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Resisting Guantanamo: Rights at the Brink of Dehumanization

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RESISTING GUANTANAMO:
RIGHTS AT THE BRINK OF DEHUMANIZATION

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The Supreme Court’s June 2008 decision in Boumediene v. Bush, granting constitutional habeas corpus rights to terrorist suspects at Guantánamo Bay, appeared to usher in a rights moment in which legal advocacy achieved transformative results. But the history of rights-based litigation at Guantánamo suggests that such victories often are fleeting, with court pronouncements failing to produce the meaningful change—freedom of prisoners, closure of Guantánamo—expected of such landmark decisions. This reflects not simply a failure of the courts, but a limitation of rights in the face of extreme state violence.

This Article argues that the work of rights—and of lawyers—at Guantánamo is best understood not as an example of transformative legal practice, but as a form of resistance to dehumanization. Guantánamo has proven to be a project of dehumanization, achieved through three forms of erasure of the prisoners’ humanity: cultural erasure through the creation of a terrorist narrative; legal erasure through formalistic legerdemain; and physical erasure through torture. Because Guantánamo was defined by the Administration as rights-free, it placed the very value of rights-based advocacy in doubt, raising the question: Why adopt a rights-based strategy in a rights-free zone? Drawing on the author’s experience representing a Guantánamo prisoner, the Article considers various theories of rights, concluding that rights at Guantánamo may not be able to achieve the transformative results of prisoner freedom or prison closure, but nonetheless do the important work of maintaining prisoner humanity. A comparison between the rights-based litigation brought by the prisoners’ lawyers and the hunger strikes engaged in by the prisoners themselves illuminates the nature of such resistance, its potential, and its limitations.

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INTRODUCTION

When the Supreme Court issued its decision in *Boumediene v. Bush* 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.¹ 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.”² Indeed, the pronouncement that a provision of the Constitution extended to noncitizen wartime prisoners held outside of the sovereign United States was breathtaking, particularly 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. It was a rebuke to the Executive’s claims of outsized authority, and, the Court told us, a re-assertion of the supremacy of law. It was a rights moment. Or so it seemed.

For many of us who have represented prisoners at Guantánamo, 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, which opened as an interrogation and detention center in 2002, few prisoners’ advocates were holding their breath. In 2004, in the case of *Rasul v. Bush*,³ the Court similarly had held that the prisoners had a right of habeas corpus, and yet, four years on, not a single prisoner had had a meaningful opportunity to contest his detention. The same is true as of this writing. Like *Boumediene*, commentators greeted *Rasul* as a game-changing decision, and enthusiasm and optimism spread among advocates and prisoners alike that the decision would bring law, and therefore justice, to the seemingly lawless zone of Guantánamo. In this way, *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.⁴ Nonetheless, for many of us, and for the prisoners, the

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⁴ In *Rasul*, the Court held that the federal habeas statute, 28 U.S.C. §2241, provides for habeas jurisdiction over the detention of Guantánamo prisoners. As discussed in greater detail in
euphoria of Boumediene was tempered by the experience of Rasul, for Rasul taught the vast space that can exist between judicial decree and executive action. The problem did not lie with Boumediene—the legal victory was resounding—but with the limitations inherent to legal victory, and the limitations inherent to rights.

What was clear the moment the case was decided, and what has been borne out in the months of litigation in hundreds of cases since, is that Boumediene alone could not close Guantánamo, but could only narrow the space in which it is allowed to operate. Now that the headlines have faded, the rights 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. 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. While commentators can point to an unbroken record of legal victories in Guantánamo cases at the Supreme Court, the view from 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, epitomized by the government’s invention of the “enemy combatant” category; and physical erasure through torture.

While these three dimensions of dehumanization are distinct, they are also interrelated, and 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. 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.

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 Administration’s position has been that they lack any rights whatsoever, under any source of law. Thus has the Administration attempted 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” 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” or “radical constitutionalism”—the very kinds of progressive constitutional optimism that the Rasul and Boughemiene 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.

