

Essay

GUANTANAMO IS ABOUT THE BODY: NARRATIVE, RIGHTS AND RESISTANCE

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INTRODUCTION

I have visited the U.S. detention and interrogation center at Guantánamo Bay about a dozen times since the fall of 2004. On one visit, in December 2005, I met with my then-client, Omar Khadr, at that time one of about 400 prisoners at Guantánamo, in a small trailer inside one of the prison camps.¹ Typically when we met Omar, it was in a place called Camp Echo, a cluster of bungalow-style buildings set around the perimeter of a fenced-in compound. The rooms in which we met were divided, with a very small cell on one side of a chain metal wall, and an empty space on the other, furnished with only a folding table and a couple of plastic chairs. There was one vertical, opaque slit window by the door, conjuring the outdoors but not actually permitting sight of it. The floors and walls were a dingy institutional white, an air conditioner droned endlessly, keeping the room over-cooled. To sit there for a few hours at a time, as we typically did, was claustrophobic and at times despairing.

But the room in which I met Omar this time was different. The walls had wood paneling and there was an oriental rug on the floor. I sat in an overstuffed couch and Omar sat in a recliner. There was a coffee table, a television and DVD player, and a mini-refrigerator stocked with sodas and snacks. Although it did so crudely, the space was designed to mimic a typical Middle Eastern living room. There was even a hookah in one corner. Only after several minutes in this altered space did I realize we were in a high-end interrogation room. The camera in the ceiling and the metal eyehooks in the floor, to which prisoners are chained, were the giveaways. It was a reminder that Guantánamo is built upon deception, that even what appears normal—or especially what does—is artifice. The high-end interrogation room exists in opposition to the low-end interrogation rooms—rooms I have never been allowed to see—those spaces designed not for momentary comfort, but for threats of permanent pain. Omar had been in the faux living room before, but he had also been in those other rooms, subjected to harsh interrogation, and even torture, including one instance, at the age of 16, when soldiers used him as a human mop—lifting him off the ground, pouring solvent on him, and using his body to clean the floor on which he had urinated because he hadn't been permitted a bathroom break. In those other rooms, he was threatened with rendition to other countries, where he was told he would be raped by older men.²

¹ Although he is still at Guantánamo as of this writing, I no longer represent Omar Khadr. He continues to be represented by military defense counsel and by Canadian civilian counsel.

² See Memorandum of Muneer I. Ahmad & Richard J. Wilson to Habeas Privilege Team Re. Request for Classification Review in *O.K. v. Bush*, 04-CV-01136 (JDB) (copy on file with author).

These two interrogation rooms, the one seemingly normal, the other the site of deliberate dehumanization, exist side-by-side, their histories so conjoined as to question whether they are in fact separate spaces, or are instead mutually constitutive of a single reality.

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Six years after its opening as a post-9/11 detention camp, Guantánamo has come to stand for many things, to many people. To its champions, it represents the successful capture, detention, and interrogation of Al Qaeda terrorists, and the prevention of subsequent terrorist attacks. To its critics, it represents the abandonment of rule of law commitments for the sake of the war on terrorism. And to many in the Muslim world, it signifies the hypocrisy of the United States, demanding respect for human rights and rule of law around the world while violating both at home. Unquestionably, Guantánamo raises profound questions for the application of international humanitarian law to the “war on terrorism,” the availability of human rights protections in an era of anti-terrorism, and the role of the courts in adjudicating claims of terrorism suspects. But for all the discussion of Guantánamo’s symbolism, its historical significance and its jurisprudential meaning, something far more fundamental has been obscured. At its core, Guantánamo is about the body: the detention of the body, the extraction of information from the body, and the torture of the body. So, too, are the efforts to resist Guantánamo, enacted by the prisoners and by their lawyers, about the body: the prisoners have put their physical bodies on the line, in hunger strikes, suicides and suicide attempts, while the lawyers have fought doggedly for the right of habeas corpus—“show me the body”. Many have invoked the metaphor of the body politic to discuss the meaning of Guantánamo, suggesting it as a cancer on America or a lesion on our collective self, but mine is an insistence on the literal body, and the inescapable corporeality of the detention, interrogation and torture of those prisoners held there, as well as their resistance to and bids for liberation from the Guantánamo regime.

This focus on the body as body illuminates Guantánamo’s significance by calling attention to four issues. First, it raises the question of whose bodies are detained and interrogated there. Without exception, it has been only noncitizen Muslim men who have been imprisoned there. While at least one (though perhaps no more) of the prisoners was Caucasian,³ the vast majority have been Arab and South

³ David Hicks, a white Australian who converted to Islam, was released from Guantánamo in May 2007, pursuant to a plea agreement in military commission proceedings that required him to serve a nine-month prison sentence in Australia. [Cite] According to Moazzam Begg, a British citizen previously imprisoned at Guantánamo, Hicks was known as the “token white man” of Guantánamo. See Annabel Crabb, *Hicks: Guantánamo’s ‘token white man,’* THE

Asian, thus endowing Guantánamo with racial as well as national, religious, and gender characteristics. Second is the question of how the indefinite detention of those bodies, without charge and without meaningful opportunity for legal challenge, has been achieved. This inquiry implicates both the social construction of the terrorist, as well as the legal construction of the “enemy combatant.” The end result is to conjoin social and legal narratives of exclusion—not merely from the social or from the law, but from humanity itself—so as to necessitate and effectuate the legal erasure of the Guantánamo prisoners. Third, a focus on the body demands that we understand torture not as a question of legal memoranda or exercises in line-drawing, but as a project of state violence enacted upon, and realized in, the body. In this regard, the most important laws relating to torture are the laws of physics, as these are the governing principles and limiting factors in the exercise of force by one body against another. Finally, the role of the body at Guantánamo deepens our understanding of rights and resistance at Guantánamo, for it helps us to see that what is fundamentally at stake is whether the people imprisoned there can be reduced to mere biological existence, or whether through the efforts of their lawyers or themselves, they can retain and assert their humanity.

Guantánamo exemplifies a modern expression of a historically familiar phenomenon: dehumanization through legal erasure. This is to say that law has been deployed to create the preconditions for the exercise of a state power so brutal as to deprive the Guantánamo prisoners of the ability to be human. In this way, Guantánamo recalls Hannah Arendt’s formulation of citizenship as the right to have rights.⁴ What we see at Guantánamo is the inverse of citizenship: no right to have rights, a rights vacuum that enables extreme violence, so as to place Guantánamo at the center of a struggle not merely for rights, but for humanity—that state of being that distinguishes human life from mere biological existence.

I write this story of Guantánamo based upon my experiences over nearly three years of representing a prisoner there. Through this lens of legal representation, I seek to explore both the social and legal mechanics of Guantánamo’s operation, as well as the efforts of the prisoners to resist them and of the prisoners’ lawyers to dismantle them. Thus, I seek in part to tell a story about lawyering—that is, the processes, theories, politics, ideologies and values that animate, inform and ultimately constitute the work of the lawyer. But any given lawyering approach necessarily implicates a vision of law, its structure and operation, its making and unmaking, and its relation to other fields

AGE, Nov. 25, 2005, *available at* <http://www.theage.com.au/news/national/hicks-guantanamos-token-white-man/2005/11/24/1132703316502.html>.

⁴ HANNAH ARENDT, *ORIGINS OF TOTALITARIANISM* 376 (Schocken Books 2004).

of inquiry such as politics, power, sovereignty, citizenship, and subordination. And so this is a story about law as well.

As a matter of lawyering, my interest is in exploring why we adopted a rights-based advocacy strategy in an environment defined explicitly by the absence of rights. Since the first prisoners arrived at Guantánamo, the Administration's position has been that they lack any rights whatsoever, under any source of law. The ability of the state to define a rights-free zone, and the political manipulability of rights, on which that ability depends, recall the central insights of the Critical Legal Studies (CLS) movement. And yet, despite the overwhelming evidence of politics animating law at Guantánamo, as advocates we made a conscious decision to engage in rights-based argument, and "rights talk"⁵ more generally. This approach finds some support in the critique of CLS made by many critical race theory scholars regarding the continuing vitality of rights-based approaches and the promise of "critical legalism"⁶ or "radical constitutionalism,"⁷ but demands further inquiry into the political, cultural, jurisprudential and strategic value of arguing rights in the historical moment and place of Guantánamo.

This is especially true because despite the extraordinary work done by hundreds of lawyers representing Guantánamo prisoners, not a single prisoner has been released as the result of a court order, and not a single prisoner has had the opportunity to meaningfully contest the legality of his detention. Perhaps most troubling, in its 2007 Term, the Supreme Court confronts virtually the same threshold question regarding the Guantánamo prisoners as it did in its 2003 Term: whether the prisoners can even be heard in federal habeas corpus proceedings.⁸ It is no wonder, then, that despite a handful of success stories, in the eyes of many of the prisoners, little has changed.

In this way, the litigation history of Guantánamo suggests the limits of transformative legal practice. But this is not to say that the lawyering has itself been a failure. Rather, I argue that instead of expecting legal contest at and around Guantánamo to produce transformative results, we might better understand it as a form of resistance. Such a reframing of the Guantánamo litigation invites comparison with other forms of

⁵ See generally MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

⁶ See Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. 323, 393-94 (1987) (defining critical legalism as "a legal concept that has transformative power and that avoids the traps of individualism, neutrality and indeterminacy that plague many mainstream concepts of rights or legal principles").

⁷ *Id.* at 334.

⁸ Compare *Boumediene v. Bush* (06-1195) (considering whether the federal habeas statute, 28 U.S.C. § 2241, as amended by the Military Commissions Act of 2006, provides for habeas jurisdiction over the detention of Guantánamo prisoners) with *Rasul v. Bush* 542 U.S. 466 (2004) (holding that the federal habeas statute, 28 U.S.C. §2241, provides for habeas jurisdiction over the detention of Guantánamo prisoners).

resistance, and helps explain both the power and the limitations of legal practice in the face of inordinate state violence.

In Part I of this Essay, I discuss the contextual nature of rights and the integral relationship between law and narrative, and then discuss the social construction of the terrorist body and the legal construction of the “enemy combatant” which, together, helped to establish the narrative preconditions for the dehumanization of Guantánamo. I intersperse these discussions with narrative description of the place and space of Guantánamo. In Part II, I explore the contours of the “rights-free” zone of Guantánamo through reflection on my experience representing Omar in military commission proceedings, and through a doctrinal analysis of the shifting meanings of core legal terms in the Guantánamo legal regime. In so doing, I suggest how the experience of lawyering in and around Guantánamo helped to prove up its lawless nature. Part III considers the tactical, strategic, and theoretical values of adopting rights-based legal approaches in the rights-free zone of Guantánamo, paying particular attention the value of rights as recognition, and ultimately arguing the importance of rights as a mode of resistance to state violence. Finally, in Part IV, I build upon this discussion of resistance by considering direct forms of resistance in which prisoners themselves have participated. In particular, I suggest the hunger strike as a paradigmatic form of prisoner *bodily* resistance, and argue the lawyers’ rights-based litigation and the prisoners’ hunger strikes share a conceptual understanding of the relationship between rights, the body, and humanity. I conclude with reflections on the value and limitations of reframing the work of the Guantánamo prisoners’ lawyers as nothing more, but also nothing less, than resistance.

I. RIGHTS AND NARRATIVE: ESTABLISHING THE PRECONDITIONS FOR DEHUMANIZATION

A. Rights In Context, Law in Narrative

Like law itself, rights are an overdetermined concept, meaning different, and contradictory, things to different people. The question “What are rights?” can be disaggregated into three related, foundational inquiries: (1) Where do rights come from?; (2) What is their content?; and (3) What is their force? Answering these questions helps to understand how a theory of rights bridges from abstraction to materiality, and how rights relate to law.

The first question is ontological, and despite a voluminous literature on the subject, remains thoroughly contested. Universalist claims,

ranging from natural law theories⁹ to human rights doctrines,¹⁰ compete with positivist conceptions of rights as a human enterprise, but as Pierre Schlag argues, the ontological identity of rights in American legal discourse remains elusive.¹¹ The second question concerns the substantive content of rights—What is due process? Against what conduct does a right against torture protect?—and structures a deeply normative project in American legal discourse. Last is the coercive nature of rights, their ability to alter material relationships among individuals or between individuals and the state.

Despite bids for absolutes or universals, originating from across the political spectrum, the answers to all three of these questions are almost always context-specific. Indeed, each relies upon historically bounded interpretive practices. The aspiration of universality notwithstanding, rights, and our understanding of them, emerge from specific political, cultural, and historical moments. As a matter of theory, we might locate rights in some ontologically ethereal space, as natural law attempts, but in practice, we can only discern the emergence of rights—their arrival on the scene—in the particularity of historical place and time. Similarly, the substantive content of rights, their material expression through law, has proven dynamic and specific. As Austin Sarat and Thomas Kearns have observed, “Rights, which are claimed to be natural and unalienable, do not spring fully formed at the conclusion of some philosophical argument or analysis; instead, they take a long time to be realized and instantiated.”¹² So, too, do those instantiations vary over time, and gain force through historical accretion.¹³ Elizabeth Schneider similarly has

⁹ For a discussion of natural law in American legal thought, see MORTON HOROWITZ, *TRANSFORMATION OF AMERICAN LAW 1870-1960* (1992); Morton Horowitz, *Rights*, HARV. C.R.-C.L. L. REV. 23 (1988).

¹⁰ For a discussion of the ontological claims of international human rights, see Michael J. Perry, *Is the Idea of Human Rights Ineliminably Religious?*, in *LEGAL RIGHTS*, *supra* note ___, at 205.

¹¹ Schlag writes:

It would be interesting to pursue this ontological question. Moreover, one would think that addressing this question would itself be a predicate for any intellectually serious discussion about the normative or political value of rights. For American legal thought, however, it is extremely important that this question be avoided. Indeed, it is the avoidance of the ontological question that allows all the passionate academic normative talk for, against, and about “rights” to get off the ground in the first place.

Pierre Schlag, *Rights in the Postmodern Condition*, in *LEGAL RIGHTS: HISTORICAL AND PHILOSOPHICAL PERSPECTIVES*, 263, 265 (Austin Sarat & Thomas R. Kearns eds., 1996).

¹² Austin Sarat & Thomas R. Kearns, *Editorial Introduction*, in *LEGAL RIGHTS: HISTORICAL AND PHILOSOPHICAL PERSPECTIVES* 1, 6-7 (Austin Sarat & Thomas R. Kearns eds., 1996).

¹³ Derrida has described this temporality as the “mystical foundation” of law’s authority, a formulation he borrows from Pascal:

Nothing according to reason alone, is just in itself; all changes with time. Custom creates the whole of equity, for the simple reason that it is

argued the dialectical relationship of rights and politics.¹⁴ Finally, the coercive dimension of rights is perpetually contested, taking the form, variously, of questions such as, “Is there a right without a remedy?” or “Are rights self-executing?”

With this understanding of the contextual specificity of rights in mind, I situate my discussion not merely in the historical period inaugurated by September 11th, and not merely in the governance regime of Guantánamo Bay, but in the even more particularized experience of representing a Guantánamo prisoner in legal proceedings. In this way, I explicitly reject the role of legal historian, whose work is to look at the development of law with the benefit of distance, time, and personal detachment. Instead, I embrace the role of accidental legal ethnographer. Informed by the methodological principles of social anthropology, I am in this story a participant observer, seeking to chart, document, and interpret the legal and cultural topographies of Guantánamo from the inside out, through a process of information gathering and analysis that is only possible through social engagement in the very legal and cultural systems I am studying. I declare openly my subjectivities as an advocate, but subjectivity is inherent in all ethnography; it is the price one pays for the qualitative and relational analysis of participant observation.

Admittedly, mine is a deeply imperfect methodology. I did not set out to research and write an ethnography of Guantánamo; rather, I intended to be an advocate there. And so in both intention and practice, my claims to ethnographic method are perhaps more gestural than rigorously faithful. Nonetheless, I insist upon situating the question of prisoner’s rights within the “social text”¹⁵ of Guantánamo, and through the use of narrative, attempt to provide the kinds of thick description of Guantánamo—its people, institutions, histories, and ambitions—that enable meaningful cultural and legal inquiry.

It is, however, not only the historical specificity of rights that compels such an approach. Law itself is dependent upon narrative for its meaning. Narrative renders law from doctrine to praxis, law in stasis to law in action, abstract hermeneutic to the friction of real-world substantiality. Robert Cover described law as semiotic—that is, a system of signification—rather than a determinate corpus of self-

accepted. It is the mystical foundation of its authority. Whoever carries it back to its first principle destroys it.

Jacques Derrida, *Force of Law: The Mystical Foundation of Authority*, in *DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE* 230, 239 (quoting Blaise Pascal, *Pensées*, no. 294) (Drucilla Cornell, Michael Rosenfeld & David Gray Carlson, eds. 1992).

¹⁴ Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives From the Women’s Movement*, 61 N.Y.U. L. REV. 589 (1986).

¹⁵ See CLIFFORD GEERTZ, *NEGARA* (1980).

defining rules.¹⁶ On its own, then, law is indeterminate. As Cover argued, “law is a resource in signification that enables us to submit, rejoice, struggle, pervert, mock, disgrace, humiliate or dignify.”¹⁷ It is narrative context that fixes the meaning of law, legal institutions, doctrine, and legal practice, for law is fundamentally and inextricably embedded in narrative.

Let me be clear about what I mean by narrative. Specifically, I want to distinguish narrative from mere story. The narrative with which I am concerned is the social construction of meaning in human behavior, that is both antecedent to and constitutive of law. Of course, in any historical moment, multiple narratives exist simultaneously, pitched in implicit contest with one another, each promising the fullest explanation of our times. In this sense, narrative is a vision of the world, a story not just of plot and characters, but of what forces and motivations animate people and events.

I say that narrative is both antecedent to and constitutive of law because it is through the meaning-making process of narrative construction that law itself acquires meaning. We can think of narrative as the architecture of context, claiming and defining specific spaces, evoking histories, giving expression to social and cultural influences, arising from and expressing a specific politics, and fusing a normative vision with the materiality of the real world. Narrative makes argument, around law and through law, rooting itself, as Cover wrote, in normative worlds.¹⁸ To understand legal dispute, one must comprehend the narrative contest it inhabits. And to understand legal victory, one must recognize the triumph of one narrative vision over another.

My recourse to narrative, then, is itself argument: a claim to the multiple, conflicting, projected understandings of Guantánamo as place and people, historical time and historical event, ideology and belief. I seek ultimately to illuminate the legal and rights contest of Guantánamo, for which narrative is not merely a convenient device, but an indispensable and constitutive methodology.

B. An Iconography of Terror: The Social Construction of the Terrorist Body as Narrative Precondition for Legal Erasure

From the moment Guantánamo opened as an interrogation center for terrorist suspects, the Administration has described the prisoners as “the worst of the worst,” as unfathomably dangerous, and as trained and

¹⁶ “[L]aw is predominantly a system of meaning rather than an imposition of force.” Robert Cover, *The Supreme Court, 1982 Term—Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 12 (1983).

¹⁷ *Id.* at 8.

