPTER 3

“*THE DARK KNIGHT: A FILMIC ANALYSIS THROUGH A POST-9/11 LENS*”

3.0 Moving into Gotham

The Dark Knight draws close thematic connection to *The Man Who Shot Liberty Valance* in its treatment of the rule of law, as well as in its character and their place in the scope of the connection it plays to violence. Furthermore, it explores the complex dynamics at work concerning the morality of extralegal action within a state of exception. As we will see, the conclusions it makes with regard to these things bears a striking resemblance to those of *Liberty Valance*.

What differentiates the world of *The Dark Knight* from a movie like *The Man Who Shot Liberty Valance* and other great Westerns, is that in *The Dark Knight* there is *supposed to be* a legal order in place. The film takes place in the fictional city of Gotham, which is obviously not a frontier outside the legal bounds of the United States; in fact, it is arguably the opposite. A legal system is already exists. There is the city mayor, the police department, and the District Attorney’s office. The key point is that the normal mechanisms are ineffectual. It could be that they lack a *force* to back them up. Yet we see that corruption has run so rampant that even Commissioner Gordon’s (Gary Oldman) right-hand officer betrays him to the mob. In *The Dark Knight*’s predecessor, *Batman*

Begins,¹²⁹ it is established that Bruce Wayne (Christian Bale) chooses to don the cape and cowl because of the extensive crime in the city. In *The Dark Knight*, we see the continuation of Batman's "quest" so to speak, to rid the city of crime. Batman's tactics have been working, and have squeezed the mob into a corner, with different factions working together, rather than vying for power, in order to survive. Yet despite an improvement in the crime levels in the city, we still see that they are above and beyond the normal capabilities of the police force and the executive through District Attorney Harvey Dent (Aaron Eckhart).

We further see how crime ridden the city is through the opening scene, which is a bank heist. This clearly establishes crime as the forefront of the film's thematic justification for Batman's existence. Without crime at the high level that is it, and without corruption infecting the government, Batman ceases to have a purpose. In a similar way that the lack of a normal legal system and widespread crime leave the frontier in a state of rule-of-law-flux, so too is Gotham City. The introduction of The Joker (Heath Ledger) only exacerbates the amount to which the rule of law's place within the city has been complicated. He embodies (as did Liberty Valance) the very essence of the destruction of the rule of law. He represents anarchy and chaos. As Bruce Wayne's faithful butler Alfred (Michael Caine) says at one point, "some men just want to watch the world burn." The Joker's motives are as inconsistent and confounding as the explanations he gives of the scars on his face.¹³⁰ The Joker, as the embodiment of lawlessness, presents a stark

¹²⁹ Christopher Nolan, Director, Warner Bros., 2005.

¹³⁰ Each time The Joker explains his scars and how he got them, he gives a different story and account. Never is his explanation the same twice. This not only adds to the mystery of the character, but when approaching him as a terrorist comparable to those in the "War on Terror," it gives another layer and point of comparison. Westerners, Americans especially, have a hard if not impossible time relating to and explaining the actions of the 9/11 hijackers. I will elaborate on this connection between The Joker and Al Qaeda terrorists later.

image of a force that demands a response. Through him and the terror he inflicts upon the city, as well as the other criminal factions existent within Gotham, we can connect the film not only to contemporary explorations of the rule of law in the modern world, but of the state of exception as well.

Through this state of exception framework, we can see the operation of the rule of law, just as was the case in *Liberty Valance*. What mechanisms are available when the law ceases to carry weight? What solutions, if any, exist when the refuge of the rule of law is no longer fully available? I will confront these and other questions in this chapter, and given the importance of establishing the state of exception's place within the film, I now turn to that idea.

3.1 Gotham City as the Exception

It is easy to see how the state of exception exists within the film. Batman exists as a response to what he considers extraordinary circumstances; the crime levels in Gotham City have reached unmanageable levels. Not only is the mob a major player in Gotham City's crime, but petty criminals, drug lords, and then terrorists, inhabit it. What is not precisely clear is whether Bruce Wayne (Christian Bale), in taking up the role of his alter ego, is making this judgment, or if the city has long ago made this judgment itself. Certainly, we are given a clear indication that the legal frameworks within Gotham have been struggling to survive; the criminal syndicates had previously been in control, and law enforcement's effectiveness was, for all intents and purposes, nonexistent. In other words, "In the absence of effective law enforcement, the criminals in the Gotham Underground have taken control of the city, leaving a volatile and chaotic atmosphere in their wake."¹³¹ In one scene, Assistant District Attorney Rachel Dawes (Maggie Gyllenhaal) asks, "How could you want to raise children in a city like this?" Although she is not specifically implicating the unnaturally high crime rates, in responding, Harvey Dent takes it to mean as much, leading the viewer to perceive Gotham as a city that has been thrust into a state of crisis.

The Bat signal personifies this. Its existence furthers the acceptance by both Gordon and Dent that Batman is at times needed. The use of the signal essentially calls for a moment of exception, as is done when it is used to ask Batman to go to Hong Kong and apprehend Lau (Chin Han), a crime lord who has fled the United States. The Bat signal operates as an indication that an exceptional circumstance exists, and as a result,

¹³¹ Phillips, "The Dark Knight: Constructing Images of Good vs. Evil in an Age of Anxiety," 27.

exceptional action should be taken. Without an environment of emergency, such a signal would have no use. In other words, “the meaning conveyed by the bat signal is an acknowledgement that the present crisis is perceived as beyond the scope of traditional law enforcement...”¹³² The signal is not simply a calling card for Gordon, however, although he is the only one who uses it. Gordon is the only cop Batman believes is not dirty and so is the only cop he trusts and agrees to work with. But there is a collective acquiescence of the signal’s use and its symbolic meaning. This is why, in one of the final shots of the film, the destruction of the Bat signal holds such power.¹³³ The rule of law has failed, and so Batman must take the place of what the state has failed to do: protect its citizens and enforce the law as it should traditionally be enforced, even if that enforcement is not done in the traditional, legalistic sense.

