



AMERICAN BAR  
FOUNDATION

# Researching Law

Fall 2024 // Vol. 33 // No. 1

A photograph of a woman with dark hair, wearing a bright orange jacket and a matching scarf, speaking at a wooden podium. A microphone is positioned in front of her. The podium has a sign that reads 'COLORADO CONVENTION CENTER'. The background is dark and out of focus.

**Discounting Life: Necropolitical Law,  
Culture, and the Long War on Terror**

The Fellows CLE Seminar // 2023 ABA Annual Meeting



# Discounting Life: Necropolitical Law, Culture, and the Long War on Terror

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**Jothie Rajah**, a Research Professor at the American Bar Foundation, discussed her recent book *Discounting Life: Necropolitical Law, Culture, and the Long War on Terror*, at the ABF Fellow's Continuing Legal Education (CLE) Seminar at the 2023 Annual Meeting of the ABA in Denver, Colorado. *Discounting Life* views law through an interdisciplinary lens to "perceive how law's compound meanings have been represented, reconfigured, and globalized" during the long War on Terror, discounting lives taken and persons injured and traumatized as "collateral damage."

**Judy Perry Martinez**, former ABA President and World Justice Project Vice President; **Will A. Gunn**, General Counsel and Vice President for Legal Affairs at the Legal Services Corporation and former Chief Defense Counsel of the DoD Office of Military Commissions; and **George Freeman**, Executive Director of the Media Law Resource Center; joined Rajah for a panel discussion about her book's arguments and conclusions. **Jimmy Goodman**, ABF President and Director of Crowe & Dunlevy, moderated this robust and timely discussion of issues important to national and international justice and the Rule of Law.

## “Where is Law in the War on Terror?”

In **Jothie Rajah’s** opening presentation of *Discounting Life*, she began by acknowledging the influential work of James Boyd White’s *The Legal Imagination*, which emphasized the importance of language in shaping legal constructs and meaning. Rajah, a humanist scholar, underscored White’s connection to her work, which couples law with humanist values and principles, aiming to examine the relationship between law, language, and power.

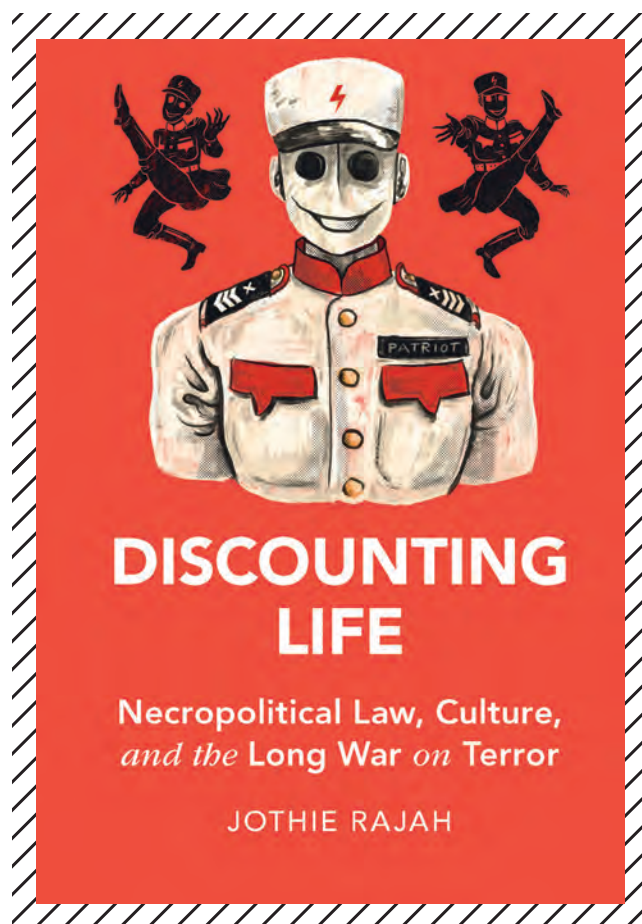
Her scholarly commitment revolves around the political ideal of the Rule of Law, which centers the law’s autonomy from power and the law’s capacity to scrutinize and limit power, protecting the less powerful through principles like due process, accountability, and the inalienability of human rights. Rajah takes an interdisciplinary approach, challenging narratives of exception that suggest law can be suspended or made absent from society.