¹⁸ *Id.* at 5, 25.

hardened killers.¹⁹ As the then-Chairman of the Joint Chiefs of Staff declared in January 2002, these are the kind of people who would chew through the hydraulic cable of a C-17 cargo plane to bring it down.²⁰ The government coupled these characterizations with menacing imagery, as the Pentagon released pictures of men being transported to Guantánamo while strapped to the floor of a plane, heads covered, hands shackled, an American flag draped above, and still more pictures of men in orange jumpsuits, crumpled on the ground behind chain-linked fence.²¹ Taken together, these images helped to construct a state iconography of the “war on terrorism.”²² They told a narrative of transnational forces of evil committed, with fanatical zeal, to the destruction of the U.S., to which the U.S. then responds with military and moral superiority, thereby subduing the enemy, neutralizing him, rendering him abject, and, under the vigilant eye of America, ensuring that he remains broken and contained.

In this regard, we might think about the value that Guantánamo serves, international condemnation notwithstanding, in purchasing domestic faith in the belief that the homeland is secure. Guantánamo is evidence of the government’s success—visible but not too visible, close but not too close—in subduing evil. Through partial visibility, we are encouraged to see a government ensuring our safety; through partial occlusion, we are relieved of the knowledge of the methods used to achieve such security. In this way, Guantánamo fills an existential need for security. That we obtain such security through the quarantine of darkened bodies is a familiar compromise—at Guantánamo, as well as in the territorial U.S.—and one that is not easily disturbed. Indeed, the very ground on which prisoners were first kept at Guantánamo was

¹⁹ See John Mintz, *U.S. to Free 7 Held in Cuba*, WASH. POST, Oct. 23, 2002, at A02 (quoting Donald Rumsfeld’s description of the prisoners as the “worst of the worst”).

²⁰ See Department of Defense News Briefing, Secretary Rumsfeld and Gen. Myers, Jan. 11, 2002, <http://www.defenselink.mil/Transcripts/Transcript.aspx?TranscriptID=2031>.

²¹ See generally *Gitmo Photos*, U.S. Department of Defense, April 5, 2006, <http://www.defenselink.mil/home/features/gitmo/facilities.html>.

²² I put “war on terrorism” in scare quotes because as currently conducted, U.S. anti-terrorism efforts encompass not only combat in places such as in Afghanistan, but the capture of individuals far from any battlefield, such as in Bosnia, Gambia, and Zambia. Similarly, anti-terrorism policy includes practices as disparate as warrantless wiretapping of U.S. citizens, see James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, December 16, 2005 at A01, and rendering of noncitizens to third countries where they have alleged torture, see REPORT OF THE EVENTS RELATED TO MAHER ARAR, COMMISSION OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR (2006), available at http://www.ararcommission.ca/eng/AR_English.pdf. The “war on terrorism” is therefore a war in metaphor only. For further discussion of the dangerous consequences of accepting this metaphor, see *infra* notes ___-___ and accompanying text. For similar critiques of the war terminology, see JOSEPH MARGULIES, GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER 1, 43 (2006) (arguing that the “war on terror” justification has resulted in “an Administration that exercises substantially more power in the conduct of military operations, with fewer restraints, than ever before”); see also *Hamdan v. Rumsfeld*, Oral Argument, available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-184.pdf.

previously used by the U.S. government to detain Haitian refugees in the 1990s.²³ Closer to home, the over-incarceration of African Americans and Latinos in U.S. prisons, promises safety through racial containment.²⁴ And it was this exact bargain of securing the nation through incarceration of a racial minority, uninvited to the bargaining table, that led to the incarceration of Japanese Americans during World War II.²⁵

The dark, bearded, turbaned men of Al Qaeda are central figures in the post-9/11 state iconography, and though pictures of the prisoners at Guantánamo as they now appear have not been released, it seems fair to say that these essentialized notions of the terrorist²⁶ are what

²³ The history of Haitian detention at Guantánamo is a particularly ugly one. See BRANDT GOLDSTEIN, *STORMING THE COURT* (2005); Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 *YALE L. J.* 2391 (1994); The Lowenstein Human Rights Clinic, *Aliens and the Duty of Nonrefoulement: Haitian Centers Council v. McNary*, 6 *HARV. HUM. RTS. J.* 1 (1993). Amy Kaplan has linked this racialized history of Guantánamo to its present usage, writing:

The current prisoners not only first literally inhabited the camps built for the Haitian and Cuban refugees, but they also continue to inhabit the racialized images that accrued over the century in the imperial outpost of Guantánamo: images of shackled slaves, infected bodies, revolutionary subjects, and undesirable immigrants. The prisoners fill the vacated space of colonized subjects, in which terrorism is imagined as an infectious disease of racialized bodies in need of quarantine. The category of "enemy combatants" effaces all differences among the prisoners and also draws on these older imperial codes ... Thus "enemy combatant" is a racialized category, not only because of rampant racism toward Arabs and Muslims, but also because of this history. Stereotypes of the colonized, immigrants, refugees, aliens, criminals, and revolutionaries are intertwined with those of terrorists and identified with racially marked bodies in an imperial system that not only colonizes spaces outside U.S. territories but also regulates the entry of people migrating across the borders of the United States.

Kaplan, *supra* note ___, at 840.

²⁴ The argument regarding structural racism in the U.S. criminal justice system, culminating in the disproportionate imprisonment of African Americans and Latinos, is a familiar one. See, e.g., MICHAEL J. LYNCH & E. BRITT PATTERSON, *RACE AND CRIMINAL JUSTICE* (1991) (compiling several articles discussing the impact of racial biases on all stages of the criminal justice system); Angela Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 25-30 (discussing the discriminatory impact of police officer and prosecutorial discretion and describing them as further manifestations of racial disparities in the criminal justice system).

²⁵ See, e.g., BRIAN MASARU HAYASHI, *DEMOCRATIZING THE ENEMY: THE JAPANESE AMERICAN INTERNMENT* (2004) (concluding U.S. internment of Japanese Americans during World War II furthered broader socio-political goals of the U.S. government vis-à-vis the Japanese American population); TETSUDEN KASHIMA, *JUDGMENT WITHOUT TRIAL: JAPANESE AMERICAN IMPRISONMENT DURING WORLD WAR II* (2003) (arguing that plans for U.S. internment and incarceration of Japanese Americans far preceded the attack on Pearl Harbor in 1941 and were developed as early as the 1920s in preparation of a perceived future conflict with Japan).

²⁶ I have written previously on the racial construction of the terrorist. See Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 *CAL. L. REV.* 1259 (2004) ("*Rage Shared by Law*"); Muneer Ahmad, *Homeland Insecurities: Racial Violence the Day After September 11*, 72 *SOC. TEXT* 101 (2002). See also Volpp, *supra* note

Guantánamo is meant to conjure: it is men like these, we are meant to believe, who are detained there.

My former client, Omar Khadr, was a fifteen-year old boy when he was taken into U.S. custody. When Omar was taken to Guantánamo, he could not yet grow a beard. Indeed, he had not completed puberty. As scientific research on adolescent development tells us, his brain physiology was still in a state of flux, the biological bases for impulse control and exercise of judgment still inchoate.²⁷ Now, at age 21, Omar, a Canadian citizen, has spent nearly one fourth of his life growing up at Guantánamo Bay.

The state is as dependent upon narrative for the instantiation of law as are those who would contest state power.²⁸ Precisely for this reason, narratives of the state are instruments of violence.²⁹ Their totalizing, explanatory claims bludgeon multiple and divergent histories, the wave of master narrative washing over the granular, specific accounts of 400 individual human beings. The task of the prisoners' lawyers has been to surface these alternative accounts, thereby contesting the blanket assertion of state power through the exercise of narrative autonomy.

At Guantánamo the state narrative was presumptively legitimate because it did not begin there, but instead derived from and helped to reinforce a racialized social construction of the terrorist that had already taken hold in the aftermath of 9/11, and has its antecedents well before. Immediately following the terrorist attacks, the Administration deployed a set of racially directed immigration enforcement and detention practices which, coupled with thousands of incidents of hate violence—including 22 murders—helped to consolidate the disparate identities of Arabs, Muslims, and South Asians into a newly minted monolithic category in the American racial lexicon: the “Muslim-looking” person.³⁰ Through these state and cultural practices, the Muslim and the terrorist became one in the same. As Leti Volpp has argued, this racial category was inherently oppositional to a newly consolidated post-9/11 national

___; Margaret Chon & Donna E. Arzt, *Walking While Muslim*, 68 LAW & CONTEMP. PROBS. 215 (2005).

²⁷ See *Johnson v. Texas*, 509 U.S. 350, 367 (1993) (“[A] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.”); See also Brief of the American Medical Association, American Psychiatric Association, American Society for Adolescent Psychiatry, American Academy of Child & Adolescent Psychiatry, American Academy of Psychiatry and the Law, National Association of Social Workers, Missouri Chapter of the National Association of Social Workers, and National Mental Health Association as Amici Curiae in Support of Respondent, *Roper v. Simmons*, 543 U.S. 551 (2005).

²⁸ See Cover, *supra* note ___, at 33 (“[T]he *nomos* of officialdom is also ‘particular’ And it, too, reaches out for validation and seeks to extend its legitimacy by gaining acceptance from the normative world that lies outside its core.”).

²⁹ See *id.* at 40 (“[T]he jurisgenerative principle by which legal meaning proliferates in all communities never exists in isolation from violence”).

³⁰ See Ahmad, *Rage Shared by Law*, *supra* note ___, at 1265-82; Volpp, *supra* note ___, at 1576-86.

identity, and acted to expel Arabs, Muslims, and South Asians from the cultural or affective (non-formal) citizenship they might otherwise have enjoyed.³¹

“Muslim-looking” is a peculiar category, as it collapses phenotype and faith, and conjures a literal face of religion—that is, we know what a Muslim (and therefore a terrorist) looks like. Although this category is ostensibly about religion, and embraces various visual cues, such as turbans, beards, and veils,³² it opens a space hovering somewhere between religion and race, and indeed, has significant racial valance. The Muslim is different, and deficient, not only in appearance, but in constitution. The menace is not merely the God who is worshipped, but the broader set of cultural practices, modes of living, and systems of belief that are attributed monolithically to more than a billion people. It is, therefore, the total embodiment of the Muslim—the Muslim body—that is constructed as an inherent mortal threat.

The power of the Muslim-terrorist equation is in expelling the Muslim terrorist suspect not only from the national polity, but from the civilized world. The seeming incomprehensibility of the 9/11 attacks renders the terrorist suspect monstrous,³³ thereby necessitating a strategy of containment. Thus the neo-Orientalist³⁴ formation of the “Muslim-looking” category in the aftermath of 9/11 helped to make Guantánamo not only possible, but necessary.

This phenomenon—the creation of a monster who not only exists in opposition to the civilized, but is invented in order to establish the liberal bona fides of the civilized—is painfully familiar, especially for its invocation of the Muslim subject. As Jean-Paul Sartre wrote in the context of French racism toward Algerian colonial subjects, “One of the functions of racism is to compensate the latent universalism of bourgeois liberalism: since all human beings have rights, the Algerian will be made a subhuman.”³⁵ The existence of the liberal, civilized West, therefore, required the invention of the illiberal, barbaric East³⁶: “the only way the European could make himself man was by fabricating slaves and

³¹ Volpp, *supra* note __, at 1592-98.

³² For a discussion of the performative dimensions of Arab, Muslim, and South Asian identities in the aftermath of September 11th, see Sunita Patel, *Performative Aspects of Race: “Arab, Muslim, And South Asian” Racial Formation After September 11*, 10 *ASIAN PAC. AM. L. J.* 61 (2005); Margaret Chon & Donna E. Arzt, *Walking While Muslim*, 68 *LAW & CONTEMP. PROBS.* 215 (2005). For a discussion of performance theory and identity, see Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 *CORNELL L. REV.* 1259 (2000); Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 *HARV. C.R.-C.L. L. REV.* 1 (2000); Kenji Yoshino, *Covering*, 111 *YALE L.J.* 769 (2002).

³³ See Jasbir K. Puar & Amit S. Rai, *Monster, Terrorist, Fag: The War on Terrorism and the Production of Docile Patriots*, 20 *SOCIAL TEXT* 117 (2002).

³⁴ See EDWARD SAID, *ORIENTALISM* (1978).

³⁵ JEAN-PAUL SARTRE, *COLONIALISM AND NEOCOLONIALISM* 149 (Haddour, Brewer & McWilliams trans., Routledge 2001)

³⁶ See Volpp, *supra* note __, at [redacted] (discussing Orientalist tropes in the post-September 11th construction of the terrorist); Ahmad, *supra* note __, at [redacted] (same).

monsters.”³⁷ The post-September 11th iconography thus easily took hold in the entrenched understandings of the Muslim subject.

Omar Khadr was captured in Khost, Afghanistan, in July of 2002, following an intense firefight around the house in which he was living. Several hours of combat and two five-hundred pound bombs killed the other occupants, who were believed to be Al Qaeda fighters, but Omar survived. The government alleges that at the conclusion of the firefight, Omar arose from the rubble of the destroyed house and threw a grenade that killed a U.S. soldier. While the Administration claims the authority to detain those at Guantánamo indefinitely and without charge as “enemy combatants,”³⁸ it has nonetheless chosen to try a small number of prisoners, including Omar, for alleged war crimes in military commissions.³⁹

Hovering in the background of the formal charges against Omar are a variety of suspicions and allegations about his family. His father, in particular, is suspected by the U.S. to have had terrorist ties, and his family is deeply unpopular in Canada. Taken together, the formal and informal charges against Omar assimilate him into a barbaric clan of cold, calculated murderous men, finding a special place for him in the government’s iconography of terror. In this narrative, he is terror’s child, thus subtly reinforcing the notion of the Muslim terrorist suspect as constitutively monstrous, so much so that his children are natural-born terrorists, too.

C. Narrative and Normalcy: Welcome to Guantánamo

The central cultural project of Guantánamo has been to normalize what is, on first inspection, extraordinarily aberrant, and to render intelligible the seemingly bizarre.

My colleague and co-counsel Rick Wilson and I made our first trip to Guantánamo in October 2004. Over the course of nearly a dozen subsequent visits, my experience and memory of the place has become routinized, but that first trip was fraught with anxiety, anticipation, and fear of the unknown. Only a handful of habeas lawyers had visited the island before us,⁴⁰ leaving to our imagination what a military interrogation and detention center in a law-free zone must look like. Into that imagined world, I projected myself, a brown-skinned Muslim entering a facility whose preoccupation was the interrogation and

³⁷ Jean-Paul Sartre, *Preface to FRANTZ FANON, THE WRETCHED OF THE EARTH* lviii (Richard Philcox trans., Grove Press 2004) (1964).

³⁸ See *infra* notes ___-___ and accompanying text.

³⁹ See *infra* notes ___-___ and accompanying text.

⁴⁰ Counsel visits were enabled by the Supreme Court’s decision in *Rasul v. Bush*, handed down on June 30, 2004, which recognized the right of Guantánamo prisoners challenge the legality of their detention by way of habeas corpus. 542 U.S. 466 (2004). Once the right of the prisoners to file habeas petitions was established, a right of access to counsel (though not a right to counsel at government counsel) followed.

detention of brown-skinned Muslims, thus adding identity-based anxiety to our many other fears.

Our travel to Guantánamo did nothing to disabuse our expectations of a dark and secretive island. We flew to Ft. Lauderdale, and from there boarded a 19-seat turbo-prop charter flight on Lynx Air (later flights would be via a Lynx competitor, optimistically named Air Sunshine). The flight was full, so full in fact, that the excess weight necessitated a refueling stop on Exzuma Island. Stooping under the plane's low roofline to arrive at my seat, I eyed my fellow passengers with suspicion, as I wondered what reputable business they could possibly have at Guantánamo. Only when we arrived did I come to understand that the physical plant of the base, and many of its services, rely on contractors for their operation.

As Rick and I sat with jaws clenched, two passengers stood out, if only because they were so at ease. Caucasian women in their early twenties, they were deeply tanned, with bleached hair, and dressed in unusually revealing clothing. One traveled with a small dog. We later learned that they worked for military intelligence, and we laughed at the spectacle and incongruity of it all, though the humor of the anecdote drained away some months later when stories emerged of female interrogators being deployed to sexually humiliate prisoners.⁴¹

The flight was long, loud, and uncomfortable. We were less than 500 miles away, but the flight took four hours: since the U.S. does not have diplomatic relations with the Castro government, we could not fly over Cuban airspace and therefore had to detour around the eastern peninsula of the island. As I sat wedged against the window, the two small engines blaring as we hurtled toward the dark mystery of Guantánamo, I recalled the iconography of the prisoners' transport to the island—heads hooded, wrists and ankles shackled, sitting on the floor of a cavernous cargo plane with nylon straps tethering them to one another and to the sides of the plane.⁴² This would be the first of many comparisons I would draw between my condition and Omar's, an early signal of the experiential and situational distance between us.

Our convoluted itinerary reminded me of the spatial dimension of the government's detention project. It was no accident that visiting the base was difficult, but instead was a core design element of Guantánamo. The geographic remoteness of the base from the territorial

⁴¹ See, e.g., Raymond Bonner, *Detainee Says He Was Tortured in U.S. Custody*, N.Y. TIMES at A11, Feb. 13, 2005 (reporting allegations of sexual humiliation suffered by released prisoner Mamdouh Habib).

⁴² See *supra* notes ___ - ___ and accompanying text. Representative images are available at <http://globalresearch.ca/articles/CRG2111A.html>. Images of U.S. military transports of prisoners were anonymously sent to media sources on November 8, 2002. Although the U.S. government was unaware who leaked the photos, it verified the photos were authentic. See *Pentagon Probes Anonymous Release of Detainee Photos: Pictures Show Restrained Men in Military Transport*, CNN.com (Nov. 8, 2002), available at <http://archives.cnn.com/2002/US/11/08/detainees.pictures> (last visited Feb. 1, 2008).

United States reflected and facilitated the legal and psychic dispossession that the government intended Guantánamo to achieve. In this way, the prisoners were deliberately lost at sea, held outside of and inaccessible to the realm of the normal, as part of a twofold strategy to free the hand of the government and to induce despair among the prisoners.⁴³

By the time we arrived, night had fallen. We emerged onto the tarmac with floodlights illuminating the humid air and armed soldiers, only slightly older than our client, ready to greet us. We gathered our luggage, which was then searched, and then met our liaison, a young army corporal, who accompanied us to the dank rooms of a small motel, called the Combined Bachelor Quarters (CBQ), where we would be staying. In a matter of minutes, Guantánamo shifted from the realm of the imagination into our lived experience. That night, our theoretical understanding of the place stood poised for collision and reconciliation with its real-world materiality.

Despite our initial disorientation, days at Guantánamo are quickly routinized, and with routinization comes normalization. A ferry takes you across Guantánamo Bay itself, from the Leeward to the Windward side. For fifteen or twenty minutes, it is the calm beauty of the Caribbean. Then, arriving at the other side, you encounter a giant desalination plant (necessary because Castro cut off the supply of fresh water to the base). A short drive up a winding hill, you enter what has been consciously designed to mimic a small town in 1950s middle America. A single road, Sherman Avenue, runs from one end of the base to the other, along which one finds an outdoor movie theater, evocative of drive-ins of a bygone era. There is a McDonald's, an A&W Root Beer, a bowling alley and a "public" library. There is a large laundromat, and the Navy Exchange—a combined grocery and department store. On our first visit there, it was impossible to find a good cup of coffee, but they have since begun serving Starbucks at one small outlet. There are athletic fields and housing developments named West Iguana and Tierra Kay that look like suburban subdivisions. There is even a school for the kids on base. The speed limit is 25 miles per hour—strictly enforced, in large part to protect the iguanas⁴⁴—which reinforces the sensation that time goes slowly at Guantánamo.