The introduction of the Joker only exacerbates the concept of crisis, and by extension, the rule of law’s overall weakness. This is especially true as the film progresses, from the opening scene of a simple bank robbery to eventually blowing up a hospital, to the threat of blowing up boats with living people on them, the Joker’s acts of terror continue to escalate. Even when compared to Gotham’s normally overwhelming crime, the Joker’s terrorism is framed as *demanding* special action. The city’s police force is unable to adequately deal with his acts of terror on their own, and so resort to allowing mechanisms that under normal conditions would easily violate the rule of law. The film makes quite clear that Batman exists out of some sort of necessity; this point is strongly emphasized when Bruce Wayne attempts to give up his alter ego and is, for all intents and purposes, forced to take it up again. In this way, the film sets itself up not

¹³² Phillips, “The Dark Knight: Constructing Images of Good vs. Evil in an Age of Anxiety,” 32.

¹³³ See: Figure 5.

simply as an analogy for post-9/11 politics, but as a discussion of the response to a state of crisis in general.

Even if we accept that the city has entered a state of exception, and even if we accept that the normal legal channels have essentially failed, are Batman's actions legitimate? Where does Batman's legitimacy come from, and does that legitimacy give us insight into the rule of law's relation to violence? If Batman, who uses overt violence¹³⁴ "for the greater good," can be deemed a legitimate mechanism, then does this validate the reasoning that the rule of law requires some form of violent action? Let us take one of the biggest examples used by conservatives supporting the film: Batman uses the cell phones of the citizens of Gotham to spy on them and pinpoint The Joker's location,¹³⁵ uses violence – arguably torture – to gain vital information, and frequently sidesteps standard legal authority to apprehend criminals. This places the film clearly within the realm of concepts related to the rule of law and its uses and abuses. The film's grounding within a state of exception framework further allows us to look at these questions through the lens of not simply a transition from a "state of nature" to a state of order, but as a state of order thrust into exceptional circumstances. Before I examine *The Dark Knight* itself, however, let us look at the similarities we find between it and *The Man Who Shot Liberty Valance*. The thematic connections the two films bear place them on similar interpretive ground.

¹³⁴ In one scene, for example, he drops a crime boss, Maroni (Eric Roberts) from a fire escape, breaking his legs, in order to get information about the Joker.

¹³⁵ This is also used as a comparison to President Bush's warrantless wiretapping program.

3.2 *The Dark Knight* as a Western?

Although I am not suggesting that *The Dark Knight* is actually a Western, the thematic similarities that it has to both the genre, and to *Liberty Valance* place it clearly within the same thread of thinking that I have been pursuing thus far. I have previously spoken of the concept of the epic, or mythological hero. Robert Pippin argues, “Many Westerns revolve around a pair of characters who seem to figure as two sides of the heroic character, or of any heroic character: a violent, extralegal, ‘elemental’ side, and a domesticated, law-abiding side.” He references Doc Holliday and Wyatt Earp in *My Darling Clementine*, as well as Tom Doniphon and Ransom Stoddard in *The Man Who Shot Liberty Valance*. This same dynamic is used in *The Dark Knight*, in a much more explicit way with Batman and Harvey Dent. In this sense, we can see a direct thematic relationship of *The Dark Knight* to the Western as I have so far established.

What is interesting is the way in which each uses their respective characters. In *My Darling Clementine*, Wyatt Earp comes into the town of Tombstone and takes the job of marshal. Throughout the film, his sense of justice, law and order are at odds with Doc Holliday, who uses intimidation and threats to get what he wants. More than once he encourages Earp, who doesn’t carry a gun, to do so because of the threat of violence in the town. In *The Man Who Shot Liberty Valance*, the earnest, law-abiding lawyer from the east, Ransom Stoddard, is consistently at odds with the gun-toting Tom Doniphon. In both instances, one character represents the face of law and order, or the rule of law as is normally understood, and another an “extralegal” side. In this we can see the metaphorical battle of the state of exception’s rule of law played out through the

characters; that is, the apparent need for extralegal measures while attempting to maintain the rule of law.

The Dark Knight, by extension, has the vigilante Batman, who uses violence, coercion, and a number of other “extralegal” measures to apprehend criminals. Alongside him is Harvey Dent, the District Attorney who uses the law, and depends on the rule of and by law, to both try and convict those criminals. *The Dark Knight* makes this thematically explicit with reference to Batman as Dark Knight vs. Dent as Gotham’s White Knight. It further reflects this duality, as well as the difficult questions of the legality of one’s actions when Dent transforms into the villain Two-Face, half of his face burned beyond recognition.¹³⁶ Not only is the duality expressed in the physical, as well as psychological, separation of Dent, we see another side to the law-abiding citizen of the once-proud District Attorney.

The conflict between legal and extralegal becomes crystal clear through Dent’s manifestation of Two-Face. And it further forces us to question what the best course of action is. In the films mentioned in this thesis, it is violence that eventually leads to a resolution of sorts. None of them, whether they condone the violence that is used, resolve whether that violence was required to get to that point of resolution. Yet they leave one with the impression, or the idea, that violence is a necessary part of resolving conflict, or instilling legal order in a society without it.

I believe that the most important tenets of the Western are those of discussions and dissections of the law (and the rule of law), justice, and morality. Moreover, just as John Ford’s Westerns, like *The Man Who Shot Liberty Valance* and *My Darling Clementine* are so deeply focused on the construction and myth of American identity, *The*

¹³⁶ See: Figure 6

Dark Knight is as well. “The great Hollywood Westerns present in a recognizably mythic form dimensions of an American self-understanding of great relevance to the question of the nature of the political in the American imaginary.”¹³⁷ The main differences lie in the temporal. While Ford’s Westerns are concerned with the reconstruction of the United States following the Civil War, as well as being made during and mostly after World War II. *The Dark Knight*, by contrast, was filmed and released after 9/11, and at the close of George W. Bush’s second term as President. In some ways, this returns us to the concepts of the Western that I have spoken of previously in Chapter 2.

If we think of the Western as a way to understand ourselves as a polity per Pippin, and what it means to be an American, then *The Dark Knight* can be thought of as a reevaluation of that meaning in the light of 9/11. Its main focus is clearly within the realm of post-9/11 politics, and as such, this is the lens through which we must regard it.

¹³⁷ Pippin, *Hollywood Westerns and American Myth*, 141.

3.3 *The Dark Knight* as a Post-9/11 Film

I have spoken some of the correlation in characters between *The Dark Knight* and *The Man Who Shot Liberty Valance*. If we think of Dent and Batman as correlating to Stoddard and Doniphon, respectively, then we can also think of Liberty Valance himself and the Joker as having a correlation. Just as Dent and Stoddard represents the rule of law as it ideally should be, and Doniphon and Batman represent the extralegal basis upon which a society must depend, or must at least accept, Liberty Valance and the Joker represent the anarchy and lawlessness that inherently exists within a state of emergency. The difference, perhaps, lies in two main points: firstly, Valance is not without his personal motivations. After all, he was hired to prevent statehood from coming to Shinbone. That can be pushed to the side as a matter of convenience in discussions of his place within the state of exception, but the same cannot be said for the Joker.

