

RESISTING GUANTÁNAMO: RIGHTS AT THE BRINK OF DEHUMANIZATION

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INTRODUCTION

When the Supreme Court issued its decision in *Boumediene v. Bush*¹ in June 2008—the latest of several cases regarding the rights of terrorist suspects held at Guantánamo Bay—it was hailed by progressive commentators and human rights advocates as a landmark in rights jurisprudence.² Holding that the Guantánamo prisoners possess a constitutional right to challenge the legality of their detention through the writ of habeas corpus, Justice Kennedy reached for appropriately lofty language, stating, “The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled, and in our system, they are reconciled within the framework of the law.”³ Indeed, the extension of a constitutional provision to noncitizen wartime prisoners held outside the United States was breathtaking. This was especially so in the face of six years of government insistence that the prisoners at Guantánamo had no rights whatsoever, and could be held indefinitely, even for life, without charge or meaningful opportunity to contest their treatment or detention.⁴ The decision was a rebuke to the Executive’s claims of outsized authority, and, the Court told us, a reassertion of the supremacy of law. It was a rights moment.⁵ Or so it seemed.

For many of us who have represented prisoners at Guantánamo,⁶ the promise of *Boumediene* felt eerily familiar. While commentators, the press, and even some critics argued that the Court’s holding that the prisoners could challenge the legality of their detention augured the closure of Guantánamo, few prisoners’ advocates were holding their breath. In the 2004 case of *Rasul v. Bush*,⁷ the Court similarly had held that the prisoners had a right of habeas corpus, and yet, four years on, when *Boumediene* was decided, not a single prisoner had received a meaningful opportunity to contest his detention.⁸ Like *Boumediene*, commentators greeted *Rasul* as a

¹ 128 S. Ct. 2229 (2008).

² See, e.g., Ronald Dworkin, *Why It Was a Great Victory*, 55 N.Y. REV. BOOKS No. 13, Aug. 14, 2008.

³ 128 S. Ct. at 2277.

⁴ See *infra* Part II.B.1.

⁵ By “rights moment,” I mean a moment in history in which the assertion of rights leads to the kind of legal victory that promises transformative change, particularly with regard to marginalized individuals or communities. Although its legacy remains contested, we might think of *Brown v. Board of Education* as a paradigmatic rights moment. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁶ As discussed throughout this Article, I represented a Guantánamo prisoner, Omar Khadr, from 2004 until 2007.

⁷ 542 U.S. 466 (2004).

⁸ Since *Boumediene*, district court judges have begun to hold habeas merits proceedings, and in a number of cases, have ordered prisoners released. See, e.g., *Boumediene v. Bush*, 579 F. Supp. 2d 191 (D.D.C. 2008) (granting writ as to Lakhdar Boumediene, Mohamed Nechla, Hadj Boudella, Mustafa Ait Idir, and Saber Lahmar; denying writ as to Bekacem Bensayah); *Bin Mohammed v. Obama*, No. 05-1347, 2009 WL 4015435 (D.D.C. Nov. 19, 2009) (granting writ); *Al Rabiah v. United States*, No. 02-828, 2009 WL 3048434 (D.D.C. Sept. 17, 2009) (granting writ); *Barhoumi v. Obama* No. 05-1506, slip

game-changing decision,⁹ and optimism spread among advocates and prisoners alike that the decision would bring law, and therefore justice, to the seemingly lawless zone of Guantánamo. *Rasul* seemed an important example of transformative legal practice—that is, a fundamental change in power arrangements, brought about through law—but the Executive managed to frustrate that decision for years. Importantly, *Rasul* was decided on statutory grounds while *Boumediene* was squarely constitutional.¹⁰ Nonetheless, for many of the prisoners' advocates, and for the prisoners themselves, the euphoria of *Boumediene* was tempered by the experience of *Rasul*, which taught of the vast space that can exist between judicial decree and executive action. The problem did not lie with *Boumediene*, whose legal victory was resounding, but with the limitations inherent in any such legal victory, and the limitations inherent in rights.

It was clear the moment the case was decided, and has been borne out in the months of litigation in hundreds of cases since, that *Boumediene* alone could not close Guantánamo, but could only narrow the space in which it is allowed to operate. It was into this space that the Obama Administration stepped, promising to close Guantánamo not because of a legal requirement to do so, but because of political commitments, shaped but not ordained by court action.¹¹ Now that the headlines have faded, the rights

op. (D.D.C. Sept. 3, 2009) (denying writ); *Al Odah v. United States*, No. 02-828, 2009 WL 2730489 (D.D.C. Aug. 24, 2009) (denying writ); *Al-Adahi v. Obama*, No. 05-280, 2009 WL 2584685 (D.D.C. Aug. 21, 2009) (granting writ); *Ali Awad v. Obama*, No. 05-CV-2379, 2009 WL 2568212 (D.D.C. Aug. 12, 2009) (denying writ); *Bacha v. Obama*, No. 05-2385, 2009 WL 2365846 (D.D.C. July 30, 2009) (granting writ); *Al Mutairi v. United States*, 644 F. Supp. 2d 78 (D.D.C. 2009) (granting writ); *Al Gingo v. Obama*, 626 F. Supp. 2d 123 (D.D.C. 2009) (granting writ); *Basardh v. Obama*, 612 F. Supp. 2d 30 (D.D.C. 2009) (granting writ); *Ahmed v. Obama*, No. 05-1678, 2009 WL 948712 (D.D.C. Apr. 7, 2009) (granting writ); *Hammamy v. Obama*, 604 F. Supp. 2d 240 (D.D.C. 2009) (denying writ); *Bihani v. Obama*, 594 F. Supp. 2d 35 (D.D.C. 2009) (denying writ); *Gharani v. Bush*, 593 F. Supp. 2d 144 (D.D.C. 2009) (granting writ); *Al Alwi v. Bush*, 593 F. Supp. 2d 24 (D.D.C. 2008) (denying writ); *Sliti v. Bush*, 592 F. Supp. 2d 46 (D.D.C. 2008) (denying writ). The case of the Uighurs, a Chinese ethnic minority, has posed special challenges, as their imprisonment has continued despite the district court ordering their release. Their case is now pending before the Supreme Court. See *Kiyemba v. Obama*, 555 F.3d 1022 (D.D.C. 2009), cert. granted, 2009 WL 935637 (U.S. Oct. 20, 2009) (No. 08-1234). For more information on the Uighurs, see *infra* note 126.

⁹ See, e.g., Erwin Chemerinsky, *Three Decisions, One Big Victory for Civil Rights*, 40 TRIAL 74, 74 (Sept. 2004); Michael Greenberger, *A Third Magna Carta*, NAT'L. L.J., Aug. 2, 2004, at S7; Linda Greenhouse, *Access to Courts*, N.Y. TIMES, June 29, 2004, at A1; Oona A. Hathaway, *Prisoner's Rights: The Court Puts the White House in Its Place*, NEWSDAY, June 29, 2004, at A33.

¹⁰ Compare *Rasul*, 542 U.S. 466 (holding that the federal habeas statute, 28 U.S.C. § 2241 (2006), provides for habeas jurisdiction over the detention of Guantánamo prisoners), with *Boumediene*, 128 S. Ct. 2229 (holding that the habeas-stripping provisions of the Military Commissions Act violated the Suspension Clause, U.S. CONST. art. I, § 9, cl. 2).

¹¹ See "Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities," Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009) (providing for the closure of Guantánamo "as soon as practicable, and no later than 1 year from the date of this order"); see also "Ensuring Lawful Interrogations," Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009) (regarding minimum standard of detention for executive detainees, application of Common Ar-

moment of *Boumediene* has dissolved into the less visible daily practices of the Guantánamo lawyers, human rights advocates, and other allies, where the assertion of rights is a necessary but inadequate step toward justice for the prisoners. In this post-*Boumediene* period, even as some Guantánamo prisoners' rights appear to be vindicated,¹² and even as the world awaits the closure of the blighted facility, some positions taken by the new Administration portend the perpetuation of some Bush Administration policies, or even the creation of a new Guantánamo.¹³ Thus, we see now another iteration of what we experienced after *Rasul*: that the work of rights is important but limited, and that the mere existence of rights is not enough to do justice.

This Article is about the work that rights do, and the work of the lawyers who assert them on their clients' behalf, particularly in the face of inordinate state violence, as is the case with Guantánamo. I write this story of Guantánamo based on my experiences of nearly three years of representing a prisoner there.¹⁴ While commentators can point to an unbroken record of legal victories in Guantánamo cases at the Supreme Court,¹⁵ the view from

ticle 3 of the Geneva Conventions, repudiation of Bush Administration legal positions on interrogation, and closure of CIA detention facilities).

¹² As discussed below, *see infra* note 126 and accompanying text, federal judges have ordered a small number of prisoners released following the *Boumediene* decision, and the Executive Branch has complied with these orders.

¹³ Three developments thus far in the Obama Administration are particularly troubling. First, as discussed in greater detail below, although the new Administration has abandoned the "enemy combatant" terminology on which the Bush Administration's Guantánamo policy was based, it appears to have retained much of the substantive definition. *See infra* Parts I.D & II.B.1. Second, the Obama Administration has decided to revive the military commission system. *See* Press Release, The White House Office of the Press Secretary, Statement of President Barack Obama on Military Commissions (May 15, 2009), available at http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Military-Commissions. Finally, the Obama Administration has opposed attempts to apply *Boumediene* to prisoners held outside of Guantánamo. In *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205 (D.D.C. 2009), Judge John D. Bates extended *Boumediene*, holding that foreign nationals detained by the United States at its military base in Bagram, Afghanistan, similarly had a constitutional right of habeas corpus. Disappointing many human rights advocates, the Obama Administration sought an interlocutory appeal, which was granted. *See Al Maqaleh v. Gates*, 620 F. Supp. 2d 51 (D.D.C. 2009). This has led some, including the *New York Times*, to warn that the new Administration's position, denying judicial review of indefinitely detained terrorist suspects, threatens to create a new Guantánamo. *See, e.g.*, Editorial, *The Next Guantánamo*, N.Y. TIMES, Apr. 13, 2009, at A20.

¹⁴ Although my description and analysis of Guantánamo are deeply informed by my experience representing a prisoner there, the fact of representation limits what I am ethically able to disclose. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 (Confidentiality of Information) (2004). As such, my reporting on his case is limited to what is in the public record, and even then errs on the side of nondisclosure. As of this writing, the prisoner I represented is still imprisoned at Guantánamo, and I no longer represent him, thus making his consent to further disclosure by me impossible.

¹⁵ *See Boumediene*, 128 S.Ct. 2229 (holding that Guantánamo prisoners have a constitutional right of habeas corpus); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (invalidating the military commissions system at Guantánamo); *Rasul*, 542 U.S. 466 (holding that Guantánamo prisoners have a statutory right of habeas corpus); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (O'Connor, J., plurality) (holding that a U.S. citizen detained as an "enemy combatant" has a due process right to challenge the factual basis of his detention before a neutral decisionmaker). Although the *Hamdi* case involved a U.S. citizen impi-

the prisoners' perspective is quite different, and throws into question the claim of transformative legal practice that the Court cases might otherwise suggest. This is not to say that the lawyering has itself been a failure. Rather, I argue that instead of expecting rights-based legal contest at and around Guantánamo to produce transformative results, we might better understand it as a form of resistance to dehumanization. Such a reframing of the Guantánamo litigation invites comparison with other forms of resistance, and helps explain both the power and the limitations of legal practice in extreme instances of state violence.

When placed in a human rights frame, Guantánamo is often described in terms of the government's denial of rights to the prisoners, but equally important has been the denial of their humanity. Guantánamo has been a project of dehumanization, in the literal sense; it has sought to expel the prisoners—consistently referred to as “terrorists”—from our shared understanding of what it means to be human, so as to permit, if not necessitate, physical and mental treatment (albeit in the context of interrogation) abhorrent to human beings. This has been accomplished through three forms of erasure of the human: cultural erasure through the creation of a terrorist narrative; legal erasure through formalistic legerdemain; and physical erasure through torture.

While these three dimensions of dehumanization are distinct, they are also interrelated. All are pervaded by law, and more specifically, by rights. 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.¹⁶ By this she meant that without membership in the polity, the individual stood exposed to the violence of the state, unmediated and unprotected by rights. The result of such exposure, she argued, was to reduce the person to a state of bare life, or life without humanity. 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.¹⁷

In order to better understand the work that rights do, this Article explores why prisoners' advocates, including myself, adopted a rights-based advocacy strategy in an environment defined explicitly by the absence of rights. Since the first prisoners arrived at Guantánamo, the Bush Adminis-

soned at a military brig in South Carolina, it is properly considered in this line of cases because Hamdi was held on the same “enemy combatant” basis as the Guantánamo prisoners and was initially held at Guantánamo until his U.S. citizenship was discovered. *Hamdi*, 542 U.S. at 510.

¹⁶ HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 298 (new ed., Harcourt, Brace, & World, Inc. 1966) (1951).

¹⁷ *Id.*; see also GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* (1998).

tration's position had been that they lack any rights whatsoever, under any source of law.¹⁸ Thus did the Bush Administration attempt to define a rights-free zone, through a manipulation of rights which seemed demonstrably political. 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"¹⁹ more generally. This approach finds some support in the work of rights scholars (and critical race theorists in particular) regarding the continuing vitality of rights-based approaches and the promise of "critical legalism"²⁰ or "radical constitutionalism"²¹—the very kinds of progressive constitutional optimism that the *Rasul* and *Boumediene* decisions inspire. But the subsequent litigation history demands further inquiry into the political, cultural, jurisprudential, and strategic value of arguing rights in the historical moment and place of Guantánamo.

I argue that while we might hope for rights to obtain transformative effect—to close Guantánamo, for example, or to free those who are wrongfully imprisoned—at Guantánamo and in other places of extreme state violence, rights may do the more modest work of *resistance*. Rather than fundamentally reconfiguring power arrangements, as rights moments aspire to do, resistance slows, narrows, and increases the costs for the state's exercise of violence. Resistance is a form of power contestation that works from within the structures of domination.²² While it may aspire to overturn prevailing power relations, its value derives from its means as much as from its ends. Through resistance, new political spaces may open, but even if they do not, the mere fact of resistance, the assertion of the self against the violence of the state, is self- and life-affirming. Resistance is, in short, a way of staying human. This, then, is the work that rights do: when pushed to the brink of annihilation, they provide us with a rudimentary and perhaps inadequate tool to maintain our humanity.

In Part I of this Article, I discuss the cultural erasure of the Guantánamo prisoners through the creation of a post-September 11 terrorist narrative, or what I term an iconography of terror, their legal erasure through the crea-

¹⁸ See *infra* Part I.D.

¹⁹ See generally MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991) (critiquing an overreliance on individual rights in American legal discourse).

²⁰ See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 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").

²¹ *Id.* at 334.

²² As Foucault famously wrote, "resistance is never in a position of exteriority to power." MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, VOLUME ONE 95 (Robert Hurly trans., Vintage Books 1978) (1976).

tion of the now abandoned “enemy combatant”²³ category and their physical erasure through torture. I contextualize these discussions with narrative descriptions of the place and space of Guantánamo, which I argue are necessary to understand the contextual nature of rights and rights claims, and the integral connection between law and narrative. In Part II, I deepen the discussion of legal erasure through critique and analysis of my representation of a teenage Canadian Guantánamo prisoner, Omar Khadr, 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 to the value of rights as recognition, and ultimately arguing the importance of rights as a mode of resistance to state violence. 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 resistance, and argue the lawyers’ rights-based litigation and the prisoners’ hunger strikes share a conceptual understanding of the relationship between rights, violence, and humanity. I conclude by reflecting on the value and limitations of reframing the work of the Guantánamo prisoners’ lawyers as nothing more, but also nothing less, than resistance. I suggest that neither the resistance of the lawyers nor that of the prisoners may be enough to gain the prisoners’ freedom, but that they are nonetheless essential when, as at Guantánamo, state violence is so extreme as to attempt to extinguish the human.

Throughout the Article, I insist upon an understanding of Guantánamo in both material and theoretical terms. Seven years after its opening as an interrogation and detention center, Guantánamo today is understood more for its symbolism than for the actual events that have transpired or lives that have been transformed there. Politically and culturally, domestically and internationally, Guantánamo is a stand-in for torture, abandonment of the rule of law, and the general threat to civil liberties posed by the “war on terrorism.”²⁴ In this way, even among its critics, Guantánamo has been re-

²³ The Obama Administration’s abandonment of the “enemy combatant” construct is discussed in Part II.B.1.

²⁴ I put “war on terrorism” in scare quotes because as currently conducted, U.S. antiterrorism 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. See *infra* note 225 and accompanying text. Similarly, antiterrorism policy includes practices as disparate as warrantless wiretapping of U.S. citizens, see James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1, and rendering of noncitizens to third countries where they have alleged torture, see COMMISSION OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATED TO MAHER ARAR (2006), available at <http://web.archive.org/web/>

duced to allegory. But as critical as the lessons of Guantánamo are for U.S. law and policy, they must be rooted in the lived experiences of those who have inhabited and endured the real world of Guantánamo. For example, torture at Guantánamo is not simply a question of abstract legal memoranda or an exercise in line drawing, but a concrete project of state violence enacted upon, and realized in, the human 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.

At base, Guantánamo is a material project, and more specifically a human one, enacted upon and through the bodies of those imprisoned there. Thus, the story of Guantánamo I seek to tell here is of erasure—cultural, legal, and physical—and equally important, resistance to such erasure, itself enacted upon and through the humanity of the Guantánamo prisoners.

I. THE DEHUMANIZATION PROJECT OF GUANTÁNAMO: CULTURAL AND LEGAL ERASURE

The purpose of Guantánamo is to destroy people.
—Jumah al Dossari²⁵

A. Rights in Context, Law in Narrative

I have visited the U.S. detention and interrogation center at Guantánamo Bay approximately twelve 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 prisoners²⁶ at Guantánamo, in a small trailer inside one of the prison camps.²⁷ Typically when my co-counsel and I met Omar, it was in a

20080313145724/http://www.aracommission.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 41–43 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 Brief for Petitioner Salim Ahmed Hamdan at 18, Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (No. 05-184) (referring to “the so called ‘war on terror’”).

²⁵ Jumah al Dossari, *I’m Home, but Still Haunted by Guantánamo*, WASH. POST, Aug. 17, 2008, at B4. Al Dossari was imprisoned at Guantánamo from January 2005 until July 2007, at which time he was released without charge. *Id.*

²⁶ Throughout this Article, I refer to the individuals incarcerated at Guantánamo as “prisoners” rather than “detainees,” the term favored by the government. The government’s refusal to refer to those incarcerated as “prisoners” is of a piece with its invention of the “enemy combatant” designation, and its position that they are not prisoners of war under the Geneva Conventions. See *infra* note 83 and accompanying text. The doctrinal implications of the choice of terminology aside, I find that the term “detainee” obscures the factual reality of the long-term, and indeed potentially lifetime, incarceration of those at Guantánamo, a reality I believe is better captured by describing them as prisoners.

²⁷ Although he is still at Guantánamo as of this writing, I no longer represent Omar Khadr. With colleagues and students in the International Human Rights Law Clinic at American University Washing-

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, and an air conditioner droned endlessly, keeping the room overcooled. 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 eye-hooks 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. This included one instance, at the age of sixteen, 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, interrogators threatened him with rendition²⁸ to other countries, where, he was told, he would be raped by older men.²⁹

ton College of Law, I represented Omar from July 2004 to April 2007. He continues to be represented by military defense counsel and by Canadian civilian counsel.

²⁸ Rendition has been defined as “the transfer of an individual, without the benefit of a legal proceeding in which the individual can challenge the transfer, to a country where he or she is at risk of torture.” Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333, 1336 (2005). Although the CIA has maintained a rendition program for decades, it gained new relevance after September 11th. Two cases of rendition to torture by the United States, those of Maher Arar and Khaled el-Masri, have been especially well documented. Maher Arar is a Canadian citizen whom U.S. officials detained in New York en route to Montreal following a visit to his family in Tunisia. The CIA transferred Mr. Arar, against his will, to Jordan, and then to Syria, where he was detained and tortured. COMMISSION OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR: ANALYSIS AND RECOMMENDATIONS 14, 27–30, 33–34 (2006). Khaled el-Masri, a German citizen, was arrested in Macedonia, transferred to CIA custody, and transferred to a CIA prison in Afghanistan. Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, WASH. POST, Dec. 4, 2005, at A1. For further ex-

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.