But the aspiration of small town normalcy stands in permanent tension with the dystopic detention camps erected just a few miles from

⁴³ See JOSEPH MARGULIES, *GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER* 27 (2006) (discussing how U.S. interrogators at Guantánamo Bay justified barring prisoners' access to counsel because this "instills in the prisoner the dangerous and misguided belief that he may secure relief through an adversarial civil litigation process—that is, the courts. . . . The prisoner must realize that his welfare is wholly in the hands of his interrogators . . . [whose] battle is won only then the prisoner believes all is lost, for only then will he abandon his resistance").

⁴⁴ See Transcript of Oral Argument at 5, *Rasul v. Bush*, 542 U.S. 466 (2004) (03-334) (discussing protection of iguanas at Guantánamo under U.S. law).

the town center. To get to the camps, one winds through the dry hills of the base, and after cresting the last of these, a series of low-slung buildings appear on the horizon, the shimmering waters of the Caribbean behind them. From a distance, they might be mistaken for a luxury resort, but as one approaches, the multiple checkpoints, concertina wire, and guard towers betray that momentary delusion, and the reality of the camps, their maximum security and their deliberate despair, overwhelm the senses.

Power is exercised at Guantánamo not only through spatial demarcation, but through administration of “indigenous” ritual. In Muslim countries, the call to prayer is heard five times day. In the old days, a muezzin ascended a steep minaret to make the call. Today, it is broadcast from loud speakers attached to the minarets. At Guantánamo, too, the call to prayer is heard (though prisoners have complained that is not broadcast all five times, and that the government sometimes deliberately disrupts it). But what is more jarring is to see that the recorded call is broadcast from loud speakers not atop minarets, but attached to the guard towers encircling the camps, each one staffed by armed guards, and each emblazoned by an American flag. The prisoners’ call to prayer issues nearly from the barrel of their captors’ guns.

Thus is Guantánamo built deliberately upon contradiction, these two worlds existing side-by-side, the one self-consciously normal, the other a carefully constructed project of dehumanization. The town’s aspiration of normalcy is made all the more urgent by the aberrance of the camps. The service members who work in the camps but spend their off hours in the town cross between these two worlds daily, traversing the dividing line known as “the Wire.” The prisoners, of course, are forever delimited; their containment enables the service members’ freedom, and the barbarity of the camps helps to constitute the normalcy of the town.

The normalcy of Guantánamo is called further into question—or perhaps is re-established—when one begins to appreciate its racialized labor market. Almost all of the laborers at the base—the janitors and food service staff, the landscapers and maintenance workers—are Filipino, Haitian, and Jamaican migrants—referred to as third country nationals, or TCNs⁴⁵; the reliance on migrant workers for low-wage service industry labor in the U.S. extends to Guantánamo. It is a reminder that the penal colony that is Guantánamo Bay is indeed colonial. Moreover, it inaugurates recognition of a pervasive yet complex racial economy at Guantánamo, where black and brown migrant labor services a multi-racial U.S. military that in turn incarcerates and interrogates Muslim men. In this regard, even though we were in the legal netherland of Guantánamo, it seemed impossible to

⁴⁵ [Newspaper articles on TCNs.]

escape the multiple taxonomies of American citizenship, and in particular, their racial, national, and labor⁴⁶ dimensions.

D. Is There Law at Guantánamo? The Legal Construction of the Terrorist Body as Narrative Precondition for Dehumanization

Is there law at Guantánamo? By now, the executive, legislative, and judicial actions relating to Guantánamo have been thoroughly documented by others, beginning with the Presidential Military Order approving the detention of “enemy combatants” and trials by military commission,⁴⁷ and the legal memoranda purporting to except the prisoners from the protections of the Geneva Conventions⁴⁸ and approving the use of interrogation techniques previously considered torture.⁴⁹ So, too, has the relevant Supreme Court jurisprudence—*Rasul v. Bush*,⁵⁰ *Hamdi v. Rumsfeld*,⁵¹ and *Hamdan v. Rumsfeld*⁵²—been explored, as well as the lower court actions and Congress’s intervention in the form of the Detainee Treatment Act of 2005⁵³ and the Military Commissions Act of 2006.⁵⁴ Rather than rehearse these discussions here, I seek to explore a more fundamental question: despite the repeated claims by critics that Guantánamo is a law-free zone, does this corpus of state action by all three branches not constitute an abundance of law at Guantánamo? Rather than Guantánamo suffering from a lack of law, is it possible that law is all around?

Answering this question requires a summary discussion of the creation and development of the Guantánamo governance regime. While that regime is multi-faceted, and has evolved over time, at its inception it sought to detain and interrogate indefinitely, without charge, and without opportunity for judicial review, any non-U.S. citizen in the world whom the Executive deemed to be an “enemy combatant.” In addition, the regime contemplated the trial by military commission of select “enemy combatants” for alleged war crime offenses, under rules of the Executive’s making. Notably, the “enemy combatant” construct was a legal invention of the Administration, distinct from the presumptive “prisoner of war” status to which the prisoners otherwise would have been entitled, the intended effect of which was to remove the prisoners from the ambit of both the Geneva Conventions and the U.S. courts. In this way, in the eyes of the law, the prisoners were made invisible.

⁴⁶ See Michael Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667 (2003).

⁴⁷ [Cite – PMO.]

⁴⁸ [Cite]

⁴⁹ [Cite]

⁵⁰ 542 U.S. 466 (2004). See *infra* notes ___-___ and accompanying text.

⁵¹ 542 U.S. 507 (2004). See *infra* notes ___-___ and accompanying text.

⁵² 126 S. Ct. 2749 (2006). See *infra* notes ___-___ and accompanying text.

⁵³ Pub. L. No. 109-148, §1003, 119 Stat. 2739.

⁵⁴ Pub. L. No. 109-366, 120 Stat. 2600.

Hidden on a remote and mysterious island—which was made inaccessible to lawyers and human rights advocates for nearly two years—the prisoners were nearly erased.

The creation of Guantánamo and its current status as an interrogation and detention center for suspected terrorists consists of three overlapping components: executive authorization, judicial contest, and congressional intervention. In the first instance, the idea of Guantánamo was purely executive, and both arose from and helped to constitute a “virulent strain of” the theory of the unitary executive.⁵⁵ A presidential order authorized the apprehension and detention of terrorist suspects as “enemy combatants,” anywhere in the world.⁵⁶ Informed by legal advice from within the Executive Branch,⁵⁷ the presidential order purported to exempt the Guantánamo prisoners from the Geneva Conventions, the primary advantage of which was to enable the use of “harsh interrogation techniques,” which otherwise would have violated the Geneva Conventions’ prohibition on torture and cruel, inhuman, and degrading treatment.

Second, and perhaps most critical in the unfolding story of Guantánamo, has been the contest for judicial involvement. As suggested previously,⁵⁸ the location of the interrogation and detention center at Guantánamo served multiple strategic purposes. Among them as the intention to evade the jurisdiction of U.S. courts. Thus, the principal, and enduring court challenge regarding Guantánamo has not been with respect to the adjudication of rights, but instead concerns the reach of the courts. In its first Guantánamo-related case, *Rasul v. Bush*, the Supreme Court held that the federal habeas statute reached the prisoners at Guantánamo, thus repudiating the government’s claim of extra-judicial authority.⁵⁹ In subsequent litigation in federal district court, prisoners’ counsel sought to exercise their clients’ habeas rights by demanding that the government state the legal and factual bases for detention, and demanding a hearing in federal court in which to contest those bases.⁶⁰ But such attempts at rights contestation were quickly aborted, as the government adopted an exceptionally narrow interpretation of *Rasul*. By the government’s account, *Rasul* stood for

⁵⁵ Neal Kumar Katyal, *Hamdan v. Rumsfeld: The Academy Goes to Practice*, 120 HARV. L. REV. 65, 70 (2006) (distinguishing the traditional theory of a unitary executive from the “wild-eyed theory, masquerading as a ‘unitary executive’ concept, that purported to allow ... [the Administration] to defy and creatively reinterpret even the will of Congress—all supposedly entirely consistent with the Constitution. This virulent strain of the unitary executive, which emphasized the President’s ‘inherent authority’ to act, gained traction and led to a number of exceptionally dangerous policies, culminating in the so-called ‘torture memorandum.’”) (internal citations omitted).

⁵⁶ [PMO]

⁵⁷ [Cite – DOJ memoranda]

⁵⁸ See *supra* note ___ and accompanying text.

⁵⁹ 542 U.S. 466 (2004).

⁶⁰ See *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d. 433 (D.D.C. 2005); *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005).

the proposition that the habeas statute gave the federal courts jurisdiction over any Guantánamo prisoner claims arising under their statutory or constitutional rights. But, the government argued, the prisoners possessed neither statutory nor constitutional rights, and therefore the courts could hear the cases but could not act; they could listen, but they could not speak.⁶¹

Two federal district judges divided on the question of whether the prisoners possessed any enforceable rights.⁶² Before the Court of Appeals decided the issue, Congress intervened, at the Administration's behest, passing the Detainee Treatment Act (DTA),⁶³ which amended the federal habeas statute and seemingly stripped the courts of the jurisdiction found in *Rasul*.

As the habeas litigation stalled in the Court of Appeals, the first challenge to the Guantánamo military commission system rose to the Supreme Court in *Hamdan v. Rumsfeld*. The DTA was enacted after *certiorari* had been granted in *Hamdan* but before the case was heard, thus forcing the Court to consider the statute's jurisdiction-stripping provisions as a threshold matter. The Court disposed of the jurisdictional issue expeditiously,⁶⁴ and proceeded to the merits, rejecting the government's argument that the prisoners stood outside the Geneva Conventions, and instead finding that the military commission system was unauthorized under the Uniform Code of Military Justice and contrary to Common Article 3 of the Geneva Conventions.

The *Rasul* and *Hamdan* decisions are enormously important, both for their willingness to resolve jurisdictional questions in the prisoners' favor, and in the case of *Hamdan*, to adjudicate their substantive rights claims. With *Rasul*, there has been a tendency to describe, and lament, the case as "merely" jurisdictional. Indeed, the government's position has been that *Rasul* had no direct bearing on the substantive rights of the prisoners, and that in fact they have none.⁶⁵ But even if merely

⁶¹ See Motion to Dismiss or for Judgment as a Matter of Law and Response Pursuant to the Court's Sept. 20, 2004 Order, *Khadr v. Bush*, 04-CV-01136JDB (D.D.C. Oct. 4, 2004).

⁶² Senior Judge Joyce Hens Green issued an opinion that found the prisoners to have Fifth Amendment due process rights. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 433 (D.D.C. 2005). Judge Richard Leon reached the opposite conclusion. *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005).

⁶³ Pub. L. No. 109-148, §1003, 119 Stat. 2739.

⁶⁴ 126 S. Ct. at 2762-2769.

⁶⁵ Much of the parties' debate over whether the prisoners possess constitutional or statutory rights has centered on footnote 15 of the majority opinion in *Rasul*, which states:

Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe custody in violation of the Constitution or laws or treaties of the United States. 28 U. S. C. §2241(c)(3).

jurisdictional, *Rasul* is noteworthy precisely because of the ease with which the withholding of jurisdiction could have defeated the prisoners' claims entirely. By finding jurisdiction to hear the prisoners' cases, the Court rejected a long tradition of upholding state action through the deployment of jurisdictional rules.⁶⁶ Robert Cover decried this "apologetic and statist orientation" of jurisdictional decisions for "prevent[ing] courts from ever reaching the threatening questions."⁶⁷ In this way, by Cover's account, jurisdictional disposal of a case was a means of upholding state violence—and thereby doing state violence—while disclaiming personal culpability of the judges involved.⁶⁸

In *Rasul*, the Court resisted the state violence of Guantánamo, concluding that while it may be geographically outside the United States, it was not beyond the reach of the courts, or more simply, it was not *beyond*. By recognizing Guantánamo as within its realm, the Court helped to make it real; by bearing witness through its finding of jurisdiction, the Court transported Guantánamo from the netherworld of the imagination to the cognizable, demarcated, and substantial world.

As the post-*Rasul* litigation languished in the lower courts—depleting the prisoners and their lawyers of the faith in law inspired by the Supreme Court's decision—the Court went a significant step further in *Hamdan*. There, the Court passed quickly and deliberately over the jurisdictional issues, determined to reach the "threatening questions". And threatening they were: whether the prisoners had enforceable rights under U.S. law, and whether they were protected by the Geneva Conventions. Just as *Rasul* repudiated the government contention that Guantánamo was beyond the reach of the courts, *Hamdan* established that prisoners—at least those few facing trial by military commission—had certain enforceable rights. Thus did law intrude upon Guantánamo.

The significance of the *Hamdan* decision can be measured by the speed with which the Administration moved for Congress to overturn it, which Congress did. With enactment of the Military Commissions Act of 2006 ("MCA"),⁶⁹ Congress once more attempted to strip the courts of habeas jurisdiction over Guantánamo, and authorized a new military commission system to replace the one invalidated by the Court in *Hamdan*. The MCA is remarkable in three ways: (1) its habeas-stripping provisions have provoked a constitutional dispute on a core liberty concern; (2) it attempts a unilateral re-interpretation of sections of the Geneva Conventions; and (3) it replaces the discredited military commission system with one that suffers from many of the same defects

Rasul, 542 U.S. at 483 n. 15.

⁶⁶ See Owen Fiss, *Dombrowski*, 86 YALE L. J. 1103 (1977).

⁶⁷ Cover, *supra* note __, at 57.

⁶⁸ *Id.* at 156 ("[T]he judge—armed with no inherently superior interpretive insight, no necessarily better law—must separate the exercise of violence from his own person").

⁶⁹ Pub. L. No. 109-366, 120 Stat. 2600.

that troubled the Supreme Court in *Hamdan*. The cumulative result is to return the prisoners to a realm beyond law.

Of course, the government has never accepted the argument that Guantánamo is either lawless or beyond the law. Rather, it has insisted upon the lawfulness of its governance regime, as it must; even the most totalitarian of regimes claim to be operating in accordance with the law, and use the law, its language, forms, actors, and mythologies to legitimize its actions.⁷⁰ By the government's account, law is all around: contract law governs the agreement with Cuba granting the U.S. use of Guantánamo as a naval station; the Uniform Code of Military Justice applies to wrongdoing committed by military personnel and civilian contractors on the base; and international humanitarian law authorizes the wartime detention of combatants.

Notably, an argument can be made from the left that there is law (as opposed to the normative argument that there should be) at Guantánamo. Traditional human rights law posits that human rights obligations apply everywhere and all the time. By this account, Guantánamo does not exist outside the law; rather, the law is permanent, and immanent, and thus the conditions of Guantánamo are the result of illegal acts by state authorities. If one accepts the integrity of human rights law, and its ontological independence from any state sovereign, then it follows that there can never be lawlessness, only gross violations of law.

But such competing claims to the existence of law at Guantánamo reveal the "Is there law?" question to be both political and jurisprudential. For the administration, the claim to law reflects a concern, and a contest, over the legitimacy of state power.⁷¹ I return to this inherent linkage between law and legitimacy in Section II.A,⁷² but note here the suspicion that must attach when the claim to law is made by an executive that simultaneously insists upon the nonjusticiability of its claim. Indeed, the administration's claims of law's applicability are selective at best: For example, it relies upon international humanitarian law (IHL) for the principle that combatants may be detained for the duration of hostilities, but has sought to disclaim the applicability of other provisions of IHL, most notably Common Article 3 of the Geneva Conventions.

For human rights advocates, the claim to law is also a claim about state power, and its subordination to a set of norms and principles which originate outside the state, without the need for state consent, and yet have the force to bind it. While I am sympathetic to the human rights position, my experience at Guantánamo, and more importantly that of the prisoners, makes the assertion of law's existence seem ever more fanciful. Indeed, looking from the lived experience of those on the

⁷⁰ See Cover, *supra* note __, at __.

⁷¹ *Id.* at __.

⁷² See *infra* Section II.A..

receiving end of illegality suggests a limit to the faith one can place in the aspiration of human rights law. At some point, systematic illegality—particularly when enacted under a claim of law—crosses into lawlessness. We might consider, for example, the experience of a now-released British prisoner named Feroz Ali Abassi. In an administrative review proceeding called a Combatant Status Review Tribunal,⁷³ created by the Administration in the aftermath of *Rasul*, Abassi submitted written complaints that military police had sex in front of him while he prayed, and he argued that he should be considered a prisoner of war rather than an enemy combatant. But as the Associated Press reported:

[A]n Air Force colonel, whose identity remains blacked out [on the transcript], would have none of it. “Mr. Abassi your conduct is unacceptable and this is your final warning. I do not care about international law. I do not want to hear the words international law again. We are not concerned about international law,” the colonel insisted before having Abassi removed from the hearing so that the military could consider classified evidence against him. Abassi was freed in January 2005.⁷⁴

Or, as a U.S. intelligence official said to prisoner Hadj Boudella, “You are in a place where there is no law – we are the law.”⁷⁵

Here, then, we must acknowledge the inextricability of law and the state, and the special, though not exclusive, authority the state holds in defining what is law because of its monopoly on legitimate violence. The challenge of the human rights movement is to establish law that transcends sovereignty. It remains to be seen, however, whether law can so exist, or if, liked a trapped animal, one limb isn’t always caught in state power. In this context, the *Rasul* and *Hamdan* decisions represent not just law, but law’s ambition, and its contradiction: a force that can transcend state power, even as it is constituted by it.

⁷³ The Combatant Status Review Tribunal were created by the Administration after the Supreme Court decided the *Rasul* case, and the same day, the case of *Hamdi v. Bush*, [CITE]. For a fuller description of the origins and nature of the CSRT, see *infra* notes ___ - ___ and accompanying text.

⁷⁴ *U.S. Releases Gitmo Detainee Names*, Associated Press March 4, 2006, available at <http://www.cbsnews.com/stories/2006/03/02/terror/main1364552.shtml>.

⁷⁵ REPORT ON TORTURE AND CRUEL, INHUMAN AND DEGRADING TREATMENT OF PRISONERS AT GUANTÁNAMO BAY, CUBA ii, CENTER FOR CONSTITUTIONAL RIGHTS, July 2006 (quoting Unclassified Attorney Notes of Robert Kirsch), available at http://www.ccr-ny.org/v2/reports/docs/Torture_Report_Final_version.pdf.