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6 Hannah Arendt, Origins of Totalitarianism 376 (Schocken Books 2004).
8 See Mari 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”).
9 Id. at 334.
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, resistance slows, narrows, and increases the costs for the state’s exercise of violence. 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. It 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 social erasure of the Guantánamo prisoners through the creation of a post-September 11 terrorist narrative, or what I term an iconography of terror, and the legal erasure of the prisoners through the creation of the “enemy combatant” category. 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 teenaged 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. Finally, in Part IV, I build upon this discussion of resistance by considering direct forms of resistance in which prisoners themselves have participated. In particular, I suggest the hunger strike as a paradigmatic form of prisoner 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 with reflections on the value and limitations of reframing the work of the Guantánamo prisoners’ lawyers as nothing more, but also nothing less, than resistance. I 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. Six years after its opening as an interrogation and detention center, Guantánamo today is frequently 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.” In this way, even among
its critics, Guantánamo has been reduced to allegory. But as important
as its lessons Guantánamo are for U.S. law and policy—and they are
indeed critical—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 legal
memoranda or an exercise in line-drawing, but a 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, and more specifically a human
project, enacted upon and through the bodies of those imprisoned there.
Thus, the story of Guantánamo I seek to tell here is of erasure of the
human—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 GUANTANAMO:
CULTURAL AND LEGAL ERASURE

"The purpose of Guantanamo is to destroy people.
--Jumah al Dossari"

A. Rights In Context, Law in Narrative

I have visited the U.S. detention and interrogation center at
Guantánamo Bay about a dozen times since the fall of 2004. On one
visit, in December 2005, I met with my then-client, Omar Khadr, at that
time one of about 400 prisoners at Guantánamo, in a small trailer inside
one of the prison camps. Typically when we met Omar, it was in a

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10 Juma al Dossari, I’m Home, but Still Haunted by Guantanamo, 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.

11 Throughout this Essay, I refer to the individuals incarcerated at Guantánamo as “prisoners”
rather than “detainees,” the term favored by the Government. The government 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 notes 62 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.

12 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
place called Camp Echo, a cluster of bungalow-style buildings set around the perimeter of a fenced-in compound. The rooms in which we met were divided, with a very small cell on one side of a chain metal wall, and an empty space on the other, furnished with only a folding table and a couple of plastic chairs. There was one vertical, opaque slit window by the door, conjuring the outdoors but not actually permitting sight of it. The floors and walls were a dingy institutional white, an air conditioner droned endlessly, keeping the room over-cooled. To sit there for a few hours at a time, as we typically did, was claustrophobic and at times despairing.

But the room in which I met Omar this time was different. The walls had wood paneling and there was an oriental rug on the floor. I sat in an overstuffed couch and Omar sat in a recliner. There was a coffee table, a television and DVD player, and a mini-refrigerator stocked with sodas and snacks. Although it did so crudely, the space was designed to mimic a typical Middle Eastern living room. There was even a hookah in one corner. Only after several minutes in this altered space did I realize we were in a high-end interrogation room. The camera in the ceiling and the metal eyehooks in the floor, to which prisoners are chained, were the giveaways. It was a reminder that Guantánamo is built upon deception, that even what appears normal—or especially what does—is artifice. The high-end interrogation room exists in opposition to the low-end interrogation rooms—rooms I have never been allowed to see—those spaces designed not for momentary comfort, but for threats of permanent pain. Omar had been in the faux living room before, but he had also been in those other rooms, subjected to harsh interrogation, and even torture, including one instance, at the age of 16, when soldiers used him as a human mop—lifting him off the ground, pouring solvent on him, and using his body to clean the floor on which he had urinated because he hadn’t been permitted a bathroom break. In those other rooms, he was threatened with rendition to other countries, where he was told he would be raped by older men.13

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

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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.” So, too, do those instantiations vary over time, and gain force through historical accretion. Elizabeth Schneider similarly has argued the dialectical relationship of rights and politics. Finally, the coercive dimension of rights is perpetually contested, taking the form, variously, of questions such as, “Is there a right without a remedy?” or “Are rights self-executing?”

With this understanding of the contextual specificity of rights in mind, I situate my discussion not merely in the historical period inaugurated by September 11th, and not merely in the governance regime of Guantánamo Bay, but in the even more particularized experience of representing a Guantánamo prisoner in legal proceedings. In this way, I explicitly reject the role of legal historian, whose work is to look at the development of law with the benefit of distance, time, and personal detachment. Instead, I embrace the role of accidental legal ethnographer. Informed by the methodological principles of social anthropology, I am in this story a participant observer, seeking to chart, document, and interpret the legal and cultural topographies of

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15 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.