* * *

Despite aspirations across the political spectrum to identify a universalist source of rights, 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.”³⁰ So, too, do those instantiations vary over time, and gain force through historical accretion.³¹ Elizabeth Schneider similarly has argued the dialectical

amples of the CIA rendition program, see Amnesty Int’l, *USA/Jordan/Yemen Torture and Secret Detention: Testimony of the ‘Disappeared’ in the ‘War on Terror’*, AI Index AMR 51/108/2005, Aug. 4, 2005, available at <http://www.amnesty.org/en/library/asset/AMR51/108/2005/en/3df5f930-d4cc-11dd-8a23-d58a49c0d652/amr511082005en.pdf> (detailing the experiences of three Yemeni men: Muhammad Faraj Ahmed Bashmilah, Salah Nasser Salim ‘Ali, and Walid Muhammad Shahir Muhammad al-Qadasi, held in secret U.S. detention). For further background on the development of rendition in U.S. policy, see Jane Mayer, *Outsourcing Torture: The Secret History of America’s “Extraordinary Rendition” Program*, NEW YORKER, Feb. 14 & 21, 2005, at 106.

²⁹ See Memorandum from Muneer I. Ahmad & Richard J. Wilson to Habeas Privilege Team Re: Request for Classification Review, O.K. v. Bush, 04-CV-01136 (JDB) (Dec. 30, 2004) (copy on file with author). For a recitation of other instances of mistreatment that Omar experienced, see O.K. v. Bush, 377 F. Supp. 2d 102, 106–10 (D.D.C. 2005). In 2008, Omar’s Canadian lawyers obtained and released video of an interrogation of him in February 2003, when Omar was sixteen. See Ian Austen, *Blurry Peek at Questioning of a Guantánamo Inmate*, N.Y. TIMES, July 16, 2008, at A10. The video is available online at http://www.youtube.com/watch?v=yNCyrFV2G_0.

³⁰ Austin Sarat & Thomas R. Kearns, *Editorial Introduction*, in LEGAL RIGHTS: HISTORICAL AND PHILOSOPHICAL PERSPECTIVES 1, 6–7 (Austin Sarat & Thomas R. Kearns eds., 1996).

³¹ 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 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 (Drucilla Cornell, Michael Rosenfeld & David Gray Carlson eds., 1992) (quoting BLAISE PASCAL, PENSÉES No. 294, available at <http://oregonstate.edu/instruct/phl302/texts/pascal/pensees-b.html#SECTION%20V>).

relationship of rights and politics.³² Finally, the coercive dimension of rights is perpetually contested, taking the form of such questions as “Is there a right without a remedy?” and “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. 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,³³ 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 made possible only 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”³⁴ 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, a system of signification, rather than a determinate corpus of self-defining rules.³⁵ On its own, then, law is indeterminate. As Cover argued, “law is a resource in signification that enables us

³² See Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives From the Women’s Movement*, 61 N.Y.U. L. REV. 589 (1986).

³³ See CLIFFORD GEERTZ, *NEGARA: THE THEATRE STATE IN NINETEENTH-CENTURY BALI* (1980); CLAUDE LÉVI-STRAUSS, *TOTEMISM* (1963); BRONISLAW MALINOWSKI, *THE FAMILY AMONG THE AUSTRALIAN ABORIGINES: A SOCIOLOGICAL STUDY* (1963).

³⁴ See, e.g., CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 449 (1973) (espousing the interpretation of cultures and complex societies as “texts”).

³⁵ “[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) [hereinafter Cover, *Nomos and Narrative*].

to submit, rejoice, struggle, pervert, mock, disgrace, humiliate or dignify."³⁶ Narrative context fixes the meaning of law, legal institutions, doctrine, and legal practice, because law is fundamentally and inextricably embedded in narrative. As Cover wrote:

No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.³⁷

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, a construction 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.³⁸

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.³⁹ 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.⁴⁰ To understand a legal dispute, one must comprehend the narrative context it inhabits. And to understand a legal victory, one must recognize the triumph of one narrative vision over another.

³⁶ *Id.* at 8.

³⁷ *Id.* at 4–5.

³⁸ Yet narrative does not merely reflect a social order. The discursive act of narration renders that social order, and its social meaning, flexible and dynamic, creating realities as it describes them. See BRUCE LINCOLN, *THEORIZING MYTH: NARRATIVE, IDEOLOGY, AND SCHOLARSHIP* 149 (1999) (describing a political theory of narrative that “recognizes the capacity of narrators to modify details of the[ir] stories, . . . introducing changes in the classificatory order . . . that reflect their subject position and advance their interests”). Narrative derives from and generates substantiality. The act of narration is transformed into an ideological contest, in which discursive interpretation—the naming of actors and ideas, the foregrounding of values, and the selection of chronologies—simultaneously reflects and constitutes the social reality it seeks to create. See Clifford Geertz, *Ideology as a Cultural System, in IDEOLOGY AND DISCONTENT* 63–64 (David E. Apter ed., 1964) (“[T]he function of ideology is to make an autonomous politics possible by providing the authoritative concepts that render it meaningful . . .”). Narrative and social reality thus are locked in “a symbiotic relation of co-reproduction, each one being simultaneously producer and product of the other.” LINCOLN, *supra*, at 210.

³⁹ See ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 113 (2000) (describing narrative as “the necessary discourse of law”).

⁴⁰ Cover, *Nomos and Narrative*, *supra* note 35, at 5, 25.

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

B. The Cultural Erasure of the Human: An Iconography of Terror

From the moment Guantánamo opened as an interrogation center for terrorist suspects, the Bush Administration described the prisoners as “the worst of the worst,” as unfathomably dangerous, and as trained and hardened killers.⁴¹ 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.⁴² The government coupled these characterizations with menacing imagery, as anonymous sources leaked 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.⁴³ Taken together, these images helped to construct a state iconography of the “war on terrorism.” They told a narrative of transnational forces of evil fanatically committed to the destruction of the United States, to which the United States then responds with military and moral superiority. Thus, the enemy is subdued, neutralized, and rendered abject, and remains broken and contained.

In this regard, we might think about the value that Guantánamo served, 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, the American public was encouraged to see a government ensuring our safety; through partial occlusion, we were relieved of the knowledge of the methods used to achieve such security. Thus 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 United States—and one that is not easily disturbed. Indeed, the very ground on which prisoners were first kept at Guantánamo was previously used by the

⁴¹ See John Mintz, *U.S. to Free 7 Held in Cuba*, WASH. POST, Oct. 23, 2002, at A2 (quoting Donald Rumsfeld’s description of the prisoners as the “worst of the worst”).

⁴² See Donald Rumsfeld, U.S. Sec’y of Def., and Gen. Richard B. Myers, Chairman, Joint Chiefs of Staff, Department of Defense News Briefing (Jan. 11, 2002), <http://www.defenselink.mil/Transcripts/Transcript.aspx?TranscriptID=2031>.

⁴³ Representative photos are available at <http://globalresearch.ca/articles/CRG211A.html>.

U.S. government to detain Haitian refugees in the 1990s.⁴⁴ Closer to home, the overincarceration of African Americans and Latinos in U.S. prisons promises safety through racial containment.⁴⁵ 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.⁴⁶

The dark, bearded, turbaned men of Al Qaeda are central figures in the post-September 11 state iconography, and though pictures of the prisoners at Guantánamo as they currently appear have not been released, it seems fair to say that these essentialized notions of the terrorist⁴⁷ are what Guantánamo is meant to conjure. It is men like these, we are meant to believe, who are imprisoned there.

⁴⁴ 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 detainees 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.

Amy Kaplan, *Where Is Guantánamo?*, 57 AM. QUARTERLY 831, 840 (2005).

⁴⁵ 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 J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 25–30 (1998–99) (discussing the discriminatory impact of police officer and prosecutorial discretion and describing them as further manifestations of racial disparities in the criminal justice system).

⁴⁶ See, e.g., BRIAN MASARU HAYASHI, *DEMOCRATIZING THE ENEMY: THE JAPANESE AMERICAN INTERNMENT* (2004) (concluding that U.S. internment of Japanese Americans during World War II furthered broad sociopolitical 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).

⁴⁷ 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) [hereinafter, Ahmad, *Rage Shared by Law*]; Muneer Ahmad, *Homeland Insecurities: Racial Violence the Day After September 11*, 72 SOC. TEXT 101 (2002). See also Margaret Chon & Donna E. Arzt, *Walking While Muslim*, 68 LAW & CONTEMP. PROBS. 215 (2005); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002).

My former client, Omar Khadr, is imprisoned there. He was a fifteen-year old boy when taken into U.S. custody. When Omar arrived at 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.⁴⁸ Now, at age twenty-three, Omar, a Canadian citizen, has spent nearly one fourth of his life at Guantánamo Bay.

* * *

The state is as dependent upon narrative for the instantiation of law as are those who would contest state power.⁴⁹ Precisely for this reason, narratives of the state are instruments of violence.⁵⁰ 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. Instead, it derived from and helped to reinforce a racialized social construction of the terrorist that had already taken hold in the aftermath of September 11, and that has its antecedents well before. Immediately following the terrorist attacks, the Bush Administration deployed a set of racially directed immigration enforcement and detention practices which, coupled with thousands of incidents of hate violence—including nineteen 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.⁵¹ Through these state and ostensibly private practices, the Muslim and the terrorist became one and the same. As Leti Volpp has argued, this racial

⁴⁸ 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 for the American Medical Ass’n, American Psychiatric Ass’n, American Society for Adolescent Psychiatry, American Academy of Child & Adolescent Psychiatry, American Academy of Psychiatry & the Law, National Ass’n of Social Workers, Missouri Chapter of the National Ass’n of Social Workers, and National Mental Health Ass’n as Amici Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633) (arguing that adolescent minds are “anatomically immature”).

⁴⁹ See Cover, *Nomos and Narrative*, *supra* note 35, 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.”).

⁵⁰ See *id.* at 40 (“[T]he jurisgenerative principle by which legal meaning proliferates in all communities never exists in isolation from violence.”).

⁵¹ See Ahmad, *Rage Shared by Law*, *supra* note 47, at 1265–82; Volpp, *supra* note 47, at 1576–86.

category was inherently oppositional to a newly consolidated post-September 11 national identity, and acted to expel Arabs, Muslims, and South Asians from the cultural or affective (nonformal) citizenship they might otherwise have enjoyed.⁵²

“Muslim-looking” is a peculiar category, as it collapses phenotype and faith, and conjures a literal face of religion. It presumes that 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,⁵³ 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 political 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 September 11 attacks renders the terrorist suspect monstrous,⁵⁴ thereby necessitating a strategy of containment. Thus the neo-Orientalist⁵⁵ formation of the “Muslim-looking” category in the aftermath of September 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 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

⁵² Volpp, *supra* note 47, at 1592–98. Volpp does not argue that the post-September 11 national identity was monolithic, but instead that state actions helped to forge a new and recognizable identity claim. *Id.* Of course, that claim, like all identity claims, has been contested.

⁵³ For a discussion of the performative dimensions of Arab, Muslim, and South Asian identities in the aftermath of September 11, see Chon & Arzt, *supra* note 47; Sunita Patel, *Performative Aspects of Race: “Arab, Muslim, And South Asian” Racial Formation After September 11*, 10 ASIAN PAC. AM. L.J. 61 (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).

⁵⁴ 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).

⁵⁵ See EDWARD W. SAID, *ORIENTALISM* (1978) (introducing the term “Orientalism” to describe a Western conception of the Orient, in terms that reflected and perpetuated political and cultural hegemony toward the region).

beings have rights, the Algerian will be made a subhuman.”⁵⁶ The existence of the liberal, civilized West, therefore, required the invention of the illiberal, barbaric East⁵⁷: “the only way the European could make himself man was by fabricating slaves and monsters.”⁵⁸ The post-September 11 iconography thus easily took hold in the entrenched understandings of the Muslim subject.

Returning to Omar’s case, he was captured near Khost, Afghanistan, in July 2002, following an intense firefight around the house in which he was living.⁵⁹ Several hours of combat and two 500 pound bombs killed the other occupants, who were believed to be Al Qaeda fighters.⁶⁰ 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.⁶¹ While the Bush Administration claimed the authority to detain those at Guantánamo indefinitely and without charge as “enemy combatants,”⁶² it nonetheless chose to try a small number of prisoners, including Omar, for alleged war crimes in military commissions.⁶³

Hovering in the background of the formal charges against Omar are a variety of suspicions and allegations about his family.⁶⁴ His father, in particular, is suspected by the United States 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 the 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.

⁵⁶ JEAN-PAUL SARTRE, *COLONIALISM AND NEOCOLONIALISM* 149 (Haddour, Brewer & McWilliams trans., Routledge 2001) (1964).

⁵⁷ See Volpp, *supra* note 47, at 1586–91 (characterizing the post-September 11 construction of the terrorist as a redeployment of Orientalist tropes).

⁵⁸ Jean-Paul Sartre, *Preface to FRANTZ FANON, THE WRETCHED OF THE EARTH* lviii (Richard Philcox trans., Grove Press 2004) (1961).

⁵⁹ See Charge Sheet at 5–8, *United States v. Khadr*, (Apr. 4, 2007), available at <http://www.defenselink.mil/news/Apr2007/Khadreferral.pdf>; Canadian Press, *Canadian teenager threw grenade: U.S. Military* (Sept. 9, 2009), available at http://montreal.ctv.ca/servlet/an/plocal/CTVNews/20020909/kahdr_omar_recovery_020909/20020909/?hub=MontrealHome.

⁶⁰ See MICHELLE SHEPHARD, *GUANTANAMO’S CHILD: THE UNTOLD STORY OF OMAR KHADR* 83 (2008).

⁶¹ Charge Sheet at 5–8, *United States v. Khadr*, (Apr. 4, 2007), available at <http://www.defenselink.mil/news/Apr2007/Khadreferral.pdf>.

⁶² See *infra* Part II.B.1.

⁶³ See *infra* notes Part II.A.

⁶⁴ For an exhaustive discussion of Omar’s family, see SHEPHARD, *supra* note 60.

C. *Cultural Erasure Through Normalization: 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 have 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,⁶⁵ 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 detention of brown-skinned Muslims, thus adding identity-based anxiety to my many other fears.

Our travel to Guantánamo did nothing to disabuse our expectations of a dark and secretive island. We flew to Fort Lauderdale, and from there boarded a nineteen-seat turbo-prop charter flight on Lynx Air.⁶⁶ The flight was full, so full that the excess weight necessitated a refueling stop on Exuma 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.

The flight was long, loud, and uncomfortable. We were less than 500 miles away, but the flight took four hours; because the United States 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, 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.⁶⁷ This would be the first of many comparisons I

⁶⁵ 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 to 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 expense) followed. See *Al Odah v. United States*, No. 02-828 (CKK) (D.D.C. Oct. 20, 2004) (Mem.), available at <http://guantanamo.org/pdf/kollar-kotelly.pdf>.

⁶⁶ Later flights would be via a Lynx competitor, optimistically named Air Sunshine.

⁶⁷ See *Gitmo Photos*, *supra* note 43 and accompanying text. Representative images are available at <http://globalresearch.ca/articles/CRG211A.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 of 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, <http://archives.cnn.com/2002/US/11/08/detainees.pictures>.

would draw between my condition and Omar's, an early signal of the experiential and situational distance between us.

Our convoluted itinerary reflected the spatial dimension of the government's detention project. It was no accident that visiting the base was difficult: inaccessibility was a core design element of Guantánamo. The geographic remoteness of the base from the territorial United States reflected and facilitated the legal and psychic dispossession that the government intended Guantánamo to achieve. The prisoners were deliberately lost at sea, held outside the realm of the normal, as part of a twofold strategy to free the hand of the government—both literally and figuratively—and to induce despair among the prisoners.⁶⁸

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 searched, and then met our liaison, a young army corporal, who accompanied us to the dank rooms of the Combined Bachelor Quarters, the small motel 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 were quickly routinized, and with routinization came 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, which is necessary because Castro cut off the supply of fresh water to the base. After 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 twenty-five miles per hour—strictly enforced, in large part to protect the

⁶⁸ See MARGULIES, *supra* note 24, at 27 (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 when the prisoner believes that all is lost, for only then will he abandon his resistance").

iguanas⁶⁹—which reinforces the sensation that time passes 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 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 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 it is not broadcast all five times and that the government sometimes deliberately disrupts it). But on our first visits there, the recorded call was broadcast from loud speakers not atop minarets, but attached to the guard towers encircling the camps, each tower staffed by armed guards, and each emblazoned by an American flag. The prisoners’ call to prayer issued 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 underscores the service members’ freedom, and the barbarity of the camps helps to constitute the normalcy of the town.⁷⁰

⁶⁹ See Associated Press, *More rights for Gitmo’s lizards than detainees?*, MSNBC, Dec. 8, 2007, <http://www.msnbc.msn.com/id/22161810>; see also Transcript of Oral Argument at 5, *Rasul v. Bush*, 542 U.S. 466 (2004) (No. 03-334) (discussing protection of iguanas at Guantánamo under U.S. law).

⁷⁰ The normalcy of Guantánamo is called further into question—or perhaps is reestablished—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 TCNs. See Matthew Hay Brown, *Guantanamo Base Provides an Enclave of Small-Town Life*, HARTFORD COURANT, Dec. 26, 2003, at A27 (noting that many of Guantánamo’s Jamaican and Filipino laborers have worked on the base for over thirty years); Paul Koring, *The Uneasy Mix Called Guantanamo*, GLOBE AND MAIL, Jan. 14, 2006, at A19 (describing the “TNC Hills,” a housing complex where most of Guantánamo’s labor force lives). The reliance on migrant workers for low-wage service industry labor in the United States 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

*D. The Legal Erasure of the Human: "Enemy Combatants"
and the Law of Guantánamo*

President Obama's promise to review the government's Guantánamo policy reflects widespread concern regarding the legality of the Bush Administration's governance regime. But that very review reminds us that for much of the Bush era, the government's policies presented a fundamental question: Is there law at Guantánamo?

By now, others have thoroughly documented the executive, legislative, and judicial actions relating to Guantánamo, beginning with the Presidential Military Order approving the detention of "enemy combatants" and trials by military commission,⁷¹ and the legal memoranda purporting to except the prisoners from the protections of the Geneva Conventions⁷² and approving

labor services a multiracial 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 escape the multiple taxonomies of American citizenship, and in particular, their racial, national, and labor dimensions.

⁷¹ Presidential Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001) [hereinafter Presidential Military Order].

⁷² The Executive Branch's position on the applicability of the Geneva Conventions to the conflict in Afghanistan has gone through three stages since the onset of hostilities. First, U.S. military commanders concluded that the Geneva Conventions applied. See FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DoD DETENTION OPERATIONS (Aug. 2004), reprinted in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 908, 947 (Karen J. Greenberg, Joshua L. Dratel & Anthony Lewis eds., 2005); William H. Taft, *Keynote Address, The Geneva Conventions and the Rules of War in the Post-9/11 and Iraq World Symposium*, 21 AM. U. INT'L L. REV. 149, 154 (2005).

Second, on February 7, 2002, President Bush issued a memorandum declaring the Geneva Conventions inapplicable to members of Al Qaeda. Memorandum from President George W. Bush to the Vice President, et al., *Humane Treatment of al Qaeda and Taliban Detainees* (Feb. 7, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf>. President Bush claimed inherent authority to suspend the Conventions as to the conflict in Afghanistan, but declined to exercise that authority. *Id.* Instead, he classified members of the Taliban as "enemy combatants" and asserted that "as a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva." *Id.*

In so deciding, President Bush accepted the legal counsel of the Department of Justice over that of senior military advisors. Deputy Assistant Attorney General John Yoo advised President Bush that neither Al Qaeda nor the Taliban enjoyed protection under the Geneva Conventions. Memorandum from John Yoo, Deputy Assistant Attorney Gen., Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Def., *Application of Treaties and Laws to al Qaeda and Taliban Detainees*, (Jan. 9, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf>. Alberto Gonzales confirmed the legal conclusions of the Jan. 9, 2002 Yoo memo. Memorandum from Alberto R. Gonzales, Counsel to the President, to President George W. Bush, *Decision Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees* (Jan. 25, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf> ("The nature of the new war . . . renders obsolete Geneva's strict limitations . . . and renders quaint some of its provisions . . .").