The Joker, by contrast, has no clear, or even discernable motivation.¹³⁸ This brings me to my main point here: the film squarely places the Joker within the conceptual framework of a post-9/11 Al Qaeda terrorist.¹³⁹ Many iconographic images of the War on Terror are visible in the movie.¹⁴⁰ One instance in particular rings frighteningly true. In once scene, the Joker kidnaps a man posing as Batman, the video leaking to the news and broadcast for all to see. The man is tied to a chair, and the obvious implication is that he

¹³⁸ As I have mentioned before, Bruce Wayne's butler, Alfred, at one point says that "some men just want to watch the world burn," alluding to the fact that the Joker's motivations are beyond normal comprehension.

¹³⁹ Lars Dittmer speaks at length about the connection of the Joker to an Al Qaeda terrorist, noting that, for example, the imagery associated with the Joker is pulled directly out of current events. *New Evil – The Joker in "The Dark Knight" as a Prototype of the Post-September 11-Villain* (GRIN Verlag GmbH, 2009)

¹⁴⁰ It is also possible to read the idea of "otherness" in the Joker as more evidence of his metaphorical image as a terrorist.

has been tortured and will most likely be killed.¹⁴¹ The allusion is clear: the evocation of images from the early 2000s, like the videos of Daniel Pearl in 2002 and Nick Berg in 2004.¹⁴² This iconography of fear, terror and violence can further be seen in not only the threat, but the execution of a plot by the Joker to blow up a hospital. In most contexts, this simple explosion could be seen as just special effects to please a crowd – and it certainly functions in this way as well – but here it operates to evoke feelings we associate with the modern era’s War on Terror.

This image of the Joker as an “other,” or a terrorist in the post-9/11 sense is only furthered when put in terms of Schmitt’s friend-enemy distinction, coupled with George W. Bush’s own words. “They believe things,” Bush said at a 2006 Republican fundraiser, “The best way to describe their ideology is to relate to you the fact that they think the opposite of the way we think.”¹⁴³ This is a strict contrast of “terrorists” to “Americans.” In the same sense, the Joker is portrayed as the opposite of the way the audience would think: he is a confusing, utterly unrelatable force of evil. He is also placed in opposition to the characters the audience associates with fighting for freedom and justice: Batman, Dent, and Gordon.

More than images and iconography of the War on Terror, the film’s star, Christian Bale, has openly admitted its connection to current events, stating that “This apparently

¹⁴¹ See: Figure 7.

¹⁴² Dittmer expands upon this argument. “The allusion to these videos is clear in *The Dark Knight* – in several scenes the Joker presents himself with kidnapped persons in videos that are televised in Gotham. In the first video the Joker announces that people will die if Batman does not reveal his true identity – in the video he has one of the fake Batmen tied to a chair and audibly tortures him. Later he has newsman Mike Engel in his power and makes him, with a trembling voice, announce the next strikes on the city in a video. These videos emulate the tense and frightening atmosphere of the terrorist decapitation films – in their amateurish presentation they raise a high degree of immediacy. It is therefore sure that many spectators will feel reminded of the early 2000s, when terror messages of Qaeda and their allies were broadcasted with a relative regularity.”

¹⁴³ “Bush Shifting Public Focus to Terrorism and Iraq War.” *The New York Times*, August 31, 2006.

lightweight superhero--originally this spoofy, kitschy, campy character--we've actually managed to turn that around. [The analogy of the war on terror] is absolutely one that I read into the script immediately."¹⁴⁴ What we are able to then find is that *The Dark Knight* is not only applicable to concepts of the state of exception, but also to modern politics. This makes the film timely in its thematic associations and compelling in its execution thereof. Additionally, and as a result of the film's examination of a state of exception situation, the rule of law's place in modern politics is also brilliantly explored, as I will more deeply analyze later in this chapter.

Because of the film's connection to current, post-9/11 politics, it has been widely seen as analogous to policies and practices of George W. Bush's Presidential Administration up to that point. In the following section, I will explore these arguments and how they fail to fully grapple with the more nuanced ideas *The Dark Knight* explores, even if it does bear comparison to such anti-terror policies.

¹⁴⁴ Joe Allen, *Batman's War of Terror*, <http://socialistworker.org/2008/07/31/batmans-war-of-terror> (July 2008).

3.4 *The Dark Knight* and the Bush Administration: Defense or Admonition?

Given *The Dark Knight*'s clear association with post-9/11 politics, one idea that continues to be debated is that the film is a "defense of" George W. Bush's Presidential Administration and the policies he used that subordinated the rule of law.¹⁴⁵ In the following I will examine this argument, how it relates to the state of exception and the rule of law, and then finally give my own views on the subject.

Writing for *The Wall Street Journal*, Andrew Klavan likened *The Dark Knight* to an analysis of, and endorsement of, George W. Bush's policies in the war on terror. In an article by Klavan entitled, "What Bush and Batman Have in Common," he states that,

There seems to me no question that the Batman film "The Dark Knight," currently breaking every box office record in history, is at some level a paean of praise to the fortitude and moral courage that has been shown by George W. Bush in this time of terror and war. Like W, Batman is vilified and despised for confronting terrorists in the only terms they understand. Like W, Batman sometimes has to push the boundaries of civil rights to deal with an emergency, certain that he will re-establish those boundaries when the emergency is past.¹⁴⁶

Klavan is far from the only conservative commentator to link the film directly to post-9/11 policies, as well as directly linking Batman's character to George W. Bush and Dick Cheney. Spencer Ackerman took a similar outlook to that of Klavan,¹⁴⁷ essentially

¹⁴⁵ The policies include, but are not limited to, The USA Patriot Act, the use of signing statements to supersede legislative authority, warrantless wiretapping of American citizens, and the indefinite detention of suspected terrorists.

¹⁴⁶ Andrew Klavan, "What Bush and Batman Have in Common," *The Wall Street Journal*, July 25, 2008. http://www.liveleak.com/view?i=edf_1216956549.