II. THE RIGHTS-FREE ZONE

A. Rights and Absurdism: Legitimizing and Delegitimizing the Military Commissions

It has become a commonplace to describe Guantánamo as Kafkaesque. Indeed the official narrative of Guantánamo bears an uncanny resemblance to the literary narrative of *The Trial*⁷⁶. As one scholar has written: “If there is anything that is assuredly and appropriately ‘Kafkaesque,’ it would be a situation of indefinite detention, where one is not formally charged, where one is obstructed in seeking counsel, where various machinations keep an individual from having his or her ‘day in court,’ and where, all the while, one is being secretly and separately ‘judged,’ either in a formal sense (by the state) or more informally by the community of observers who are invited to infer guilt based on the status or mark of the putative offender.”⁷⁷

Absurdity abounds at Guantánamo. Before *Rasul*, iguanas were protected under the Endangered Species Act but prisoners were protected by no law.⁷⁸ Under pressure from the federal courts, the administration determined several men, whose “enemy combatant” status had never been substantiated, to be “no longer enemy combatants,” even though, as a federal judge noted, they had never been “enemy combatants” in the first place.⁷⁹ A habeas lawyer was falsely accused of smuggling contraband—namely, a pair of athletic underwear—in to a prisoner, ostensibly by wearing them in himself.⁸⁰ The list is endless.

The invocation of Kafka, as well as Sartre and Lewis Carroll, speaks not only to the absurdist tendencies of Guantánamo, but more broadly, to the absurdist tendencies of unchecked legal regimes. In the existential crises of *The Trial* or *No Exit*,⁸¹ and in the topsy-turvy universe of *Alice in Wonderland*,⁸² nonsensical worlds are established through rules, and seeming lawlessness is established by and through law. What troubles readers of the existentialist texts, and amuses readers of the absurd, is the insistence on internal logic even as the rules they create are logically

⁷⁶ FRANZ KAFKA, *THE TRIAL* (Edwin Muir & Willa Muir trans., Schocken 1968) (1925).

⁷⁷ Brian Pinaire, *The Essential Kafka: Definition, Distention and Dilution in Legal Rhetoric*, 46 U. LOUISVILLE L. REV. 113, 154-55 (2007).

⁷⁸ See Brief for Petitioners at 36 n. 62, *Al Odah v. United States*, 542 U.S. 466 (2004) (03-343) (noting applicability of the Endangered Species Act, 16 U.S.C. § 1538, to Cuban iguanas at Guantánamo); Transcript of Oral Argument at 52, *Rasul v. Bush*, 542 U.S. 466 (2004) (03-334) (Justice Souter noting, “We even protect the Cuban iguana”).

⁷⁹ [Cite]

⁸⁰ See Clive Stafford-Smith, *America’s black hole*, L.A. TIMES, Oct. 5, 2007.

⁸¹ JEAN-PAUL SARTRE, *NO EXIT, AND THREE OTHER PLAYS* (Lionel Abel trans., Vintage Books 1955).

⁸² LEWIS CARROLL, *ALICE IN WONDERLAND & THROUGH THE LOOKING GLASS* (1946).

disjoined from history, lived experience, liberal expectations, and common sense. Alice's world is a wonderland only because it is so at odds with her, and her reader's, conventions and expectations. And yet, the conceit of all three texts is to demonstrate how an elaborate though opaque set of rules can re-construct reality, in a bid to reconstitute normalcy. It is Josef K., Garcin, and Alice who are made to feel foolish, and not their keepers. Thus do these texts launch into narrative contest with the known and understood worlds of their readers. Similarly, the law of Guantánamo is embedded in the story of Guantánamo, and that story is made and re-made through narrative contest.

As lawyers began to penetrate Guantánamo in the fall of 2004, they learned and exposed prisoner stories of torture and abuse, of mistake and innocence, and of lawless detention, thereby disrupting the government's master narrative of unrelenting terror. Habeas lawyers' access to the prisoners therefore threw Guantánamo into a new realm of narrative contest, one in which the government participated vigorously, and continues to do so today, largely through storytelling.

One story the government has told is of Guantánamo as a humane and effective interrogation center. This narrative seeks to counter allegations of torture and abuse by advancing a commitment to a non-confrontational, collaborative model of interrogation, while at the same time insisting that Guantánamo cannot be closed, as many have demanded, because it continues to yield valuable human intelligence in the fight against terrorism.⁸³ To tell this story, the government has let reporters and members of Congress observe an interrogation (something they have refused to permit the prisoners' lawyers to do). And yet, as Neil Lewis reported in the *New York Times*, these interrogations appear to have been staged:

Journalists who were permitted to view an interview session from behind a glass wall ... were shown an interrogator and detainee sharing a milkshake and fries from the base's McDonald's and appearing to chat amiably. It became apparent to reporters comparing notes in August [2005], however, that the tableau of the interrogator and prisoner sharing a McDonald's meal was presented to at least three sets of journalists.⁸⁴

⁸³ See Neil A. Lewis, *Fresh Details Emerge on Harsh Methods at Guantanamo*, N.Y. TIMES, Jan. 1, 2005, at A11 ("Military officials have gone to great lengths to portray Guantanamo as a largely humane facility for several hundred prisoners, where the harshest sanctioned punishments consisted of isolation or taking away items like blankets, toothpaste, dessert or reading material. Maj. Gen. Geoffrey D. Miller, who was the commander of the Guantanamo operation from November 2002 to March 2004, regularly told visiting members of Congress and journalists that the approach was designed to build trust between the detainee and his questioner.").

⁸⁴ *Id.*

What Lewis and other journalists witnessed was a set piece, one more attempt to construct and conceal reality, not unlike the high-end interrogation room in which I met Omar in 2005.

Nowhere was the staging of Guantánamo more evident than in the military commissions. Whereas the vast majority of Guantánamo prisoners have never been charged with a crime, and never will be, the government has charged a select few, including Omar, with alleged war crimes, to be tried by military commission. Trials are so common a feature in our popular culture that it is difficult not to view them through a theatrical lens. In the military commissions, however, theater was not merely a metaphor, but an ambition. The general suspicions that attaches to military trials,⁸⁵ combined with the gross procedural and substantive irregularities of these military commissions, led critics to call the proceedings nothing more than show trials. Mindful of this criticism, and seeking to rebut it, the administration sought to perform the commissions' legitimacy, and in so doing only further undermined it.

The commission process was established by presidential order in November 2001,⁸⁶ and the first prisoners were charged and referred before a commission in 2003.⁸⁷ From the very beginning, the commissions were plagued by accusations of structural unfairness, inadequate protections for defendants, and rules that seemed to change at whim; many of these charges were vindicated by the Supreme Court's wholesale invalidation of the commissions in *Hamdan*. In their original incarnation,⁸⁸ the commission rules permitted testimony obtained through torture, the unfettered use of secret evidence, and exclusion of the defendant from his own trial.⁸⁹ Mounting domestic and international criticism—some of it coming from within the commission prosecutor's own office⁹⁰—exerted enormous pressure on the government to shore up the legitimacy of the commission process, much of which was done on a purely cosmetic level.

The government went to great lengths to make the commission look as much like a real court, even as they were emptied of the substantive

⁸⁵ See generally U.S. Dep't of State, Equatorial Guinea, Country Reports on Human Rights Practices (Mar. 6, 2006) available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61567.htm> (documenting the "questionable" use in military trials of evidence obtained through torture); U.S. Dep't of State, Peru, Human Rights Practices (Feb. 1995) available at http://www.freelori.org/gov/statedept/94_perureport.html ("Proceedings in military courts do not meet internationally accepted standards for due process. Military trials are closed to the public and carried out in secrecy.").

⁸⁶ Presidential Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

⁸⁷ Cite

⁸⁸ The Military Commissions Act creates a third version of the military commissions. The first version was radically altered by a comprehensive rules change in March 2004. That next version was invalidated by the Supreme Court in *Hamdan*, after which the MCA was enacted.

⁸⁹ Cite

⁹⁰ See *infra* notes ___ - ___ and accompanying text.

rights that ordinarily inhere in a courtroom.⁹¹ Although there was no judge in these proceedings, the presiding officer was ordered to wear a robe⁹² (and ours carried a gavel); although this was a commission and not a court, the commission room, formerly a dental clinic, was swathed with blue velvet curtains and rich, dark wood furniture so as to look like a courtroom. The curtains only went two-thirds of the way up the wall, after which the painted cinder block of the weathered building were exposed. But two thirds was just far enough for the curtains to fill the frame of the cameras in the room, which broadcast proceedings on a closed-circuit system. For those of us appearing as defense lawyers in the commissions, we knew we were on a hastily constructed set, where costume and props and scenic design attempted to consecrate the once-barren space. In our very first commission session we were handed a document listing speaking parts for the presiding officer, the lawyers, and our client, and ordered, with no apparent sense of irony, to follow “the script.”⁹³

This crude staging recalls the insights of Peter Gabel and Paul Harris, who have noted the deployment of a “tableau of authoritarian symbols” by legal systems in order to self-legitimize.⁹⁴ Describing this phenomenon of self-legitimation, they write:

[A]ll forms of serious social conflict are channeled into public settings that are heavily laden with ritual and authoritarian symbolism. Each discrete conflict is treated as an isolated “case”: the participants are brought before a judge in a black robe who sits elevated from the rest, near a flag to which everyone in the room has pledged allegiance each day as a child; the architecture of the courtroom is awesome in its severity and in its evocation of historical tradition; the language spoken is highly technical and intelligible only to the select few who have been “admitted to the Bar.” This spectacle of symbols is both frightening and perversely exciting. It signifies to people that those in power deserve to be there by virtue of their very majesty and vast learning.

⁹¹ Recently, the government proposed spending up to \$125 million to build new commission facilities at Guantánamo. See <http://www.fbo.gov/spg/DON/NAVFAC/N62470CON/N62470-07-R-2500/SynopsisP.html>. The proposal was subsequently shelved after it became public and faced criticism from the newly elected Congress.

⁹² See Email of John Altenburg, Jr. to Keith Hodges, Jan. 5, 2006 (on file with author) (“Presiding Officers will wear black judicial robes like those worn by Military Judges at Army and Air Force courts-martial and by civilian judges throughout the United States”).

⁹³ See Email of Keith Hodges, “Initial Session Trial ‘Script’ With Presiding Officer (and no other members), Jan. 3, 2006 (copy on file with author).

⁹⁴ Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 367 (1982-83).

When disseminated throughout the culture (through, for example, the schools and the media), these symbols help to generate a belief not only in the authority of the law, but in authority in general.⁹⁵

The value of the Gabel and Harris critique is in exposing the ritual and symbolism deeply embedded in long-standing legal systems, and the role that they play in upholding and perpetuating obedience to political authority. At Guantánamo, however, the commissions were erected on a nearly blank slate: the last American military commission was convened in 1942.⁹⁶ Thus, the commissions at Guantánamo did not require the excavation of socio-cultural artifacts buried deep within the legal system. Rather, because we were witnessing the creation of a legal system nearly from scratch, the installation and instantiation of authority were on blatant display.

In the commissions, the trappings of law substituted for law itself. At every turn, the government maintained that the prisoners at Guantánamo had no rights whatsoever, under any source of law, even when they were being tried criminally. Moreover, while the administration claimed they had legal authority to convene the commissions (a position repudiated by the Supreme Court in *Hamdan*), there were few formal rules governing the commission. The only substantive requirement for the commissions was that they be “full and fair,”⁹⁷ a phrase that the prosecution and the presiding officer repeated *ad nauseum*,⁹⁸ and one that expanded, or more typically contracted, to meet the particular substantive challenge being raised.

Despite the protests of defense lawyers, the commissions operated with virtually no rules of evidence, no discovery rules, no rules of decision, and no rules regarding precedent. Thus, not only was positive law in short supply, so, too, was any sense as to what interpretive practices would be followed by the commissions, what precedential value a decision in one commission would have later on in the same trial, in another trial before the same presiding officer, or in a trial before a different presiding officer.

Our military co-counsel, Lieutenant Colonel Colby Vokey, attempted to gain some clarity on the question of what jurisprudence would be relevant to the decisionmaking of the commission. In the course of voir dire of the presiding officer, he attempted to learn what caselaw, if any—domestic or international, criminal or civil, military or civilian—would be followed, to which the presiding officer responded,

⁹⁵ *Id.* at 372.

⁹⁶ See *Ex Parte Quirin*, 317 U.S. 1 (1942).

⁹⁷ Presidential Military Order § 4(c)(2).

⁹⁸ Carol Rosenberg, *Pre-Trial Hearings for Detainees Elicit Criticisms, Defense*, MIAMI HERALD, Jan. 16, 2006, at International News (quoting military defense attorney, Army Maj. Tom Fleener, “If I hear ‘full and fair trial’ one more time, it’s going to make me sick”).

“If you want to know if ... a particular case is applicable or a point of law, file a motion and I will decide it based on the briefs and the arguments and the law.”⁹⁹ Leaving aside the circularity of this argument, it contemplates counsel divining the law through a system of ping-pong—motions citing various cases like so many bursts of energy issuing into an ocean of unknowable dimension, with the hope that they might actually hit something and signal the existence and location of applicable law.

Unlike an established system of law, where the parties might seek to distinguish other cases factually or legally from the one being litigated, the commission system’s fundamental principles of jurisprudence were unknown. The commissions were thus a common law system at time zero, boundless in its potential, but entirely bereft of guidance as to how the law might actually evolve. The resulting was a lack of predictability and a corresponding manipulability, both of which undermined the system as a whole.

Our faith in the system had never been very strong. In the several months of Omar’s commission case, we filed nearly 40 motions, including motions to adopt the rules of discovery and rules of evidence applicable in courts-martial. The commission managed never to decide these motions, and many other substantive ones like it, before the *Hamdan* decision came down. One decision it did issue, however, is worthy of mention. The defense had moved to disqualify the commission appointing authority (the rough equivalent of a convening authority in courts-martial) for bias, and in support of that motion had moved for the production of the appointing authority in order to demonstrate his bias through examination. The presiding officer denied our motion to produce the appointing authority, finding that we had proffered only the areas on which we would question the witness, and not what the witness would actually say.¹⁰⁰ We subsequently renewed our motion, noting in passing that the requirement that we state what the witness would say in order to obtain his production for the purposes of examining him had “an Alice in Wonderland quality” to it.¹⁰¹ The next day, the presiding officer rejected this filing, holding that the Alice in Wonderland reference was “patently disrespectful of” the commission

⁹⁹ United States v. Khadr, Draft Transcript of Proceedings at 447 (April 5, 2006) (on file with author). Later in the same proceeding, the presiding officer elaborated: “I think that we will look to international law, I think that we will look through military law, I think that we will look through federal criminal law, I think that we will look at a lot of sources to—to flesh out the procedural rules that govern this proceeding. The purpose or the obligation of counsel is that as they see issues and they need it resolved, they file motions, they brief motions, they cite what they think is appropriate authority, and then I decide it. If counsel have a question as to the—what law is applicable, then—then it’s their obligation to file a motion.” *Id.* at 448.

¹⁰⁰ United States v. Khadr, Presiding Officer Ruling on Defense Motion for the Production of Mr. Altenburg, June 7, 2006.

¹⁰¹ United States v. Khadr, Defense Renewed Motion to Compel Production of Mr. Altenburg, June 21, 2006.

and the presiding officer, and as such would be moved to “the inactive section of the filings inventory.”¹⁰² By uttering the words “Alice in Wonderland,” we unwittingly had made the motion disappear.

This ruling was among the last official actions taken by the commission before the Supreme Court shut it down. Tellingly, it reflected a preoccupation with the dignity of the commission, as a stand-in for legitimacy, and demonstrated the speed with which the commission could move if it wanted, even as our substantive motions languished. Indeed, the commission system had issued a rule ordering that that commissions be treated with dignity.¹⁰³ The illegitimacy of the commissions was established less than a week later, suspending all issues before the commission, substantive and frivolous alike, though not before we filed a revised motion including an appendix of the hundreds of Supreme Court decisions and briefs and federal appellate, district, and state court opinions that reference *Alice in Wonderland*.¹⁰⁴ The *Alice in Wonderland* appendix was both cheeky and plainly serious, for it was meant to suggest that an established legal system, secure in its own legitimacy, would not be so easily offended.

B. The Permanent Emergency and the Politics of the Moment: Guantánamo Legal Process Through the Lens of Critical Legal Studies

The stated rationale for the use of military commissions at Guantánamo rather than established courts was that the “war on terrorism” made the application of ordinary standards of justice impracticable.¹⁰⁵ This exception to the standard rules of criminal justice with regard to commissions tracks a broader argument of exceptionalism with regard to the “war on terrorism,” according to which the different, and exigent, nature of terrorism’s threat necessitates deviation from ordinary principles of law. This “state of exception,” as Carl Schmitt

¹⁰² United States v. Khadr, Presiding Officer Ruling on Defense Motion to Renew Their Motion for the Production of Mr. Altenberg [sic], June 22, 2006.

¹⁰³ “The decorum and dignity to be observed by all at the proceedings of these Military Commissions will be the same as that observed in military and Federal courts of the United States.” U.S. Dep’t of Defense, Presiding Officers Memorandum #16, Rules of Commission Trial Practice Concerning Decorum of Commission Personnel, Parties and Witnesses, Feb. 16, 2006 (“POM 16”), available at <http://www.defenselink.mil/news/Feb2006/d20060217POM16.pdf>. POM 16 specifically mandates that “[a]ll communications, whether written or oral, should be couched in civil, non-sarcastic language, focusing on the factual or legal disputes.” *Id.* Rule 6(a) (emphasis added).

¹⁰⁴ United States v. Khadr, Defense Renewed Motion to Compel Production of Witness (Mr. John D. Altenburg, Jr.) (Revised), June 26, 2006.

¹⁰⁵ See Presidential Military Order, Nov. 13, 2001 (“Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts”).

termed the phenomenon in 1930s Germany,¹⁰⁶ presupposes emergency, and by its own terms promises to be temporary. Schmitt famously described the sovereign as he who has the power to decide the state of exception.¹⁰⁷ And yet, as Giorgio Agamben argues, the history of the state of exception is one of unrelenting expansion, self-justification, and self-perpetuation until the state of exception becomes permanent.¹⁰⁸ As others have noted, the inauguration of a seemingly permanent “war on terrorism” transforms the exception into the prevailing paradigm of governance.¹⁰⁹

Agamben demonstrates that the theoretical difficulty with the state of exception is that it cannot exist strictly within or strictly outside of law: either the positive law sanctions the exception, in which case law is donut-shaped, or the exception is extra-legal, in which case the exercise of expanded state power in times of emergency demonstrates the limits of law’s dominion.¹¹⁰ Law and lawlessness are inextricably linked, not unlike the normalcy of small-town Guantánamo and the deviance of the camps.

How, then, are we to understand the relationship between law and lawlessness? How do we know when a state of exception is sanctioned by law, and when it is not? As I have suggested previously, law instantiates norms. It is normalizing. But the domain of law is, by necessity, constituted in reference to the lawless. At Guantánamo, we see that law is all around, but it only reaches so far. To place someone outside the law, while simultaneously maintaining that that *is* the law, is to reveal law’s limit, the lawlessness of law.¹¹¹ The question of where those limits are drawn, however, is political, cultural, and historical, and not fundamentally juridical. Mark Tushnet suggests that because the terms regulating states of exception are typically subject to interpretation (i.e., what constitutes an emergency?), the interpretation of those terms is bound to be political.¹¹² In this sense, “states of exception are ones in

¹⁰⁶ See CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE THEORY OF SOVEREIGNTY* (George Schwab trans., MIT Press 1985) (1934).

¹⁰⁷ *Id.* at __.

¹⁰⁸ AGAMBEN, *supra* note __.

¹⁰⁹ See, e.g., Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 *GEORGIA L. REV.* 699 (2006).