Then-Secretary of State Colin Powell disagreed, arguing that suspension of the Geneva Conventions would evoke wide international condemnation. Memorandum from Colin L. Powell, Sec'y of State, U.S. Dep't of State, to Alberto R. Gonzales, Counsel to the President, *Draft Decision Memorandum to*

the use of interrogation techniques previously considered to be torture.⁷³ Similarly, the relevant Supreme Court jurisprudence—*Rasul v. Bush*,⁷⁴

the President on the Applicability of the Geneva Conventions to the Conflict in Afghanistan (Jan. 26, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.26.pdf>. Powell recommended the continued applicability of the Geneva Conventions to the conflict in Afghanistan, with the qualification that neither members of Al Qaeda nor the Taliban would enjoy Prisoner of War status. *Id.*; accord Memorandum from William H. Taft IV, Legal Advisor, U.S. Dep't of State, to Alberto R. Gonzales, Counsel to the President, Comments on Your Paper on the Geneva Convention (Feb. 2, 2002), available at http://www.nytimes.com/packages/html/politics/20040608_DOC.pdf (echoing Secretary Powell's concerns and legal recommendation).

The third, and latest, Executive Branch position came on January 22, 2009, when President Obama issued two executive orders reversing the Bush policies with respect to executive detainees and the Geneva Conventions. The first order requires that executive detention facilities operate in conformity with Common Article 3 of the Geneva Conventions. Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities, Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009). The second, concerning interrogation standards, provides that Common Article 3 sets the minimum standard of treatment for executive detainees and that the Army Field Manual be read in conformity with Common Article 3. Ensuring Lawful Interrogations, Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009). This latter order specifically repudiates the Office of Legal Counsel memoranda issued by the Bush Administration. *Id.*

⁷³ In the initial—now notorious—August 2002 memo drafted by the Office of Legal Counsel on permissible interrogation techniques, acts tantamount to torture were narrowly defined to include only those specifically intended to produce harm of a gravity akin to “death, organ failure, or the permanent impairment of a significant body function.” Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), available at <http://news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf>. Though later rescinded, the Bybee Memo provided the legal framework for the authorization of interrogation techniques previously considered a violation of U.S. legal norms under domestic and international law. Moreover, it tacitly authorized the explicit use of torture in limited circumstances where justified by necessity. *Id.* A subsequent memorandum, written by John Yoo, went further to suggest that the claim of wartime executive authority could excuse interrogators from criminal liability for acts of torture. Memorandum from John Yoo, Deputy Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, to William J. Haynes II, Gen. Counsel, Dep't of Def., Military Interrogation of Alien Unlawful Enemy Combatants Held Outside the United States 80 (Mar. 14, 2003), available at http://gulcfac.typepad.com/georgetown_university_law/files/march.14.memo.part1.pdf (pt. 1) and http://gulcfac.typepad.com/georgetown_university_law/files/march14.memo.part2.pdf (pt. 2). Collectively, these and other Office of Legal Counsel memoranda are referred to as the “Torture Memos.” See, e.g., Jeffrey Rosen, *The Nation: The Struggle Over the Torture Memos*, N.Y. TIMES, Aug. 15, 2004, at D5. President Obama released additional Office of Legal Counsel memos on April 16, 2009. See Mark Mazzetti & Scott Shane, *Interrogation Memos Detail Harsh Tactics by the C.I.A.*, N.Y. TIMES, Apr. 17, 2009, at A1.

This new legal framework enabled numerous revisions to operations manuals of the U.S. armed forces authorizing new interrogation techniques. For example, responding to a perceived lack of progress with interrogations, Guantánamo Commander Major General Michael E. Dunlavey sought authorization for the use of techniques of greater severity than those previously permitted under the 1992 version of the Army Field Manual 34-52. Memorandum from Major Gen. Michael E. Dunlavey, Commander, Joint Task Force 170, to Gen. James T. Hill, Commander, U.S. Southern Command, Proposed Counter-Resistance Strategies, Oct. 11, 2002, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.12.02.pdf>. For a comprehensive discussion of the Bush Administration's evolving policy on permissible interrogation procedures, see Rick Abel, *Contesting Legality in the United States after September 11*, in FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM 361 (Terence C. Halliday, Lucien Karpik & Mal-

Hamdi v. Rumsfeld,⁷⁵ *Hamdan v. Rumsfeld*⁷⁶—the lower court actions, and Congress’s intervention in the form of the Detainee Treatment Act of 2005⁷⁷ and the Military Commissions Act of 2006⁷⁸ have all been debated by others.⁷⁹ While the Court’s decision in *Boumediene v. Bush* poses a set of new doctrinal and theoretical challenges,⁸⁰ rather than rehearse previous discussions of the case law or suggest new ones here, I seek to explore a more fundamental question: despite the repeated claims by critics that Guantánamo is a law-free zone, does the 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 post-September 11 Guantánamo governance regime. While that regime is multifaceted 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.”⁸¹ 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.⁸² Notably, the “enemy combatant” construct was a legal invention of the Bush 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.⁸³ In this way, in

colm M. Feeley eds., 2007). For one of many critiques of John Yoo’s legal advice, see Peter Margulies, *True Believers at Law: National Security Agendas, the Regulation of Lawyers, and the Separation of Powers*, 68 MD. L. REV. 1 (2008).

⁷⁴ 542 U.S. 466 (2004).

⁷⁵ 542 U.S. 507 (2004).

⁷⁶ 548 U.S. 557 (2006).

⁷⁷ Pub. L. No. 109-148, § 1003, 119 Stat. 2739 (2005).

⁷⁸ Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948–50 (2006); 18 U.S.C. § 2441; and 28 U.S.C. § 2241(c)–(e)).

⁷⁹ See, e.g., Baher Azmy, *Rasul v. Bush and the Intra-Territorial Constitution*, 62 N.Y.U. ANN. SURV. AM. L. 369 (2007); Jared A. Goldstein, *Habeas Without Rights*, 2007 WISC. L. REV. 1165 (2007); Jenny S. Martinez, *Process and Substance in the ‘War on Terror’*, 108 COLUM. L. REV. 1013 (2008).

⁸⁰ *Boumediene* held that, as a constitutional matter, the writ of habeas corpus extends to the prisoners at Guantánamo, that the prisoners there “are entitled to a prompt habeas corpus hearing,” and that the habeas courts have the power to order release. *Boumediene v. Bush*, 128 S. Ct. 2229, 2266, 2275 (2008). However, the Court’s opinion expressly notes two limitations: the definition of the key term “enemy combatant” is relegated to the lower courts, as is the responsibility for establishing the “procedural and substantive standards” for the habeas hearings. *Id.* at 2273, 2276.

⁸¹ See Presidential Military Order, *supra* note 71.

⁸² *Id.*

⁸³ See Memorandum from John Yoo, Deputy Assistant Attorney Gen., Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, Dep’t of Def., Application of Treaties and Laws to al Qaeda and Taliban Detainees, (Jan. 9, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf>; see also MARGULIES, *supra* note 24, at 56–59.

the eyes of the law, the prisoners were made invisible. 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.

Importantly, the current moment is not the first time that the United States has argued that Guantánamo is a rights-free zone. Reviewing its use as a detention center for Haitian refugees in the 1990s, Gerald Neuman has described Guantánamo as an “anomalous zone,” in which the United States argued that the Haitians “had no constitutional rights whatsoever.”⁸⁴ That position was accepted by the Eleventh Circuit,⁸⁵ though rejected by the Second.⁸⁶ The result of this rights-free zone, Neuman argued, was “a true reverse Carnival, a ruler’s festival of uninhibited exercise of power”⁸⁷:

The government, . . . feeling unconstrained by law, responded with more severity than sympathy to its unwelcome guests. The government surrounded the camp with razor barbed wire, set out camp rules, and punished infractions by confinement to the brig, after only the most rudimentary procedures Although the government’s own physicians warned against concentrating an immune-suppressed population [some of the detainees were HIV-positive], the government overrode their advice An INS spokesman dismissed concern for the detainees with the remark, “they’re going to die anyway, aren’t they?”⁸⁸

In this sense, while the current incarnation of Guantánamo presents a particularly vivid example of a rights-free zone, anomaly is no stranger to Guantánamo. The Haitian experience presented a template for how rights could be stripped away, and recommended Guantánamo for its combination of geographic proximity and jurisdictional extraterritoriality. Perhaps more frightening, as Neuman suggests, anomaly is no stranger to law, but instead seems a regular if episodic visitor.⁸⁹

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.⁹⁰ A presidential order authorized the appre-

⁸⁴ Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1229 (1996).

⁸⁵ *Haitian Refugee Ctr. v. Baker*, 953 F.2d 1498, 1513 n.8 (11th Cir. 1992).

⁸⁶ *Haitian Ctrs. Council v. McNary*, 969 F.2d 1326 (2d Cir. 1992), *vacated as moot sub nom.*, *Sale v. Hatian Ctrs. Council*, 509 U.S. 918 (1993); *see also Haitian Ctrs. Council v. Sale*, 823 F. Supp. 1028, 1041–42 (E.D.N.Y. 1993) (*vacated by Stipulated Order Approving Class Action Settlement Agreement* (Feb. 22, 1994)).

⁸⁷ Neuman, *supra* note 84, at 1232.

⁸⁸ *Id.*

⁸⁹ *Id.* at 1228–29.

⁹⁰ Neal Kumar Katyal, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 69 (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 Bush Administration] to defy and creatively reinterpret even the will of Congress—all supposedly entirely consistent

hension and detention of terrorist suspects as “enemy combatants,” anywhere in the world.⁹¹ Informed by legal advice from within the Executive Branch,⁹² the presidential order purported to exempt the Guantánamo prisoners from the Geneva Conventions, the primary advantage of which was to enable the use of “enhanced interrogation techniques,”⁹³ 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,⁹⁴ the location of the interrogation and detention center at Guantánamo served multiple strategic purposes, including the intention to evade the jurisdiction of U.S. courts. Thus, the principal and enduring court challenge regarding Guantánamo has not been the adjudication of rights, but 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 unreviewable authority.⁹⁵ 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.⁹⁶ 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 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 prisoners possessed neither statutory nor constitutional rights. Thus, by the government’s account, the courts could hear the cases but could not act; they could listen, but they could not speak.⁹⁷

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).

⁹¹ Presidential Military Order, *supra* note 71.

⁹² See *supra* note 72 and accompanying text.

⁹³ See Action Memo from William J. Haynes, Gen. Counsel, Dep’t of Def., to Donald H. Rumsfeld, Sec’y of Def., Counter-Resistance Techniques (Dec. 2, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.12.02.pdf> (authorizing, among other techniques, stress positions, extended isolation, hooding, twenty-hour interrogations, restriction on meals, and exploitation of individual phobias).

⁹⁴ See *supra* Part I.B.

⁹⁵ 542 U.S. 466 (2004). For an excellent analysis of *Rasul*, see Azmy, *supra* note 79.

⁹⁶ See *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d. 443 (D.D.C. 2005); *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005).

⁹⁷ 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).

Two federal district judges divided on the question of whether the prisoners possessed any enforceable rights.⁹⁸ Before the Court of Appeals decided the issue, Congress intervened, at the Bush Administration's behest, passing the Detainee Treatment Act (DTA),⁹⁹ which amended the federal habeas statute and seemingly stripped the courts of the jurisdiction found in *Rasul*.¹⁰⁰

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*.¹⁰¹ 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 expeditiously¹⁰² and proceeded to the merits, rejecting the government's argument that the prisoners stood outside the Geneva Conventions. The Court instead found that the military commission system was unauthorized under the Uniform Code of Military Justice and contrary to Common Article 3 of the Geneva Conventions.¹⁰³

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 the prisoners' substantive rights claims. There has been a tendency to describe, and lament, the *Rasul* case as "merely" jurisdictional, because 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.¹⁰⁴ But even if merely 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.¹⁰⁵

⁹⁸ Senior Judge Joyce Hens Green issued an opinion that found the prisoners to have Fifth Amendment due process rights. See *Guantanamo Detainee Cases*, 355 F. Supp. 2d at 464. Judge Richard Leon reached the opposite conclusion. See *Khalid*, 355 F. Supp. 2d at 320–24.

⁹⁹ Pub. L. No. 109-148, § 1003, 119 Stat. 2739 (2005).

¹⁰⁰ *Id.* § 1005(e).

¹⁰¹ 548 U.S. 557 (2006).

¹⁰² *Id.* at 571–83.

¹⁰³ *Id.* at 625, 632–33.

¹⁰⁴ 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).

Rasul v. Bush, 542 U.S. 466, 483 n.15 (2004).

¹⁰⁵ See Owen M. Fiss, *Dombrowski*, 86 YALE L.J. 1103 (1977).

Robert Cover decried this “apologetic and statist orientation” of jurisdictional decisions for “prevent[ing] courts from ever reaching the threatening questions.”¹⁰⁶ 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.¹⁰⁷

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 legal and popular imaginations 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.¹⁰⁸

The significance of the *Hamdan* decision can be measured by the speed with which the Bush Administration moved for Congress to overturn it. Congress yielded, and with the enactment of the Military Commissions Act of 2006 (MCA),¹⁰⁹ it 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 provoked a constitutional dispute on a core liberty concern,¹¹⁰ ultimately resolved in *Boumediene*; (2) it attempted a unilateral reinterpretation of sections of the

¹⁰⁶ Cover, *Nomos and Narrative*, *supra* note 35, at 56.

¹⁰⁷ *Id.* at 54 (“[T]he judge—armed with no inherently superior interpretive insight, no necessarily better law—must separate the exercise of violence from his own person.”).

¹⁰⁸ *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 561 (2006) (discussing the right to be present at one’s own trial).

¹⁰⁹ Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600.

¹¹⁰ *See id.* § 7, amending 28 U.S.C. § 2241(e)(1) (“No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined . . . an enemy combatant or is awaiting such determination.”). I have written previously about the implications of the MCA’s habeas-stripping provisions for noncitizens within the United States. *See* Muneer I. Ahmad, *Guantánamo Is Here: The Military Commissions Act and Noncitizen Vulnerability*, 2007 U. CHI. LEGAL F. 1 (2007).

Geneva Conventions;¹¹¹ and (3) it replaced the discredited military commission system with one that suffers from many of the same defects that troubled the Supreme Court in *Hamdan*.¹¹² Until *Boumediene* was decided, the cumulative result was 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 their actions.¹¹³ By the government's account, law is all around: contract law governs the agreement with Cuba granting the United States use of Guantánamo as a naval station;¹¹⁴ the Uniform Code of Military Justice applies to wrongdoing committed by military personnel and civilian contractors on the base; and international humanitarian law (IHL) authorizes wartime detention of combatants.

An argument can be made from the left that there is law (as opposed to the normative argument that there should be) at Guantánamo. Human rights law posits that fundamental *jus cogens* norms apply everywhere and all the time.¹¹⁵ By this account, Guantánamo does not exist outside the law; rather, the law of fundamental rights is permanent, and immanent, and thus

¹¹¹ Responding to the *Hamdan* decision, including the Court's finding that the commissions, as then constituted, violated Common Article 3, the MCA sought to cabin the scope and application of the Geneva Conventions. See 10 U.S.C. § 948b(d)(2)(f) (2006) (defining the military commissions as per se "regularly constituted courts" under Common Article 3 of the Geneva Conventions); *id.* § 948b(d)(2)(g) (declaring that the Geneva Conventions may not be invoked as a source of rights by enemy combatants); MCA, *supra* note 109, § 5(a) (barring the use of the Geneva Conventions as a source of rights in any habeas or other civil proceeding in which the United States or its agents are a party); *id.* § 6(a)(3)(A) (granting the President inherent authority to interpret the meaning and application of the Geneva Conventions, including the definition of "grave breaches").

Numerous commentators have argued against this evisceration of the Conventions under U.S. law. See generally Mark A. Drumbl, *The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, the Geneva Conventions, and International Criminal Law*, 75 GEO. WASH. L. REV. 1165 (2007); Carlos Manuel Vázquez, *The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide*, 101 AM. J. INT'L L. 73 (2007).

¹¹² See MCA, *supra* note 109, § 3 (adding Chapter 47A to Title 10 of the U.S. Code).

¹¹³ See generally Robert M. Cover, *The Folktales of Justice*, in NARRATIVE, VIOLENCE AND THE LAW: THE ESSAYS OF ROBERT COVER 173, 174–75 (Martha Minow, Michael Ryan & Austin Sarat eds., 1992) [hereinafter Cover, *Folktales of Justice*] (discussing the value of law in legitimizing "the exercise of coercion and . . . the organization of authority and privilege").

¹¹⁴ See Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 23, 1903, U.S.–Cuba, art. III, T.S. No. 418, in THE CONSOLIDATED TREATY SERIES, 1902–1903, at 429–430 (Clive Perry ed., Ocean Publications 1980).

¹¹⁵ See generally HENRY J. STEINER & PHILLIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 161–73, 1222–37 (2d ed. 2000) (discussing *jus cogens* in the context of international human rights); Pieter van Dijk, *A Common Standard of Achievement About Universal Validity and Uniform Interpretation of International Human Rights Norms*, 13 NETH. Q. HUM. RTS. 105 (1995) (recognizing the universality of a core set of human rights as evidenced by broad codification in international and regional legal conventions).

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 Bush Administration, the claim to law reflected a concern, and a contest, over the legitimacy of state power.¹¹⁶ I return to this inherent linkage between law and legitimacy in Part II.A, 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 were selective at best. For example, it relied upon IHL for the principle that combatants may be detained for the duration of hostilities,¹¹⁷ but has sought to disclaim the applicability of other provisions of IHL, most notably Common Article 3 of the Geneva Conventions.¹¹⁸

For human rights advocates, the claim to law is also a claim about state power and the subordination of state power to a set of norms and principles that originate outside the state, and yet have the force to bind it, even without the state’s consent. While I am sympathetic to the human rights position, my experience at Guantánamo, and more importantly the prisoners’ experience, makes the assertion of law’s existence seem ever more fanciful. Indeed, looking from the lived experience of those on the 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,¹¹⁹ created by the Bush Administration in the aftermath of *Rasul*, Abassi submitted written complaints that military police

¹¹⁶ Cover, *Folktales of Justice*, *supra* note 113, at 174–75. *But see* Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WISC. L. REV. 379 (1983) (questioning the existence of a causal relationship between actions by legal institutions and popular belief in the legitimacy of government). Although Hyde raises an empirical question regarding causality between state action and popular consciousness, my argument here is about the government’s *belief* in the importance of making the commissions appear legitimate.

¹¹⁷ *See, e.g.*, Brief for the Respondents in Opposition, *Hamdi v. Rumsfeld*, 2003 WL 23189498, at *20 (Dec. 3, 2003) (No. 03-6696) (relying upon “laws and customs of war,” as well as Hague Convention of 1907, for authority for wartime detention of combatants).

¹¹⁸ *See, e.g.*, Brief for Respondents at 37–38, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184), 2006 WL 460875 (arguing that Common Article 3 “is inapplicable to the ongoing conflict with al Qaeda”).

¹¹⁹ The Combatant Status Review Tribunal was created by the Bush Administration after the Supreme Court decided the *Rasul* case and, on the same day, the case of *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). For a fuller description of the origins and nature of the CSRT, see *infra* note 126 and accompanying text.

had sex in front of him while he prayed. He also 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 2005.¹²⁰

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.”¹²¹

Here, then, we must acknowledge the inextricability of law and the state, and because of its monopoly on legitimate violence, the special, though not exclusive, authority the state holds in defining what is law. 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, like a trapped animal, one limb isn’t always caught in state power. In this context, the *Rasul*, *Hamdan*, and *Boumediene* 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.

The Court’s decision in *Boumediene*¹²² is the latest, but likely not the last chapter in the Guantánamo legal history. Like *Rasul*, which was decided on statutory grounds, it affirms the jurisdiction of the federal courts to hear the prisoners’ habeas petitions, but it is even more significant because the decision is based on constitutional grounds. Pushed into a corner by the MCA, the Court confronted directly the question of whether the habeas-stripping provision of Section 7 of the statute was in violation of the Suspension Clause, and found that it was.¹²³ This constitutional vindication of the prisoners’ right to be heard, and the seeming willingness of the district court judges to now proceed with the prisoners’ habeas cases expeditiously,¹²⁴ suggests anew the potential for transformative legal practice. And yet,

¹²⁰ Gina Pace, *U.S. Releases Gitmo Detainee Names*, ASSOCIATED PRESS, Mar. 4, 2006, available at <http://www.cbsnews.com/stories/2006/03/02/terror/main1364552.shtml>.

¹²¹ CTR. FOR CONSTITUTIONAL RIGHTS, REPORT ON TORTURE AND CRUEL, INHUMAN AND DEGRADING TREATMENT OF PRISONERS AT GUANTÁNAMO BAY, CUBA ii (July 2006) (quoting Unclassified Attorney Notes of Robert Kirsch), available at http://ccrjustice.org/files/Report_ReportOnTorture.pdf.