Guantánamo from the inside out, through a process of information gathering and analysis that is only possible through social engagement in the very legal and cultural systems I am studying. I declare openly my subjectivities as an advocate, but subjectivity is inherent in all ethnography; it is the price one pays for the qualitative and relational analysis of participant observation.

Admittedly, mine is a deeply imperfect methodology. I did not set out to research and write an ethnography of Guantánamo; rather, I intended to be an advocate there. And so in both intention and practice, my claims to ethnographic method are perhaps more gestural than rigorously faithful. Nonetheless, I insist upon situating the question of prisoner’s rights within the “social text”\(^ {18}\) of Guantánamo, and through the use of narrative, attempt to provide the kinds of thick description of Guantánamo—its people, institutions, histories, and ambitions—that enable meaningful cultural and legal inquiry.

It is, however, not only the historical specificity of rights that compels such an approach. Law itself is dependent upon narrative for its meaning. Narrative renders law from doctrine to praxis, law in stasis to law in action, abstract hermeneutic to the friction of real-world substantiality. Robert Cover described law as semiotic—that is, a system of signification—rather than a determinate corpus of self-defining rules.\(^ {19}\) On its own, then, law is indeterminate. As Cover argued, “law is a resource in signification that enables us to submit, rejoice, struggle, pervert, mock, disgrace, humiliate or dignify.”\(^ {20}\) It is narrative context that fixes the meaning of law, legal institutions, doctrine, and legal practice, for law is fundamentally and inextricably embedded in narrative. As Cover, wrote, “No set of legal institutions on 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.”\(^ {21}\)

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

\(^{18}\) GEERTZ, supra note 17.

\(^{19}\) “[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 “Nomos and Narrative”].

\(^{20}\) Id. at 8.

\(^{21}\) Id. at 4-5.
plot and characters, but of what forces and motivations animate people and events.22

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.23 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.24 To understand legal dispute, one must comprehend the narrative contest it inhabits. And to understand legal victory, one must recognize the triumph of one narrative vision over another.

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

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

From the moment Guantánamo opened as an interrogation center for terrorist suspects, the Administration has described the prisoners as “the worst of the worst,” as unfathomably dangerous, and as trained and hardened killers.25 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.26

22 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 the details of the[ir] stories, . . . introducing changes in the classificatory order . . . that reflect their subject position and advance their interest”). 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.


24 Cover, Nomos and Narrative, supra note 19, at 5, 25.


The government coupled these characterizations with menacing imagery, as the Pentagon released pictures of men being transported to Guantánamo while strapped to the floor of a plane, heads covered, hands shackled, an American flag draped above, and still more pictures of men in orange jumpsuits, crumpled on the ground behind chain-linked fence. They told a narrative of transnational forces of evil committed, with fanatical zeal, to the destruction of the U.S., to which the U.S. then responds with military and moral superiority, thereby subduing the enemy, neutralizing him, rendering him abject, and, under the vigilant eye of America, ensuring that he remains broken and contained.

In this regard, we might think about the value that Guantánamo serves, international condemnation notwithstanding, in purchasing domestic faith in the belief that the homeland is secure. Guantánamo is evidence of the government’s success—visible but not too visible, close but not too close—in subduing evil. Through partial visibility, we are encouraged to see a government ensuring our safety; through partial occlusion, we are relieved of the knowledge of the methods used to achieve such security. In this way, Guantánamo fills an existential need for security. That we obtain such security through the quarantine of darkened bodies is a familiar compromise—at Guantánamo, as well as in the territorial U.S.—and one that is not easily disturbed. Indeed, the very ground on which prisoners were first kept at Guantánamo was previously used by the U.S. government to detain Haitian refugees in the 1990s.


28 I put “war on terrorism” in scare quotes because as currently conducted, U.S. anti-terrorism efforts encompass not only combat in places such as in Afghanistan, but the capture of individuals far from any battlefield, such as in Bosnia, Gambia, and Zambia. Similarly, anti-terrorism policy includes practices as disparate as warrantless wiretapping of U.S. citizens, see James Risen and Eric Lichtblau, Bush Lets U.S. Spy on Callers Without Courts, N.Y. TIMES, December 16, 2005 at A01, and rendering of noncitizens to third countries where they have alleged torture, see REPORT OF THE EVENTS RELATED TO MAHER ARAR, COMMISSION OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR (2006), available at http://www.ararcommission.ca/eng/AR_English.pdf. The “war on terrorism” is therefore a war in metaphor only. For further discussion of the dangerous consequences of accepting this metaphor, see infra notes 28-32 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 Transcript of Oral Argument, Hamdan v. Rumsfeld, 542 U.S. 557 (2006), available at http://www.supremecourts.gov/oral_arguments/argument_transcripts/05-184.pdf.