¹⁴⁷ "The thought of Vice President Dick Cheney in a form-fitting bat costume might be too much for most people to bear. But the concepts of security and danger presented in Christopher Nolan's new Batman epic, 'The Dark Knight,' align so perfectly with those of the Office of the Vice President that David Addington,

arguing that the film defends the Bush Administration's anti-terror policies. Notable bloggers like Matt Yglesias agree with the assessment of comparing the film to current War on Terror policies.¹⁴⁸

However, not all of those who have looked at the film take such a strictly conservative view of the film. For example, Cosmo Landesman, writing for *The Sunday Times*, said that,

The film champions the antiwar coalition's claim that, in having a war on terror, you create the conditions for more terror. We are shown that innocent people died because of Batman - and he falls for it. Here is a Batman consumed with liberal guilt and self-loathing.¹⁴⁹

In this way we can see that the film has spurred debate across the political spectrum. Its overall meaning is thus up to interpretation, and not so cut and dry. *The Dark Knight* fits more into the "Great Western" model described in Chapter 2 than the "black and white 'B' Westerns." As such, and per my argument of the film's thematic similarities to the Western

To call Batman either a metaphorical defense of post-9/11 anti-terror policies, or one of the "antiwar coalition" I believe misses the point. If anything, these two competing theories raise the idea that the film, and the character of Batman himself, are more complex and not simply as black-and-white as one can so easily interpret them to be. As

Cheney's chief of staff and former legal counsel, might be an uncredited script doctor." Spencer Ackerman, "Batman's 'Dark Knight' Reflects Cheney Policy," *The Washington Independent*, <http://washingtonindependent.com/509/batmans-dark-knight-reflects-cheney-policy>.

¹⁴⁸ Yglesias agrees with Ackerman's assessment that Batman is analogous to Dick Cheney, insofar as Dick Cheney thinks of himself on the same terms Batman thinks of *himself*. But Yglesias sees more complexity than simply stating the film is an endorsement of Bush or Cheney's War on Terror Policies. Matthew Yglesias, *Dark Knight Politics*, <http://www.theatlantic.com/politics/archive/2008/07/-em-dark-knight-em-politics/49451/> (July 2008).

¹⁴⁹ "The Dark Knight - The Sunday Times Review," *The Sunday Times* (London), July 27, 2008.

Matthew Yglesias wrote, “Instead, it makes everybody think about the present political situation but we’ll probably reach different conclusions about it just as we reach different conclusions about the real world.”¹⁵⁰ This is the better approach. Rather than simply laying blame, or claiming acceptance, the film can be used to help us understand the themes it raises, especially in the context of the modern world.

Todd McGowan, in analyzing the film, argues that Christopher Nolan does not, as some conservative commentators have done, endorse the comparison of Batman to President Bush as a positive with regard to his anti-terror policies. He argues that Batman, unlike for example, George W. Bush, embraces the fact that by acting outside the rule of law, as a vigilante, he is a criminal. In responding directly to Andrew Klavan, McGowan concedes that it is easy to see Batman through the sphere of conservative political attitudes today. He states that Batman’s actions place him “fully on the terrain of contemporary politics and in the company of conservative political figures.”¹⁵¹ But McGowan does not accept this argument, and rather reads the character with more depth, nuance, and complexity. In comparing Batman to George W. Bush and Batman’s extralegal measures to those of Bush’s, he states that,

Both figures view it as temporary, but what separates Batman is the attitude he takes toward this violation of the law: he accepts that his willingness to embrace this type of exceptionality constitutes him as a criminal. Because he views it as a criminal act, Batman is quick to eliminate it. But this is precisely what Bush would be loath to accept and why he views the War on Terror as a quasi-eternal struggle.¹⁵²

¹⁵⁰ Matthew Yglesias, *Dark Knight Politics*, <http://www.theatlantic.com/politics/archive/2008/07/-em-dark-knight-em-politics/49451/> (July 2008).

¹⁵¹ McGowan, *The Dark Knight’s Necessary Exception*, 6.

¹⁵² McGowan, *The Dark Knight’s Necessary Exception*, p. 7.

Although some might disagree with this interpretation,¹⁵³ I believe it to be a more subtly designed and multi-layered one than the conventional argument that Batman is somehow analogous to George W. Bush and/or Dick Cheney.¹⁵⁴ This is not to say that the base justification both use is not along the same lines – i.e. use whatever means necessary in order to preserve order and keep the people safe – because it is. But there are certain issues that prevent the analogy from holding up under heavier scrutiny.

¹⁵³ Nickie D. Phillips writes that Glenn Beck once noted George W. Bush having told him in a private interview, “I am willing to be hated for the next 50 years, I’m willing to die as the worst president ever because of the war on terror, I know it has to be fought, I know we’re dealing with evil here.” Furthermore, he quotes Dick Cheney on Meet The Press saying, “It’s going to be vital for us to use any means at our disposal, basically, to achieve our objective.” Finally, Matt Yglesias agreed with the basic interpretation that Batman is a Cheney-esque figure in the sense that he is willing to use whatever means necessary to meet a specific end. “Constructing Images of Good vs. Evil in an Age of Anxiety,” 31, 37.

¹⁵⁴ Examples of this blunt interpretation include Andrew Bolt, who wrote in the *Herald Sun* that, “See how Bush – oops, I mean Batman – must time and again compromise his values, and ours, to save his city from far greater evils.”

3.5 Batman's Role: A Clear Distinction

It is important to remember that Batman is an unelected vigilante, not an elected leader of a democratic nation. This may seem like splitting hairs when speaking metaphorically, but the point must be taken seriously, especially if we consider Bonnie Honig's argument of the people as sovereign seriously.¹⁵⁵ Bush was not elected by the people to ignore the rule of law, but to follow it. Batman, by contrast, was never elected, but his legitimation comes through a post-hoc framework.¹⁵⁶ If we agree that a post-hoc legitimation is central to the idea of the people as sovereign, then we must ask whether the tactics used by George W. Bush have been legitimized by the people or not, and would seriously question whether they in fact have been.

Secondly, even though McGowan dismisses it,¹⁵⁷ one cannot help but look at the fact that when Batman spied on the people of Gotham to find the Joker, not only did he put a fail-safe in place to dismantle the program immediately after its use, but further left that responsibility in the hands of another, Lucius Fox (Morgan Freeman).¹⁵⁸ This point

¹⁵⁵ As she states, "I have focused analogously on a remainder of sovereign power (contra Schmitt and yet working within the frame of his metaphor), on sovereign power's dependence upon the decision-power of the people, on something like what Jason Frank has called the democratic state of exception." Honig, *Emergency Politics: Paradox, Law, Democracy*, 106.