¹¹⁰ See Stephen Humphreys, *Legalizing Lawlessness: On Giorgio Agamben’s State of Exception*, 17 *EUROPEAN J. INT’L L.* 677, 678 (2006) (discussing two schools of thought regarding the state of exception as identified by Agamben).

¹¹¹ Austin Sarat and Nasser Hussain provide an insightful analysis of how a constitutive lawlessness of law can benefit a criminal defendant. See Sarat & Hussain, *supra* note __. They describe executive clemency as “lawful lawlessness,” and ask, “How does a system of rules understand and accommodate the exercise of power that is by its very nature unbound by rules?”. *Id.* at 1314.

¹¹² Mark Tushnet, *Meditations on Carl Schmitt*, 40 *GEORGIA L. REV.* 877, 886 (2006); see also Levinson, *supra* note __, at 736 (“I increasingly believe ... that the discussion of emergency powers is ultimately a profoundly political one, with law, at least as traditionally conceived, having relatively little to do with the resolution of any truly live controversy”).

which politics replaces law.”¹¹³ But as Tushnet also notes, if one accepts the central insight of the Legal Realism, or the variant expressed by Critical Legal Studies, that politics always displaces law, then there are no states of exception.¹¹⁴ Rather, emergencies “merely surface the usually hidden role of politics in determining the content of law.”¹¹⁵

If Tushnet is correct, as I believe he is, then the law and lawlessness of Guantánamo are properly understood as the politics of the moment. The military commissions provide ample evidence that this is the case.

The military commissions seemingly are a mathematical proof of the central theorems of Critical Legal Studies: law transparently manufactured by, and covering for, politics; legal process intended to meet political goals; a radically indeterminate system based upon infinitely manipulable classifications; and seemingly neutral principles easily deployed by politicians in service of prevailing power structures.¹¹⁶

The central paradox of the commissions was exactly that addressed by Agamben: the propagation of lawlessness through the exercise of law. As I discussed previously, the commission system lacked rules for the most fundamental aspects of a trial, and what rules it had changed at whim. Because the system disavowed lineage to any extant common law system, it was left no other option than to make up the law as it went along. This “law” consisted of a steady flow of directives from the Secretary of Defense (“Military Commission Orders”), the Department of Defense General Counsel (“Military Commission Instructions,”), the Appointing Authority (“Appointing Authority Regulations” and “Appointing Authority Orders”), and the presiding officers (“Presiding Officer Memoranda”). We were instructed to refer to these various rules as “Commission Law,” an invention that by its terminology, and capitalization, sought to endow the commissions with the majesty, and legitimacy, of law.¹¹⁷ This grasp for the mantle of law complemented

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See generally PETER FITZPATRICK & ALAN HUNT EDS., *CRITICAL LEGAL STUDIES* (1987).

¹¹⁷ Our military co-counsel, Colonel Vokey, questioned the use of the term “Commission Law” by the presiding officer, with only comic effect:

DC [Defense Counsel]: By “Commission Law,” sir, are you referring to the Military Commission Orders, the?

Presiding Officer: Regulations, the Military Commission’s Instructions, the Presidential Military Order, the POMs [Presiding Officer Memoranda], and anything else that applies. We use Commission Law as a shorthand for trying to encapsulate all that.

DC: All right, sir, but the term, “Commission Law,” is not really law, is it?

Presiding Officer: Do you have a question, Colonel Vokey?

DC: Well the term, “Commission’s Law,” was that developed by yourself, or as a Presiding Officer?

the hastily decorated commission room and judicially costumed presiding officers.

The political goal of producing convictions was also on blatant display. When the commissions were first established, military defense lawyers were assigned for the sole purpose of convincing charged prisoners to plead guilty.¹¹⁸ Emails from within the prosecutor's office confirmed suspicions that the process would not permit fair trials. As one prosecutor wrote, "[W]hen I volunteered to assist with this process and was assigned to this office, I expected there would be a minimal effort to establish a fair process and diligently prepare cases against significant accused. Instead, I find a half-hearted and disorganized effort by a skeleton group of relatively inexperienced attorneys to prosecute fairly low-level accused in a process that appears to be rigged."¹¹⁹ The chief prosecutor (who subsequently retired) was accused of stating repeatedly to his office "that the military panel will be handpicked and will not acquit these detainees".¹²⁰

As noted previously, the absence of an applicable jurisprudence left the commission system of adjudication unbounded by principle, and enabled the easy deployment of seemingly neutral terms such as "rule of law" and "full and fair" to political ends. Moreover, the relevant legal

Presiding Officer: That's developed as a shorthand. I don't know where it came from originally. I believe it does appear somewhere in either the POMs or MCIs [Military Commission Instructions] or somewhere, but I am not sure.

DC: All right, sir----

Presiding Officer: But again, Colonel Vokey, it is a shorthand, it is not intended as a term of art or anything else. It is intended as a shorthand to capture the things that apply to this Commission.

DC: All right, sir. So for shorthand, we can use Military Commission's Regulations the same way?

Presiding Officer: I am not sure what you mean?

DC: Instead of calling it law, because you have to agree it is not law, right, sir?

Presiding Officer: No, I don't agree it is not law. If you want to call it, "regulations," then you call it regulations. I am going to refer to it as "Commission Law," and I would hope that you would be able to follow me. Let's move on, please.

United States v. Khadr, Draft Transcript of Proceedings at 437-39 (April 5, 2006) (on file with author).

¹¹⁸ See Marie Brenner, *Taking on Guantanamo*, VANITY FAIR, Mar. 2007, at 328 (quoting Judge Advocate General (JAG) defense attorney, Air Force Colonel Will Gunn as stating: "It was made clear to me that our access to [Guantanamo Bay] was contingent on our getting a guilty plea from [Salim] Hamdan"); Nat Hentoff, *Eroding Detainees Rights; Administration Shows Disregard for Prisoners' Attorneys*, WASH. TIMES, Oct. 30, 2006, at A19 ("Lt. Cmdr. Swift said he had been commanded by Pentagon superiors to negotiate a guilty plea by Hamdan in 2003"); see also Neil A. Lewis, *Military's Lawyers for Detainees put Tribunals on Trial*, N.Y. TIMES, May 4, 2004, at A1 (quoting military defense lawyers describing the tribunals as "fundamentally flawed" and "inherently unfair and rigged").

¹¹⁹ Email of Captain John Carr to Colonel Fred Borch, March 15, 2004 (copy on file with author).

¹²⁰ *Id.*

categories on which detention, interrogation, and criminal liability were to be based were themselves radically indeterminate. As a signal example, the definition of “enemy combatant” –the very basis for the detention, interrogation at Guantánamo—has shifted dramatically over time, depending upon the needs of the government in the particular political moment. Rather than a static legal category, it has proven fluid and fundamentally political. Similarly, the seemingly fixed meaning of “war crime,” well-established in international law, has been re-determined by the administration. Each of these examples is discussed in greater detail below.

1. The Indeterminacy of “Enemy Combatant”

The “enemy combatant” term emerged in popular parlance before the administration attempted to endow it with legal meaning. Media accounts used the term to describe suspected terrorists, and attributed it to *Ex Parte Quirin*.¹²¹ As Peter Jan Honigsberg has demonstrated, the administration has proffered at least six different definitions of the term, often times conflating distinct categories established in international humanitarian law.¹²² Rather than review each etymological turn, I seek here to highlight three competing definitions, each of which emerged to meet the political demands of the particular moment.

International humanitarian law distinguishes between lawful and unlawful belligerents, where lawfulness entitles the belligerent to POW status upon capture, and to immunity from prosecution under domestic law for taking up arms.¹²³ Both lawful and unlawful combatants may be

¹²¹ See, e.g., David G. Savage, *Response to Terror; Special Military Court; Bush Order for Military Tribunals Gets Several Thumbs Down; Law: Experts say plan for terror suspects goes against international law and American standards*, L.A. TIMES, Nov. 15, 2001, at A1; William R. Slomanson, *Should We Try Bin Laden in Court?*, SAN DIEGO UNION-TRIBUNE, Nov. 7, 2001, at B9.

¹²² Petr Jan Honigsberg, *Chasing “Enemy Combatants,” and Circumventing International Law: A License for Sanctioned Abuse*, 12 UCLA J. INT’L. L. & FOREIGN AFF. 1, 46-70 (2007) (tracing the usage “enemy combatant”).

¹²³ See generally Knut Ipsen, *Combatants and Non-Combatants*, in *The Handbook of Humanitarian Law in Armed Conflicts* 65-68 (Deiter Fleck ed., 1995); Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1, 3-24 (Cambridge 2005). International Humanitarian Law (IHL) is based on a fundamental principle of distinction: all parties to an armed conflict must distinguish between combatants and civilians. By definition, a combatant’s status as a member of the armed forces of a party to an armed conflict vests the individual with a right to directly engage in hostilities provided those acts comport with other IHL provisions governing lawful targets and methods of attack. Thus, in addition to enjoying POW status, a legal presumption exists conferring immunity on lawful combatants for acts committed during periods of armed conflict, in effect, barring prosecution of such combatants for the “mere fact of fighting.” Ipsen, *Combatants and Non-Combatants*, at 68. In contrast, a civilian’s presumed status as a non-combatant confers on him immunity from attack. But where a civilian directly participates in hostilities, he generally forfeits this immunity and will be treated as an unlawful combatant. Because unlawful combatants lack the protective shield of POW status, if captured, an unlawful combatant can be subject to domestic prosecution under a state’s criminal law.

detained for the duration of hostilities.¹²⁴ The administration's use of "enemy combatant" at times conflates both categories,¹²⁵ and at other times seems to create a third.

The presidential order purporting to authorize the detention of individuals at Guantánamo provides one important definition of "enemy combatant".¹²⁶ It grants detention authority for any non- U.S. citizen whom the president determines there is reason to believe "(i) is or was a member of the organization known as Al Qaida, (ii) has engaged in, aided or abetted or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii)". Arguably, it is this class of people to whom the "enemy combatant" term was applied in the popular media. Thus, this iteration of the "enemy combatant" category is a creation of the executive, and requires nothing more than a unilateral, presidential determination that there was "reason to believe" an individual was connected, in any of a myriad of ways, to terrorist activity adverse to the United States.

As the government's enemy combatant regime was challenged in court, the definitions began to shift. In *Hamdi v. Rumsfeld*,¹²⁷ for example, the definition narrowed considerably. Yaser Hamdi was a U.S. citizen captured in Afghanistan, detained at Guantánamo, and then transferred to a military brig in South Carolina following discovery of his citizenship. When the Supreme Court considered the legality of his detention as an "enemy combatant," Justice O'Connor, writing for the Court, noted that "[t]here is some debate as to the proper scope of this term, and the Government has never provided any court with the full criteria that it uses in classifying individuals as such,"¹²⁸ thus conceding the ambiguity of the government's definition. The Court went on to consider Hamdi's case in light of the specific definition proffered by the

¹²⁴ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (noting that the capture and detention of combatants—whether lawful or unlawful—to prevent their return to the battlefield is recognized by "universal agreement and practice" as "important incidents of war").

¹²⁵ See, e.g., Letter from William J. Haynes II, Gen. Counsel of the Dep't of Def., to Carl Levin, U.S. Senator (Nov. 26, 2002), available at <http://www.nimj.com/documents/dodletter.pdf> ("An enemy combatant is an individual who, under the laws and customs of war, may be detained for the duration of an armed conflict").

¹²⁶ Presidential Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001). The presidential military order did not itself use the term "enemy combatant," but soon after its promulgation, administration officials began using "enemy combatant" as a shorthand for those subject to the order. The order also requires that it be in the interest of the United States that such individual be subject to the order, though this adds no substantive requirement to the "enemy combatant" definition. *Id.* at § 2(a)(2).

¹²⁷ 542 U.S. 507 (2004).

¹²⁸ *Id.* at 516.

government, namely, an individual who “‘was part of or supporting forces hostile to the United States or coalition partners’ in Afghanistan and who ‘engaged in an armed conflict against the United States.’”¹²⁹ Suddenly, the requirements of the Presidential Military Order of either membership in Al Qaeda or participation in terrorism have dropped away, and conveniently so: the U.S. alleged that Hamdi had affiliated with the Taliban, and not Al Qaeda, and alleged that he was with a Taliban unit that was engaged in battle against the Northern Alliance, not acts of international terrorism.¹³⁰ Accepting the government’s new definition, the Court held that although Hamdi’s detention was authorized by Congress, due process required “a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.”¹³¹

In *Rasul v. Bush*,¹³² heard the same term as *Hamdi*, the government proffered the same “enemy combatant” definition as in *Hamdi*, only to change it again once the two cases were decided. Whereas *Hamdi* concerned the legality of the detention of a U.S. citizen as an “enemy combatant,” *Rasul* involved noncitizen prisoners at Guantánamo Bay who sought to challenge the legality of their detention in U.S. courts. The *Rasul* decision did not address the substantive definition of “enemy combatant,” and instead limited its inquiry to whether the federal habeas statute granted the courts jurisdiction over the Guantánamo prisoners’ cases, and concluded that it did.¹³³ The import of these two cases was immediately apparent: even when Congress had granted detention authority over “enemy combatants,” that detention could be challenged in federal court, and at least where U.S. citizens were involved, the fundamental notice and hearing requirements of due process attached. Thus, the Supreme Court seemed to set the stage for meaningful federal court inquiry into the government’s “enemy combatant” definition.

In an effort to avoid such scrutiny, the government hastily constructed a process it termed the Combatant Status Review Tribunal (“CSRT”),¹³⁴ which provided rudimentary and incomplete notice to each prisoner of the basis of his detention, as well as a flawed and perfunctory hearing process in which to contest that basis.¹³⁵ But in inventing a

¹²⁹ *Id.* (citing Brief for Respondents). The government’s brief did not explicitly limit its “enemy combatant” definition to Afghanistan, though the Court read this limitation in. See Brief for Respondents, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696).

¹³⁰ *Hamdi*, 542 U.S. at 510.

¹³¹ *Id.* at 509.

¹³² 542 U.S. 466 (2004).

¹³³ *Id.* at 483-484.

¹³⁴ The *Hamdi* and *Rasul* decisions were handed down on June 30, 2004. The CSRT procedure was created by a Department of Defense memorandum issued on July 7, 2004 by then-Deputy Secretary of Defense Paul Wolfowitz. See Order Establishing Combatant Status Review Tribunal, Deputy Secretary of Defense (July 7, 2004) (“Wolfowitz Memo”), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.

¹³⁵ See generally The Guantanamo Detainees’ Second Supplemental Brief Addressing the Effect of the Detainee Treatment Act of 2005 on this Court’s Jurisdiction Over the Pending

process, the government also invented a new substantive definition of “enemy combatant,” this time defining it as “an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.”¹³⁶ Once more, the definition shifted, this time expanding massively beyond the battlefield of Afghanistan, and expanding well beyond actual engagement in armed conflict against the United States.¹³⁷

Appeals 38-40, *Al Odah v. United States*, 05-5064 (D.C. Cir.) (2006 WL 679965) (documenting how CSRTs deprived prisoners access to counsel, permitted the use of evidence obtained through torture, and barred any meaningful opportunity by prisoners to contest the charges brought against them); *In re Guantanamo Detainees*, 355 F.Supp.2d 443, 468 (D.D.C. 2005) (“[T]he CSRT failed to provide any detainee with sufficient notice of the factual basis for which he is being detained and with a fair opportunity to rebut the government’s evidence supporting the determination that he is an ‘enemy combatant.’”); Kristine A. Huskey, *Standards and Procedures for Classifying “Enemy Combatants”: Congress, What Have You Done?*, 43 TEX. INT’L L.J. 41, 46-50 (2007).

¹³⁶ Wolfowitz Memo, *supra* note ___, at ¶ a.

¹³⁷ Arguably, the “enemy combatant” definition has been modified again since the CSRT was created. When Congress enacted the Military Commissions Act (MCA), no generalized definition of “enemy combatant” was provided. Instead Congress distinguished for purposes of jurisdiction under the MCA a “lawful enemy combatant” from an “unlawful enemy combatant,” only the latter of which could be tried under the MCA. *See* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. § 948-50; 18 U.S.C. § 2441; and 28 U.S.C. § 2241(c)-(e)) (2006), at § 948d(a) (“[M]ilitary commissions under this chapter shall have jurisdiction . . . [over] alien unlawful enemy combatant[s].”). This distinction between “lawful” or “unlawful” complicated the existing CSRT definition. Pursuant to the Wolfowitz Memo of July 7, 2004, a CSRT was tasked solely with determining if a prisoner was an “enemy combatant,” defined therein as one “who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.” Wolfowitz Memo, *supra* note ___, at ¶ a. No determination was made of whether a prisoner’s combatancy was “lawful” or “unlawful.”

Further complicating matters, the MCA codified two separate substantive (and arguably contradictory) definitions of “unlawful enemy combatant”: (1) “a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces”); and (2) “a person who, before, on, or after the date of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal [CSRT] or another competent tribunal established under the authority of the President or the Secretary of Defense.” 10 U.S.C. § 948(a)(1). Yet because, pursuant to the Wolfowitz Memo, a CSRT lacked the authority to distinguish between a “lawful enemy combatant” and an “unlawful enemy combatant,” the second definition offered by the MCA is facially invalid. Anyone determined to be an “enemy combatant” by a CSRT would thus fail the jurisdictional threshold—an “unlawful enemy combatant”—required for trial under the MCA.