29 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:
and Latinos in U.S. prisons, promises safety through racial containment.\textsuperscript{30} 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.\textsuperscript{31}

The dark, bearded, turbaned men of Al Qaeda are central figures in the post-9/11 state iconography, and though pictures of the prisoners at Guantánamo as they now appear have not been released, it seems fair to say that these essentialized notions of the terrorist\textsuperscript{32} are what Guantánamo is meant to conjure: it is men like these, we are meant to believe, who are detained there.

My former client, Omar Khadr, was a fifteen-year old boy when he was taken into U.S. custody. When Omar was taken to Guantánamo, he could not yet grow a beard. Indeed, he had not completed puberty. As

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


\textsuperscript{30} 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. \textit{See, e.g., Michael J. Lynch & E. Britt Patterson, Race and Criminal Justice} (1991) (compiling several articles discussing the impact of racial biases on all stages of the criminal justice system); Angela Davis, \textit{Prosecution and Race: The Power and Privilege of Discretion}, 67 FORDHAM L. REV. 13, 25-30 (1998-1999) (discussing the discriminatory impact of police officer and prosecutorial discretion and describing them as further manifestations of racial disparities in the criminal justice system).


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.\(^{33}\) Now, at age 21, Omar, a Canadian citizen, has spent nearly one fourth of his life growing up at Guantánamo Bay.

The state is as dependent upon narrative for the instantiation of law as are those who would contest state power.\(^{34}\) Precisely for this reason, narratives of the state are instruments of violence.\(^{35}\) Their totalizing, explanatory claims bludgeon multiple and divergent histories, the wave of master narrative washing over the granular, specific accounts of 400 individual human beings. The task of the prisoners’ lawyers has been to surface these alternative accounts, thereby contesting the blanket assertion of state power through the exercise of narrative autonomy.

At Guantánamo the state narrative was presumptively legitimate because it did not begin there, but instead derived from and helped to reinforce a racialized social construction of the terrorist that had already taken hold in the aftermath of 9/11, and that has its antecedents well before. Immediately following the terrorist attacks, the Administration deployed a set of racially directed immigration enforcement and detention practices which, coupled with thousands of incidents of hate violence—including 22 murders—helped to consolidate the disparate identities of Arabs, Muslims, and South Asians into a newly minted monolithic category in the American racial lexicon: the “Muslim-looking” person.\(^{36}\) Through these state and cultural practices, the Muslim and the terrorist became one in the same. As Leti Volpp has argued, this racial category was inherently oppositional to a newly consolidated post-9/11 national identity, and acted to expel Arabs, Muslims, and South Asians from the cultural or affective (non-formal) citizenship they might otherwise have enjoyed.\(^{37}\)

“Muslim-looking” is a peculiar category, as it collapses phenotype and faith, and conjures a literal face of religion—that is, we know what a Muslim (and therefore a terrorist) looks like. Although this category is

\[^{33}\text{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.").}^{16}\text{See also Brief of the American Medical Association, American Psychiatric Association, American Society for Adolescent Psychiatry, American Academy of Child & Adolescent Psychiatry, American Academy of Psychiatry and the Law, National Association of Social Workers, Missouri Chapter of the National Association of Social Workers, and National Mental Health Association as Amici Curiae in Support of Respondent, Roper v. Simmons, 543 U.S. 551 (2005).}^{17}\text{See Cover, Nomos and Narrative, supra note 19, 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.").}^{18}\text{See id. at 40 ("[T]he jurisgenerative principle by which legal meaning proliferates in all communities never exists in isolation from violence.").}^{19}\text{See Ahmad, Rage Shared by Law, supra note 32, at 1265-82; Volpp, supra note 32, at 1576-86.}^{20}\text{Volpp, supra note 32, at 1592-98.}
ostensibly about religion, and embraces various visual cues, such as turbans, beards, and veils, it opens a space hovering somewhere between religion and race, and indeed, has significant racial valance. The Muslim is different, and deficient, not only in appearance, but in constitution. The menace is not merely the God who is worshipped, but the broader set of cultural practices, modes of living, and systems of belief that are attributed monolithically to more than a billion people. It is, therefore, the total embodiment of the Muslim—the Muslim body—that is constructed as an inherent mortal threat.