¹²² 128 S. Ct. 2229 (2008).

¹²³ *Id.* at 2274.

¹²⁴ See Press Release, U.S. Dist. Court for D.C., DC Chief Judge Meets with Judges to Discuss District Court Procedures for Guantanamo Cases (July 2, 2008), <http://www.dcd.uscourts.gov/public-docs/system/files/Guantanamo-PressRelease070208.pdf> (“The judges of this Court are committed to deciding these[] cases as expeditiously as possible.” (quoting Royce C. Lamberth, C.J.)) (last visited Sept. 5, 2009). A flurry of case activity suggests that the district court is expediting these cases.

the history of the Guantánamo litigation suggests that the proper measure of such court victories is not their doctrinal significance, but their effect in the lived experience of the prisoners. Six years after some of the prisoners arrived, the question finally resolved by the Court in *Boumediene* is not whether they are being held lawfully, or what substantive rights they have—Fifth Amendment due process or Sixth Amendment confrontation rights, for example—but only that they are entitled to contest their detention. Indeed, the Court ensured many months more of wrangling in the lower courts because it expressly declined to rule on two of the most fundamental issues necessary to the resolution of these cases: the definition of “enemy combatant” and what procedures should govern the habeas proceedings.¹²⁵ Thus, while the *Boumediene* decision is undoubtedly historic in limiting the scope of executive authority, it merely returned the prisoners to the place they were four years ago, after *Rasul*.¹²⁶

¹²⁵ *Boumediene*, 128 S. Ct. at 2273, 2275. The Court was sensitive to the issue of delay, noting, “[w]hile some delay in fashioning new procedures is unavoidable, the costs of delay can no longer be borne by those who are held in custody.” *Id.* at 2275. Yet it seems that the costs will be borne by the prisoners after all.

¹²⁶ The Supreme Court did provide the lower courts with some significant guidance that should make post-*Boumediene* litigation more fruitful than was the post-*Rasul* litigation. Specifically, the Court found that the government procedure created in the aftermath of *Rasul*, known as the Combatant Status Review Tribunal (CSRT) and purportedly designed to confirm the “enemy combatant” status of each prisoner, was an inadequate substitute for federal habeas review. The Court found the procedure inadequate even though the DTA authorized a limited review of its conclusions by the D.C. Court of Appeals. *Boumediene*, 128 S. Ct. at 2262–74. Thus, the Court has now ruled on two issues that dominated the post-*Rasul* litigation: the availability of habeas after passage of the DTA and the MCA, and the adequacy of the CSRT proceedings. With this doctrinal underbrush cleared, the path to full habeas proceedings should be clearer, and yet I remain concerned about the ability of the Executive Branch to forestall hearings because of myriad other legal issues to be litigated, not least of which is the question of what substantive rights the prisoners possess.

Jenny Martinez has raised a related set of concerns about the “war on terror” cases, noting the disconcerting tendency of lawyers and courts alike to focus on procedural rights at the expense of substantive claims. See Martinez, *supra* note 79.

Finally, the case of the Uighurs at Guantánamo provides an acute example of the post-*Boumediene* gap between procedural and substantive justice. The Uighurs, a Muslim ethnic minority, have been determined not to be enemy combatants, but cannot be returned to China because of a likelihood they will be tortured by the Chinese government. On October 7, 2008, Judge Ricardo Urbina granted the writ of habeas corpus to the Uighurs and ordered their release into the United States. *In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d 33 (D.D.C. 2008). The government immediately challenged that order, and the D.C. Circuit subsequently reversed, holding that the plenary power doctrine precluded the courts from ordering the government to admit someone to the United States. *Kiyemba v. Obama*, 555 F.3d 1022, 1026–29 (D.C. Cir. 2009). Thus, the Uighurs, who in all likelihood never should have been brought to Guantánamo in the first place, were trapped there indefinitely despite their right to habeas having been vindicated. Although the Supreme Court recently granted certiorari in their case, *Kiyemba v. Obama*, 555 F.3d 1022 (D.D.C. 2009), *cert. granted*, 2009 WL 935637 (U.S. Oct. 20, 2009) (No. 08-1234), the plight of the Uighurs is likely to be resolved politically rather than legally: the United States recently negotiated for the transfer of four Uighurs to Bermuda and six to the South Pacific nation of Palau, and is attempting to resettle the remaining Uighurs elsewhere. See Erik Eckholm, *Out of Guantánamo, Uighurs Bask in Bermuda*, N.Y. TIMES, June 14, 2009, at A4; David Johnston, *Uighurs Leave*

A few recent decisions by habeas judges to order release of a small number of prisoners,¹²⁷ and the government's decision not to appeal, suggest anew that *Boumediene*, and the rights-based strategy, may well have greater vitality than my argument thus far has suggested. However, these decisions come six years after Guantánamo opened, and at least as important, after the 2008 presidential election. Indeed, the dramatically changed political climate may prove to be the most important factor in rights enforcement at Guantánamo. Even then, the change in Administration may not satisfy fully the justice claims of Guantánamo.¹²⁸

E. *The Physical Erasure of the Human: Torture*

Taken together, the cultural and legal erasures discussed above enabled the physical erasure of prisoners at Guantánamo and in particular, their torture.

The physical erasure of torture is self-evident, and thus needs only brief comment. By definition,¹²⁹ torture involves the degradation of the body or the mind, such that torture always seeks to erase, even if to varying degrees depending upon its specific method and duration. The infamous "Torture Memos" written by John Yoo and others at the Department of Justice Office of Legal Counsel¹³⁰ literally underwrote torture at Guantánamo, including the well-documented practices of waterboarding,¹³¹ rendition,¹³²

Guantánamo for Palau, N.Y. TIMES, Nov. 1, 2009, at A22; Warren Richey, *Supreme Court Leaves Hanging the Case of Detained Uighurs*, CHRISTIAN SCI. MON., June 30, 2009, available at <http://www.csmonitor.com/2009/0701/p02s06-usju.html> (reporting on the Supreme Court's failure to act on Uighurs' petition for certiorari). Five Uighurs were previously resettled in Albania. See Tim Golden, *Chinese Leave Guantánamo for Albanian Limbo*, N.Y. TIMES, June 10, 2007, at A1.

¹²⁷ See *Basardh v. Bush*, 2009 WL 856345 (D.D.C. Mar. 31, 2009) (ordering release of Yasin Muhammad Basardh); *El Gharani v. Bush*, 593 F. Supp. 2d 144 (D.D.C. 2009) (ordering release of Mohammed el Gharani); *Boumediene v. Bush*, 579 F. Supp. 2d 191, 199 (D.D.C. 2008) (directing Respondents "to take all necessary and appropriate diplomatic steps to facilitate the release of Petitioners Lakhdar Boumediene, Mohamed Nechla, Hadj Boudella, Mustafa Ait Idr, and Sabr Lahmar forthwith").

¹²⁸ See *supra* note 13 and accompanying text.

¹²⁹ The Convention Against Torture defines torture as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment Pt. I, Art. 1, ¶ 1, Dec. 10, 1984, 1465 U.N.T.S. 85, reprinted in 23 I.L.M. 1027, 1027 (1984). This definition was incorporated into federal regulations. See 8 C.F.R. § 1208.18(a)(1) (2008).

¹³⁰ See *supra* notes 72–73 and accompanying text.

¹³¹ See, e.g., Jonathan S. Landay, *Cheney Confirms That Detainees Were Subjected to Waterboarding*, MCCLATCHY NEWSPAPERS, Oct. 25, 2006, <http://www.mcclatchydc.com/190/story/>

and prolonged stress positions, as well as other conduct that while not rising to the level of torture constituted cruel, inhuman, and degrading treatment.¹³³ The faulty reasoning of those legal memoranda enabled real-world destruction enacted upon the bodies of the prisoners.

Through the infliction of pain, torture not only damages the body and the mind, it is, as Elaine Scarry has described, “world-destroying.”¹³⁴ As Scarry writes:

It is the intense pain that destroys a person’s self and world, a destruction experienced spatially as either the contraction of the universe down to the immediate vicinity of the body or as the body swelling to fill the entire universe. Intense pain is also language destroying; as the content of one’s world disintegrates, so the content of one’s language disintegrates; as the self disintegrates, so that which would express and project the self is robbed of its source and its subject.¹³⁵

Thus, physical erasure also eliminates the intelligible voice, reducing human speech to the primordial expression of pain, “a state anterior to language.”¹³⁶

In addition to these erasures of the body, mind, and self, torture at Guantánamo has achieved a third form of physical erasure, for the very fact of the prisoners’ torture necessitated their concealment. The historical retreat of torture from respectability means that it must be performed in hiding,¹³⁷ layering one more curtain over the already shrouded bodies of the Guantánamo prisoners.

14893.html (quoting then-Vice President Cheney confirming the use of waterboarding and stating that its use is ““a no-brainer”).

¹³² See *supra* note 28.

¹³³ See generally JAMEEL JAFFER & AMRIT SINGH, ADMINISTRATION OF TORTURE: A DOCUMENTARY RECORD FROM WASHINGTON TO ABU GHRAIB AND BEYOND 44 (2007) (collecting government documents, many obtained by the American Civil Liberties Union through Freedom of Information Act litigation, relating to U.S. detention and interrogation practices); KRISTIAN WILLIAMS, AMERICAN METHODS (2006) (discussing U.S. interrogation practices); THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg, Joshua L. Dratel & Anthony Lewis eds., 2005) (collecting primary sources related to U.S. interrogation practices).

¹³⁴ ELAINE SCARRY, THE BODY IN PAIN 29 (1995).

¹³⁵ *Id.* at 35.

¹³⁶ *Id.* at 4.

¹³⁷ As Paul Kahn has written:

With the disappearance of the penal spectacle [when torture was carried out publicly] the practice of torture became a secret practice . . . occur[ing] in places closed to public regard, under conditions of deniability, and by agents whose own relationship to the state is likely to be “shadowy.” The modern phenomenon of torture has the opaque presence of the “deniable.” It must be known but not seen; it must be spoken of but never speak itself. It is a political practice that cannot exist in a public space. Nevertheless, to be effective the threat of torture must taint the public space. It is always just beyond view.

PAUL W. KAHN, SACRED VIOLENCE 3 (2008) (footnote omitted).

II. TECHNIQUES OF LEGAL ERASURE: LEGAL ABSURDISM AND RADICAL INDETERMINACY

Having established the multiple forms of erasure that constitute the dehumanization of Guantánamo, in this Part I focus on legal erasure and the deployment of law in the deprivation of rights. I first offer a description and critique of the military commission system based on my experience representing Omar Khadr, paying particular attention to the absurdist tendencies of the thinly conceived commissions. I then discuss the legal indeterminacy of core legal concepts in the Bush Administration's Guantánamo regime and argue that the Administration's tendency toward legal invention further undermined Guantánamo, even as the Administration reached for law's mantle of legitimacy.

A. *Legal Erasure Through Legal Absurdism: 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*.¹³⁸ 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.¹³⁹

Absurdity abounds at Guantánamo. Before *Rasul*, iguanas were protected under the Endangered Species Act but prisoners were protected by no law.¹⁴⁰ Under pressure from the federal courts, the Bush Administration determined that several men, whose “enemy combatant” status had never been substantiated, were “no longer enemy combatants,” even though, as a federal judge noted, they had never been “enemy combatants” in the first place.¹⁴¹ A habeas lawyer was falsely accused of smuggling contraband,

¹³⁸ FRANZ KAFKA, *THE TRIAL* (Edwin Muir & Willa Muir trans., Schocken Books 1968) (1925).

¹³⁹ Brian Pinaire, *The Essential Kafka: Definition, Distention, and Dilution in Legal Rhetoric*, 46 U. LOUISVILLE L. REV. 113, 154–55 (2007). The Kafkaesque quality of Guantánamo is similarly captured in STEVEN T. WAX, *KAFKA COMES TO AMERICA* 176–77 (2008). For an insightful discussion of the tactics used by the government to disrupt lawyers' relationships with their clients at Guantánamo, and the ethical challenges of representing prisoners there, see David Luban, *Lawfare and Legal Ethics in Guantánamo*, 60 STAN. L. REV. 1981 (2008). For a more personal account of such challenges, see Marc Falkoff, *This Is To Whom It May Concern: A Guantánamo Narrative*, 1 DEPAUL J. SOC. JUST. 153 (2008).

¹⁴⁰ See Brief for Petitioners at 36 n.62, *Al Odah v. United States*, 542 U.S. 466 (2004) (No. 03-343), 2004 WL 96764 (noting applicability of the Endangered Species Act, 16 U.S.C. § 1538 (2006), to Cuban iguanas at Guantánamo); Transcript of Oral Argument at 52, *Rasul v. Bush*, 542 U.S. 466 (2004) (No. 03-334) (Justice Souter noting, “We even protect the Cuban iguana.”).

¹⁴¹ See *Qassim v. Bush*, 407 F. Supp. 2d 198, 200 (D.D.C. 2005).

namely, a pair of athletic underwear, in to a prisoner, ostensibly by wearing them in himself.¹⁴² 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*,¹⁴³ and in the topsy-turvy universe of *Alice in Wonderland*,¹⁴⁴ 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 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 reconstruct reality, in a bid to reconstitute normalcy. It is Josef K., Garcin, and Alice who are made to feel foolish, not their keepers. Thus these texts launch into a 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 remade 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 terror. Habeas lawyers' access to the prisoners threw Guantánamo into a new realm of narrative contest, one in which the government participated vigorously, largely through storytelling.

One story the government told was that Guantánamo was a humane and effective interrogation center. This narrative sought to counter allegations of torture and abuse by advancing a commitment to a nonconfrontational, collaborative model of interrogation, and to counter demands for Guantánamo's closure by arguing that it continues to yield valuable human intelligence in the fight against terrorism.¹⁴⁵ To tell this story, the government has let reporters and members of Congress observe an interrogation

¹⁴² See Clive Stafford-Smith, Editorial, *America's Legal Black Hole*, L.A. TIMES, Oct. 5, 2007, at A27.

¹⁴³ JEAN-PAUL SARTRE, *NO EXIT, AND THREE OTHER PLAYS* (Lionel Abel trans., Vintage Books 1955) (1944).

¹⁴⁴ LEWIS CARROLL, *ALICE IN WONDERLAND & THROUGH THE LOOKING GLASS* (Grosset & Dunlap 1946) (1865).

¹⁴⁵ See Neil A. Lewis, *Fresh Details Emerge on Harsh Methods at Guantánamo*, N.Y. TIMES, Jan. 1, 2005, at A11 ("Military officials have gone to great lengths to portray Guantánamo 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 Guantánamo 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.").

(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.¹⁴⁶

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 likely never will be, the government has charged a select few, including Omar, with alleged war crimes,¹⁴⁷ 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 attach to military trials,¹⁴⁸ coupled with the gross procedural and substantive irregularities of these military commissions, have led critics to call the proceedings nothing more than show trials. Mindful of this criticism, and seeking to rebut it, the Bush Administration sought to bolster the commissions' legitimacy, and in so doing, only further undermined it.

The commission process was established by presidential order in November 2001,¹⁴⁹ and the first prisoners were charged and referred before a

¹⁴⁶ *Id.*

¹⁴⁷ See *infra* Part II.B.2 for a discussion of the indeterminacy of war crimes as charged by the Bush Administration.

¹⁴⁸ See generally U.S. DEP'T OF STATE, EQUATORIAL GUINEA, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (Mar. 8, 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, 1994 (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.").

¹⁴⁹ Presidential Military Order, *supra* note 71. For a comprehensive history and critique of the military commission system, see David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil Over the Guantánamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131 (2008) [hereinafter David Glazier, *A Self-Inflicted Wound*]; Glenn M. Sulmasy, *The Legal Landscape After Hamdan: The Creation of Homeland Security Courts*, 13 NEW ENG. J. INT'L. & COMP. L. 1 (2006); Detlev F. Vagts, *Military Commissions: A Concise History*, 101 AM. J. INT'L L. 35 (2007); see also Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1260 (2002) (contending that the President's order for the trial of suspected terrorists is "flatly unconsti-

commission in 2004.¹⁵⁰ 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.¹⁵¹ Many of these charges were vindicated by the Supreme Court's wholesale invalidation of the commissions in *Hamdan*. In their original incarnation,¹⁵² the commission rules permitted testimony obtained through torture,¹⁵³ the liberal use of secret evidence, and exclusion of the defendant from his own trial.¹⁵⁴ Eva-

tutional"); David Glazier, Note, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005 (2003) (arguing that to comport with legal norms of the twenty-first century and ensure due process, military commissions should have the same procedure as courts martial).

¹⁵⁰ See Neil A. Lewis, *U.S. Charges Two at Guantánamo With Conspiracy*, N.Y. TIMES, Feb. 25, 2004, at A1 (reporting that Ali Hamza Ahmed Sulayman al-Bahlul and Ibrahim Ahmed Mahmoud al-Qosi were the first two detainees at Guantánamo Bay charged by the Pentagon); see also News Release, U.S. Dep't of Def., Two Guantanamo Detainees Charged (Feb. 24, 2004), available at <http://www.defenselink.mil/releases/release.aspx?releaseid=7088> (reporting the two were charged).

¹⁵¹ See, e.g., Eugene R. Fidell, Dwight H. Sullivan & Detlev F. Vagts, *Military Commission Law*, 2005 ARMY LAW 47 (2005) (noting that "the commission system's rules are subject to continuous change and, in fact, have been revised in sometimes internally-inconsistent ways" (footnote omitted)); David Glazier, *Full and Fair by What Measure?: Identifying the International Law Regulating Military Commission Procedure*, 24 B.U. INT'L L.J. 55, 58 (2006) ("[T]hough President Bush mandated that the Guantanamo tribunals provide a 'full and fair trial,' observers documented that commissioners essentially made up procedures as the trials proceeded, and that even the presiding officers seemed unable to articulate the legal regimes governing their courts." (footnotes omitted)); Neil A. Lewis, *Lawyer Says Detainees Face Unfair System*, N.Y. TIMES, Jan. 22, 2004, at A25; Memorandum from Amnesty Int'l, to the U.S. Gov't, *The Rights of People in U.S. Custody in Afghanistan and Guantánamo Bay* (Apr. 2002), <http://www.amnesty.org/en/library/asset/AMR51/053/2002/en/c92423a1-d868-11dd-9df8-936c90684588/amr510532002en.pdf>; Nat'l Ass'n of Crim. Def. Lawyers Ethics Advisory Comm., Op. 03-04 (2003), available at [http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/ethicsopinions/\\$FILE/Ethics_Op_03-04.pdf](http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/ethicsopinions/$FILE/Ethics_Op_03-04.pdf); Nat'l Inst. of Mil. Just., *Statement on Civilian Attorney Participation as Defense Counsel in Military Commissions* (2003), available at http://www.nimj.com/documents/NIMJ_Civ_Atty_Participation_Statement.pdf.

¹⁵² The rules governing the military commissions have changed considerably, and nearly constantly, since they were announced by the Presidential Military Order issued in November 2001. See *supra* note 71. Seemingly in the face of public criticism, the Pentagon issued a series of sometimes contradictory rules and instructions which provided some additional detail on the procedures to be used. See David Glazier, *A Self-Inflicted Wound*, *supra* note 149 (chronicling the unfolding rules of the commissions). Following the invalidation of the military commissions by the Supreme Court in *Hamdan*, Congress's enactment of the MCA established new rules. *Id.* at 174-85. On May 15, 2009, President Obama stated that he would continue the use of military commissions and announced yet another set of new rules. See Statement of President Barack Obama on Military Commissions, *supra* note 13.

¹⁵³ See *infra* note 274 and accompanying text.

¹⁵⁴ As a plurality of the Court explained in *Hamdan*:

The accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding that either the Appointing Authority or the presiding officer decides to "close." Grounds for such closure "include the protection of information classified or classifiable . . . ; information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests." . . . Appointed military defense counsel must be privy to these closed sessions, but may, at the presiding officer's discretion, be forbidden to reveal to his or her client what took place therein.

luating the military commission system in its early incarnation, Professor Mary Cheh posed the baseline questions, and provided a terse and unambiguous answer: “Are the military commissions rigged? Are they fixed or arranged in a way to produce a desired result? Are they irregular courts in which accepted procedures are perverted and defense counsel’s hands tied? In a word, yes.”¹⁵⁵ Mounting domestic¹⁵⁶ and international¹⁵⁷ criticism, some

Hamdan v. Rumsfeld, 548 U.S. 557, 614 (2006) (plurality opinion) (citation omitted) (quoting from and citing to Military Commission Order No. 1 § 6(B)(3) (Mar. 21, 2002), available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf> [hereinafter MCO No. 1]). *But see id.* at 654 (Kennedy, J., concurring) (arguing that MCO No. 1 § 6(D)(5)(b) does not permit admission of secret evidence if such admission would deprive defendant of a “full and fair trial”); *id.* at 722–23 (Thomas, J., dissenting) (same).