The practical effect of this glaring inconsistency was addressed directly by the presiding judges in the military commission trials of Salim Hamdan and Omar Khadr. On June 4, 2007, the military judges in both cases issued identical rulings dismissing claims against Khadr and Hamdan on grounds the military commissions lacked jurisdiction because neither Hamdan nor Khadr were properly determined to be “unlawful enemy combatants” under the MCA definition, but only “enemy combatants” under the CSRT definition. *United States v.*

It is difficult to see the CSRT definition as other than a bill of attainder-style categorization, as it was invented after the individuals whose detention the government sought to justify were already in custody. Unlike Yaser Hamdi, who looked much like a traditional combatant found on the battlefield in Afghanistan, the CSRT definition had to contend with, and rationalize, the detentions of individuals at Guantánamo who had been picked up in places as remote from the battlefield as Gambia, Zambia, and Bosnia.¹³⁸ Similarly, whereas the *Hamdi* definition of “enemy combatant” served the government’s needs when the case at hand was one of an individual caught with a Taliban

Hamdan, Decision and Order—Motion to Dismiss for Lack of Jurisdiction, June 7, 2007, available at <http://www.scotusblog.com/movabletype/archives/Hamdan%20order%206-4-07.pdf>; United States v. Khadr, Order on Jurisdiction, June 4, 2007, available at <http://www.scotusblog.com/movabletype/archives/Brownback6-4-07.pdf>. The Administration filed a motion to reconsider in the *Khadr* case but the decision was affirmed in a considerably longer decision explaining in full the inconsistencies between the MCA and CSRT definitions. United States v. Khadr, Disposition of Prosecution Motion for Reconsideration P 001, June 29, 2007, available at http://www.scotusblog.com/movabletype/archives/2007/06/court_1.html. In response, on July 4, 2007 the Administration filed an interlocutory appeal to the newly created Court of Military Commission Review arguing the CSRT’s determination that Khadr was an “enemy combatant” encompassed the MCA’s “unlawful enemy combatant” definition sufficient to establish the military commission’s jurisdiction over Khadr’s case. Brief on Behalf of Appellant, United States v. Khadr, CMCR No. 07-001 (filed July 4, 2007), available at <http://www.scotusblog.com/movabletype/archives/US%20brief%20re%20Khadr%20at%20MCR.pdf>. In its first ever decision, the Court of Military Commission Review held that while military commissions created under the MCA only had jurisdiction over “unlawful enemy combatants”—thus confirming the earlier decision that a CSRT determination of “enemy combatant” status was insufficient to establish jurisdiction—military judges presiding over military commissions can independently determine whether a prisoner is an “unlawful enemy combatant.” United States v. Khadr, CMCR No. 07-001, Sept. 24, 2007, available at <http://www.scotusblog.com/movabletype/archives/CMCR%20ruling%209-24-07.pdf>. Khadr’s case was thus allowed to proceed to determine whether Khadr was in fact an “unlawful enemy combatant.” The court did however reject the Administration’s claim that there was no significant legal difference between an “enemy combatant,” as defined by a CSRT, and an “unlawful enemy combatant.” Citing to the Wolfowitz Memo, the court noted that a CSRT determination of “enemy combatant” status functioned only to justify the continued detention of a prisoner during ongoing hostilities; it bore no legal relevance to establish criminal liability under the Law of War. Prosecution of prisoners thus requires an independent assessment of whether their “enemy combatant” status was “lawful” or “unlawful.” The court justified this interpretation by clarifying the distinction between the definition of “enemy combatant” and “unlawful enemy combatant.” For the former, the CSRT needed only to establish a prisoner was “part of” Taliban or al Qaeda forces to classify him as an “enemy combatant,” participation in or support of hostilities was unnecessary. Yet under the MCA, a prisoner must have “engaged in” or “purposefully and materially supported” hostilities to qualify as an “unlawful enemy combatant” subject to prosecution by military commission. The court concluded that this narrower definition of “unlawful enemy combatant” justified a new status determination by the military commission before Khadr could be tried for violations of the Law of War. *Id.* at 16. Based on this decision by the Court of Military Commission Review, Hamdan’s trial was allowed to proceed and both Hamdan and Khadr’s cases are currently scheduled for trial for Spring, 2008.

¹³⁸ See, e.g., *El-Banna v. Bush*, 04-CV-1144RWR (D.D.C. 2004) (seeking a writ habeas corpus for Jamil El-Banna and Bisher Al-Rawi, two prisoners captured in Gambia, as well as Martin Mubanga, a prisoner captured in Zambia); *Boumediene v. Bush*, 04-CV-1166RJL (D.D.C. 2004) (seeking a writ of habeas corpus for Belkacem Bensayah, a prisoner captured in Bosnia).

unit while engaged in armed conflict with a U.S. coalition partner (the Northern Alliance), the requirement of engagement in armed conflict was clearly inadequate to uphold the detentions of the alleged chauffeur for Osama Bin Laden,¹³⁹ or individuals alleged to be mere acquaintances of suspected Al Qaeda operatives.¹⁴⁰ The government's unfolding "war on terrorism" required an "enemy combatant" definition that was global in reach and extended beyond the ordinary indicia of combatancy.

The government readily conceded the breadth of its new "enemy combatant" definition, agreeing with a federal habeas judge that it would encompass a "little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities,' ... a person who teaches English to the son of an al Qaeda member, ... and a journalist who knows the location of Osama Bin Laden but refuses to disclose it to protect her source."¹⁴¹ Equally remarkable, the government has argued that each prisoner had already been determined to meet the CSRT definition of an "enemy combatant" through "multiple levels of review by officers of the Department of Defense,"¹⁴² despite the fact that the applicable definition was invented only after these reviews were to have been performed,¹⁴³ and indeed, conflicted with competing definitions being proffered by the government.

Interestingly, even the rudimentary CSRT proceedings concluded that some of the Guantánamo prisoners were not, in fact, "enemy combatants," further undermining the claim that they previously had been subject to multiple levels of review. But rather than state explicitly, and honestly, that these individuals were not "enemy combatants," the government insisted on referring to them as "no longer enemy combatants."¹⁴⁴ The "no longer enemy combatant" designation suggests that these individuals once were, even though such a factual determination seems never to have been made. This kind of wordplay, clever in an *Alice in Wonderland* sense ("How could I no longer be something I never was?"), was described by the prisoners' counsel as

¹³⁹ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2761 (2006).

¹⁴⁰ See *Kurnaz v. Bush*, 04-CV-1135ESH (D.D.C. 2004); *In re Guantanamo Detainees*, 355 F.Supp.2d at 470 (discussing how a CSRT found Murat Kurnaz to be an "enemy combatant" merely because he befriended an alleged suicide bomber at a mosque in Germany).

¹⁴¹ *In re Guantanamo Cases*, 355 F. Supp. 2d 443, 475 (D. D.C. 2005) (internal citations omitted), *vacated by Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted sub nom Al Odah v. U.S.*, 127 S. Ct. 3067 (U.S. June 29, 2007).

¹⁴² Order Establishing Combatant Status Review Tribunal, *supra* note ___, at ¶ a.

¹⁴³ It is questionable whether any such reviews ever were performed. In litigation challenging the CSRT determinations, the government resisted court orders to produce complete records of its "enemy combatant" determinations even for the CSRTs, much less reviews purported to have been performed beforehand. Yet in a decision rendered February 1, 2008, the United States Court of Appeals for the District of Columbia denied the Administration's petition for rehearing *en banc*, thus affirming an earlier panel decision ordering the government to produce classified evidence used for CSRT determinations of whether a prisoner was an "enemy combatant." *Bismullah v. Gates*, ___ F.3d ___ (C.A.D.C. 2008) (2008 WL 269001).

¹⁴⁴ See *Qassim v. Bush*, 382 F. Supp. 2d. 126, 127 (D.D.C. 2005).

Orwellian,¹⁴⁵ but the judge chose a more familiar characterization: he called it “Kafkaesque.”¹⁴⁶

2. *The Indeterminacy of “War Crime”*

Just as the executive branch has defined and re-defined “enemy combatant,” so, too has it attempted to re-determine the meaning of the term “war crime,” the legal predicate for criminal liability before a military commission. The Uniform Code of Military Justice authorizes the use of military commissions to try violations of the law of war, as well as other authorized offenses.¹⁴⁷ Prior to the enactment of the Military Commissions Act, neither the charges for crimes to be heard before commissions nor their elements were defined by Congress, but instead were provided by the Executive.¹⁴⁸ Moreover, none of the charges lodged against Omar and the other prisoners have ever been recognized as war crimes. For example, all ten prisoners initially put before commissions were charged with conspiracy, a charge that a four-member plurality of the Supreme Court in *Hamdan* concluded did not constitute a war crime.¹⁴⁹ In addition, the principal charge against Omar—“murder by an unprivileged belligerent”¹⁵⁰—has never been recognized as a war crime, either.

Enactment of the Military Commissions Act cured the defect of the commissions lacking congressional authorization, but merely implicated Congress in the re-definition of “war crime.” The MCA includes a catalogue of charges deemed triable by military commission, along with their elements, including conspiracy.¹⁵¹ In this way, it resembles an ordinary criminal statute. But the Act includes a curious pronouncement: “The provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission.”¹⁵² This statement is proven demonstrably false by Congress’s stubborn inclusion of conspiracy as an offense “traditionally triable by military commissions,” despite the contrary historical record.¹⁵³

¹⁴⁵ *Id.* at 127 n. 3

¹⁴⁶ *Qassim v. Bush*, 407 F. Supp. 2d 198,200 (D.D.C.2005).

¹⁴⁷ Order Establishing Combatant Status Review Tribunal, *supra* note __, at ¶ a.

¹⁴⁸ See Military Commission Instruction No. 2, 32 C.F.R. § 11.6 (2005).

¹⁴⁹ *Hamdan v. Rumsfeld*, 126 S. Ct. at 2780 (Stevens, J.). Justice Kennedy did not reach this issue. *Id.* at 2809 (Kennedy, J.).

¹⁵⁰ United States v. Khadr, Charges: Conspiracy; Murder by an Unprivileged Belligerent; Attempted Murder by an Unprivileged Belligerent; Aiding the Enemy, *available at* <http://www.defenselink.mil/news/Nov2005/d20051104khadr.pdf> (last visited Feb. 3, 2008).

¹⁵¹ 10 U.S.C. § 950v (2006).

¹⁵² 10 U.S.C. § 950p (2006).

¹⁵³ See *Hamdan*, 126 S.Ct. at 2780-2786 (plurality opinion).

Once more, legal categories prove malleable rather than established, fluid rather than fixed, and threaten to become the playthings of lawyers and judges and politicians rather than the expressions of liberal principle. The congressional statement of purpose attempts to inoculate against an *ex post facto* claim, but can only avoid this charge of after-the-fact criminalization by altering our understanding of the before-the-fact historical record.

With specific regard to Omar's case, Congress engaged in the kind of linguistic legerdemain that further undermines faith in the integrity of the Guantánamo legal regime. At the time of the MCA's enactment, Omar was the only prisoner to be charged with "murder by an unprivileged belligerent."¹⁵⁴ Like conspiracy, this charge was unknown to the law of war, and in this sense was an invention of the Executive. Indeed, the charge turned the law of war on its head by making the status of the offender, rather than that of the victim, determinative of the existence of a war crime. Whereas an unprivileged combatant could be charged for murder under domestic law, he could only be charged with a war crime if the victim was a protected person, such as medical or religious personnel, civilians not taking active part in hostilities, or military personnel placed *hors de combat* (for example, by detention or injury).¹⁵⁵

The MCA appears to acknowledge the legal infirmity of the "murder by an unprivileged charge," as evident from its omission from the statute's catalogue of charges. Instead, the MCA includes the charge of "murder in violation of the law of war." An earlier section of the statute includes the well-recognized war crime offense of "murder of a protected person,"¹⁵⁶ but "murder in violation of the law of war" appears to contemplate some other class of murder that also is a war crime. No such offense exists. The very purpose of this section of the statute is to codify law of war offenses, but by incorporating "violation of the law of

¹⁵⁴ Another prisoner, David Hicks, was charged with "attempted murder by an unprivileged belligerent," but that charge was subsequently dropped as part of a plea agreement that led to his release in March 2007. Spencer S. Hsu, *Guantanamo Detainee Returns to Australia; Hicks to Serve Out Sentence Near Home*, WASHINGTON POST, May 21, 2007, at A10; U.S. Dep't of Defense, News Release No. 614-07, *Detainee Transfer Announced*, May 19, 2007, available at <http://www.defenselink.mil/releases/release.aspx?releaseid=10898>.

¹⁵⁵ See Rome Statute of the International Criminal Court art. 8(2), July 17, 1998, 2187 U.N.T.S. 90 (omitting any reference to an individual's status—whether lawful or unlawful—as determinative to the definition of a "war crime" within the jurisdiction of the International Criminal Court); YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 233 (Cambridge 2004) (arguing that a combatant's unlawful status does not, alone, constitute a war crime; rather, only where an unlawful combatant commits a serious breach of the International Humanitarian Law—e.g., murder of a protected person—can he be prosecuted under international law).

¹⁵⁶ 10 U.S.C. § 950v(a)(2) (2006). The MCA properly defines a protected person to include "any person entitled to protection under one or more of the Geneva Conventions, including— (A) civilians not taking an active part in hostilities; (B) military personnel placed hors de combat by sickness, wounds, or detention; and (C) military medical or religious personnel." *Id.*

war” into the definition of the offense, the MCA renders the definition circular. It is this opaque offense with which Omar was charged following enactment of the MCA.¹⁵⁷

For Omar, and I suspect for many of the other prisoners, it was difficult to accept that he would ever get a fair trial before the commission. His legal consciousness¹⁵⁸ was of law’s manipulability and its cover for political power. His experience, both before and during (and after) the commission demonstrated that at Guantánamo law was everywhere¹⁵⁹ and nowhere at the same time. As for his lawyers, we were not blind to the overwhelming politics of the process. And yet, in this rights-free environment, we elected to pursue a primarily rights-based strategy, not merely in federal habeas proceedings, but in the commission at Guantánamo as well. The question is, why?

III. ARGUING RIGHTS IN A RIGHTS-FREE ZONE: TACTICS, STRATEGIES, AND THEORIES

As I have discussed thus far, we believed the commission to be a purely political apparatus, devoid of legal legitimacy, and yet, rather than boycott the proceedings, we participated in them. What is more, despite our keen awareness that the system was built upon a rights-free edifice, we insisted on making rights-based arguments in the commission. Thus, we argued that the Constitution, and in particular, Fifth Amendment due process protections, extended to Omar, as did substantive and procedural protections of the Geneva Conventions¹⁶⁰; we argued that Omar had rights as a child, under international treaty,¹⁶¹ as well as customary international law; and we argued that human rights law applied, and could not be displaced by international humanitarian law.¹⁶²

¹⁵⁷ United States v. Khadr, Charge Sheet, Apr. 4, 2007, available at <http://www.defenselink.mil/news/Apr2007/Khadreferral.pdf>.

¹⁵⁸ See David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 592 (1984) (defining legal consciousness as “all the ideas about the nature, function and operation of law held by anyone in society at a given time”); Austin Sarat, “...The Law Is All Over”: *Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUM. 343 (1990) (using legal consciousness as interchangeable with legal ideology).

¹⁵⁹ See Sarat, *supra* note 81, at 343 (quoting a man on public assistance as saying, “For me the law is all over. I am caught, you know; there is always some rule that I’m supposed to follow, some rule I don’t even know about that they say”).

¹⁶⁰ These arguments were made before the Supreme Court decided *Hamdan v. Rumsfeld*, in which it found the protections of Common Article 3 of the Geneva Conventions applicable to the prisoners. See *supra* notes ___-___ and accompanying text.

¹⁶¹ See Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 263, U.N. GAOR, 54th Sess., Annex I, U.N. Doc. A/RES/54/263 (May 25, 2000) (entered into force Feb. 12, 2002).

¹⁶² See Robert K. Goldman & Brian D. Tittmore, *Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian Law and Human Rights Law* at 33, American Society of International Law Task Force on Terrorism (December 2002), available at <http://www.asil.org/taskforce/goldman.pdf> (“That

Critical Legal Studies would counsel the futility of this rights-based strategy given the malleability of law and the contingency of its structures and definitions—on full display in the ever-shifting nature of such seemingly bedrock questions as who is an “enemy combatant” and what is a “war crime”—for so long as the political context in which rights reside can be redefined, so, too, can the rights themselves. Moreover, the danger of such a strategy is not merely futility, but complicity in the commission’s project of self-legitimation, a concern that haunted us throughout the process. Indeed, one of the most sobering events for me in the commissions came in the first session, in which I had made a lengthy legal argument. During a break, a presiding officer from another case thanked me for the quality of my presentation and said that I had elevated the process. Although I did not create it, I had helped to hold up the commission’s curtain of legitimacy.

The CLS critique argues that the indeterminacy of rights makes them not only unstable, but captive to political power. Whereas the Legal Realists posited that politics animate law, CLS scholars argue that politics both consumes and constructs law, deploying it as a cover for the operation of political power. Though I am sympathetic to this view, I still doggedly pursued a rights-based strategy on Omar’s behalf.

The question of why one might engage in rights-based litigation in as rights-starved an environment as Guantánamo involves tactical, strategic, and theoretical considerations.¹⁶³

A. Rights Tactics and Rights Strategies

The lawyer’s instinct, if not the human one, is to appeal to a higher authority when confronted with profound, seemingly irremediable injustice in the primary forum of contest. In the military commissions, that higher authority was a federal habeas court which, unlike the commission, stood independent of the Executive, and enjoyed a legitimacy to which the commission could only aspire. As a tactical matter, therefore, we sought in the commission proceedings to dramatize the irregularity of the commission, in contrast to the proceedings a criminal defendant could expect in a regular court—either a military court martial or federal district court. Rights were an effective discourse strategy for this project, for they provided instantly recognizable handles for the comparison: the right to see the evidence against you, the right to confront witnesses, the right to competent counsel were all so familiar within the American courtroom that their invocation in the

the United States must afford certain minimum human rights protections to unprivileged combatants who fall into its hands in the course of an international armed conflict is dictated by treaty and customary norms to which it is bound under international human rights and humanitarian law”).

¹⁶³ For a discussion of the distinction between tactics and strategy, see MICHEL DE CERTEAU, *THE PRACTICE OF EVERYDAY LIFE* (Steven Rendall trans., 1984).

commission—not just in principle but in the language of rights—would help to cast the commission as fatally deficient in the eyes of the habeas court when they reviewed the proceedings.

This approach recalls Rick Abel's observation that even though a reflection of power, law nonetheless can be a source of countervailing power as well, because state power is divided among the branches and therefore potentially heterogeneous.¹⁶⁴ Such heterogeneity creates opportunities for even non-state actors to wield power, strategically and interstitially, working the gaps and crevices within a complex state apparatus. Notably, recourse to the habeas court proved to be the most successful strategy in challenging the legitimacy of the military commissions; the *Hamdan* case, which invalidated the original military commission system at Guantánamo, was brought via a collateral habeas action.

As a corollary to Abel's theorem, our invocation of rights was designed not only to appeal to the judiciary, but to Congress, civil society actors, and the press. Rights may be an impoverished discourse, susceptible of manipulation and, even recognized, unable to execute themselves without political consent, but they are nonetheless a familiar and shared discourse, whose resonance carries across branches of government and across different segments of society. When we engaged in rights talk within the military commission, we knew that we were speaking to multiple audiences simultaneously—"playing to the gallery," as it is often pejoratively described—and we knew that the language of rights, as a metric of both correctness and fairness, was accessible to all.

As I have discussed previously, the structure of the commissions and their early conduct convinced us that our assertions of rights would almost always fail. But claiming the language of rights forced the government to disclaim it. Each time we argued that the Geneva Conventions compelled some protection for Omar, the government was forced to argue the inapplicability of the Geneva Conventions. So it was when we argued constitutional due process and international human rights claims. Our hope was to dramatize, through the cumulative governmental disclaiming of rights, what Omar understood intuitively: that Guantánamo was a rights-free zone.

The fact of divided government and diffuse power¹⁶⁵ does not, of course, compel the exercise of countervailing power. Just as our rights-based arguments were rejected in the commissions, fallen victims to the government's unswerving assertion that the prisoners lacked rights of any kind, so too could the courts, Congress, and the public reach the same conclusion. But the existence of multiple sources of power also

¹⁶⁴ Richard Abel, *Speaking Law to Power: Occasions for Cause Lawyering*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 69, 102-04 (Austin Sarat & Stuart Scheingold eds., 1998).

¹⁶⁵ See generally MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: VOLUME ONE* (Robert Hurley, trans., Vintage Books 1978).

permits different relationships between law and power. This is to say that the value of rights may vary across space and time. As a creation of the Executive housed within the cultural and command structures of the military, the commissions were institutionally situated far differently than the Article III habeas courts, and subject to different political pressures than congress. The appeal of rights, their narrative and jurisprudential meaning, can be expected to vary with the narrative frame of the audience. Thus, the repeated failure of rights-based arguments in the Commissions was not necessarily itself a failure, if competing arbiters of rights, in both the popular and legal imaginations, were to come to different conclusions.