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

This phenomenon—the creation of a monster who not only exists in opposition to the civilized, but is invented in order to establish the liberal bona fides of the civilized—is painfully familiar, especially for its invocation of the Muslim subject. As Sartre wrote in the context of French racism toward Algerian colonial subjects, “One of the functions of racism is to compensate the latent universalism of bourgeois liberalism: since all human beings have rights, the Algerian will be made a subhuman.”

The existence of the liberal, civilized West, therefore, required the invention of the illiberal, barbaric East: “the only way the European could make himself man was by fabricating slaves and monsters.”

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

Omar Khadr was captured in Khost, Afghanistan, in July of 2002, following an intense firefight around the house in which he was living. Several hours of combat and two five-hundred pound bombs killed the

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40 See EDWARD SAID, ORIENTALISM (1978).
41 JEAN-PAUL SARTRE, COLONIALISM AND NEOCOLONIALISM 149 (Haddour, Brewer & McWilliams trans., Routledge 2001)
42 See Volpp, supra note 32, at 1586-91 (characterizing the post-September 11th construction of the terrorist as a redeployment of Orientalist tropes).
other occupants, who were believed to be Al Qaeda fighters, but Omar survived. The government alleges that at the conclusion of the firefight, Omar arose from the rubble of the destroyed house and threw a grenade that killed a U.S. soldier. While the Administration claims the authority to detain those at Guantánamo indefinitely and without charge as “enemy combatants,” it has nonetheless chosen to try a small number of prisoners, including Omar, for alleged war crimes in military commissions.

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

C. 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 has become routinized, but that first trip was fraught with anxiety, anticipation, and fear of the unknown. Only a handful of habeas lawyers had visited the island before us, 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 our many other fears.

46 United States v. Khadr, Charge Sheet, supra note 44.
47 See infra Sec. II.B.1.
48 See infra notes Sec. II.A.
49 For an exhaustive discussion of Omar’s family, see SHEPHERD, supra note 45.
50 Counsel visits were enabled by the Supreme Court’s decision in Rasul v. Bush, handed down on June 30, 2004, which recognized the right of Guantánamo prisoners challenge the legality of their detention by way of habeas corpus. 542 U.S. 466 (2004). Once the right of the prisoners to file habeas petitions was established, a right of access to counsel (though not a right to counsel at government expense) followed. Al Odah v. United States, No. 02-828 (CKK) (D.D.C. Oct. 20, 2004) (Memorandum Opinion), available at guantanamoonline.org/pdf/kollar-kotelly.pdf.
Our travel to Guantánamo did nothing to disabuse our expectations of a dark and secretive island. We flew to Ft. Lauderdale, and from there boarded a 19-seat turbo-prop charter flight on Lynx Air (later flights would be via a Lynx competitor, optimistically named Air Sunshine). The flight was full, so full in fact, that the excess weight necessitated a refueling stop on 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: since the U.S. does not have diplomatic relations with the Castro government, we could not fly over Cuban airspace and therefore had to detour around the eastern peninsula of the island. As I sat wedged against the window, the two small engines blaring as we hurtled toward the dark mystery of Guantánamo, I recalled the iconography of the prisoners’ transport to the island—heads hooded, wrists and ankles shackled, sitting on the floor of a cavernous cargo plane with nylon straps tethering them to one another and to the sides of the plane. This would be the first of many comparisons I would draw between my condition and Omar’s, an early signal of the experiential and situational distance between us.

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

By the time we arrived, night had fallen. We emerged onto the tarmac with floodlights illuminating the humid air and armed soldiers,

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52 See MARGULIES, supra note 28, 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 then the prisoner believes all is lost, for only then will he abandon his resistance”).
only slightly older than our client, ready to greet us. We gathered our luggage, which was then searched, and then met our liaison, a young army corporal, who accompanied us to the dank rooms of a small motel, called the Combined Bachelor Quarters (CBQ), where we would be staying. In a matter of minutes, Guantánamo shifted from the realm of the imagination into our lived experience. That night, our theoretical understanding of the place stood poised for collision and reconciliation with its real-world materiality.