¹⁵⁶ "If the people do not exist as a prior—or even as a post hoc—unifying force, then what will authorize or legitimate their exercises of power?" Honig, *Emergency Politics: Paradox, Law, Democracy*, 77.

¹⁵⁷ McGowan states that, "The difference between Bush's version of the state of exception and Batman's — between the conservative and the leftist — does not ultimately reside in the fact that it is temporary for Batman and permanent for Bush. Both figures view it as temporary, but what separates Batman is the attitude that he takes toward this violation of the law: he accepts that his willingness to embrace this type of exceptionality constitutes him as a criminal." He sees the difference between them as an acceptance on the part of Batman of being antithetical to the rule of law, whereas Bush masks his lawlessness under the façade of the rule of law. Todd McGowan, *The Exceptional Darkness of The Dark Knight*, <http://www.ejumpcut.org/archive/jc51.2009/darkKnightKant/text.html> (2009).

¹⁵⁸ Bruce Wayne had set up a machine to use the cell phones of the people of Gotham as a triangulating device, essentially spying on them to locate the Joker. In the scene, Wayne (Batman) explains to Fox that Fox, not he, will be in charge of the machine. He further explains that when he is done using it to enter a password. That password ends up dismantling the entire machine, preventing it from ever being used again.

resonates not simply because it echoes Harvey Dent's earlier reference to the Roman Commissarial Dictatorship,¹⁵⁹ but because it is an almost blatant example of such. Under the Roman model, "the decision to institute a constitutional dictatorship should never be in the hands of the man or men who will constitute the dictator."¹⁶⁰ In this circumstance, we can see Batman's self-regulation, appointing someone to check his own power, to limit his control and the scope of his authority.

If we look at Batman's use of wiretapping to spy on Gotham's citizens on its face, analogizing it to Bush's tactics are clear. And yet Batman not only puts in place a stopgap, but puts the power to use and operate the machine in another's hands as well. He still holds the responsibility of having enabled the device in the first place, but it must be noted that he removes himself from the question of whether it should continue. Furthermore, he puts that choice in the hands of someone who, by all accounts, does not agree with his use of the machine and openly condemns him for having even built it. George W. Bush, by contrast, would likely have simply continued his warrantless wiretapping program indefinitely, had it not come to light that such a program was, in fact, in use. It also must further be noted that his use of such a program was ridiculous on its face, as the FISA court¹⁶¹ had never once denied a warrant since its inception.¹⁶²

This brings us back to the distinction McGowan makes. His argument is that Batman, unlike George W. Bush, knowingly and overtly acts as a criminal, including

¹⁵⁹ Dent notes at one point that, "When their enemies were at the gates, the Romans would suspend democracy and appoint one man to protect the city. It wasn't considered an honor, it was considered a public service."

¹⁶⁰ Rossiter, *Constitutional Dictatorship*, 299.

¹⁶¹ The FISA court was a special court set up under the guidance of the original Foreign Intelligence Surveillance Act of 1978.

¹⁶² William Weaver and Robert Pallitto, "The Fourth Amendment and the Foreign Intelligence Surveillance Act, *American Political Science Association* (2003).

accepting this fact at the end of the film.¹⁶³ What we see with George W. Bush, though, is essentially using “legal” means to undermine the rule of law.¹⁶⁴ This is inherently antithetical to Batman’s approach, as he openly uses extralegal means. He does not hide behind a façade of legality, even if in the end one argues that his actions are justified given the circumstances. This subtle distinction creates a disconnect between the words of President Bush, Vice-President Cheney, and Batman, and their actions. I further believe that, when analyzed on a deeper and more nuanced level, the role that Batman plays is more akin to what we see from a character like Tom Doniphon in *The Man Who Shot Liberty Valance* than that of a real-world President like George W. Bush.

There are further implications on the rule of law to consider because of this. Despite the comparison of Batman to President Bush being laughable under stricter scrutiny, that does not mean that the vigilante gets off free. In fact, it is arguable that *because* Batman is not technically elected by the people, he has less authority to disrupt the normal rule of law mechanisms in place. Yet regardless of this line of thinking, what we must consider is whether Batman has legitimacy, where that legitimacy comes from, and whether his actions, extralegal or not, work to promote and strengthen the rule of law, or in fact – as in the case of President Bush – work to undermine it.

¹⁶³ This is arguably a direct reading of some of the film’s last lines, when Gordon says that Batman “is not a hero,” going on to state that he is “The Dark Knight.” Batman, in shouldering the criminal acts of Dent as his own, shoulders his own criminality.

¹⁶⁴ This is essentially the argument that Kim Lane Scheppelle makes. She goes through many different facets of Bush’s policies to illustrate her point. One point in particular is her description of the Bush Administration’s usurpation of Title III of the Fourth Amendment in favor of using the FISA legislation. She argues that “FISA can be used quite widely to substitute for the traditional Title III, Fourth Amendment-based warrant, even for U.S. citizens and green-card holders.” Scheppelle, “Law in a Time of Emergency: States of Exception and the Temptations of 9/11,” 1046-1047.

3.6 Batman: Agent of the Rule of Law, or Lawless Vigilante?

It is clear that Batman's existence is in response to a state of crisis, and that he can be thought of as a tool of the exception, which leads one to ask, what role does he play? Is he an agent of the rule of law, or just a lawless vigilante? Bruce Wayne decides to become Batman as a direct response to crime rates in Gotham, spurred by the death of his parents at the hands of a criminal. It is also clear that he uses extralegal measures in order to accomplish his ends, including a scene in which he essentially tortures the Joker to extract information, ignores the national sovereignty and extradition treaties with Hong Kong in order to retrieve a criminal, and wiretaps the population of Gotham without a warrant. Yet the people cheer for him, and it is difficult not to infer that audiences that watch the film in some way accept his actions in the interest of the ends he achieves;¹⁶⁵ mainly, that he is able to successfully stop a reign of crime and terror within the city.