In many ways, our rights-based strategy was focused less on U.S. institutions and more on Canada. This reflects a geopolitical view that Omar's continued detention, and his trial by military commission, are partially the function of Canadian acquiescence to American power. To date, Canada has not publicly criticized either Guantánamo or the trial by military commission of Omar. In contrast, other countries, most notably Great Britain, have rejected both the detention and trial by military commission of their citizens, stating publicly the unacceptability of these practices, and expending political capital in order to end them. As a result of these efforts, all Britons have been released from Guantánamo, suggesting that international political arrangements circumscribe Omar's legal predicament at Guantánamo. The political domain, then, includes not only the U.S., and not only U.S.-Canada relations, but the domestic politics of Canada.

Thus, even if rights-based arguments fall flat in the U.S., Omar's circumstances might be improved if rights-based arguments were to alter political discourse in Canada. This strategy could be viewed as reducing rights to politics, and deploying rights as mere political devices. But the existence of multiple sources of power also permits different relationships between law and power. This is to say that the value of rights may vary across space and time. We know that rights discourse, in the current historical moment, has more purchase in Canada than in the United States. A rights-based strategy therefore feeds into what is essentially ongoing interlocutory review of Omar's case by the Canadian government (admittedly, governed by its own political process, but a different politics), which is in turned informed by broader Canadian public opinion.

And so our rights-based strategy in the military commissions attempted to negotiate the uneasy relationship between law and politics, to view rights as less than self-defining but more than "nonsense on stilts."¹⁶⁶ The strategy sought to subject the "law" of the commissions to the scrutiny of a range of political actors. In this sense, our strategy did

¹⁶⁶ See Jeremy Bentham, *A Critical Examination of the Declaration of Rights*, in BENTHAM'S POLITICAL THOUGHT 257, 269 (Bhikhu Parekh ed., 1973).

not depend on victory in the commission itself. Indeed, the goal of demonstrating the legal emptiness of the commissions was better served by our arguments—for due process, for rules of evidence, for prohibitions on coerced testimony—failing in them. We used the commission, and its rejection of our rights-based strategy, for its political and educational value, echoing Jules Lobel’s call for deliberate use of courts as forums for protest.¹⁶⁷ In so doing, we “drag[ged] the courtroom into politics.”¹⁶⁸

Clearly, not all of our tactics worked, and certainly they did not produce our ultimate goal of returning Omar to Canada. Moreover, even these tactics came at a cost of partially legitimizing the commission as a site of legal contest. Nonetheless, I believe the strategic potential of rights-based argument was sufficient to make our approach defensible. I must admit, however, that it was not all clear-eyed strategy that led me to the rights-based approach, for even before I had thought through the strategic potential, I was inclined toward arguing rights.

This rights tropism is the logical and predictable consequence of our professional training as lawyers. Indeed, it is an occupational hazard. I do not mean to disclaim rights wholesale, but at the same time, I am mindful, and wary, of rights as the first recourse for helping our clients achieve their goals.¹⁶⁹ Rights become the faith story for many of us, holding out hope for a gradualist, liberal perfection of the injustice in the world.

B. Rights Theories

That a language of rights may gain us strategic advantage is helpful, but does not itself tell us why this is the case. Are rights merely a vocabulary for considering and structuring power contests as between individuals and as between individuals and the state, or do they operate at some other level?

1. Rights as Recognition

In one of our first hearings in the military commissions, I filed a motion asking the commission to find that the Chief Prosecutor had committed prosecutorial misconduct. On the eve of the commencement of Omar’s commission proceedings, the Department of Defense held a press conference at Guantánamo, at which both the prosecution and the defense were invited to speak. I spoke first, and decried the lack of rules of the commission, the admissibility of evidence obtained through

¹⁶⁷ Jules Lobel, *Courts as Forums for Protest*, 52 U.C.L.A. L. REV. 477 (2004-05).

¹⁶⁸ *Id.* at 483.

¹⁶⁹ Gabel & Harris

torture as well as cruel, inhuman and degrading treatment,¹⁷⁰ and the fact that the government had chosen to prosecute a child for alleged war crimes. I repeated allegations that Omar had been tortured, and called the commission a “sham.”

The Chief Prosecutor spoke after me, and as I sat at the back of the auditorium listening, he referred to Omar as “a murderer” and “a terrorist,” expressed his personal belief that Omar was guilty of the charges against him, and expressed his belief that Omar would have preferred to spend the recently passed Muslim holiday of *Eid* with Osama Bin Laden than at Guantánamo. Not surprisingly, his comments were broadcast widely by the international press gathered to cover the military commissions.

The following day, I argued that the Chief Prosecutor had violated his ethical obligations as a prosecutor, thereby committing prosecutorial misconduct. In particular, I argued that his comments contravened the rules governing extrajudicial pretrial statements.¹⁷¹ In its opposition, the prosecutor argued that I had opened the door to the offending statements by claiming that Omar had been tortured and that the commission was a sham. In oral argument, the commission’s presiding officer expressed his distaste for the “torture” and “sham” comments, and expressed an inclination to hold the prosecution and defense to the same standard with respect to extrajudicial statements. After a lengthy argument in which I parsed the relevant ethical rules and their comments and reviewed the leading cases, I arrived at a moment of exasperation. My doctrinal analysis had failed to persuade the presiding officer that the rules themselves apply a higher standard to prosecutors because of the power disparity inherent in prosecution. He likewise appeared to reject my argument that just as the power to prosecute strengthens the hand of the prosecutor, so does the weight of an indictment often compel the defense to speak publicly, and aggressively, on behalf of his client. I had exhausted the caselaw—which, I believe, stood clearly on our side—to no avail.

The argument had shifted, from the prosecution defending its clearly prejudicial comments about Omar, to me defending the right to assert publicly Omar’s credible claims of torture, and by implication, his right not to be tortured. And it was in this moment of exasperation and exhaustion that I came to a deeper understanding of rights and the work that they do. Abandoning doctrine, I argued the absolute necessity of my being able to speak publicly and without recrimination of Omar’s torture, for the simple reason that he was not able to do so himself. I rehearsed the total control that the government had over Omar, noting, “the state, the government, has had sole custody of my client for three and-a-half years, has had absolute control over his physical body, has

¹⁷⁰ Explain rule change; DTA.

¹⁷¹ Cites

had absolute control over to whom he's able to speak, has had absolute control over whether he has representation [sic] to a lawyer for the first two years he was here, has had absolute control over his knowledge of the outside world."¹⁷² I went on for some time longer, not quite sure how or where to land this argument. Finally, I blurted, "[H]e hasn't had available to him the opportunity to speak, the opportunity to say anything. He could not even give his name, raise his hand and say, 'I am here.'"¹⁷³ Though the transcript does not reflect it, I remember pausing here, feeling dizzy, and wondering, as the presiding officer later would,¹⁷⁴ what this had to do with anything. We lost the motion.

Only later did I come to understand that by claiming rights, we were demanding recognition—raising one's hand, not waiting to be called on before answering, "I am here." The government had sought to remove Omar and the other prisoners not only from the ambit of law, but from the world. They chose Guantánamo because it was remote, then cloaked it in darkness—refusing to disclose the names or identities of those there,¹⁷⁵ refusing access to the outside world. Legal erasure enabled physical erasure. In this context, rights were not just notional, they were existential.

Martha Minow similarly has noted that "[t]he language of rights voices an individual's desire to be recognized in tones that demand recognition."¹⁷⁶ For Minow, the claim to rights is a bid to be heard, a hailing device that "initiates a form of communal dialogue."¹⁷⁷ Moreover, by turning the question from one of speaker to one of audience, she identifies rights claims as an inherently communitarian project. Although we often think of rights in individualistic terms, Minow argues persuasively that rights claims always must be made to someone—a community—and that by making the claim, the claimant implicates herself in the community.¹⁷⁸ The result is not necessarily substantive equality, but instead what Minow terms "an equality of attention."¹⁷⁹ She writes:

The rights tradition in this country sustains the call that makes those in power at least listen. Rights—as words and as forms—structure attention even for the claimant who is much less powerful than the authorities, and for individuals and groups treated throughout the community as less than equal. The interpretive approach

¹⁷² Transcript

¹⁷³ Transcript; errata sheet.

¹⁷⁴ Transcript

¹⁷⁵ Cite to AP FOIA litigation.

¹⁷⁶ Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L. J. 1860, 1880 (1986-87).

¹⁷⁷ *Id.* at 1875.

¹⁷⁸ *Id.* at ___.

¹⁷⁹ *Id.* at ___.

construes a claim of right, made before a judge, as a plea for recognition of membership in a community shared by applicant and judge, much as reader and author share the same text.¹⁸⁰

Rights, then, are intertextual, and while litigant and adjudicator may not hold equal interpretive power, they are bound by a shared interpretive project.¹⁸¹

Minow's insight reminds us that when Omar attempts to proclaim (through his lawyers or otherwise), "I am here," the ambition is to proclaim it *to* somebody, and in so doing, to insist upon his place in the community. Minow's claim is not that rights assertion creates community, but that it *reconfirms* it.¹⁸² Here, then, is a limiting principle to rights claims: they cannot create community where community does not already exist. Put another way, the ability of the rights claimant to gain even the "equality of attention" of which Minow writes requires a baseline of consent *of* the community that the claimant belongs *to* the community. The return to the realm of belonging requires the community's consent to admission.

Here, then, is the limiting principle of rights claims at Guantánamo: the community did not admit of the prisoners' membership. To the contrary, it sought to cast the prisoners both physically and metaphysically as far away as possible.

Minow's conception of rights and community is consistent with Hannah Arendt's notion of citizenship. Linda Bosniak has incisively mapped the multiple dimensions that citizenship can occupy,¹⁸³ but for Arendt, political citizenship—membership in the polity—was fundamental. She defined citizenship as "the right to have rights,"¹⁸⁴ by which she meant that one could not gain the benefit of first-order rights, such as a right against deprivation of life or liberty, if one was not, *a priori*, deemed a member of the political community. Arendt wrote with regard to statelessness. The extraordinary violence done to Jews during World War II, she argued, was possible only through political dispossession. Once Jews were removed from any national polity, they lost that *a priori* right to have and claim rights. The consent to Jewish membership in the polity having been revoked, so, too, was the Jews' ability to claim rights that flow from membership in a polity. For Arendt, and for Minow, rights presuppose politics, and not the other way around. It is this critical insight that proves fatal to Omar and the other prisoners at Guantánamo.

¹⁸⁰ *Id.* at 1879-80.

¹⁸¹ Cite to Cover.

¹⁸² Minow, *supra* note __, at, 1873.

¹⁸³ See LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* (2006).

¹⁸⁴ ARENDT, *supra* note __, at 376.

What we see at Guantánamo is the inverse of Arendt's formulation of citizenship: no right to have rights. The legal debate at Guantánamo has almost never been about the content of the prisoners' rights, their contours or their meaning.¹⁸⁵ Rather, time and again, the fundamental question has been whether the prisoners have the right to have rights, or in Minow's formulation, whether they have the right to "the basic equality of consideration," or more simply, the right not only to speak ("I am here!"), but to be heard. This demand to be heard is exactly what the Guantánamo habeas litigation has been about since its inception in 2002, and it is what the government has resisted and rejected ever since.

2. Rights as Resistance

Habeas corpus, whose history has been explored exhaustively by others,¹⁸⁶ translates as "show me the body," and captures the communitarian, corporeal, and testimonial dimensions of not just rights claims, but citizenship. For a judge to order the government to produce a defendant for the purposes of considering the legality of his detention is to recognize the defendant's *a priori* membership in the community. To require that the defendant himself—his corpus—be produced, and not just reasons for his detention proffered, is to acknowledge the physicality and inescapably human experience of an otherwise abstract liberty interest. And to permit the defendant to not only attend his own hearing, but to speak on his own behalf, is to credit his standing as an actor and agent. Taken together, the communitarian, corporeal, and testimonial bespeak of a shared concern: human dignity.

It is this human dignity, the human as distinguished from the merely biological, with which Arendt was fundamentally concerned. For Arendt, rights are indispensable to humanity, a protective membrane poised between the state and the individual. What she saw, and Giorgio Agamben has recently revived,¹⁸⁷ is the idea that a confrontation between the state and the individual unmediated by rights reduces the

¹⁸⁵ *Hamdan* stands as an important exception, as there the Supreme Court determined that the prisoners were protected by Common Article 3 of the Geneva Conventions. [Cite]

¹⁸⁶ See, e.g., ROLLIN C. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY AND ON THE WRIT OF HABEAS CORPUS 143 (1858); Maxwell Cohen, *Habeas Corpus Cum Causa—The Emergence of the Modern Writ—II*, 18 CAN. B. REV. 172 (1940); WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980); Jonathan L. Hafetz, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509 (1998); Eric M. Freedman, *Milestones in Habeas Corpus*, 51 ALA. L. REV. 531 (2000); ERIC M. FREEDMAN, *HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY* (2001); Richard H. Fallon, Jr. & Danel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029 (2007); Jared Goldstein, *Habeas Without Rights*, 2007 WISC. L. REV. 1165; *Boumediene v. Bush* (06-1195), Brief of Legal Historians as *Amici Curae* in Support of Petitioners (August 2007), available at http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/06-1195_PetitionerAmCuLegalHist.pdf.

¹⁸⁷ GIORGIO AGAMBEN, *STATE OF EXCEPTION* (2005)

individual to bare life, or naked life,¹⁸⁸ which is life without humanity. It is this unmediated, unmitigated confrontation that both requires and enables the rendering of the human inhuman, animal, and savage.¹⁸⁹ It is this rights-free confrontation that permits torture—the hand of the state encumbered by no law other than the laws of physics. And it is this unmediated confrontation that permits the transmogrification of a child into a terrorist. For Arendt, to be a citizen is to be human, and to be anything else is merely, and barely, life.

The conception of rights as a bare protection interposed between the individual and state violence is intuitively familiar to the anti-death penalty advocate,¹⁹⁰ and to criminal defense lawyers generally. But the American legal embodiment of citizenship as rights is *Dred Scott*.¹⁹¹ While Scott was suing for his freedom from slavery, the case turned upon his citizenship. The Supreme Court found that Scott was not a “citizen of a State,” and therefore, under the jurisdictional limits of Article III of the Constitution, could not bring suit in federal court.¹⁹² Thus, the case removed Scott’s right even to be heard, by removing him from the polity. Like the Guantánamo prisoners, he had no right to have rights, and the negation of his political citizenship condemned him to the unmitigated violence of slavery.

The denial of habeas to Omar and the other prisoners similarly places them outside the communitarian consent that rights require. This expulsion from the polity authorizes the expulsion from humanity that torture represents. Here, we must remember that this expulsion was prefigured by the state iconography that placed the prisoners outside the realm of human understanding, and therefore of outside of humanity itself.¹⁹³

Stripped of the mediation of rights, Guantánamo reveals the essential and inescapable violence of law. Politics may dictate who is entitled to mediation, and what form it will take, but all are subject to the force of the state that, fundamentally, animates law. The demand for rights is a plea to blunt state force, and not to fundamentally reorganize the structure of power.

And so I return to the litigation strategy we adopted in Omar’s case. By invoking rights, we sought recognition of Omar in a polity of significance. In this way, rights hailed Omar into the community, though his admission would depend upon community consent.

¹⁸⁸ AGAMBEN, *supra* note __, at __.

¹⁸⁹ See Frédéric Mégret, *From ‘Savages’ to ‘Unlawful Combatants’: A Postcolonial Look at International Law’s ‘Other’*, in ANNE ORFORD, ED., *INTERNATIONAL LAW AND ITS “OTHERS”* (2006).

¹⁹⁰ See generally Austin Sarat & Nasser Hussain, *On Lawful Lawlessness: George Ryan, Executive Clemency, and the Rhetoric of Sparin Life*, 56 *STAN. L. REV.* 1307 (2003-04).

¹⁹¹ See *Scott v. Sandford*, 60 U.S. 393 (1856).

¹⁹² *Id.* at ____.

¹⁹³ See *supra* notes __-__ and accompanying text.

As Arendt's analysis suggests, the demand for recognition is tantamount to a claim to humanity. To be human—to rise above biological existence and to secure political and social life—requires rights. And yet, once more, this bid was subject to political forces. No amount of rights-claiming could overcome a political will to deny the prisoners' humanity.

In light of this, our strategy can be understood in a third way: rights as resistance. By this account, the rights claim sought not to escape the violence of the state, but to make that violence more costly to the state. To continue its brutal regime at Guantánamo, the government first would have to do violence to rights; to lay its hands on Omar again, the state would have to crash through his rights claims. Rather than avoid the state's confrontation with the individual, this strategy seeks to expose it. The onus then shifts from the prisoner trying to establish the existence of rights to the state establishing their non-existence, from the individual establishing harm done to the state justifying its own violence.

In some respects, this strategy has worked. So long as it could avoid any discussion of Guantánamo, as it long attempted to do, the government could enact violence without political cost. But rights claims force the government into discourse in which the violence of the state is put on display, and must be justified. The claim of rights itself may interpose a membrane between the state and the individual even if the right itself ultimately is found not to exist.

Put another way, our rights-based strategy could be understood as interposing a protective membrane between Omar and the state. In this way, we wanted to mediate, and moderate, the relationship between the state and Omar, with the hope of ultimately transforming the relationship from one of potentate and biological mass to one more recognizable as warden and prisoner. This was a form of resistance to Omar's mistreatment, which required the state to either stop its violence, or engage in it in the public forum of the court. This approach had some success, as the worst of the mistreatment of Omar and the other prisoners stopped once the government was forced to grapple with it in the daylight of federal court. And yet, Omar's other fundamental material conditions—indefinite detention, and trial before a substandard tribunal—remained the same, just as the fundamentals of Guantánamo have remained largely the same for the hundreds of other prisoners.

At the end of the day, I believe our approach has not proven more successful because the fundamental question of political citizenship has not been resolved in the prisoners' favor, and as I have argued, the success of even first-order rights depends upon *a priori* political membership.

When I have rehearsed these arguments for others, particularly lawyers, the response I have often gotten is that we did the best that we could, and that there was no alternative. To argue the existence of rights, and to do so forcefully, is to fulfill the professional obligation of a

lawyer. But this strikes me as too weak a conception of professional obligation. I believe that the rights-based approach has been worthy and necessary, but not merely because it was a form of last-resort lawyering, or what Scott Cummings has termed “constrained legalism.”¹⁹⁴ Rather, the rights-based lawyering has performed an essential role of mounting resistance to the unbridled exercise of state violence, essential not because there is nothing else to be done, but because of the opportunities and potentialities that resistance creates.

IV. RESISTANCE RECONSIDERED: THE HUNGER-STRIKING PRISONER AND THE RIGHTS-ASSERTING LAWYER

What is the value of resistance, and what is the benefit of conceiving as rights in a resistance frame? To answer this question, I first examine modes of resistance engaged in directly by the prisoners at Guantánamo—in particular, the hunger strike—and then suggest that these forms of resistance and the litigation undertaken by the prisoners’ lawyers are more similar than they might first seem. In so doing, I argue that the rights-based litigation in which the lawyers engaged may be nothing more—but importantly, nothing less—than a mode of resistance to state violence.