Despite our initial disorientation, days at Guantánamo are quickly routinized, and with routinization comes normalization. A ferry takes you across Guantánamo Bay itself, from the Leeward to the Windward side. For fifteen or twenty minutes, it is the calm beauty of the Caribbean. Then, arriving at the other side, you encounter a giant desalination plant (necessary because Castro cut off the supply of fresh water to the base). A short drive up a winding hill, you enter what has been consciously designed to mimic a small town in 1950s middle America. A single road, Sherman Avenue, runs from one end of the base to the other, along which one finds an outdoor movie theater, evocative of drive-ins of a bygone era. There is a McDonald’s, an A&W Root Beer, a bowling alley and a “public” library. There is a large laundromat, and the Navy Exchange—a combined grocery and department store. On our first visit there, it was impossible to find a good cup of coffee, but they have since begun serving Starbucks at one small outlet. There are athletic fields and housing developments named West Iguana and Tierra Kay that look like suburban subdivisions. There is even a school for the kids on base. The speed limit is 25 miles per hour—strictly enforced, in large part to protect the iguanas—53—which reinforces the sensation that time goes slowly at Guantánamo.

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

Power is exercised at Guantánamo not only through spatial demarcation, but through administration of “indigenous” ritual. In Muslim countries, the call to prayer is heard five times day. In the old days, a muezzin ascended a steep minaret to make the call. Today, it is broadcast from loud speakers attached to the minarets. At Guantánamo,

too, the call to prayer is heard (though prisoners have complained that is not broadcast all five times, and that the government sometimes deliberately disrupts it). But what is more jarring is to see that the recorded call is broadcast from loud speakers not atop minarets, but attached to the guard towers encircling the camps, each one staffed by armed guards, and each emblazoned by an American flag. The prisoners’ call to prayer issues nearly from the barrel of their captors’ guns.

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

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

D. The Legal Erasure of the Human: “Enemy Combatants” and the Law of Guantánamo

Is there law at Guantánamo? By now, the executive, legislative, and judicial actions relating to Guantánamo have been thoroughly documented by others, beginning with the Presidential Military Order approving the detention of “enemy combatants” and trials by military

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The legal memoranda purporting to except the prisoners from the protections of the Geneva Conventions and approving the use of interrogation techniques previously considered torture. So, too, has the relevant Supreme Court jurisprudence—Rasul.
Counsel, U.S. Dep’t of Justice, Memorandum for 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 [hereinafter “Bybee Memo”]. Though later rescinded, the Bybee Memo, named after its principal author, then-Assistant Attorney General for the Office of Legal Counsel, Jay Bybee, provided the legal framework for the authorization of interrogation techniques previously considered violative 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. (Bybee was subsequently nominated and confirmed to the U.S. Court of Appeals for the Ninth Circuit.)

A subsequent memorandum, written by then-Deputy Assistant Attorney General John Yoo, went even further, and in shockingly poor legal reasoning, suggested that the claim of wartime executive authority could excuse interrogators from criminal liability. In one section, for example, Yoo argues:

If a government defendant were to harm an enemy combatant during an interrogation in a manner that might arguably violate a criminal prohibition, he would be doing so in order to prevent further attacks on the United States by the al Qaeda terrorist network. In that case, we believe that he could argue that the executive branch’s constitutional authority to protect the nation from attack justified his actions.