¹⁵⁵ Mary Cheh, *Should Lawyers Participate in Rigged Systems? The Case of the Military Commissions*, 1 J. NAT’L. SECURITY L. & POL’Y 375, 378 (2005). As Cheh notes, however, there were those who believed the commissions to meet fundamental standards of justice. *Id.* at 378–79 n.17. Notably, Judge James Robertson, the district court judge in *Hamdan*, who ruled that Salim Hamdan could not be tried by military commission because his prisoner of war status had not been determined by a “competent tribunal,” stated, “In most respects, the procedures established for the Military Commission at Guantánamo under the President’s order define a trial forum that looks appropriate and even reassuring when seen through the lens of American jurisprudence.” *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 166 (D.D.C. 2004), *rev’d*, 415 F.3d 33 (D.C. Cir. 2005), *rev’d*, 548 U.S. 557 (2006).

¹⁵⁶ The American Bar Association was among the first organizations to raise concerns about the use of military commissions system. See ABA TASK FORCE ON TERRORISM & THE LAW, REPORT AND RECOMMENDATIONS ON MILITARY COMMISSIONS (Jan. 4, 2002), available at <http://www.abanet.org/leadership/military.pdf>; ABA TASK FORCE ON TREATMENT OF ENEMY COMBATANTS, REPORT TO THE HOUSE OF DELEGATES 2 (Aug. 2 2003), available at http://www.nimj.com/documents/ABA_CDC_Corrected_Fin_Rep_Rec_FULL_0803.pdf (noting that the military commission rules “as now drafted, do not sufficiently guarantee that CDC [civilian defense counsel] will be able to render zealous, competent, and effective assistance of counsel to detainees”); Letter from William H. Neukom, President, Am. Bar Ass’n, to the President of the United States (Feb. 27, 2008), available at http://www.abanet.org/poladv/letters/antiterror/2008feb27_detainees_1.pdf. The National Association of Criminal Defense Lawyers and the Association of the Bar of the City of New York have also been important critics. See Nat’l Assoc. of Crim. Def. Lawyers, Ethics Advisory Comm., Opinion 03-04 (2003); Letter from Barry M. Kamins, President, Ass’n of the Bar of the City of New York, to Senator Patrick Leahy et al. (Mar. 12, 2008), available at http://www.nycbar.org/pdf/report/Guantanamo_MC311.pdf.

¹⁵⁷ Perhaps most notable among the international criticism was that from the United Kingdom, whose attorney general, Lord Peter Goldsmith, objected publicly in 2004 to the use of military commissions for British citizens then detained at Guantánamo, stating:

[W]hile we must be flexible and be prepared to countenance some limitation of fundamental rights if properly justified and proportionate, there are certain principles on which there can be no compromise.

Fair trial is one of those—which is the reason we in the U.K. have been unable to accept that the U.S. military tribunals proposed for those detained at Guantanamo Bay offer sufficient guarantees of a fair trial in accordance with international standards.

Attorney Gen. Lord Peter Goldsmith, Address at the Cour de Cassation on the Centenary of the Entente Cordiale, (June 25, 2004), available at http://news.bbc.co.uk/2/hi/uk_news/politics/3839153.stm. See also Lord Johan Steyn, Judicial Member, British House of Lords, Guantanamo Bay: The Legal Black Hole, 27th F.A. Mann Lecture (Nov. 25, 2003), available at <http://www.statewatch.org/news/2003/nov/guantanamo.pdf> (arguing that the treatment of prisoners at Guantánamo does not comply with international standards for fair trials).

of it coming from within the commission prosecutor's own office,¹⁵⁸ 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 commissions look as much like real courts as possible, even as they were emptied of the substantive rights that ordinarily inhere in a courtroom.¹⁵⁹ Although there was no judge in these proceedings, the presiding officer was ordered to wear a robe¹⁶⁰ (and ours carried a gavel); although this was a commission and not a court, the commission room, formerly a dental clinic,¹⁶¹ 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 painted cinder block wall—just high enough to fill the frame of the closed-circuit video cameras. 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.”¹⁶²

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.¹⁶³ 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

¹⁵⁸ See *infra* note 178 and accompanying text.

¹⁵⁹ In November 2006, the Bush Administration proposed spending up to \$125 million to build new commission facilities at Guantánamo. See Federal Business Opportunities, Legal Compound at Guantánamo Bay, Cuba, <http://www.fbo.gov> (follow “Opportunities” hyperlink) (last visited Apr. 17, 2009). The proposal was subsequently shelved after it became public and faced criticism from the newly elected Congress. See Carol Rosenberg, *Plans to Build Courthouse at Guantánamo Bay Revised*, MIAMI HERALD, Dec. 10, 2006, available at <http://www.miamiherald.com/1377/story/320156.html>.

¹⁶⁰ See Email from Major Gen. John Altenburg, Jr., Appointing Auth. for Military Comm’ns, to Keith Hodges, Assistant to the Presiding Officers (Jan. 5, 2006, 12:51 EST) (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.”).

¹⁶¹ See Neil A. Lewis, *Pentagon Charges 5 More in Guantánamo Bay Camp*, N.Y. TIMES, Nov. 8, 2005, at A22.

¹⁶² See Email from Keith Hodges, Assistant to the Presiding Officers, to Chief Prosecutor, Chief Defense Counsel, and Chief Paralegals for Prosecution and Defense (Jan. 3, 2006) (on file with author) (attaching trial script developed by the Office of the Presiding Officers).

¹⁶³ 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, 373 (1982–83).

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. 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.¹⁶⁴

The Gabel and Harris critique exposes the ritual and symbolism deeply embedded in longstanding 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 1942.¹⁶⁵ Thus, the commissions at Guantánamo did not require the excavation of sociocultural 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 Bush Administration claimed it had legal authority to convene the commissions (a position repudiated by the Supreme Court in *Hamdan*),¹⁶⁶ there were few formal rules governing the commission. The only substantive requirement for the commissions was that they be “full and fair,”¹⁶⁷ a phrase that the prosecution and the presiding officer repeated ad nauseum,¹⁶⁸ 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 or what precedential value a decision in one commission would have in the same trial, in another trial before the same presiding officer, or in a trial before a different presiding officer. While any newly created legal system is bound to encounter initial problems, the failure of the commission system to contemplate or address these fundamental issues of adjudication suggests how poorly designed it was.

¹⁶⁴ *Id.* at 372 (footnote omitted).

¹⁶⁵ See *Ex Parte Quirin*, 317 U.S. 1 (1942).

¹⁶⁶ *Hamdan v. Rumsfeld*, 548 U.S. 557, 593–94 (2006).

¹⁶⁷ Presidential Military Order, *supra* note 71, at 57,835.

¹⁶⁸ Carol Rosenberg, *War-Crimes Hearings Resume in Controversy*, MIAMI HERALD, Jan. 16, 2006, at 25A (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.”).

Our military co-counsel, Lieutenant Colonel Colby Vokey, attempted to gain some clarity on the question of what jurisprudence would be relevant to the decision-making of the commission. In the course of voir dire of the presiding officer, he attempted to learn what case law, if any—domestic or international, criminal or civil, military or civilian—would be followed, to which the presiding officer responded, “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.”¹⁶⁹ 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 result 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 forty motions, including motions to adopt the rules of discovery and rules of evidence applicable in courts-martial. The commission never decided 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. We had moved to disqualify the commission’s 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

¹⁶⁹ Draft Transcript of Proceedings at 447, *United States v. Omar Ahmed Khadr* (No. 05008) (Apr. 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.

This approach stands in sharp contrast to that taken by the Supreme Court in *Hayburn’s Case*. See 2 U.S. (2 Dall.) 409 (1792). Only two years after the Court was formed, the Attorney General asked the Court what “system of practice” it would follow, to which the Court responded, “The Court considers the practice of the Courts of *King’s Bench* and *Chancery* in *England* as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein, as circumstances may render necessary.” *Id.* at 411, 413–14. My thanks to Gautam Huded for this example.

only the areas on which we would question the witness, and not what the witness would actually say.¹⁷⁰ 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.¹⁷¹ The next day, the presiding officer rejected this filing, holding that the Alice in Wonderland reference was “patently disrespectful of” the commission and the presiding officer, and as such would be moved to “the inactive section of the filings inventory.”¹⁷² 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, the ruling 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 the commission be treated with dignity.¹⁷³ The Court established the illegitimacy of the commissions 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*.¹⁷⁴ 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.

¹⁷⁰ Ruling on Defense Motion for the Production of Witness John D. Altenburg, Jr. at 2, United States v. Khadr (June 7, 2006) (on file with author).

¹⁷¹ Defense Renewed Motion to Compel Production of Witness John D. Altenburg, Jr. at 1, United States v. Khadr (June 21, 2006) (on file with author).

¹⁷² Ruling on Defense Motion to Renew Their Motion for the Production of Mr. Altenberg [sic], United States v. Khadr (June 22, 2006) (on file with author).

¹⁷³ U.S. Dep't of Def., Presiding Officers Memorandum #16, *Rules of Commission Trial Practice Concerning Decorum of Commission Personnel, Parties, and Witnesses* 2 (Feb. 16, 2006), available at <http://www.defenselink.mil/news/Feb2006/d20060217POM16.pdf> [hereinafter POM 16] (stating that “[t]he 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”).

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.* at 5 (emphasis added).

¹⁷⁴ Defense Renewed Motion to Compel Production of Witness Mr. John D. Altenburg, Jr., United States v. Khadr (Revised) (June 26, 2006). The D.C. Circuit has since invoked Lewis Carroll to deride the government’s use of unreliable evidence in its attempt to establish enemy combatancy:

[T]he government suggests that several of the assertions in the intelligence documents are reliable because they are made in at least three different documents. We are not persuaded. Lewis Carroll notwithstanding, the fact that the government has “said it thrice” does not make an allegation true. See LEWIS CARROLL, *THE HUNTING OF THE SNARK* 3 (1876) (“I have said it thrice: What I tell you three times is true.”).

Parhat v. Gates, 532 F.3d 834, 848–49 (D.C. Cir. 2008).

The Supreme Court's invalidation of the military commission system in *Hamdan* led Congress to authorize a new system under the MCA,¹⁷⁵ thus overcoming the Court's objection that the original commissions lacked congressional authorization.¹⁷⁶ In 2007, a new military commission system was unveiled¹⁷⁷ to renewed criticism, including sharp accusations of political interference in the system made by its former chief prosecutor, Air Force Colonel Morris Davis.¹⁷⁸ While the new commission system resolved some of the problems of its predecessors, it remained deeply flawed, and criticisms such as Colonel Davis's fueled domestic and international concerns about its legitimacy. Nonetheless, the commission system did manage to bring a case to completion in August 2008, that of Osama Bin Laden's driver, Salim Hamdan. That case, which featured closed proceedings and secret witnesses, ended in a conviction of Hamdan for providing

¹⁷⁵ See Military Commissions Act, 10 U.S.C. §§ 948–950 (2006).

¹⁷⁶ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 590–95 (2006).

¹⁷⁷ Omar Khadr was re-charged under the new commission system. *United States v. Khadr*, Charge Sheet, Apr. 5, 2007, available at <http://www.defenselink.mil/news/Apr2007/Khadrrreferral.pdf>. However, the charges against him were subsequently dismissed after a military judge concluded that he lacked jurisdiction over the case. See *United States v. Khadr*, Order on Jurisdiction, June 4, 2007, available at <http://www.scotusblog.com/movabletype/archives/Brownback6-4-07.pdf> (dismissing charges for lack of jurisdiction); *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 (denying government's motion to reconsider, and providing fuller explanation of dismissal of charges). Although the decision was subsequently overturned on appeal, *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>, and the case against Omar continued, these decisions suggested a greater measure of rigor to the post-MCA system. However, the commissions remained the target of criticism, and on his first day in office, President Obama ordered military prosecutors to seek a 120-day continuance in all pending military commission cases, including Omar's. See *United States v. Khadr*, Government Motion: Request for 120-Day Continuance in the Interests of Justice, Jan. 20, 2009, available at <http://www.defenselink.mil/news/P%20011.pdf> (arguing that continuance is "in the interests of justice, as it will permit the newly inaugurated President and his Administration to undertake a thorough review of both the pending cases and the military commissions process generally"); Peter Finn, *Obama Seeks Halt to Legal Proceedings at Guantanamo*, WASH. POST., Jan. 21, 2009, at A2.

¹⁷⁸ See Josh White, *From Chief Prosecutor to Critic at Guantanamo*, WASH. POST., Apr. 29, 2008, at A1 (relating comments by Davis that Pentagon officials pressured him to bring cases that could have "strategic political value" in an election year). Colonel Davis took the unusual step of testifying about his claims of political interference in the military commission proceedings for Salim Hamdan. *Id.* Davis is not the only military critic. Army Brigadier General Gregory Zanetti, the deputy commander of the military task force running the detention operation at Guantánamo, has stated, "The strategy seemed to be spray and pray, let's go, speed, speed, speed . . . Charge 'em, charge 'em, charge 'em and let's pray that we can pull this off." Jane Sutton, *Guantanamo Trials Put Generals at Odds*, REUTERS, Aug. 13, 2008, available at <http://www.reuters.com/article/domesticNews/idUSN1337894520080813>. Zanetti went on to describe Brigadier General Thomas Hartmann, the legal advisor to the military commissions convening authority, as "abusive, bullying and unprofessional." *Id.* Hartmann has insisted that he "viewed it as his mission to get the trials moving but in a fair and transparent manner. He acknowledged telling prosecutors he wanted cases that would 'capture the public's imagination.'" *Id.*

material support for terrorism.¹⁷⁹ And yet, rather than enhancing the commissions' legitimacy, the conviction and its accompanying sentence seemed to diminish them further, as news accounts focused on two facts: first, that the first "war on terror" war crime tribunal resulted in a five-and-a-half-year sentence, for which Hamdan was given credit for all but five months; and second, that the government maintained that even after completing the remaining months of his sentence, Hamdan might still be detained indefinitely as an "enemy combatant."¹⁸⁰

B. Legal Erasure Through Radical Indeterminacy

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.¹⁸¹ 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 termed the phenomenon in 1930s Germany,¹⁸² 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.¹⁸³ 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.¹⁸⁴ As others have noted, the inauguration of a seemingly per-

¹⁷⁹ See William Glaberson, *Panel Convicts Bin Laden Driver in Split Verdict*, N.Y. TIMES, Aug. 7, 2008, at A1.

¹⁸⁰ See *id.* A *New York Times* editorial lambasted the government for pursuing its case against such a low-level figure as Hamdan, and for affording so substandard a trial, concluding: "Mr. Bush's supporters have been crowing over the Hamdan verdict as if it were some kind of a triumph. In truth, it is a hollow victory in the war on terror, a blow to America's standards of justice and image in the world." Editorial, *The United States v. the Driver*, N.Y. TIMES, Aug. 10, 2008, at WK9. In November 2008, Hamdan was sent to Yemen to serve out his remaining unsuspended sentence, and in January 2009, he was released by the Yemeni government. *Yemen Frees Former bin Laden Driver After Jail Term Ends*, REUTERS, Jan. 11, 2009, available at <http://www.reuters.com/article/newsMaps/idUSTRE50A2JR20090111>.

¹⁸¹ See Presidential Military Order, *supra* note 71, at 57,833 ("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.").

¹⁸² See CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE THEORY OF SOVEREIGNTY* 1-15 (George Schwab trans., MIT Press 1985) (1934).

¹⁸³ *Id.*

¹⁸⁴ GIORGIO AGAMBEN, *STATE OF EXCEPTION* (Kevin Attell trans., 2005).

manent “war on terrorism” transforms the exception into the prevailing paradigm of governance.¹⁸⁵

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 extralegal, in which case the exercise of expanded state power in times of emergency demonstrates the limits of law’s dominion.¹⁸⁶ 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.¹⁸⁷ But the domain of law is, by necessity, constituted by reference to the lawless. At Guantánamo, we see that law is all around, but it only reaches so far. To use the law to place someone outside of it is to reveal law’s limit, the lawlessness of law.¹⁸⁸ 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.¹⁸⁹ In this sense, “states of exception are ones in which politics replaces law.”¹⁹⁰ But as Tushnet also notes, if one accepts the central insight of Legal Realism, that politics always displaces law, then there are no states of exception.¹⁹¹ Rather, “[e]mergencies merely surface the usually hidden role of politics in determining the content of law.”¹⁹²

Gerald Neuman similarly has criticized “anomalous zones” such as Guantánamo, which he describes as “geographical exceptions to policies

¹⁸⁵ See, e.g., Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 GA. L. REV. 699 (2006).

¹⁸⁶ See Stephen Humphreys, *Legalizing Lawlessness: On Giorgio Agamben’s State of Exception*, 17 EUR. J. INT’L L. 677, 678 (2006) (book review) (discussing two schools of thought regarding the state of exception as identified by Agamben).

¹⁸⁷ See *supra* Part I.A.

¹⁸⁸ Austin Sarat and Nasser Hussain provide an insightful analysis of how a constitutive lawlessness of law can benefit a criminal defendant. See Austin Sarat & Nasser Hussain, *On Lawful Lawlessness: George Ryan, Executive Clemency, and the Rhetoric of Sparing Life*, 56 STAN. L. REV. 1307 (2004). They describe executive clemency as “lawful lawlessness” and ask, “How does a system of rules understand and accommodate the exercise of a power that is by its very nature unbound by rules?” *Id.* at 1314.

¹⁸⁹ Mark Tushnet, *Meditations on Carl Schmitt*, 40 GA. L. REV. 877, 886 (2006); see also Levinson, *supra* note 185, 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.”).

¹⁹⁰ Tushnet, *supra* note 189, at 886.

¹⁹¹ *Id.*

¹⁹² *Id.*

otherwise regarded as fundamental.”¹⁹³ Consistent with Tushnet’s analysis, Neuman warns that such zones “may become, quite literally, sites of contestation of the polity’s fundamental values,”¹⁹⁴ thus revealing the political dimension to such suspensions of law.

And yet, while Guantánamo may resonate with latent dynamics in law more generally, it is an extreme example of law’s submission to politics. Indeed, 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.¹⁹⁵

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,¹⁹⁶ 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 often contradictory 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.¹⁹⁷ This grasp

¹⁹³ Neuman, *supra* note 84, at 1233.

¹⁹⁴ *Id.*

¹⁹⁵ See generally CRITICAL LEGAL STUDIES (Peter Fitzpatrick & Alan Hunt eds., 1987) (discussing principal insights of Critical Legal Studies).

¹⁹⁶ See *supra* Part II.A.

¹⁹⁷ Our military co-counsel, Colonel Vokey, questioned the use of the term, “Commission Law,” by the presiding officer:

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?

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—

for the mantle of law complemented the hastily decorated commission room and judicially costumed presiding officers.

The intense struggle over what constituted “law” in the commissions, and the government’s attempt to label its ad hoc system as Law, reflect the cultural, mythological, and political qualities that make law forever contested and contingent. Robert Cover cogently described this phenomenon, noting in particular the way in which the label of law can be legitimizing:

The word “law,” itself, is always a primary object of contention. People argue and fight over “what is law” because the term is a valuable resource in the enterprises that lead people to think and talk about law in the first place The struggle over what is “law” is then a struggle over which social patterns can plausibly be coated with a veneer which changes the very nature of that which it covers up. There is not automatic legitimation of an institution by calling it or what it produces “law,” but the label is a move, the staking out of a position in the complex social game of legitimation. The jurisprudential inquiry into the question “what is law” is an engagement at one remove in the struggle over what is legitimate.¹⁹⁸

As information about the inner workings of the commission system emerged, it supported critics’ suspicions that the system was designed to produce convictions rather than do justice. When the commissions were first established, military defense lawyers were assigned for the sole purpose of convincing charged prisoners to plead guilty.¹⁹⁹ 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 at least be a minimal effort to establish a fair process and diligently prepare cases against significant accused. Instead, I find

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.