The lawyers representing the Guantánamo prisoners have done extraordinary work. Over a period of six years, they have filed hundreds of motions, secured Supreme Court victories in two cases, and obtained *certiorari* in a third. In addition, they have engaged in the kind of multi-dimensional advocacy that is frequently urged among social change theorists,¹⁹⁵ working assiduously with the media, lobbying foreign governments, engaging human rights institutions, and literally traveling the world—Germany, Bosnia, Yemen, Saudi Arabia, Afghanistan, Pakistan, and many other countries—to investigate and advocate their clients’ cases.¹⁹⁶ Despite these efforts, three realities remain: (1) not a

¹⁹⁴ See Scott L. Cummings, *Critical Legal Consciousness in Action*, 120 Harv. L. Rev. F. 39 (2007), <http://www.harvardlawreview.org/forum/issues/120/feb07/cummings.pdf> (describing “critical legalism” as “an approach to legal activism informed by a critical appreciation of law’s limits that seeks to exploit law’s opportunities to advance transformative goals).

¹⁹⁵ For a thick description and analysis of such multi-dimensional advocacy, see Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CAL. L. REV. 1879 (2007); see also Sameer M. Ashar, *Law Clinics and Mobilization*, __ CLIN. L. REV. __ (forthcoming 2008).

¹⁹⁶ In a particularly compelling example of such multi-dimensional advocacy, lawyers from the Federal Public Defenders office in Portland, Oregon, representing a Sudanese man named Adel Hamad, created an online video describing Hamad’s case, as well as the lawyers’ investigation in Afghanistan and elsewhere. The video describes Hamad’s claim of innocence, and then presents video testimony of former colleagues in Afghanistan corroborating his account. The video, posted on YouTube, has been viewed more than 100,000 times. See *Guantanamo Unclassified*, <http://youtube.com/watch?v=D5E3w7ME6Fs> (last visited March 1, 2008). The lawyers also created an accompanying website to facilitate broader advocacy on Hamad’s behalf. See *Project Hamad*, <http://projecthamad.org> (last

single prisoner has been released as the result of a court order; (2) not a single prisoner has had the opportunity to meaningfully contest the legality of his detention; and (3) perhaps most damning, the issue before the Supreme Court in 2008 is, functionally, the same as that brought before the Court in 2003: whether the prisoners can be heard in habeas corpus proceedings. It is no wonder, then, that in the eyes of many prisoners, nothing has changed.

It is against this backdrop of unsuccessful legal advocacy, of unending detention and the persistence of legal forms such as “enemy combatancy,” the CSRTs and the military commissions, that some prisoners have charted an alternative path of action and protest. This has taken many forms: throwing at guards a cocktail of feces, urine and saliva known as an “A bomb”¹⁹⁷; refusing to meet with their lawyers¹⁹⁸; boycotting or disrupting military commission proceedings (for those few who have them); suicides and suicide attempts¹⁹⁹; and hunger strikes.²⁰⁰ In each of these, the prisoners make use of what little they have in order to engage in resistance. Bereft of any weapon with which to strike their captors, they use the refuse of their own bodies, demonstrating once more that Guantánamo is about the body. Unable to make any meaningful decision about the time they eat, the time they exercise, or the time the lights come on or go off, they exercise their agency by refusing their lawyers; forced into irregular and unfair military commissions, they choose no process at all; pushed to the brink of bare life, they choose no life at all.

Despite the range of resistance activities that exist at Guantánamo, it is the hunger strike on which I want to focus, and which I want to

visited March 1, 2008). First taken to Guantánamo in 2003, Hamad was released and returned to Sudan in December 2007. See *Breaking News: Adel Hamad is Back in Sudan!*, <http://projecthamad.org/blog/2007/12/13/breaking-news-adel-hamad-is-back-in-sudan> (last visited March 1, 2008). Shortly before his release, a military lawyer involved in the review of prisoners’ cases at Guantánamo termed Hadad’s detention “unconscionable.” See Leonard Doyle, *Guantanamo military lawyer breaks ranks to condemn ‘unconscionable detention’*, THE INDEPENDENT, Oct. 27, 2007, <http://www.independent.co.uk/news/world/americas/guantanamo-military-lawyer-breaks-ranks-to-condemn-unconscionable-detention-398033.html> (last visited March 1, 2008).

¹⁹⁷ See Sgt. Jim Greenhill, *Outmoded Images of Detention Center, Mission Frustrate Guantanamo Troopers*, ARMED FORCES PRESS SERVICE, Dec. 1, 2006, at <http://www.defenselink.mil/news/NewsArticle.aspx?ID=2272>.

¹⁹⁸ See William Glaberson, *Many Detainees at Guantánamo Rebuff Lawyers*, N.Y. TIMES at A1, May 5, 2007.

¹⁹⁹ In June 2006, two Saudi prisoners and one Yemeni committed suicide. See James Risen & Tim Golden, *Saudi Arabia Identifies 2 Dead Guantánamo Detainees*, N.Y. TIMES, June 11, 2006. There have been more than forty suicide attempts at Guantánamo. *Id.* From August 18-26, 2003, twenty-three prisoners attempted suicides, which the government characterized as “self-injurious behavior.” Associated Press, *23 Detainees Attempted Suicide in Protest at Base, Military Says*, Jan. 25, 2005, available at <http://www.nytimes.com/2005/01/25/national/25gitmo.html?scp=43&sq=guantanamo+suicide&st=nyt>. This information was not disclosed until January 2005. *Id.*

²⁰⁰ See George J. Annas, *Hunger Strikes at Guantánamo: Medical Ethics and Human Rights in a “Legal Black Hole,”* 355 N. ENG. J. MED. 1377 (2007).

compare to the rights-based litigation advanced by the lawyers. Hunger strikes have been a persistent feature of Guantánamo since shortly after the interrogation and detention center opened. Some of the hunger strikes have been short-lived, while others have been broken by a government's policy of forced-feeding.²⁰¹ There have been as many as two hundred prisoners on hunger strike at any one time.²⁰² At the end of 2005, by which time the habeas litigation had seriously stalled, eighty-four prisoners were on hunger strike, leading the government to initiate its forced-feeding policy; by February 2006, only three prisoners remained on hunger strike.²⁰³

Sami al-Haj is one of the prisoners who remained on hunger strike. A Sudanese journalist for Al Jazeera, al-Haj has been at Guantánamo for six years, on various and shifting charges terrorist affiliations.²⁰⁴ On January 7 2007, the fifth anniversary of his imprisonment at Guantánamo, al-Haj began his hunger strike,²⁰⁵ which continues today, the significance of which can only be appreciated by examining how the government's forced-feeding regime works upon the prisoner's body²⁰⁶:

First, the prisoner refuses food and drink. Initially, officials try to persuade the prisoner otherwise, offering food and liquids. If those are refused, the prisoner is taken to a medical facility and fed intravenously. If the prisoner refuses I.V. fluids, as many have, or pulls the tube out, then the government places the prisoner is strapped into a restraint chair—it's manufacturer states, "It's like a padded cell on wheels!"²⁰⁷—and doctors force a feeding tube up the prisoner's nose, down the throat, and into the stomach.²⁰⁸ This is done twice a day, without the consent of the prisoner, even when the prisoner is competent to give such consent.²⁰⁹ As one of al-Haj's lawyers has described, "It's really a regime to make it as painful and difficult as possible," a characterization that the government rejects.²¹⁰ As another of his lawyers stated, "Have

²⁰¹ *Id.* at 1377.

²⁰² *Id.* at 1378.

²⁰³ *Id.* at 1377.

²⁰⁴ See Nicholas D. Kristof, *Sami's Shame, and Ours*, N.Y. TIMES, Oct. 17, 2006; Nicholas D. Kristof, *When We Torture*, N.Y. TIMES, Feb. 14, 2008; Joel Campagna, *The Enemy?*, CMTE. TO PROTECT JOURNALISTS, Oct. 3, 2006, at http://www.cpj.org/Briefings/2006/DA_fall_06/prisoner/prisoner.html.

²⁰⁵ See Memo from Clive Stafford-Smith Re. Sami al-Haj Hunger Strike Diary, March 4, 2007 ("Stafford-Smith Memo") (copy on file with author); Prisoner 345, <http://www.prisoner345.net>.

²⁰⁶ The following description is a composite drawn from a diary maintained by al-Haj, see Stafford-Smith Memo, *supra* note __, and a description of hunger strike protocols provided by the Commander of the U.S. Navy Hospital at Guantánamo. See Declaration of John S. Edmondson, M.D., *Al Joudi v. Bush*, 05-301 (D.D.C.), Oct. 19, 2005, available at http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimony-of-military-physicians/edmondson_affidavit.pdf.

²⁰⁷ See Emergency restraint chair, <http://www.restraintchair.com> (last visited March 1, 2008).

²⁰⁸ See Annas, *supra* note __, at 1377.

²⁰⁹ *Id.* at 1379.

²¹⁰ Kristof, *When We Torture*, *supra* note __ (quoting lawyer Zachary Katznelson).

you ever pushed a 43-inch tube up your nostril and down into your throat? Tonight, Sami will suffer that for the 479th time.”²¹¹

As in countless struggles before theirs,²¹² prisoners at Guantánamo have used hunger strikes for multiple purposes: building solidarity, demanding improved treatment, drawing attention to their plight.²¹³ Hunger strikes are typically described and understood as non-violent, and many of them are just that. But the persistence of a small number of Guantánamo prisoners in their hunger strikes despite the government’s forced-feeding regime suggests another motivation. While peaceful in their execution, the hunger strikes seem intended to provoke the enactment of violence upon the hunger striker.

For al Haj and others, who know that day after day, their continued hunger strike will bring only more painful forced feedings, their hunger strikes seem more than just a passive form of resistance. It is not that they would choose death rather than suffer further at Guantánamo. Indeed, al Haj has stated that he wish not to die, writing, “It is sad to be on this strike. I have no desire to die. I am suffering, hungry. The nights are very long and I cannot sleep. But I will continue the struggle until we get our rights. The strike is the only way that I can protest.”²¹⁴ Now that the forced feeding regime is in place, its brutality established and its inevitability clear, the actions of the hunger strikers are better understood as a more active form of resistance. By refusing food and water, al-Haj forces the unmediated confrontation between state power and the individual of which Arendt wrote. After more than a year of forced feeding, he knows that the government possesses the means and the will to keep him from dying. But each day, he chooses to make them engage in violence upon his body in order to achieve their goal. In this way, he refuses to be complicit in his own captivity. But he also refuses to be passive in the face of state power. He may not be able to stop it, but he is able to mount resistance, to make the exercise of state violence more costly to the state, to ensure that the cost for his captors’ degradation of him is their degradation of themselves. Hovering at the brink of annihilation—on the verge of bare life—he nonetheless resists total dehumanization by forcing his captors to brutalize him. And in this

²¹¹ Stafford-Smith, *America’s black hole*, *supra* note ____.

²¹² See generally DAVID BERESFORD, *TEN DEAD MEN: THE STORY OF THE 1981 IRISH HUNGER STRIKE* (1987) (discussing the hunger strike undertaken by Bobby Sands and others in Northern Ireland); SHARMANN APT RUSSELL, *HUNGER: AN UNNATURAL HISTORY* (2005) (tracing the role of hunger as a force for social change, and tracing its use by religious and political figures); MARK DOW, *AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS* (2004) (discussing use and efficacy of hunger strikes as a means of protest within American immigration prisons).

²¹³ Annas, *supra* note ____, at 1378-79; see generally Hernan Reyes, *INT’L CMTE. OF THE RED CROSS, MEDICAL AND ETHICAL ASPECTS OF HUNGER STRIKES IN CUSTODY AND THE ISSUE OF TORTURE*, Jan. 1998, available at <http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList302/F18AA3CE47E5A98BC1256B66005D6E29>.

²¹⁴ Stafford-Smith Memo, *supra* note ____, at 4.

way, through this agency and even righteousness, his decrepit body, that withering mass of vibrating flesh, is made and kept human again.

We can understand the radical hunger strike—radical not in its ideology, but in its peaceful invitation to violence—as a rejection of the rights-based strategy. Rather than making recourse to rights to intercede in the conflict between state and individual, the hunger striker seeks to force the confrontation. He understands that while rights may mediate the conflict to the individual's advantage, the mediation also serves the interests of the state, as it both legitimizes and masks the violence of state action. The hunger striker has made a strategic calculation that the invocation of rights at Guantánamo does more work for the government than it does for the prisoner, for it contributes to the perception that the prisoners are subject to legal process, that Guantánamo is governed by law, while the government's ability to maintain its detention regime is little disturbed. Thus, the hunger striker seeks to expose the inherent violence of the state by forcing upon the government an unmediated confrontation.

It is only logical that the site for confrontation between individual and the state is the body, for once the mediating force of rights is removed, that is all that is left. The inherent violence of the Law of Guantánamo manifests once more, inextricably bound up with the body. As Robert Cover wrote:

[T]he normative world-building which constitutes "Law" is never just a mental or spiritual act. A legal world is built only to the extent that there are commitments that place bodies on the line. The torture of the martyr is an extreme and repulsive form of the organized violence of institutions. It reminds us that the interpretive commitments of officials are realized, indeed, in the flesh. As long as that is so, the interpretive commitments of a community which resists official law must also be realized in the flesh, even if it be the flesh of its own adherents.²¹⁵

Thus, just as Law is realized in the body of the prisoner, so, too, is the prisoner's resistance.

The condition of the prisoners at Guantánamo, and the forms of their resistance, recall the insistently visceral, corporeal dimension of the work of Frantz Fanon, for whom the body was inescapably implicated in the counterviolence of the colonized.²¹⁶ Like the colonizer and the colonized, the struggle at Guantánamo is "between brute realities and

²¹⁵ Robert M. Cover, *Violence and the Word*, 96 YALE L. J. 1601 (1986).

²¹⁶ See FRANTZ FANON, *THE WRETCHED OF THE EARTH* 1-62 (Richard Philcox trans., Grove Press 2004)

resistant bodies.”²¹⁷ As Homi Bhaba suggests, this resurgence of the body is the consequence of radical dehumanization.²¹⁸ The colonized body is conditioned to violence, thereby gaining a “visceral intelligence dedicated to the survival of the body and spirit,”²¹⁹ or as Fanon wrote, “The muscles of the colonized are always tensed.”²²⁰

As lawyers, we sought to use rights to mediate the confrontation of state power and the individual, but prisoners like Sami al-Haj have chosen to use their bodies to force the unmediated confrontation. We thought that rights might transform the realities of Guantánamo, but to date they have not. Al-Haj thought that his protest might force his captors to return to their own humanity, but to date it has not. In this way, the rights-based litigation of the lawyers and the hunger strikes of the prisoners may be more alike than they are dissimilar. Far from being transformative, rights, in this context, might do something more modest: to serve as resistance, a way of not necessarily stopping the violence of the state, but of making it more costly. In this way, rights claims are a domesticated hunger strike, a rhetorical, genteel, abstracted and unmessy form of engaging state power. For the government to continue its practices at Guantánamo, it must crash through the protective membrane of rights that we assert, just as it must force the feeding tube down Sami al-Haj’s throat. Both strategies possess transformative potential, but each may have to settle for being resistance and nothing more, but also, nothing less.

My point is not to argue that the prisoners’ hunger strikes have been more effective than the lawyers’ right-based litigation, or vice versa. Rather, I see both strategies pushing in the same direction, and both arising from the same conceptual and material challenge of confronting the violence of state power. But there are at least three critical differences between these strategies. First, in the hunger strike, the prisoner expresses his own agency. Indeed, key to the forced confrontation with state power is that there is no intermediary. In this way, the lawyer is not merely absent, she is rejected. Second, for the government to crash through rights claims is a metaphysical violence; for it to force feed the prisoners is physical violence, flesh on flesh, the body and will of one human being struggling against the body and will of another. Finally, by rejecting rights and achieving no better, but also no worse result, the hunger striker demonstrates the weakness of rights at Guantánamo, as if to say, asserting rights is no more effective than throwing them away. And yet, paradoxically, if we accept that the end goal of the radical hunger striker is life and not death, humanity and not bare life, then the hunger strike is for rights, for it is right to have rights

²¹⁷ Homi Bhaba, *Introduction to FANON*, *supra* note __, at xxv.

²¹⁸ *Id.*

²¹⁹ *Id.* at ix.

²²⁰ FANON, *supra* note __, at 16.

which many of the prisoners understand to constitute their humanity. As al-Haj wrote in his diary, “I will continue the struggle until we get our rights.”²²¹

CONCLUSION

How does the body speak in extremis, how does the mind withstand?
--Homi Bhaba²²²

To be sure, there have been lawyers representing Guantánamo prisoners who understood from the beginning that the litigation would not be transformational, but was instead the exercise in resistance which I have described here. I was not one of them. Rather, my professionally induced rights tropism led me into the Guantánamo litigation in the immediate aftermath of the *Rasul* decision, when it seemed that the Supreme Court had settled the question of whether the prisoners had the right to have rights, believing that through an insistence upon rights, I could gain my client’s freedom. In reality, the threshold question of the prisoner’s humanity—the question of whether Omar was a child (and therefore human) or a terrorist (and therefore not)—was the only contest in which we have ever really engaged. The violence of the state, I learned (though I should have known all along), was not only reductive but relentless, and would not be so easily contained.

Much like the death penalty lawyer, our purpose was to intervene in the prevailing, post-September 11th social organization of violence. Understanding this intervention as a resistance practice rather than a transformative act yields three benefits. First, it enlarges the time frame for action and result, de-centering the transformative “moment”—the landmark case, the smoking gun document, the game-changing revelation—and instead commits the lawyer to a long-term oppositional stance, and a set of daily practices of objection and contravention.²²³ Second, the resistance frame contextualizes the individual client representation within the larger structures and operations of power, rejecting an atomistic view of lawyering or a diffuse engagement with the state and opting instead for direct confrontation with state violence. Lastly, the resistance frame can provide the lawyer a source of sustenance in her and her client’s protracted struggle. As in death penalty litigation, resistance is mounted not merely because of a felt need to “do something,” but because through tactical maneuver and strategic intervention, previously unavailable spaces can be opened, new realities can be created, and new opportunities for more meaningful intervention realized.

²²¹ Stafford-Smith Memo, *supra* note __, at 4.

²²² Bhaba, *Introduction to FANON*, *supra* note __, at xxxi.

²²³ See generally DE CERTEAU, *supra* note __.

But the resistance frame also points to the limits of our work as lawyers, and the limits of the agentic lawyer-client relationship. That the struggle of Guantánamo is fundamentally one of humanity, the social and political meaning of the biological flesh warehoused there, makes inevitable the direct participation of the prisoner in the conflict. The process of representation at Guantánamo recapitulates the divestiture of agency on which Guantánamo was built, and unacceptably so. The hunger strike is a profound and necessary assertion of the self—messy, unabstracted, and inescapably human. Because Guantánamo places the prisoners on the razor's edge of bare life, such direct resistance is not merely an act of defiance or a means of retaliation, but a way of staying human. The crisis the prisoners face—year after year of unending detention—is fundamentally existential, and it therefore follows that the prisoners would want, and need, to assert what agency they can. Ultimately, the body in extremis must speak. For the lawyers, our challenge is to hear and to amplify, to be in conversation, and also, to understand the value of our own silence.