Bonnie Honig's view is one of the most enlightening to look at with regard to Batman's existence and its possible justification. She argues that politics is emergent, and that the rule of law is only that which the people make it. The people are the sovereign, and their will constitutes themselves as a polity. As she states,

In a paradoxical moment of founding, however, no member of the community can yet be said to possess the needed perspective, which can only come post hoc, to form the rules or identify or advocate for a collective good by which the people need to have already been acculturated in order

¹⁶⁵ We can infer this response based on the film's huge critical and commercial success. It received a 94% on the review-aggregating website Rotten Tomatoes – <http://www.rottentomatoes.com>. It made \$530 million in the United States, which as of this writing places it as the #3 most financially-successful film of all time domestically. It also managed 8 Oscar nominations, and has a consistent 8.8 user rating on IMDB (the Internet Movie Database – <http://www.imdb.com>), placing at #9 of their all-time best-rated films after over 600,000 user votes.

to be not a “blind multitude” but a “people” capable of the autonomous exercise of popular sovereignty.¹⁶⁶

If we look at Batman through this Honigian lens, we see that his existence is as a result of the *autonomous exercise* of a people. In a conversation in one scene, Bruce Wayne asks, “Who appointed the Batman?” Dent’s response is, “We did. All of us who stood by and let scum take control of our city.” What we see here is an argument that Batman exists because the people asked for him; they may not have chosen him in the traditional electoral sense, but as Honig points out, *post hoc* legitimation is what matters.

A polity decides on its political sphere. This is why Honig would agree with the legitimation of Abraham Lincoln’s suspension of habeas corpus. After the act took place, its legitimacy came through the people. True, Congress and the Courts also legitimized his actions, but one must remember that other actions of the like, such as the infamous case of *Korematsu*, were legitimized through legislative and judicial means, and yet have still been rejected by the people. In this sense, we can see Batman as an acceptable part of the polity, and his actions deemed lawful by the people in a post-hoc sense. If we accept Honig’s interpretation of the people as the sovereign, and further Carl Schmitt’s assertion that “Sovereign is he who decides on the exception,”¹⁶⁷ the people have decided that in the case of Batman, an exception is justified.

Where does this all leave the rule of law? Honig’s argument, while giving a justification for Batman and his actions, does not give an answer as to how the rule of law gains a force or stays legitimate in light of the fact that his actions can be so easily interpreted as antithetical to it. But if, as I have been arguing, there is an intrinsic

¹⁶⁶ Honig, *Emergency politics: paradox, law, democracy*, 19.

¹⁶⁷ Schmitt, *Political Theology*

connection between the rule of law and violence, and that violent or arbitrary action is in fact *needed* to give a force to the rule of law, then Honig's argument as applied to *The Dark Knight* gains a force of its own. The comparison to *Liberty Valance* is once again relevant in this case, as we see the same idea of "supplement" that I spoke of in Chapter 2.

3.7 Batman and Dent: Supplements of the Rule of Law

In relating *The Dark Knight* to *The Man Who Shot Liberty Valance* to find some common thread in their portrayal of the rule of law, it is important to note the idea of supplement. In Chapter 2, I argued along the same lines as Joshua Dienstag, that in the end Rans Stoddard needs Tom Doniphon and vice-versa, in order to produce a proper rule of law system. The *force* of Doniphon and the legal foundation of Stoddard work to create a system of order in a frontier that before, discernably had none. This is paralleled in *The Dark Knight* with Harvey Dent and Batman. One acts as a true agent of the rule of law as it is traditionally thought (Dent), and the other as an agent of justice outside of the normal constraints of the law (Batman).

Neither one of them can successfully save the city from the crime that has overtaken it. It is only together that they are able to produce results and prevent the city from falling into complete and utter chaos. In *Liberty Valance*, Doniphon and Stoddard were, as Dienstag argues, unable to produce effective results working alone.¹⁶⁸ It was only when they worked – in one form or another – in conjunction that they were able to produce the results necessary to transition to an ordered state. In *The Dark Knight*, there is no need to transition from a state of legal flux to an ordered one, but rather to *recover* from the legal quagmire that the emergency has forced upon the city. Yet the same principle is still applicable.

¹⁶⁸ As Dienstag notes, “the lawgiver who instantiates a legal order where there was none – is really **both** Doniphon and Stoddard, neither one of them sufficient to the task by themselves, both needing and acknowledging the other in the process of state formation.” Dienstag, “A Storied Shooting: Liberty Valance and the Paradox of Sovereignty,” 6.

Take, for example, the point in the film in which Lau flees the United States. The police know he is harboring criminals, and funneling money to mobsters, but can do nothing to stop him. Batman, having no jurisdiction,¹⁶⁹ as he works outside the confines of the law, retrieves him from Hong Kong. But even though Batman has retrieved him, justice cannot be served, and the rule of law cannot be thought to be effective without the actions of Dent, the District Attorney, who must prosecute and imprison Lau under the normal guidelines of the law in Gotham City. This is further shown when, in one scene, Dent attempts to use tactics reminiscent of Batman.

He finds one of the Joker's thugs and puts a gun to his head, threatening to kill him if the man does not give him information. But the Batman intervenes, telling him, "you're the symbol of hope I could never be. Your stand against organized crime is the first legitimate ray of light in Gotham in decades," going on to tell him that he plans to turn himself in, unmask himself to the public. "Gotham is in your hands now," he tells Dent. But the problem soon becomes clear: Dent alone is not enough. He himself realizes that the city *needs* the Batman, and gives himself over, claiming he is the Batman, to protect the real Batman's (Bruce Wayne's) identity.

The two work in conjunction to further the essence of justice and the rule of law, despite arguably working against it. This apparent paradox can be resolved partly by accepting the Schmittian framework of the exception. But even without thinking of this in terms of the exception, it is clear that the two ideals have been reconciled to meet a specific end: in this case, the furtherance of justice. And in this case, it is not a simple act of working against the rule of law, as one might argue in the case of President Bush.

¹⁶⁹ This is, in fact, a point made clear in the movie when one The Joker notes that, "Batman has no *jurisdiction*. He'll find him [Lau] and make him squeal."

Rather, Batman works in conjunction *with* the law, with the legal system, while at the same time existing and acting outside of it. In other words, Batman gives a force to the law that does not otherwise have a presence in just Dent alone. By extension, we can apply the same logic using Gordon. The police do not possess the *force* of law necessary to make its applicability truly enforceable.