Another key concept in her opening remarks was Achille Mbembe’s “necropolitics,” which names a form of politics that assigns differential values to human lives, with racialized populations often assigned a lesser value. She argued that necropolitical law coexists with liberal legality in the War on Terror, where the state of exception and the relation of enmity have become the normative basis for the right to kill. She also discussed the role of keywords such as “collateral damage,” which frames the entirely predictable death or injury of civilians as an accidental result of warfare. She pointed out the troubling proliferation of terms like “military-age male,” which casts boys as young as eight or nine as hostile and dangerous, shifting the legal framework towards necropolitical law. She defined the

key driving question behind her research: “Where is law in the War on Terror?”

Rajah cited an example to demonstrate how these theories can explain U.S. military actions abroad. In November of 2021, the *New York Times* reported that, in March 2019, the U.S. military in Syria used surveillance drones and jets in an air strike targeting a large group of women and children, resulting in the death of approximately 80 civilians. The report argued that the military, from the moment of the killings, engaged in efforts to conceal the event and absolve those involved.

Rajah noted that in response to the *New York Times* report, the U.S. Central Command Office acknowledged that the airstrike resulted in the death of 4 civilians and 60 “potential fighters” in addition to the 16



*Discounting Life* by Jothie Rajah (Cambridge University Press, 2022)

fighters who were later confirmed to be armed. This assessment of the potential threat rested on the military's argument that women and children within the territory controlled by the Islamic State sometimes took up arms. Rajah noted that the military's assessments were based solely on aerial footage and lacked on-ground investigation, leading to the presumption of guilt and subsequently justifying lethal action.

In this context, necropolitical law redefined the terms "self-defense" and "imminent danger" portraying civilian casualties as justifiable, categorizing these as collateral damage, even when there was no act of hostility or aggression on the part of civilians. Rajah referred to Brown University's Cost of War Project, which estimated that civilians were killed at a rate 35 times higher than U.S. soldiers in the War on Terror. She argued that given these statistics, the U.S. Central Command Office's framing of civilian deaths as "accidental" is a distortion of facts. The facts show that necropolitical law disregards civilians, discounting their entirely predictable deaths.

Highlighting the absence of public outrage and national self-examination after the Syrian airstrike was exposed, Rajah argued that the combination of necropolitical framing and the War on Terror's narratives that generated a persistent threat of terrorist attacks fostered the fear that cultivated citizen acquiescence to vengeance and asymmetrical warfare.

Rajah ended her presentation with the hope that *Discounting Life* would begin to dismantle necropolitical law: "Peace is unimagined and unimaginable under necropolitical law. By recognizing the processes, images, and code words of this type of war-making, my hope is that thinking, feeling, questioning people will become equipped to interrupt the ongoing

discounting of life that feeds and sustains the unending War on Terror."

## Breaking Down the Military-Industrial-Media-Entertainment Network

After Rajah's opening remarks, the session was opened to moderator Jimmy Goodman and the panel of experts. He began the discussion by asking Rajah to elaborate on the "military-industrial-media-network" she mentioned in *Discounting Life* and whether it differs from traditional news networks. She defined the term, which originates with international security expert James Der Derian, as a descriptor of the U.S. government's keen awareness of the media's role in shaping public opinion and generating popular support for war. This connection between emotional responses and militarism, Rajah argued, tends to stifle public debate and critical analysis, facilitating the government's goals.

Panelist **George Freeman**, Executive Director of the Media Law Resource Center, was asked to comment on Rajah's media criticisms. He disagreed with the notion of media complicity in government actions, citing historical examples of media's critical role as a watchdog on the government, such as during the Vietnam War. Freeman acknowledged a brief period of alignment with the government in the early years of the War on Terror but highlighted the media's subsequent shift towards critical reporting. He concluded his remarks by noting that attributing the war's success primarily to media influence is an exaggeration of the media's power but noted that the modern-day polarization of media makes this question far more complex.