Draft Transcript of Proceedings at 437–39, *United States v. Khadr* (No. 05008) (Apr. 5, 2006) (on file with author).

¹⁹⁸ Cover, *Folktales of Justice*, *supra* note 113, at 174–75 (footnotes omitted).

¹⁹⁹ See Marie Brenner, *Taking on Guantánamo*, VANITY FAIR, Mar. 2007, at 328, 335 (quoting Judge Advocate General (JAG) defense attorney, Air Force Colonel Will Gunn, as stating: “It was made clear to me that our access to [Guantánamo 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”).

a halfhearted 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.²⁰⁰

The chief prosecutor, who later resigned, was accused of stating repeatedly to his office “that the military panel will be handpicked and will not acquit these detainees.”²⁰¹ His replacement would resign in protest, claiming that Pentagon officials told him that the commission system could not tolerate acquittals.²⁰²

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 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 detention and interrogation at Guantánamo—has shifted dramatically over time, depending upon the needs of the government in the particular political moment; under the Obama Administration, it has been abandoned in form if not in function.²⁰³ 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 redetermined 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 Bush Administration attempted to endow it with legal meaning. Media accounts used the term to describe suspected terrorists, and attributed it to *Ex Parte Quirin*.²⁰⁴ The Bush Administration proffered at least six different definitions of the term, often times conflating distinct categories established in international humanitarian law.²⁰⁵ This debate has continued post-*Boumediene*, as that case

²⁰⁰ Email from Captain John Carr, Department of Defense Office of the General Counsel, to Colonel Fred Borch, Department of Defense Office of the General Counsel (Mar. 15, 2004, 07:56 AM) (on file with author).

²⁰¹ *Id.*

²⁰² See White, *supra* note 178 (reporting testimony from Colonel Morris Davis quoting Department of Defense General Counsel William Haynes II as saying, “‘We can’t have acquittals . . . We’ve been holding these guys for years. How can we explain acquittals? We have to have convictions.’”).

²⁰³ See *infra* notes 232–233.

²⁰⁴ See, e.g., David G. Savage, *Bush Order for Military Tribunals Gets Several Thumbs Down*, L.A. TIMES, Nov. 15, 2001, at A26; William R. Slomanson, *Should We Try Bin Laden in Court?*, SAN DIEGO UNION-TRIBUNE, Nov. 7, 2001, at B9.

²⁰⁵ Peter 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 of “enemy combatant”).

charged the lower courts with defining the term,²⁰⁶ and eventually, the Obama Administration abandoned the term altogether. 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 prisoner of war (POW) status upon capture and to immunity from prosecution under domestic law for taking up arms.²⁰⁷ Both lawful and unlawful combatants may be detained for the duration of hostilities.²⁰⁸ The Bush Administration's use of "enemy combatant" at times conflated both categories,²⁰⁹ and at other times seemed to create a third.

The presidential order purporting to authorize the detention of individuals at Guantánamo provides one important definition of "enemy comba-

²⁰⁶ See, e.g., *Boumediene v. Bush*, 583 F. Supp. 2d 133, 134, 135 (D.D.C. 2008) (Leon, J.) (considering a newly revised, and more expansive, definition of "enemy combatant" proffered by the government, and a narrower definition proffered by prisoners' counsel, reporting the court's inclination to "end up somewhere in the middle," and ultimately adopting the definition used in the Combatant Status Review Tribunals (CSRTs)). For a discussion of the CSRTs, see *infra* note 220 and accompanying text. The definition of "enemy combatant" has also been taken up by the Fourth Circuit. See *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc) (per curiam), *vacated as moot sub nom.* *Al-Marri v. Spagone*, 129 S. Ct. 1545 (2009).

²⁰⁷ See generally JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 3–24 (Cambridge 2005) (explaining the distinctions between civilians and combatants); Knut Ipsen, *Combatants and Non-Combatants*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 65–68 (Deiter Fleck ed., 1995) (explaining the rules for combatants and noncombatants in international law). 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, *supra*, at 68. In contrast, a civilian's presumed status as a noncombatant 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. *Id.*

²⁰⁸ 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 incident[s] of war" (quoting *Ex Parte Quirin*, 317 U.S. 1, 28, 30 (1942)) (alteration in original)).

²⁰⁹ See, e.g., Letter from William J. Haynes II, Gen. Counsel, Dep't of Def., to Sen. Carl Levin, Chairman, Comm. on Armed Servs. (Nov. 26, 2002), at 1, 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.").

tant.”²¹⁰ 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).²¹¹

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*,²¹² 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.²¹³ 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,”²¹⁴ 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 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.’”²¹⁵ Suddenly, the requirements of the Presidential Military Order of either membership in Al Qaeda or participation in terrorism dropped away, and conveniently so: the United States alleged that Hamdi had affiliated with the Taliban, not Al Qaeda, and alleged that he was with a Taliban unit that was engaged in battle against the

²¹⁰ Presidential Military Order, *supra* note 71, at 57,834. The presidential military order did not itself use the term “enemy combatant,” but soon after its promulgation, Bush 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 individuals be subject to the order, though this adds no substantive requirement to the “enemy combatant” definition. *Id.* § 2(a)(2), at 57,834.

²¹¹ Presidential Military Order, *supra* note 71, at 57,834.

²¹² 542 U.S. 507 (2004).

²¹³ *Id.* at 510 (plurality opinion).

²¹⁴ *Id.* at 516 (plurality opinion).

²¹⁵ *Id.* (citing Brief for Respondents at 3, *Hamdi*, 542 U.S. 507 (No. 03-6696), 2004 WL 724020).

The government’s brief did not explicitly limit its “enemy combatant” definition to Afghanistan, though the Court read in this limitation. *See* Brief for Respondents, *supra*, at 24–34.

Northern Alliance, not acts of international terrorism.²¹⁶ Accepting the government's new definition, the Court held that although Congress authorized Hamdi's detention, due process required "a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker."²¹⁷

In *Rasul v. Bush*,²¹⁸ heard during 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," but instead limited its inquiry to whether the federal habeas statute granted the courts jurisdiction over the Guantánamo prisoners' cases, concluding that it did.²¹⁹ 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 definition of "enemy combatant."

In an effort to avoid such scrutiny, the government hastily constructed a process it termed the Combatant Status Review Tribunal (CSRT).²²⁰ The CSRT was tasked solely with determining if a prisoner was an "enemy combatant."²²¹ It 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.²²² By inventing a process, the

²¹⁶ *Hamdi*, 542 U.S. at 510.

²¹⁷ *Id.* at 509.

²¹⁸ 542 U.S. 466 (2004).

²¹⁹ *Id.* at 483–84.

²²⁰ The Supreme Court handed down the *Hamdi* and *Rasul* decisions on June 30, 2004. A Department of Defense memorandum issued on July 7, 2004 by then-Deputy Secretary of Defense Paul Wolfowitz created the CSRT procedure. See Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to Gordon R. England, Sec'y of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004) [hereinafter Wolfowitz Memo], available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.

²²¹ *Id.* at ¶ a.

²²² 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 Appeals at 38–40, *Al Odah v. United States*, 282 F. App'x 844 (D.C. Cir. 2008) (Nos. 05-5064, 05-5095 to 05-5116), 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 Detainee Cases*, 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.'"); MARK DENBEAUX & JOSHUA DENBEAUX, NO-HEARING HEARINGS: CSRT: THE MODERN HABEAS CORPUS? (2006), available at http://law.shu.edu/news/final_

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.”²²³ Once more, the definition shifted, this time expanding massively beyond the battlefield of Afghanistan, and well beyond actual engagement in armed conflict against the United States.²²⁴

The CSRT definition is nothing more 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

no_hearing_hearings_report.pdf (analyzing CSRT hearings of 393 prisoners); 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).

²²³ Wolfowitz Memo, *supra* note 220, at ¶ a.

²²⁴ With the enactment of the Military Commissions Act (MCA), the CSRT’s role became more complicated because it distinguished for purposes of jurisdiction under the MCA a “lawful enemy combatant” from an “unlawful enemy combatant,” where only the latter of which could be tried under the MCA. See Military Commissions Act of 2006, Pub. L. No. 109-366, § 948d(a), 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)) (“[M]ilitary commission[s] under this chapter shall have jurisdiction . . . [over] alien unlawful enemy combatant[s].”). In contrast, the CSRT made no determination as to 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”); or (2) “a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.” 10 U.S.C. § 948a(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. See Wolfowitz Memo, *supra* note 220, at ¶ d (giving the CSRT only the authority to review the classification of “enemy combatant,” not the authority to make such a classification).

Anyone determined to be an “enemy combatant” by a CSRT would thus fail the jurisdictional threshold of an “unlawful enemy combatant” that was required for trial under the MCA.

This contradiction ended with the first ever decision by the Court of Military Commission Review, an appellate body created by the MCA, which held that while military commissions created under the MCA only had jurisdiction over “unlawful enemy combatants,” military judges presiding over commissions could independently determine whether a prisoner is in fact an “unlawful enemy combatant.” *United States v. Khadr*, CMCR 07-001 (2007), available at [http://www.defenselink.mil/news/Sep2007/KHADR%20Decision%20\(24%20Sep%2007\)\(25%20pages\).pdf](http://www.defenselink.mil/news/Sep2007/KHADR%20Decision%20(24%20Sep%2007)(25%20pages).pdf).

as remote from the battlefield as Gambia, Zambia, and Bosnia.²²⁵ 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 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 Osama Bin Laden’s alleged chauffeur²²⁶ or individuals alleged to be mere acquaintances of suspected Al Qaeda operatives.²²⁷ The Bush Administration’s unfolding “war on terrorism” required an “enemy combatant” definition that was global in reach and extended beyond the ordinary indicia of combatant status.

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.’²²⁸

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,”²²⁹ despite the fact that the applicable definition was invented only after these reviews were supposed to have been performed²³⁰ and conflicted

²²⁵ See, e.g., First Amended Petition for a Writ of Habeas Corpus at 4, *Boumediene v. Bush*, 450 F. Supp. 2d 25 (D.D.C. 2006) (No. 04-1166), 2004 WL 5225826 (seeking a writ of habeas corpus for Belkacem Bensayeh, a prisoner captured in Bosnia); Petition for Writ of Habeas Corpus at 2, *El-Banna v. Bush*, No. 04-01144 (D.D.C. July 8, 2004) (seeking a writ of 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).

²²⁶ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 569–70 (2006).

²²⁷ See *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 470 (D.D.C. 2005) (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 (citing *Kurnaz Factual Return*, Enclosure (1) at 2–3, *Kurnaz v. Bush*, 04-CV-1135ESH)).

²²⁸ *Guantanamo Detainee Cases*, 355 F. Supp. 2d at 475 (alteration in original) (citations omitted), vacated by *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), cert. granted sub nom. *Al Odah v. United States*, 551 U.S. 1161 (2007).

²²⁹ Wolfowitz Memo, *supra* note 220, at ¶ a.

²³⁰ 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 for 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 Bush 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.” See *Bismullah v. Gates*, 514 F.3d 1291 (D.C. Cir. 2008) (per curiam).

with competing definitions proffered by the government. Moreover, after *Boumediene*, the government proffered yet another definition of the term.²³¹

Soon after President Obama came into office, the new Administration gave up on the “enemy combatant” terminology entirely. In form, at least, it seemed to collapse under the weight of its multiple definitions and tainted association with the Bush Administration. The Obama Administration stated that it would no longer rely on either the “enemy combatant” category or inherent Article II powers of the President to justify ongoing imprisonment of Guantánamo prisoners, and instead would rely on the Authorization for the Use Military Force²³² and IHL.²³³

Despite this change in terminology, it is not yet clear whether the substance of the Administration’s decisions will follow. Human rights groups and some commentators have criticized the Administration’s move, for while it relies upon international law in a way that the previous Administration did not, it nonetheless continues to claim broad detention authority.²³⁴ Thus, the “enemy combatant” construct continues to resonate, even if the phraseology has changed.

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, and undermining the reliability of the construct itself. But rather than state explicitly, and honestly, that these individuals were not “enemy combatants,” the Bush Administration insisted on referring to them as “no longer enemy combatants.”²³⁵ 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 Orwell-

²³¹ See *supra* note 206.

²³² Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2006)).

²³³ See Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay at 1, 3–8, *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-442, (D.D.C. Mar. 13, 2009); Press Release, U.S. Dep’t of Justice, Department of Justice Withdraws “Enemy Combatant” Definition for Guantánamo Detainees (Mar. 13, 2009), <http://www.usdoj.gov/opa/pr/2009/March/09-ag-232.html>. Soon after this announcement, Secretary of State Hillary Clinton stated that the Administration would no longer use the term “war on terror,” signaling a broad rhetorical shift away from the Bush Administration. See Jay Solomon, *U.S. Drops “War on Terror” Phrase, Clinton Says*, WALL ST. J., Mar. 31, 2009, available at <http://online.wsj.com/article/SB123845123690371231.html>.

²³⁴ See Noah Feldman, Op-Ed., *A Prison of Words*, N.Y. TIMES, Mar. 18, 2009, at A31 (noting that the government’s “refined” position on its detention authority, requiring a showing of “substantial support” for terrorism, “is potentially broad enough to continue detaining everyone whom the Bush administration put in Guantánamo in the first place”).

²³⁵ See *Qassim v. Bush*, 382 F. Supp. 2d 126, 127 (D.D.C. 2005).

lian,²³⁶ but the judge chose a more familiar characterization: he called it “Kafkaesque.”²³⁷

2. *The Indeterminacy of “War Crime.”*—Just as the Executive Branch has defined and redefined “enemy combatant,” so, too, has it attempted to redetermine the meaning of the term “war crime,” the legal predicate for criminal liability before a military commission unless otherwise specifically authorized by Congress. Prior to enactment of the Military Commissions Act, the Uniform Code of Military Justice authorized the use of military commissions only to try violations of the law of war, or other offenses provided for by statute.²³⁸ Under the MCA, however, neither the charges for crimes to be heard before commissions nor their elements were defined by Congress, but instead were provided by the Executive.²³⁹ 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.²⁴⁰ In addition, the principal charge against Omar, “murder by an unprivileged belligerent,”²⁴¹ has never been recognized as a war crime either.²⁴²

Enactment of the Military Commissions Act cured the defect of inadequate congressional authorization of the commissions, but in so doing implicated Congress in the redefinition of “war crime.” The MCA includes a catalogue of charges deemed triable by military commission, along with their elements, including conspiracy.²⁴³ 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.”²⁴⁴ This statement is proven demonstrably false by Congress’s stubborn inclusion of conspiracy as an of-

²³⁶ *Id.* at 127–28 n.3.

²³⁷ *Qassim v. Bush*, 407 F. Supp. 2d 198, 200 (D.D.C. 2005).

²³⁸ *See* 10 U.S.C. § 821 (2006).

²³⁹ *See* Military Commission Instruction No. 2, 32 C.F.R. § 11.6 (2005).

²⁴⁰ *Hamdan v. Rumsfeld*, 548 U.S. 557, 603–04 (2006) (Stevens, J., plurality opinion). Justice Kennedy did not reach this issue. *See id.* at 653 (Kennedy, J., concurring).

²⁴¹ Charge Sheet, *United States v. Khadr* (charging Khadr with conspiracy, murder by an unprivileged belligerent, attempted murder by an unprivileged belligerent, and aiding the enemy), available at <http://www.defenselink.mil/news/Nov2005/d20051104khadr.pdf>.

²⁴² The question of whether to criminalize unprivileged belligerency for otherwise lawful acts is subject to some dispute, but appears to lack any historical support. *See* Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT’L L.J. 367, 436–39 (2004).

²⁴³ 10 U.S.C. § 950v (2006).

²⁴⁴ *Id.* § 950p.

fense “traditionally triable by military commissions,” despite the contrary historical record.²⁴⁵

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.²⁴⁶

In 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.”²⁴⁷ Like conspiracy, this charge was unknown to the law of war, and thus was an invention of the Executive. 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).²⁴⁸

The MCA appears to acknowledge the legal infirmity of the “murder by an unprivileged belligerent” 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.”²⁴⁹ An earlier section of the statute includes the well-recognized war crime offense of “murder of a protected person,”²⁵⁰ but this offense is distinguished from “murder in violation of the

²⁴⁵ See *Hamdan*, 548 U.S. at 602–13 (plurality opinion). But see MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 38–41 (2007) (discussing inchoate and collective responsibility in international law, including use of joint criminal enterprise theory).

²⁴⁶ For a discussion of ex post facto problems with conspiracy and material support for terrorism charges in military commissions, see Peter Margulies, *Guantanamo By Other Means: Conspiracy Prosecutions and Law Enforcement Dilemmas After September 11*, 43 GONZ. L. REV. 513, 538–40 (2008).

²⁴⁷ 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. See sources cited *infra* notes 267–268.

²⁴⁸ See Rome Statute of the International Criminal Court art. 8(2), July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (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 (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).

²⁴⁹ 10 U.S.C. § 950v(b)(15) (2006).

²⁵⁰ *Id.* § 950v(b)(1). 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.*

law of war.” The latter offense appears to contemplate some other class of murder that also is a war crime, and yet, it is not clear that any 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 war” into the definition of the offense, the MCA renders the definition circular. It is this opaque offense with which Omar was charged following the enactment of the MCA.²⁵¹

For Omar, and I suspect for many of the other prisoners, it was difficult to believe that he would ever get a fair trial before the commission. His legal consciousness²⁵² was of law’s manipulability and its cover for political power. Even when the charges against him were temporarily dismissed,²⁵³ there was little cause for hope, and indeed, the charges against him were quickly renewed. His experience before, during, and after the commission demonstrated that at Guantánamo law was everywhere²⁵⁴ 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. Moreover, despite our keen awareness that the system was built upon a rights-free edifice, we insisted on making rights-based arguments in the commission, as opposed to accepting the rights-free system presented to us. 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 Conventions,²⁵⁵ we argued that Omar had rights as a child, under in-

²⁵¹ Charge Sheet, United States v. Khadr, *supra* note 59.

²⁵² See Austin Sarat, “. . . *The Law Is All Over*”: Power, Resistance and the Legal Consciousness of the Welfare Poor, 2 YALE J.L. & HUMAN. 343, 343 n.1 (1990) (using legal consciousness as interchangeable with legal ideology); 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”).

²⁵³ See *supra* note 177 and accompanying text.

²⁵⁴ See Sarat, *supra* note 252, 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.”).

²⁵⁵ These arguments were made before the Supreme Court decided *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), in which it found the protections of Common Article 3 of the Geneva Conventions applicable to the prisoners. See *supra* note 101 and accompanying text.

ternational treaty obligations²⁵⁶ as well as customary international law; and we argued that human rights law applied, and could not be displaced by international humanitarian law.²⁵⁷ In contrast, the Pentagon would have had us accept their system as is, and either persuade our clients to plead guilty (as the first defense lawyers were asked to do) or proceed to a trial governed by substandard rules and an unknown jurisprudence.

This rights-based strategy might seem futile given the malleability of law and the contingency of its definitions and structures at Guantánamo, epitomized by the ever-shifting nature of such seemingly bedrock questions as who is an “enemy combatant” and what is a “war crime”; so long as the political context in which rights reside can be redefined, so, too, can the rights themselves.²⁵⁸ While all rights questions are subject to change over time, as I have argued, the legal indeterminacy at Guantánamo was especially problematic because of the novelty of its core principles, its disavowal of extant jurisprudence, and the unavailability of meaningful judicial review. Moreover, the danger of a rights-based 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 came during the first session of Omar’s commission, 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 indeterminacy of rights at Guantánamo did not only render them unstable, but suggested that they were politically determined as well. Like the velvet drapes in the military commission room, it seemed clear that law and its rhetoric, structures, and trappings were serving as a cover for the operation of political power. Still, we 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,²⁵⁹ each of which is discussed below.

²⁵⁶ See Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, S. Treaty Doc. No. 106-37, 2173 U.N.T.S. 222.

²⁵⁷ 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*, TASK FORCE PAPERS (Am. Soc’y of Int’l Law, Presidential Task Force on Terrorism, Washington, D.C.), Dec. 2002, at 33, available at <http://www.asil.org/taskforce/goldman.pdf> (“That the United States must afford certain minimum human rights protections to unprivileged enemy 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.”).

²⁵⁸ This is consistent with the view of many Critical Legal Studies scholars.

²⁵⁹ For a discussion of the distinction between tactics and strategy, see MICHEL DE CERTEAU, *THE PRACTICE OF EVERYDAY LIFE* (Steven Rendall trans., 1984).