The Dark Knight complicates this concept of reconciliation and supplementation in its treatment of Dent. Eventually, he becomes the villain Two-Face, having been burned by the Joker and his lover, Rachel Dawes killed. In his rage, he succumbs to the temptation of illegality, killing those he feels are responsible for her death. The corrupt cops who betrayed him, the mobsters who set him up, etc. Faced with the consequences of enforcing the rule of law, he breaks, and with it, the symbolic nature of what the rule of law represents to the people. The order established by the rule of law is thrown out the window, and the extreme results of violence's marriage to it come to the foreground. Yet some rule of law protections must stay in place, or the city really will fall into a destitute, chaos-ridden state – one akin to what the city looked like *before* Bruce Wayne created the Batman.¹⁷⁰ Without Dent, what does the city have left? Is the ability to reconcile the rule of law with extralegal action still a choice? Or, without Dent, does the city in fact simply succumb to the whims of a vigilante?

First, we must consider the fact that Commissioner Gordon still plays a pivotal role. He can, in some way, play the role that Dent did, keeping the Batman in check, making sure that his extralegal actions are tempered with a legal outlet. Second, we must remember that the Batman, unlike a villain such as the Joker, has a code of morals by

¹⁷⁰ The city *before* Batman's presence is arguably akin to a state of nature situation like the one we saw in *The Man Who Shot Liberty Valance*.

which he lives. He exists and continues to fight for justice partly because legal avenues are available – they are just not as effective as they should be. He does not kill, even when tempted. Given the opportunity to kill the Joker – or simply let him fall to his death – at the end of the film, he instead decides to give him to the police.¹⁷¹

¹⁷¹ See: Figure 8.

3.8 Printing the Legend of Gotham's White Knight

I spoke previously in Chapter 2 of the way in which the “legend” was printed, rather than the truth, in *The Man Who Shot Liberty Valance*. “Printing the legend” has the effect of allowing the people to live in a society believing that the rule of law exists separate from violence and arbitrary action. Yet as *Liberty Valance* demonstrates, the creation of a rule of law system requires some form of extralegality in its formation. The question *The Dark Knight* confronts is whether such action is still needed in a state in which a rule of law system is, for all intents and purposes, in place. Even within an emergency, do the people still need to believe that the rule of law exists untainted by violence and illegality? I believe that *The Dark Knight* answers this with a resounding “yes.”

At the end of the film, Harvey Dent, now the villain Two-Face, kidnaps Commissioner Gordon's son and threatens to kill him in front of Gordon as revenge for what he feels is Gordon's culpability in Rachel's death. But Dent is killed, leaving the Batman and Gordon to clean up and decide what to do. If they release the facts to the public, they reason, Dent's legacy, and with it the rule of law that he worked so hard to establish, would be for naught. Not only would the criminals Dent put away have grounds to appeal, but the people's faith in the system would derail as well.

This leaves them with a choice between presenting the facts of Dent's fate – that he became a monster like those he once fought against, like the Joker – or show him as the symbol of law and order that the people of Gotham so desire, and that the city so *needs*. Yet the only way to do that is to lay the blame of Two-Face's murders on the

Batman, the moral agent able to shoulder the burden of that which the people cannot. In essence, they choose to “print the legend” of the White Knight of Gotham in the same way that the legend was printed to give legitimacy to Ranse Stoddard’s place as Senator and possible Vice President. In the same way that the burden of extralegality was on the shoulders of Tom Doniphon in *Liberty Valance*, here Batman carries it. Furthermore, we must remember that Batman is, in the end, just a man – Bruce Wayne – like most others. Though presented with superhuman abilities, the film never lets us forget that he is, in the end, as fragile as every last one of us.

The end result of both films speaks to the need of violence – extralegal measures – and the rule of law to somehow negotiate the terms of their existences. Neither one can efficiently deal with creating, or maintaining, the rule of law. Despite the supposed opposing concepts of rule of law and violence, we see here more of a marriage of the two. *The Dark Knight*, coupled with *The Man Who Shot Liberty Valance*, give us a picture not of opposing forces, but of deeply interconnected ones.

What is seen here is a dependency by the rule of law on extralegal action to back it up and give it force. That force comes from the merging of traditional rule of law mechanisms with arbitrary action. Essentially, rather than working to dismantle the rule of law, that arbitrary action works instead to *further*, or *strengthen* it. Furthermore, the only real way in which this can work properly is if the truths of that strength are kept from the people through the use of “printing the legend.” The people want to believe in the rule of law as it would exist in a utopian society. Unfortunately, we do not live in such a society, and as such, perhaps we would be better to accept the realities of the world we live in.

CONCLUSION

4.0 Problems, Wishes, and Shortcomings

The themes, ideas, and questions I have explored in this thesis have been broad, far-reaching, and expansive. They are ones that, even given the length and depth of some of the books I have analyzed among these pages, would not suffice to come to a satisfactory conclusion. It is not without regret that I am unable to do so, but it is with acceptance that such a task is difficult, if not impossible. This is especially true given the constraints with which I have worked regarding variables such as resources and time. Given the ability to do more with the subjects I have laid out in the previous pages, there is much more I would like to do. Regardless, I believe that the overall framework I have established – of using film to explore questions of politics, the rule of law, and to some extent, social identity – holds up under stricter scrutiny. It is my earnest belief that film can enlighten us in ways the deep legal and political debates of theorists like David Dyzenhaus and Giorgio Agamben can only hope to.

There are a multitude of questions within both *The Man Who Shot Liberty Valance* and *The Dark Knight* that I did not have the opportunity to explore. One example is the idea of Batman as an arm of the executive. Does he, by virtue of working in conjunction with Gordon and Dent, essentially become no more than a pawn of the executive's desire for extralegal action? Or what of a closer look at the relationship between the Batman and the Joker? The idea that one exists only because the other does is pervasive within the film, and widely seen by many who have watched it. What are the

larger implications of this if we see them as metaphorical aspects of a post-9/11 world? Do the extralegal measures that Batman uses cause more harm than good, even if we accept that they are required? These are just a couple of the possible angles I was unable to fully explore in *The Dark Knight*.

In the case of *Liberty Valance*, what role does Hallie play? Joshua Dienstag speaks to this point as I briefly mentioned in Chapter 2. Looking at her as the *demos* like he does lends more credibility and force to the relationship of American identity to that of the rule of law and states of exception. In addition, the place of education within an ordered state seems apparently important. In *Liberty Valance*, an entire scene is devoted to Ransom Stoddard educating the town's people on the United States, the constitution, and the rule of law. What implications does this have for the foundation of the rule of law within society? What part does education play in a state of exception? Again, these are just a couple of the ways in which I could, but was unable to, extend upon and further explore the material, here in *The Man Who Shot Liberty Valance*.