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Images above: Jothie Rajah gives her opening presentation to the panel (Jace Longenecker, 2023)



Will A. Gunn answers a question posed by panel moderator Jimmy Goodman (Jace Longenecker, 2023)

*"Violence either generates submission and surrender or it encourages resistance and rage. There are studies that show that counterterrorism is a key factor in producing more terrorism by radicalizing and recruiting future terrorists."*

## Uncoupling of Law & Justice on Global Matters

Goodman then posed a question to **Judy Perry Martinez**, past president of the ABA, about the decoupling of law and justice or the notion of justice as somehow separate or distinct from the law rather than an inherent component, and what this means for lawyers and activists who are focused on worldwide justice initiatives.

Martinez lauded the book for its profound exploration of extrajudicial killings and highlighted a significant observation regarding former President Obama's rhetoric. She pointed out the shift in terminology from "lawful killings" to "justice" in Obama's speech following Osama bin Laden's death. She stated, "To this day it bothers me thinking about how we approached 9/11... The question remains whether we threw justice out of the window in doing so." She concluded that she is concerned about the decoupling of law and justice through the language we use to justify military actions.

**Will A. Gunn**, General Counsel and Vice President of Legal Affairs for the Legal Services Corporation, added that war can be seen as an "expression of national will through militaristic means," which becomes even more complicated when fueled by fear and revenge. He referenced the internment of Japanese-Americans and the bombing of Hiroshima as additional moments in U.S. military history that can be seen as extrajudicial but that were met with little public backlash at the time.

Freeman then posed a question to Rajah: "How do you fight a war if the other side does not care about the laws? Are we then fighting an enemy with one hand tied behind our back?"

Rajah responded to these comments and questions by delving into the intricate geopolitical context surrounding the 9/11 attacks, particularly the significance of oil resources in the Middle East and the complex relationship between oil corporations and political power. By pointing out these factors, she suggested that the motivations and consequences of the attacks cannot be reduced to simplistic notions of terrorists "hating the U.S. and our freedoms" but require a more nuanced explanation of global politics.

She called for further empirical studies to assess the effectiveness of violent counterterrorism measures and called for peace studies and conflict resolution as solutions to terrorism, stating, "Violence either generates submission and surrender or it encourages resistance and rage. There are studies that show that counterterrorism is a key factor in producing more terrorism by radicalizing and recruiting future terrorists."

## The Role of Lawyers in Challenging a Culture of Discounting Life

Goodman then posed an open question to the group of panelists: "What do you see as the role of the individual lawyer in challenging a culture of discounting life, extrajudicial killings, and the acceptance of collateral damage by our society?"

The consensus from the panelists was that lawyers do have the ability and responsibility to take up these difficult questions and begin to look to other countries and their models for dealing with international conflicts in a more humanizing format.

Goodman rephrased the question slightly to include government actors and their responsibility, to which Gunn emphasized the

fundamental importance of truth-telling. As a former member of the U.S. Air Force with a career as a military lawyer, he recounted operating within a system that values conformity and mission accomplishment but also placed a high regard for the Rule of Law.

Gunn reflected on a time in his career where he was asked to set up an office to defend Guantanamo detainees despite potential risks to his reputation, where he was guided by the motto “Honor Bound to Defend Freedom.” He emphasized the need for lawyers and other leaders to stand by this motto, even when they are faced with fear and the desire for vengeance. He cited examples of leaders standing up against necropolitical law, like Navy General Counsel Alberto Mora, who challenged leaders in the Department of Defense over the so-called torture memos, and prosecutor Lieutenant Colonel Stuart Couch, who withdrew from cases involving torture due to his commitment to the Rule of Law.