A. Rights Tactics and Rights Strategies

When confronted with profound, seemingly irremediable injustice in the primary forum of contest, the lawyer's instinct, if not the human one, is to appeal to a higher authority. 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, and the right to competent counsel were all so familiar within the American courtroom that their invocation in the 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 recalls Rick Abel's insight regarding the apartheid regime in South Africa: "Because the regime used legal institutions to construct and administer apartheid, it was vulnerable to legal contestation."²⁶⁰

Similarly, Abel has observed 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.²⁶¹ Such heterogeneity creates opportunities for even nonstate 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.²⁶²

As a corollary to Abel's theorem, our invocation of rights was designed not only to appeal to the judiciary, but also to Congress, civil society actors, and the press. Rights may be an impoverished discourse, susceptible of manipulation and, even when 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 au-

²⁶⁰ RICHARD L. ABEL, *POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID*, 1980–94, at 3 (1995).

²⁶¹ Richard Abel, *Speaking Law to Power: Occasions for Cause Lawyering*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 69, 102–03 (Austin Sarat & Stuart Scheingold eds., 1998).

²⁶² See *Hamdan v. Rumsfeld*, 548 U.S. 557, 557 (2006).

diences 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. This was also the case 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 power²⁶³ does not, of course, compel the exercise of countervailing power. Just as the commissions rejected our rights-based arguments, so, too, could the federal courts, Congress, and the public. But the existence of multiple sources of power also permits different relationships between law and power. The appeal of rights, their narrative and jurisprudential meaning, can be expected to vary with the narrative frame of the audience; rights may vary across space and time. Because the commissions were a creation of the Executive and housed within the cultural and command structures of the military, they were institutionally situated far differently than the Article III habeas courts and subject to different political pressures than Congress. 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, Omar’s country of citizenship. 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, the Canadian government has not publicly criticized either Guantánamo or Omar’s trial by military commission. 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.²⁶⁴ As a result of these efforts, all Britons have been released from Guantánamo,²⁶⁵ suggesting that international political arrangements circum-

²⁶³ See generally FOUCAULT, *supra* note 22 (arguing that power is dispersed among multiple and unequal relational actors, rather than emanating solely from institutions).

²⁶⁴ See *supra* note 157 and accompanying text.

²⁶⁵ See Lizette Alvarez, *Last 4 Britons at Guantánamo Return*, N.Y. TIMES, Jan. 26, 2005, at A6; Alan Cowell, *Five Britons Released From Guantánamo Arrive Home*, N.Y. TIMES, Mar. 10, 2004, at A8.

scribe Omar's legal predicament at Guantánamo. The political domain, then, includes not only the United States, and not only U.S.–Canada relations, but the domestic politics of Canada as well.

The case of former Guantánamo prisoner David Hicks is instructive in this regard. Hicks, an Australian citizen, was one of the first Guantánamo prisoners to be charged before a military commission. Through the extraordinary work of his legal counsel and effective advocacy in Australia by his family, Hicks became a cause *célèbre* in Australia, and a symbol of American injustice toward an Australian citizen.²⁶⁶ His advocates forged a narrative according to which as an Australian, Hicks was entitled to rights which the military commissions failed to afford. Hicks ultimately pleaded guilty to a single charge and was transferred back to Australia²⁶⁷ under an agreement that was widely understood to be a political compromise between the Australian and American governments rather than the product of independent legal process.²⁶⁸

Thus, even if rights-based arguments fall flat in the United States, 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 once more we see how the value of rights can vary. Even as we worried that a post-September 11 politics had made the United States inhospitable to rights claims on behalf of terrorist suspects, we understood that in the same historical moment, rights might have greater purchase in Canada. 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 turn 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.”²⁶⁹ We sought

²⁶⁶ See, e.g., Raymond Bonner, *A Lawyer in Marine Corps Khaki Wins Australian Support for His Guantánamo Client*, N.Y. TIMES, Dec. 1, 2006, at A16 (describing efforts of Hicks's military defense lawyer, Major Dan Mori, and support garnered from celebrities such as Bono to Australian politicians); Raymond Bonner, *World Briefing Australia: Lawmakers Appeal For Guantánamo Release*, N.Y. TIMES, Feb. 3, 2007, at A2 (reporting that nearly half of Australia's Parliament signed a letter to Speaker of the House Nancy Pelosi requesting Hicks's return); *Military QC Slams Hicks Trial Process*, AUSTRALIAN, Aug. 2, 2005, available at <http://www.theaustralian.news.com.au/story/0,20867,16125839-1702,00.html>.

²⁶⁷ William Glaberson, *Plea of Guilty From Detainee in Guantánamo*, N.Y. TIMES, Mar. 27, 2007, at A1.

²⁶⁸ See Raymond Bonner, *Critics Say Australian Leader Was Alert to Politics in Detainee Deal*, N.Y. TIMES, Apr. 1, 2007, at A27; Misha Schubert & Mark Coultan, *Outcry Over Hicks Sentence 'Fix'*, THE AGE, Apr. 2, 2007, available at <http://www.theage.com.au/news/national/outcry-over-hicks-sentence-fix/2007/04/01/1175366078719.html>.

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

to subject the “law” of the commissions to the scrutiny of a range of political actors. Thus, our strategy did 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.²⁷⁰ In so doing, we “drag[ged] the courtroom into politics.”²⁷¹

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.²⁷² 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.²⁷³ 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.*—As I have argued previously, rights can only be understood in the context in which they arise. Indeed, it was only through the assertion of rights in Omar’s military commission proceedings that I began to understand what role they might play for him.

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 confe-

²⁷⁰ See Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477 (2005).

²⁷¹ *Id.* at 483.

²⁷² See *infra* Part IV.

²⁷³ See Gabel & Harris, *supra* note 163, at 375–79 (advocating power-based lawyering as preferable to rights-based approaches).

rence 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 torture as well as cruel, inhuman and degrading treatment,²⁷⁴ 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.”²⁷⁵

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,” and expressed his personal belief that Omar was guilty of the charges

²⁷⁴ The original rules of the military commissions included no rule regarding the admissibility of evidence obtained through torture, and on March 1, 2006, the spokesperson for the Office of Military Commissions stated that under those rules, evidence obtained through torture could be admitted. See Carol Rosenberg, *Hearings May Consider Torture*, MIAMI HERALD, Mar. 2, 2006, at A3 (quoting Air Force Major Jane Boomer as saying, “Hypothetically, is it possible? Do the rules allow for it? . . . Yes.”). Major Tom Fleener, a military defense lawyer assigned to represent a prisoner named Ali Hamza al Bahlul, pressed the issue with Colonel Peter Brownback, the presiding officer in al Bahlul’s case, but Brownback refused to categorically prohibit evidence obtained through torture, stating only that: “My personal belief is torture is not good.” *Id.* Brownback also suggested that he and Fleener might have different understandings of what constitutes torture, though he ultimately agreed that “poking a person in the eye with a red-hot needle” would be torture. *Id.* On March 22, 2006, just days before the Supreme Court would hear argument in *Hamdan v. Rumsfeld*, which challenged the legality of the commissions, the Pentagon announced its intention to forbid evidence obtained through torture. See Carol Rosenberg, *U.S. Bars Any Evidence Resulting From Torture*, MIAMI HERALD, Mar. 23, 2006, at A3. The rule, eerily titled “Certain Evidentiary Determinations,” was issued on March 24, 2006. See DEP’T OF DEFENSE, MILITARY COMM’N INSTRUCTION NO. 10, at 1 (2006), available at <http://www.defenselink.mil/news/Mar2006/d20060327MCI10.pdf>. While the new rule does prohibit evidence obtained through torture, it fails to address evidence obtained through cruel, inhuman, or degrading treatment. *Id.* at 2.

While these additional admissibility issues were ultimately addressed in the Military Commissions Act of 2006, the end result is that statements obtained through cruel, inhuman, and degrading treatment may still be admissible. The MCA prohibits any such statements made after December 30, 2005—the enactment date of the Detainee Treatment Act of 2005 (which outlawed cruel, inhuman and degrading treatment of individuals in the custody or under the physical control of the U.S. government), 10 U.S.C. § 948r(c) (2006)—but permits such statements if made prior to the DTA’s enactment, so long as the commission military judge finds that: “(1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value” and “(2) the interests of justice would best be served by admission of the statement into evidence.” *Id.* Notably, the vast majority of prisoner interrogation at Guantánamo took place prior to enactment of the DTA.

Moreover, although the MCA purports to prohibit all statements obtained through torture whether made before or after enactment of the DTA, *id.* § 948r(b), another provision of the MCA permits the introduction of evidence by the government without disclosure of classified sources or methods of interrogation, so long as the military judge finds that the evidence is “reliable” and otherwise admissible. *Id.* § 949d(f)(2). The military judge may require that an unclassified summary of the sources and methods be disclosed to the defense and the public, but is not required to do so. *Id.* Because hearsay evidence is generally admissible, *id.* § 949a(b)(2)(E), the MCA may permit intelligence officers to testify to statements made by the defendant or others without the defense having a meaningful opportunity to inquire into or challenge the methods of interrogation, thus raising the specter of a laundering of evidence obtained through torture. My thanks to Tom Fleener for this insight.

²⁷⁵ See Transcript of Press Conference, Guantánamo Bay Naval Base, Cuba (Jan. 10, 2006) (copy on file with author).

against him and that Omar would have preferred to spend the recently passed Muslim holiday of Eid with Osama Bin Laden than at Guantánamo.²⁷⁶ Not surprisingly, his comments were broadcast widely by the international press gathered to cover the military commissions.²⁷⁷

The following day, I argued that the Chief Prosecutor had violated his ethical obligations, thereby committing prosecutorial misconduct. In particular, I argued that his comments contravened the rules governing extrajudicial pretrial statements.²⁷⁸ In its opposition, the prosecution 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.²⁷⁹ In oral argument, the commission's presiding officer expressed his distaste for the "torture" and "sham" comments and 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. The presiding officer 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

²⁷⁶ *Id.*

²⁷⁷ See, e.g., Michael Rowland, *Guantanamo Detainee Omar Khadr Faces Military Trial*, AUSTRALIAN BROADCASTING CORP. TRANSCRIPTS, Jan. 12, 2006; Michelle Shephard, *T.O. Teen "Indeed a Terrorist," U.S. Insists*, TORONTO STAR, Jan. 11, 2006, at A1; *Prosecutor Says Omar Khadr Not a Young Innocent*, CTV, Jan. 10, 2006, available at http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20060110/omar_khadr_061001?s_name=&no_ads=.

²⁷⁸ See Defense Motion for Order Prohibiting Prosecution From Making Inappropriate Extrajudicial Statements and Requiring Prosecution to Take Steps to Remediate Past Inappropriate Statements, United States v. Khadr, No. 05008 (Jan. 12, 2006) (copy on file with author). Our argument was based on Rules 3.8 and 3.6 of the District of Columbia Rules of Professional Conduct, and analogous rules for North Carolina and the Air Force, all of which governed the conduct of the Chief Prosecutor because of his bar memberships. *Id.* Rule 3.8, entitled "Special Responsibilities of a Prosecutor," includes the following: "Except for statements which are necessary to inform the public of the nature and extent of the prosecutor's action and which serve a legitimate law enforcement purpose, [the prosecutor in a criminal case shall not] make extrajudicial comments which serve to heighten condemnation of the accused." D.C. RULES OF PROF'L CONDUCT R. 3.8(f) (2007). Rule 3.6 concerns extrajudicial statements that may create a threat to the impartiality of the judge or jury. *Id.* at R. 3.6.

²⁷⁹ See Prosecution Response to Defense Motion To Order [sic] Prohibiting Prosecution From Making Inappropriate Extrajudicial Statements and Requiring Prosecution to Take Steps to Remediate Past Inappropriate Statements, United States v. Khadr, No. 05008 (Jan. 12, 2006) (copy on file with author).

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 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."²⁸⁰ 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'm here.'"²⁸¹ Though the transcript does not reflect it, I remember pausing here, feeling dizzy, and wondering, as the presiding officer later would,²⁸² 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 from the ambit of law, and in doing so, 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,²⁸³ refusing access to the outside world. Legal erasure enabled physical erasure. In this context, rights were not just notional, they were existential.

Here, we might consider the existential assertion of rights as a form of bearing witness.²⁸⁴ The statement, "I am here," is an insistence upon Omar's legibility in the world,²⁸⁵ made not by him, but by a lawyer who by virtue of citizenship, professional identity, and the speaking platform afforded by the state, can testify to the world as he sees it, the reality of Omar's human existence, even in the face of a master narrative of his invi-

²⁸⁰ Record of Trial, *United States v. Omar Ahmed Khadr*, No. 05008, Vol. VII, 1st Volume of Transcript, Jan. 11 & 12, 2006 Sess. (Redacted Version) 195 [hereinafter *Khadr Record of Trial*], available at <http://www.defenselink.mil/news/Feb2006/d20060222KhadrV7.pdf>.

²⁸¹ *Id.* at 198, 201; Errata Sheet by the Defense, *U.S. v. Khadr*, Session Transcript of 11 & 12 January 2006 (copy on file with author).

²⁸² *Khadr Record of Trial*, *supra* note 280, at 201.

²⁸³ See Josh White & Julie Tate, *Pentagon Releases Detainees' Names; About 315 From Guantanamo Identified*, WASH. POST, Mar. 4, 2006, at A7 (reporting on the Pentagon's release of names and personal information of 315 current and former detainees at Guantánamo following successful litigation by the Associated Press under the Freedom of Information Act); see also *Associated Press v. U.S. Dep't of Def.*, 410 F. Supp. 2d 147 (S.D.N.Y. 2006) (denying government's motion for summary judgment and ordering the Pentagon to release relevant identifying documents on detainees held at Guantánamo).

²⁸⁴ I am grateful to Martha Minow for suggesting this frame.

²⁸⁵ See JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED 2* (1998) (describing state attempts to order society by making its subjects legible and, by implication, making others illegible).

sibility. The assertion of rights helped to gain Omar recognition not merely as a jurisdictional subject, but as his own self—"I"—a human being.

Martha Minow similarly has noted that "[t]he language of rights voices an individual's desire to be recognized in tones that demand recognition."²⁸⁶ For Minow, the claim to rights is a bid to be heard, a hailing device that "initiates a form of communal dialogue."²⁸⁷ 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.²⁸⁸ The result is not necessarily substantive equality, but instead what Minow terms "an equality of attention."²⁸⁹ 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 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 world of the text.²⁹⁰

Rights, then, are intertextual, and while litigant and adjudicator may not hold equal interpretive power, they are bound by a shared interpretive project.²⁹¹

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 re-

²⁸⁶ Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1880 (1987).

²⁸⁷ *Id.* at 1875.

²⁸⁸ *Id.* at 1874 ("By invoking rights, an individual or group claims the attention of the larger community and its authorities. At the same time, this claim acknowledges the claimant's membership in the larger group, her participation in its traditions, and her observation of its forms.")

²⁸⁹ *Id.* at 1879.

²⁹⁰ *Id.* at 1879–80 (footnotes omitted).

²⁹¹ Robert Cover expressed this idea as an interdependence of constitutional understandings:

Neither religious churches, however small and dedicated, nor utopian communities, however isolated, nor cadres of judges, however independent, can ever manage a total break from other groups with other understandings of law. Thus it is that the Shaker understanding of 'contract' is hardly independent of understandings of contract that were prevalent in the nineteenth century. The Amish concept of church–state relations is not entirely independent of secular, libertarian concepts of such relations. The interdependence of legal meanings makes it possible to say that the Amish, the Shakers, and the judge are all engaged in the task of constitutional understanding. But their distinct starting points, identifications, and stories make us realize that we cannot pretend to a unitary law.

Cover, *Nomos and Narrative*, *supra* note 35, at 33.

confirms it.²⁹² 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 it. 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 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,²⁹³ but for Arendt, political citizenship, membership in the polity, was fundamental. She defined citizenship as “the right to have rights,”²⁹⁴ 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.²⁹⁵ 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.

We see at Guantánamo 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.²⁹⁶ 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, but to be heard (“I am here!”). 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.

²⁹² Minow, *supra* note 286, at 1873.

²⁹³ See LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* (2006).

²⁹⁴ ARENDT, *supra* note 16, at 298.

²⁹⁵ *Id.* at 11–78.

²⁹⁶ *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. *Hamdan v. Rumsfeld*, 548 U.S. 557, 630–31 (plurality opinion) (“Common Article 3 . . . is applicable here and . . . requires that Hamdan be tried by a regularly constituted court . . .”) (citations and internal quotation marks omitted).

2. *Rights as Resistance*.—Habeas corpus, whose history has been explored exhaustively by others,²⁹⁷ 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 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,²⁹⁸ is the idea that a confrontation between the state and the individual unmediated by rights reduces the individual to bare life, or naked life,²⁹⁹ 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.³⁰⁰ 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 transmutation 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 advocate³⁰¹ and to criminal defense lawyers generally. But the American

²⁹⁷ See, e.g., Brief of Legal Historians as Amici Curae in Support of Petitioners, *Boumediene v. Bush*, 128 S. Ct. 2229 (2007) (No. 06-1195), 2007 WL 2441583; WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980); ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY (2001); 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); Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029 (2007); Eric M. Freedman, *Milestones in Habeas Corpus*, 51 ALA. L. REV. 531 (2000); Jared Goldstein, *Habeas Without Rights*, 2007 WIS. L. REV. 1165 (2007); Jonathan L. Hafetz, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509 (1998).

²⁹⁸ AGAMBEN, *supra* note 184.

²⁹⁹ *Id.*

³⁰⁰ See Frédéric Mégret, *From ‘Savages’ to ‘Unlawful Combatants’: A Postcolonial Look at International Law’s ‘Other’*, in INTERNATIONAL LAW AND ITS OTHERS (Anne Orford ed., 2006).

³⁰¹ See generally Austin Sarat & Nasser Hussain, *supra* note 188.

legal embodiment of citizenship as rights is *Dred Scott*.³⁰² 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.³⁰³ 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 placed 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 outside of humanity itself.³⁰⁴

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.

With this understanding of rights in mind, 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.

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 nonexistence, from the individual establishing harm done to the state justifying its own violence.

³⁰² See *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

³⁰³ *Id.*

³⁰⁴ See *supra* Part I.B.

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.

Thus, 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 either to stop its violence or to 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.³⁰⁵ 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. 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. This is consistent with what Scott Cummings has termed "constrained legalism,"³⁰⁶ for it capitalizes on what law can accomplish, even as it recognizes what law cannot.

³⁰⁵ Arguably, however, the worst violence stopped for other reasons. Prisoner abuse was an interrogation tactic (or as the Bush Administration would call it, an "enhanced" interrogation tactic). It follows that after dozens of interrogations over a period of years, the utility, if any, of such a tactic would diminish.

³⁰⁶ See Scott L. Cummings, *Critical Legal Consciousness in Action*, 120 HARV. L. REV. (FORUM ISSUE) 39 (2007), available at <http://www.harvardlawreview.org/forum/issues/120/feb07/cummings.pdf> (describing "constrained 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").

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 of 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 three cases, and forced a public accounting of the government. In addition, they have engaged in the kind of multidimensional advocacy that is frequently urged among social change theorists,³⁰⁷ 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.³⁰⁸ Despite these efforts, the vast majority of prisoners have yet to receive a meaningful opportunity to contest the legality of their detention, and the habeas courts have yet to determine what substantive rights the prisoners even possess. Perhaps most damning, the issue before the Supreme Court in *Boumediene* in 2008 was, functionally, the same as that brought

³⁰⁷ For a thick description and analysis of such multidimensional 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 Collective Mobilization*, 14 CLINICAL L. REV. 355 (2008) (advocating incorporation of collective mobilization strategies into public interest lawyering); Ann Southworth, *Lawyers and the "Myth of Rights" in Civil Rights and Poverty Practice*, 8 B.U. PUB. INT. L.J. 469, 506–09 (1999) (discussing the importance of multidimensional strategies where sociopolitical advocacy is a primary objective).