4.1 Extensions Through Media

It is difficult to overemphasize the amount to which concepts of the rule of law and states of exception pervade media of all kinds, from television to film, even to video games. Its pervasiveness makes it difficult to avoid stumbling upon characters regularly faced with the choice of sacrificing the rule of law for safety and security within a state, and struggling over the extent to which they can balance these two competing ideals.

Television shows like *Battlestar Galactica* (2004)¹⁷² openly deal with concepts of founding a rule of law system, the competition between safety and liberty, and the way in which violence is never far apart from the attempt to instill the rule of law and reconcile these elements. Video games like *Mass Effect* (2007)¹⁷³ force us to question the extent to which we as individuals are willing to go, and to what extent we are willing to personally sacrifice ourselves, for the greater good. And other films, like the multitude of Westerns by John Ford and others, as well as films like *Children of Men* (2006)¹⁷⁴ and *Minority Report* (2002)¹⁷⁵ delve deeply into the efficacy and state of being within an “exceptional” state, or state of emergency. The practical, the theoretical, and the aesthetic are all important ways by which to analyze the political. It is my belief that all of the above, and then some, should be under consideration as we as a society and a polity, continue to move forward, evolve, and grow.

All of these points and questions are only a few of the possible ways to confront and explore some of the deeper and larger issues within the overall scope of this thesis. It

¹⁷² *Battlestar Galactica*, NBC Universal Television, 2004.

¹⁷³ Casey Hudson, Director, *Mass Effect*, Bioware, 2007.

¹⁷⁴ Alfonso Cuarón, Director, *Children of Men*, Universal Pictures, 2006.

¹⁷⁵ Steven Spielberg, Director, *Minority Report*, Twentieth Century Fox Film Corporation, Dreamworks SKG, 2002.

is with some regret and apology that I was not able to do so in this case. Yet all works are works in progress, and I believe must be seen as such. To relate this point to a well-known story from the world of cinema, it has been told that Stanley Kubrick, always the perfectionist and never one to truly call a project “complete,” personally went to theaters to remove the last five minutes of *The Shining* (1980),¹⁷⁶ deciding after its original release that he no longer wanted the film to end that way. Such an extreme example of editing and revising one’s work up until the last minute is not lost on me, and yet there is only so much I was able to accomplish. But let this point not detract from that which I *did* accomplish.

¹⁷⁶ Stanley Kubrick, Director, *The Shining* Warner Bros. Pictures, 1980.

4.2 Summary Observations

As I have said, I believe that the use of film within political discussion as I have done here is not only important, but also essential. What can we take away from what I have written here? Firstly, using these two films as examples, we can see a thread of relation between their conclusions on the connection between the rule of law and violence. The connection is intrinsic. We can then take away from this that the rule of law depends upon violence to exist. As we see in both *Liberty Valance* and *The Dark Knight*, the use of violence is not outwardly condoned, and yet it is portrayed as being *required*. Furthermore, the rule of law is exhibited in both films as being of the utmost importance to an ordered society. Without the rule of law, society as we know it collapses.

The concept of the state of exception only exacerbates the idea that the rule of law is needed. For without it, villains like the Joker and Liberty Valance have no restraint. The exception reveals the need to which the rule of law is not only needed, but the extent to which the rule of law must find reconciliation with violent or arbitrary action. This is not to argue that we must simply condone and accept such action. But the films I have looked at certainly seem to agree that some kind of reconciliation must take place between the two.

How can this reconciliation happen? The films propose an idea: hide the intrinsic interconnection between the rule of law and violence to give the people a sense of legitimacy in the rule of law, even within times in which that interconnection is ever more present and apparent. "Printing the legend," as *Liberty Valance* suggests, allows us to live with the fact that arbitrary action was required to produce an ordered society. *The*

Dark Knight seems to propose the idea that hiding, or at least minimizing, the visible relationship between the two, allows the people to deal with the sacrifices that must at times be made.

The deeper implications of these concluding thoughts from both films are both enlightening and frightening. It is my personal opinion that the protection of civil rights and the upholding of the rule of law are of the utmost importance. And yet in my exploration of such issues in this thesis, I am left somewhat disquieted, for it seems as if Carl Schmitt was more correct than many would like to admit. That is not to say that dictatorship is the answer, but simply that democracy in its ideal state of freedom and justice is more of a utopia than it is an attainable political reality. I admit that such an outlook could be considered cynical to some, but I believe that rather than cynicism, I am tapping into a pragmatism that seems lost on some.

As a final thought, I leave you, dear reader, with the following, courtesy of Jacques Derrida, from his essay, *Force of Law*:

What is a legitimate fiction? What does it mean to found the truth of justice? These are among the questions that await us. Montaigne proposed an analogy between this supplement of a legitimate fiction, that is, the fiction necessary to found the truth of justice, and the supplement of artifice called for by a deficiency in nature, as if the absence of natural law called for the supplement of historical or positive (that is to say, an addition of fictional) law just as—and that is the proximity proposed by Montaigne—“(Even as women, when their natural teeth faile them, use some of yvorie, and in stead of a true beautie, or lively colour, law-on artificiall hew...embellish themselves with counterfeit and borrowed beauties; so doth learning (and our law hath, as some say, certain lawfull fictions, on which it groundeth the truth of justice.)”.¹⁷⁷

¹⁷⁷ Derrida, *Force of Law*, 939, 941

Images



FIGURE 1

Here, we can see the cold greys of the present in Shinbone.



FIGURE 2

The dark of night as the film switches to flashback.



FIGURE 3

Stoddard is placed off screen while the outlaw Liberty Valance violently whips him.



FIGURE 4

We see Stoddard in the distance holding a gun while Tom Doniphon waits to shoot Liberty Valance from the dark alleyway.



FIGURE 5

The Bat Signal being destroyed. Its symbolism representative of the need for and legitimation of the exception.



FIGURE 6

Harvey Dent, transformed into the villain and murderer Two-Face, his physical duality a representation of the dual nature of light and dark throughout *The Dark Knight*.



FIGURE 7

A victim of the Joker, the intimidating tape of his torture released to the media and broadcast on television.



FIGURE 8

The Joker hangs upside down, his life saved by the Batman to be turned in to the police.

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