## Cover-ups or Mistakes? Accounting for Uncertainties and Risks in Warfare

The conversation was then opened up to questions from the CLE audience. Michael H. Byowitz, Treasurer of the ABF Board of Directors, inquired about the rules of war when a country is under threat. In the case of Osama bin Laden, Byowitz asked if killing him was justified because he was an active threat to the United States and if it would have cause greater danger to the military actors if they were charged with bringing him out alive.

Martinez acknowledged the complexity of such decisions that the Commander in Chief must make in these situations and the lack of complete information ultimately provided to the public. “My concern is one about the

means,” she said. “If it becomes easier and easier for us to carry out extrajudicial killings using things like drone warfare, I worry about the American people losing sight of our obligation to ask ourselves critical questions about the laws of war.”

Freeman added onto Martinez’s points, commenting that the term “law of war” is oxymoronic. He stated, “War is anti-human. So how can you bring that consistent with law? It seems almost impossible.” Gunn provided a counterpoint to Freeman’s comments, stating that the Geneva Conventions are a widely respected set of laws on how to behave in conflict with the idea of maintaining a degree of civility amid what can be mass chaos. He emphasized the importance of the laws of war as safeguards that protect combatants and civilians alike.

Rajah concluded the CLE by encouraging a more nuanced perspective of Osama bin Laden and the 9/11 attacks, acknowledging that his ability to gather a massive following should raise questions about the conditions that allowed for this to flourish. She highlighted that U.S. intelligence in the year 2001 alone received more than 40 warnings as to the possibility of a terrorist attack in the shape of airplane hijackings, but all were disregarded. She concluded her remarks by calling for a deeper examination into international tensions and issues with peacemaking strategies before violent counterterrorism action is needed, moving away from the frame of necropolitical law. ✂





From left to right, Will A. Gunn, Judy Perry Martinez, Jimmy K. Goodman, Jothie Rajah, and George Freeman (Jace Longenecker, 2023)

## Panelists

**Jothie Rajah** is a Research Professor at the American Bar Foundation. Her research lies at the intersections of law, language, and power.

She is Book Review Editor for *Law & Society Review* and has been a founding member and past coordinator of the Law and Society Association Collaborative Research Network on British Colonial Legalities and a member of the consultancy team working on translating Lao laws as part of a United Nations Development project. In addition to *Discounting Life*, she is also the author of *Authoritarian Rule of Law*, and her research articles have been widely published in peer reviewed journals, edited collections, and legal handbooks, including the *Indiana Journal of Global Legal Studies*; *Law, Text, Culture*; the *Journal of Law, Culture and the Humanities*; the *Transnational Law Journal*; and *The Routledge Handbook on Law and Society*.

**Jimmy K. Goodman** is a senior trial attorney and past president at Crowe & Dunlevy and President of the American Bar Foundation. Jimmy has specialized in high-stakes business litigation, product claims, and disputes involving tribal compacts, economic development, gaming enterprises and federal Indian law. Goodman is an ABF Visionary Fellow and previously served as a Fellows Chair. He also cochaired the ABF fundraising efforts to create the William H. Neukom Fellows Research Chair in Diversity and Law, the first endowed research chair for diversity and law.

He has also been of service to the ABA throughout his career. He held positions on the ABA Board of Governors, the ABA House of Delegates, the ABA Litigation Section, and the ABA Task Force on Human Trafficking.

Goodman's achievements and philanthropy in the field of law have led him to receive multiple honors and awards. At the Oklahoma Bar Association meeting in November 2022, Goodman received the OBA Joe Stamper Distinguished Service Award for longtime service to the Bar Association or contribution to the legal profession. Jimmy was named Oklahoma City Lawyer of the Year for Gaming Law in 2014 and 2016, for Litigation – Real Estate in 2017 and 2019, for Native American Law in 2018 and 2020, and for Litigation – Banking and Finance in 2021 by *Best Lawyers*, the oldest and most respected peer-reviewed publication in the legal profession.