³⁰⁸ In a particularly compelling example of such multidimensional 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 YouTube Video: Guantanamo Unclassified (William Teesdale 2007), <http://youtube.com/watch?v=D5E3w7ME6Fs> (last visited Sept. 5, 2009). The lawyers also created an accompanying website to facilitate broader advocacy on Hamad's behalf. See Project Hamad, <http://projecthamad.org> (last visited Sept. 5, 2009). First taken to Guantánamo in 2003, Hamad was released and returned to Sudan in December 2007. See Project Hamad Blog, <http://www.projecthamad.org/blog/2007/12/> (Dec. 13, 2007, 10:39 EST). Shortly before his release, a military lawyer involved in the review of prisoners' cases at Guantánamo termed Hamad's detention "unconscionable." See Leonard Doyle, *Guantanamo Military Lawyer Breaks Ranks to Condemn 'Unconscionable Detention'*, THE INDEPENDENT, Oct. 27, 2007, at 34, available at <http://www.independent.co.uk/news/world/americas/guantanamo-military-lawyer-breaks-ranks-to-condemn-unconscionable-detention-398033.html>.

before the Court in *Rasul* in 2003: whether the prisoners can be heard in habeas corpus proceedings. Although the prisoners prevailed in both cases, the victory in *Rasul* necessarily has tempered enthusiasm for that in *Boumediene*. It is no wonder, then, that in the eyes of many prisoners, nothing has changed.

This is not to say that legal process does not work, for during this time many prisoners have been released after litigation exposed the injustice of their imprisonment,³⁰⁹ and a small number have since been released following orders by the habeas courts.³¹⁰ Moreover, the litigation appears to have played an important role in shifting the politics around Guantánamo, enabling President Obama's promise to close the facility. And yet, the seemingly sweeping victories of *Rasul* and *Boumediene* coexist with Guantánamo's ongoing operation, suggesting that the litigation, while effective, might be insufficient.

This unsatisfying record only deepened many of the prisoners' despair. When the lawyers first got to Guantánamo, over two years after it opened, and after two years of isolation, interrogation, and torture, there was a moment of hope for many prisoners. For the first time since their capture, there was someone on their side. And though many lawyers had difficulty establishing or maintaining trust with their clients, given the extraordinary conditions of Guantánamo,³¹¹ I believe that many of the prisoners initially placed their faith in their lawyers and gave the lawyers the benefit of the doubt. But as the mountains of motions piled up without meaningful change in the material conditions of the prisoners' lives, as the clarity of *Rasul*'s promise of a hearing before an impartial judge dissolved into convolution, formalism, and bureaucracy of federal litigation, the detainees' despair began to return. Former prisoner Jumah al Dossari, who made numerous suicide attempts while at Guantánamo, expressed the failures of *Rasul*'s promise and the resulting despondency:

³⁰⁹ See, e.g., MARGULIES, *supra* note 24, at 198 (discussing role of evidence of torture of Margulies' client Mamdouh Habib in effecting his release: "When asked to explain the sudden change of heart, American officials refused to comment on the record. But they told the Australians they had decided to release him 'because the C.I.A. did not want the evidence about Mr. Habib being taken to Egypt, and his allegations of torture, raised in court.'"); see also *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 470 (D.D.C. 2005) (highlighting exculpatory evidence regarding Murat Kumaz); Craig Whitlock, *U.S. Frees Longtime Detainee: Court Had Ruled In Favor of Turk*, WASH. POST, Aug. 25, 2006, at A9 (discussing release of Kumaz and criticism by U.S. District Court Judge Joyce Hens Green of the United States for ignoring exculpatory evidence).

³¹⁰ See *Boumediene v. Bush*, 579 F. Supp. 2d 191, 199 (D.D.C. 2008) (directing Respondents "to take all necessary and appropriate diplomatic steps to facilitate the release of Petitioners Lakhdar Boumediene, Mohamed Nechla, Hadj Boudella, Mustafa Ait Idir, and Saber Lahmar forthwith"); see also *El Gharani v. Bush*, 593 F. Supp. 2d 144 (D.D.C. 2009) (ordering release of Mohammed el Gharani); *Basardh v. Bush*, No. 05 Civ. 889, 2009 WL 856345 (D.D.C. Mar. 31, 2009) (ordering release of Yasin Muhammed Basardh).

³¹¹ See Luban, *supra* note 139 (discussing how the conditions at Guantánamo disrupted the lawyers' relationships with their clients).

[One day] the military gave me a piece of paper that laid out the allegations against me. I had been in Guantánamo at that point for 2 1/2 years. My lawyer later told me that I had received this paper as a result of a U.S. Supreme Court ruling that detainees were to be allowed to have court hearings. We never got the promised hearings; instead, we went through military hearings at Guantánamo in which we were not shown any evidence or allowed to have lawyers. All we got was the piece of paper.

....

... Between suicide attempts, I tried desperately to hold on to the few fleeting moments of light that presented themselves to me. I met every few months with my attorneys and felt better whenever they were in Guantánamo, but my despair would return within a day of their departure.³¹²

The prisoners' despair was twofold: first was a concern that the lawyers' efforts could not produce their freedom; second, and more troubling, was a growing view among some of the detainees that not only could the lawyers not help, but they were actually hurting. The argument was that despite our promises and best intentions to be on their side, we were complicit in the very structure of oppression of Guantánamo. From the very beginning, the most compelling argument against Guantánamo was that it was lawless. But the presence of lawyers, the filing of motions, and the appearances before judges all suggested that there was both law and justice at Guantánamo. The danger, then, was that our presence and participation, in both habeas proceedings in Washington and in military commission proceedings at Guantánamo, legitimized the very institution whose illegitimacy and illegality we sought to establish. This trade-off is familiar in any system of dubious legitimacy.

It is against this backdrop of unsuccessful legal advocacy, 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";³¹³ refusing to meet with their lawyers;³¹⁴ boycotting or disrupting military commission proceedings (for those few who have them);³¹⁵ suicides and suicide attempts;³¹⁶ and hunger strikes.³¹⁷ In each of these, the prisoners

³¹² Al Dossari, *supra* note 25.

³¹³ See Sgt. Jim Greenhill, *Outmoded Images of Detention Center, Mission Frustrate Guantanamo Troopers*, ARMED FORCES PRESS SERVICE, Dec. 1, 2006, available at <http://www.defenselink.mil/news/NewsArticle.aspx?ID=2272>.

³¹⁴ See William Glaberson, *Many Detainees at Guantánamo Rebuff Lawyers*, N.Y. TIMES, May 5, 2007, at A1.

³¹⁵ For an insightful account of prisoners' attempts to boycott military commission proceedings and to dismiss their counsel, see Matthew Bloom, "I Did Not Come Here to Defend Myself": Responding to War on Terror Detainees' Attempts to Dismiss Counsel and Boycott the Trial, 117 YALE L.J. 70 (2007).

³¹⁶ In June 2006, two Saudi prisoners and one Yemeni committed suicide. See James Risen & Tim Golden, *3 Prisoners Commit Suicide at Guatanamo*, N.Y. TIMES, June 11, 2006, at A1. There have been forty-one suicide attempts at Guantánamo. *Id.* From August 18–26, 2003, twenty-three 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 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.³¹⁸ There have been as many as two hundred prisoners on hunger strike at any one time.³¹⁹ 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.³²⁰

Sami al-Haj is one of the prisoners who remained on hunger strike. A Sudanese journalist for Al Jazeera, al-Haj was held at Guantánamo for six years, on various and shifting charges of terrorist affiliations.³²¹ On January 7, 2007, the fifth anniversary of his imprisonment at Guantánamo, al-Haj began his hunger strike,³²² which continued for sixteen months—the significance of which can only be appreciated by examining how the government's forced-feeding regime works upon the prisoner's body.³²³

attempted suicides, which the government characterized as “self-injurious behavior.” 23 *Detainees Attempted Suicide in Protest at Base, Military Says*, N.Y. TIMES, Jan. 25, 2005, at A14, available at <http://www.nytimes.com/2005/01/25/national/25gitmo.html?scp=43&sq=guantanamo+suicides&st=nyt>. This information was not disclosed until January 2005. *Id.* For an account of Guantánamo by a prisoner who attempted suicide multiple times before ultimately being released, see Al Dossari, *supra* note 25.

³¹⁷ 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).

³¹⁸ *Id.*

³¹⁹ *Id.* at 1378.

³²⁰ *Id.* at 1377.

³²¹ See Nicholas D. Kristof, Op-Ed., *Sami's Shame, and Ours*, N.Y. TIMES, Oct. 17, 2006, at A21; Nicholas D. Kristof, Op-Ed., *When We Torture*, N.Y. TIMES, Feb. 14, 2008, at A35; Joel Campagna, *The Enemy?*, CMTE. TO PROTECT JOURNALISTS, Oct. 3, 2006, available at http://www.cpj.org/Briefings/2006/DA_fall_06/prisoner/prisoner.html.

³²² See Memorandum from Clive Stafford-Smith on Sami al-Haj Hunger Strike Diary 1 (Mar. 4, 2007) [hereinafter “Stafford-Smith Memo”] (copy on file with author); Prisoner 345, <http://www.prisoner345.net> (last visited Sept. 5, 2009).

³²³ The following description is a composite drawn from a diary maintained by al-Haj, see Stafford-Smith Memo, *supra* note 322, 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*, 406 F. Supp. 2d 13 (D.D.C. 2005) (No. 05-0301), available at <http://humanrights.ucdavis.edu/>

First, the prisoner refuses food and drink. Initially, officials try to persuade the prisoner otherwise, offering food and liquids. If the prisoner refuses those, military officials take him to a medical facility and feed him intravenously. If the prisoner refuses I.V. fluids, as many have, or pulls the tube out, then medical staff strap him into a restraint chair. (According to the chair's manufacturer, "It's like a padded cell 'on wheels'"³²⁴) Doctors then force a feeding tube up the prisoner's nose, down the throat, and into the stomach.³²⁵ This is done twice a day, without the consent of the prisoner, even when the prisoner is competent to give such consent.³²⁶ 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.³²⁷ As another of his lawyers stated, "Have you ever pushed a 43-inch tube up your nostril and down into your throat? Tonight, Sami will suffer that for the 479th time."³²⁸

As in countless struggles before theirs, prisoners at Guantánamo have used hunger strikes for multiple purposes: building solidarity, demanding improved treatment, and drawing attention to their plight.³²⁹ Indeed, like so much else at post-September 11 Guantánamo, the hunger strikes have a precedent in the experience of Haitians detained there in the early 1990s,³³⁰ but also in the political struggles of figures as diverse as Gandhi, Bobby Sands, Palestinians in Israeli jails, and U.S. prisoners protesting their harsh conditions.³³¹ Hunger strikes are typically described and understood as nonviolent, 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

projects/the-guantanamo-testimonials-project/testimonies/testimony-of-military-physicians/edmondson_affidavit.pdf.

³²⁴ See Emergency Restraint Chair, <http://www.restraintchair.com> (last visited Sept. 5, 2009).

³²⁵ See Annas, *supra* note 317, at 1377.

³²⁶ *Id.* at 1379.

³²⁷ Kristof, *When We Torture*, *supra* note 321 (quoting lawyer Zachary Katznelson).

³²⁸ Stafford-Smith, *America's Legal Black Hole*, *supra* note 142.

³²⁹ Annas, *supra* note 317, at 1378–79; see also 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> (discussing the reasons prisoners go on hunger strike).

³³⁰ See BRANDT GOLDSTEIN, *STORMING THE COURT: HOW A BAND OF YALE LAW STUDENTS SUED THE PRESIDENT—AND WON 199–222* (2005). While many of the lawyers for post-September 11 Guantánamo prisoners have been supportive of their clients' hunger strikes, the Haitians' lawyers were more interventionist, trying to persuade their clients to stop their hunger strikes. *Id.* at 204.

³³¹ 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); 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); SHARMAN APT RUSSELL, *HUNGER: AN UNNATURAL HISTORY* (2005) (tracing the role of hunger as a force for social change, and analyzing its use by religious and political figures).

peaceful in their execution, the hunger strikes seem intended to provoke the enactment of violence upon the hunger striker.³³²

For al-Haj and others who know that day after day their continued hunger strike will bring only more painful forced feedings, the 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 stated that he did not wish 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."³³³ Now that the forced feeding regime is in place, its brutality established and its ineluctability clear, the actions of the hunger strikers are better understood as a more active form of resistance. By refusing food and water, al-Haj forced the unmediated confrontation between state power and the individual of which Arendt wrote. After more than a year of forced feeding, he knew that the government possessed the means and the will to keep him from dying. But each day, he chose to make them engage in violence upon his body in order to achieve their goal. In this way, he refused to be complicit in his own captivity. But he also refused to be passive in the face of state power. He might not have been able to stop it, but he was 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 was their degradation of themselves. Hovering at the brink of annihilation—on the verge of bare life—he nonetheless resisted total dehumanization by forcing his captors to brutalize him. And in this way, through this agency and even righteousness, his decrepit body, that withering mass of vibrating flesh, was made and kept human again.

Sami al-Haj was released from Guantánamo on May 2, 2008.³³⁴

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

³³² The government's forced-feeding regime has been criticized as contrary to medical ethics. See Annas, *supra* note 317; Sondra S. Crosby et al., *Hunger Strikes, Force-Feeding, and Physicians' Responsibilities*, 298 JAMA 563 (2007); Press Release, Physicians for Human Rights, Forced Feeding of Gitmo Detainees Violates International Medical Codes of Ethics (Sept. 16, 2005) available at <http://physiciansforhumanrights.org/library/news-2005-09-16.html>. For a discussion of other medical ethics issues at Guantánamo, including the involvement of psychologists in the development of interrogation methods, see Jonathan H. Marks, *Doctors as Pawns? Law and Medical Ethics at Guantánamo Bay*, 37 SETON HALL L. REV. 711 (2007). For an analysis of U.S. prison practices regarding hunger strikes, see Tracey M. Ohm, *What They Can Do About It: Prison Administrators' Authority to Force-Feed Hunger-Striking Inmates*, 23 WASH. U. J.L. & POL'Y 151 (2007).

³³³ Stafford-Smith Memo, *supra* note 322, at 4.

³³⁴ See Press Release, Al Jazeera, Sami al Haj Freed from Guantanamo (May 2, 2008), available at <https://www.zawya.com/printstory.cfm?storyid=ZAWYA20080502112225&l=112200080502>.

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 the individual and the state is the body, for once the mediating force of rights is removed, only the body remains. 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.³³⁵

Thus, just as Law is realized in the body of the prisoner, so, too, is the prisoner's resistance.³³⁶

Alternatively, we might understand the foregrounding of the prisoner's body in terms of agency. So totalizing is the violence of Guantánamo that it reduces the prisoner's zone of autonomy to the point that it is coterminous with the body; the only exercise of the autonomous self is the exercise of the body itself, because nothing else is in the prisoner's control, and the body remains the last and final site in the contest between state power and the individual. There is nowhere else for the blows to land, and nothing else with which to strike back.

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.³³⁷ Like the colonizer and the colonized, the

³³⁵ Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1605 (1986).

³³⁶ This fundamental role of the body in acts of resistance was similarly articulated by Martin Luther King, Jr.: "We had no alternative except to prepare for direct action, whereby we would present our very bodies as a means of laying our case before the conscience of the local and the national community." Martin Luther King, Jr., *Letter From A Birmingham Jail* (Apr. 16, 1963), reprinted in WHY WE CAN'T WAIT 80 (1964), available at http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.

³³⁷ See FANON, *supra* note 58, at 1–62.

struggle at Guantánamo is “between brute realities and resistant bodies.”³³⁸ As Homi Bhaba suggests, this resurgence of the body is the consequence of radical dehumanization.³³⁹ The colonized body is conditioned to violence, thereby gaining a “visceral intelligence dedicated to the survival of body and spirit,”³⁴⁰ or as Fanon wrote, “The muscles of the colonized are always tensed.”³⁴¹

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 (though *Boumediene*, and President Obama’s executive order, suggest they still may). Al-Haj thought that his protest might force his captors to return to their own humanity,³⁴² and for more than a year it did not (though ultimately he was released). 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. Rights claims can be understood as a domesticated hunger strike, a rhetorical, abstracted, and comparatively unmessy form of engaging state power.³⁴³ 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’ rights-based litigation, or vice versa, nor do I seek to romanticize hunger strikes or denigrate rights. Rather, I see both strategies pulling in the same direction, and both arising from the same conceptual and material challenge of confronting the violence of state pow-

³³⁸ Homi Bhaba, *Forward to FANON*, *supra* note 58, at xxv.

³³⁹ *Id.*

³⁴⁰ *Id.* at ix.

³⁴¹ FANON, *supra* note 58, at 16.

³⁴² Of course, the brutality of Guantánamo has been punctuated by compassion as well. As former prisoner Jumah al Dossari described, “On occasion, I was helped by compassionate guards. After the [brutal] beating [I received] in Camp X-Ray, a young female guard appeared at my cage, looking to make sure that no other guards were watching. ‘I’m sorry for what happened to you,’ she whispered to me. ‘You’re a human being just like us.’” Al Dossari, *supra* note 25.

³⁴³ I recognize that at Guantánamo and in other instances of lawyering against extreme state violence, individual lawyers have assumed significant professional risk and have demonstrated great courage in the face of it. This is especially true of the cadre of lawyers who first took the prisoners’ case up to the Supreme Court in *Rasul*—the Center for Constitutional Rights, Joe Margulies, and Tom Wilner and Neil Kaslowe at Shearman and Sterling—as they began this work at a time when it was deeply unpopular, and was also believed to be unwinnable. It seems fair to say, however, that the risk that lawyers incur is different in kind from that of the prisoners.

er. Moreover, lawyers can play three critical roles with respect to hunger strikes, even assuming that rights are ultimately insufficient to gain their clients' freedom. First, through the assertion of rights, they can dramatize the injustice of Guantánamo, thereby making hunger strikes appear all the more logical and sympathetic. Second, for the many prisoners who are either unwilling or unable to engage in such self-harming self-help as hunger strikes, lawyers are able to use rights-based strategies to engage in resistance on their behalf. In so doing, lawyers take professional risk on their clients' behalf and may provide sustenance to their clients by demonstrating in direct and appreciable ways their willingness not only to provide legal representation, but to vouch for their client's humanity. Lastly, lawyers are able to help publicize the hunger strikes—to amplify their clients' pangs of hunger, that they might be heard outside the cages of Guantánamo, and in the rarified spaces of the territorial United States. This proved to be a highly effective strategy in the case of Sami al-Haj, whose lawyers used court filings to oppose the practice of forced feeding and simultaneously to raise the profile of al-Haj's condition. Notably, *New York Times* columnist Nicholas Kristof took up al-Haj's cause, writing about him on numerous occasions.³⁴⁴

There are, however, at least three critical differences between the lawyers' and the prisoners' strategies. First, in the hunger strike, the prisoner expresses his own agency. Indeed, the key to the forced confrontation with state power is the absence of an intermediary. 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 the right to have rights that 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."³⁴⁵

Al-Haj's case points to how the rights-based and hunger-striking modes of resistance can pull in the same direction, and how synergies can be achieved between the two. At the same time, it is important to recognize that the choice to engage in a hunger strike at Guantánamo is, in my view, fundamentally existential, and is made by at least some of the prisoners

³⁴⁴ See Kristof, *Sami's Shame, and Ours*, *supra* note 321; Kristof, *When We Torture*, *supra* note 321; see also Nicholas D. Kristof, Op-Ed., *A Prison of Shame, and It's Ours*, N.Y. TIMES, May 4, 2008, at WK13.

³⁴⁵ Stafford-Smith Memo, *supra* note 322, at 4.

without expectation of publicity or calculation as to how public knowledge might be used. Thus, the hunger strike has value as an enactment of humanity, helped by but ultimately indifferent to public attention.

CONCLUSION

How does the body speak in extremis, how does the mind withstand?
—Homi Bhaba³⁴⁶

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 perhaps 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 11 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, decentering the transformative “rights 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.³⁴⁷ 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. Lawyers can help gain their clients' release, even if not through court order; moments of transformative potential, though fleeting, can be created;

³⁴⁶ Bhaba, *Forward to FANON*, *supra* note 58, at xxxi.

³⁴⁷ See generally DE CERTEAU, *supra* note 259.

still others can be exploited. Unlike the traditional litigation model, which presupposes a beginning, a middle, and, perhaps most important, an end, resistance rejects linearity and is not strictly teleological. It thus demands that the resister—whether lawyer or prisoner—search for what altered realities might be created through the act of resistance, without knowing what or where they will be.

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 prisoners in the conflict. The process of representation at Guantánamo recapitulates the divestiture of agency on which Guantánamo was built, and for many (though not all) of the prisoners, 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 listen and to amplify, to be in conversation, to speak when our clients cannot, and sometimes to be in silence, so that the clients’ assertion of humanity might be heard. The prisoners’ resistance thus underscores a far more basic value of the lawyers’ rights assertion: it, too, is resistance, and it, too, can help to keep the prisoners human.