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**Judy Perry Martinez** is a past president of the ABA. She is Of Counsel at Simon, Peragine, Smith & Redfearn (SPS&R), and previously was with the firm from 1982 to 2003 as a partner, member of the governing committee, and commercial litigator.

Martinez joined Northrop Grumman in 2003, where she would go on to serve as Assistant General Counsel for litigation, managing litigation for the western half of the country before becoming Vice President and Chief Compliance Officer in 2011. Judy was also named to the company's Diversity and Inclusion Leadership Council.

Martinez retired from Northrop Grumman in 2015 to become a Fellow at the Advanced Leadership Initiative at Harvard, where she spent a year in residence. Following her time at Harvard, she returned to New Orleans to pursue a career in public service and rejoined SPS&R, where she continues to work.

In 2011, Martinez was appointed chair of the ABA Standing Committee on the Federal Judiciary (which evaluates all prospective nominees to the federal bench). Earlier, Judy served as the ABA lead representative

to the United Nations, as a member of the ABA Board of Governors and its executive committee, as a member of the ABA Commission on Women in the Profession and the Task Force on Building Public Trust in the American Justice System. Most recently, she served as the chair of the ABA Presidential Commission on the Future of Legal Services as a special advisor to the ABA Center for Innovation. She is a member of the American Law Institute, the Warren E. Burger Society, and has previously served on the Board of Directors of the American Bar Foundation where she is a Benefactor Fellow.

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**Will A. Gunn** is the General Counsel and Vice President for Legal Affairs for the Legal Services Corporation (LSC), the nation's largest funder of civil legal aid.

In 2009, he was appointed by President Barack Obama as the General Counsel for the U.S. Department of Veteran Affairs and served in that role for five years. He graduated from the U.S. Air Force Academy with military honors and graduated cum laude from Harvard Law School where he served as President of the Harvard Legal Aid Bureau, America's oldest student-run legal services organization. He also holds a Masters of Laws degree in environmental law from George Washington University, a Masters in National Resource Strategy from the National Defense University, and a Masters in Ministry (with a focus on Leadership) from Lancaster Bible College.

In 2003, Gunn was selected as the first ever Chief Defense Counsel for the Department of Defense Office of Military Commissions. In that role, he established an office that defends detainees brought before military commissions at the Guantanamo Prison Camp. He served as a White House Fellow during the George H. W. Bush Administration

and after retiring from the Air Force as a colonel in 2005, Gunn served as CEO of Boys & Girls Clubs of Greater Washington.

Gunn chaired the ABA's 2021 National Law Day commemoration; the ABA Youth at Risk Commission; and the ABA Commission on Racial and Ethnic Diversity. He has served as the Chair of The HistoryMakers Military Advisory Committee, Vice Chair of the U.S. Air Force Academy's Association of Graduates Board of Directors, is a deacon in his local church, and has received numerous awards including an honorary doctorate from Nova Southeastern University and the Harvard Legal Aid Bureau's Outstanding Alumni Award.

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**George Freeman** is Executive Director of the Media Law Resource Center, a nonprofit trade association supporting the media in legal matters, with 125 media companies, from ABC to Yahoo!, and 200 law firms working in the media law space. Earlier, he was Of Counsel to the law firm Jenner & Block.

For 31 years, he was the chief First Amendment and newsroom lawyer in the Legal Department of *The New York Times*. He became Vice President and Assistant General Counsel before leaving in 2012. At the *Times*, he was primarily responsible for the company's litigations and was at the forefront of numerous high profile First Amendment cases, including Judy Miller's resistance to subpoena in the prosecution of Scooter Libby and the defense of the newspaper in a libel case brought by quarterback Ken Stabler.

Freeman was the William J. Brennan Visiting Professor at the Columbia Journalism School and also taught at New York University and CUNY's Graduate School of Journalism. He has been Chair of ABA and NYS Bar Association Media Law committees and is the Founder and longtime Cochair of the ABA's Forum on Communications Law Annual Conference. He is a graduate of Amherst College and Harvard Law School. ✂



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Fall 2024 // Vol. 33 // No. 1

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