Relying on this legal framework, numerous revisions were made to operations manuals of the U.S. armed forces authorizing new interrogation techniques. Responding to a perceived lack of progress with interrogations, Guantanamo 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 for Commander, Joint Task Force 170, Legal Brief on Proposed Counter-Resistance Strategies, Oct. 11, 2002, available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.12.02.pdf. These included: Category II techniques (stress positions, extended isolation, hooding, 20-hour interrogations, restriction on meals, and exploitation of individual phobias); and Category III techniques (imminent death threats, “misperception of suffocation,” and “mild, non-injurious physical contact”), each of the latter category requiring specific prior approval. Id. Secretary of Defense Rumsfeld approved the use of Category II techniques as well as mild, non-injurious on December 2, 2002. Action Memo from General Counsel William J. Haynes, Dep’t of Defense, for Secretary of Defense Donald H. Rumsfeld, Counter-Resistance Techniques, Dec. 2, 2002, available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.12.02.pdf. Included next to his signature was a hand-written note: “However, I stand for 8-10 hours a day. Why is standing limited to 4 hours? D.R.” Id. Secretary Rumsfeld would later approve seven more interrogation techniques (including environmental manipulation and sleep adjustment), thus extending explicit authorization to a total of twenty-four severe methods for use at Guantanamo Bay. Memorandum from Secretary of Defense Donald H. Rumsfeld to Commander, U.S. Southern Command, Counter-Resistance Techniques in the War on Terrorism, Apr. 16, 2003, available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.16.pdf. For a comprehensive discussion of the 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, and Malcolm 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
v. Bush, 59 Hamdi v. Rumsfeld, 60 Hamdan v. Rumsfeld 61—been explored, as well as the lower court actions and Congress’s intervention in the form of the Detainee Treatment Act of 2005 62 and the Military Commissions Act of 2006. 63 While the Court’s decision this past Term in Boumediene v. Bush 64 poses a set of new doctrinal and theoretical challenges, rather than rehearse previous discussions of the caselaw 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 this corpus of state action by all three branches not constitute an abundance of law at Guantánamo? Rather than Guantánamo suffering from a lack of law, is it possible that law is all around?

Answering this question requires a summary discussion of the creation and development of the Guantánamo governance regime. While that regime is multi-faceted, and has evolved over time, at its inception it sought to detain and interrogate indefinitely, without charge, and without opportunity for judicial review, any non-U.S. citizen in the world whom the Executive deemed to be an “enemy combatant.” In addition, the regime contemplated the trial by military commission of select “enemy combatants” for alleged war crime offenses, under rules of the Executive’s making. Notably, the “enemy combatant” construct was a legal invention of the Administration, distinct from the presumptive “prisoner of war” status to which the prisoners otherwise would have been entitled, the intended effect of which was to remove the prisoners from the ambit of both the Geneva Conventions and the U.S. courts. In this way, in the eyes of the law, the prisoners were made invisible. 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.” 65 That position was accepted by the Eleventh Circuit, 66 though rejected by the Second. 67 The result of this rights-free zone,

64 128 S. Ct. 2229 (2008).
66 Haitian Refugee Ctr. V. Baker, 953 F. 2d 1498, 1513 n. 8 (11th Cir. 1992).
Neuman argued, was "a true reverse Carnival, a ruler’s festival of uninhibited exercise of power". 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?"

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 familiar if episodic visitor.

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. A presidential order authorized the apprehension and detention of terrorist suspects as "enemy combatants," anywhere in the world. Informed by legal advice from within the Executive Branch, the presidential order purported to exempt the Guantánamo prisoners from the Geneva Conventions, the primary advantage of which was to enable the use of "harsh interrogation techniques," which otherwise would have violated the

68 Neuman, supra note 65, at 1232.
69 Id.
70 Neal Kumar Katyal, Hamdan v. Rumsfeld: The Academy Goes to Practice, 120 HARV. L. REV. 65, 70 (2006) (distinguishing the traditional theory of a unitary executive from the "wild-eyed theory, masquerading as a 'unitary executive' concept, that purported to allow ... [the Administration] to defy and creatively reinterpret even the will of Congress—all supposedly entirely consistent with the Constitution. This virulent strain of the unitary executive, which emphasized the President’s 'inherent authority' to act, gained traction and led to a number of exceptionally dangerous policies, culminating in the so-called ‘torture memorandum.’") (internal citations omitted).
71 Presidential Military Order, supra note 56.
72 See supra note 57 and accompanying text.
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, the location of the interrogation and detention center at Guantánamo served multiple strategic purposes. Among them as the intention to evade the jurisdiction of U.S. courts. Thus, the principal, and enduring court challenge regarding Guantánamo has not been with respect to the adjudication of rights, but instead concerns the reach of the courts. In its first Guantánamo-related case, Rasul v. Bush, the Supreme Court held that the federal habeas statute reached the prisoners at Guantánamo, thus repudiating the government’s claim of extra-judicial authority. 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. 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 government argued, the prisoners possessed neither statutory nor constitutional rights, and therefore the courts could hear the cases but could not act; they could listen, but they could not speak.

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

As the habeas litigation stalled in the Court of Appeals, the first challenge to the Guantánamo military commission system rose to the Supreme Court in Hamdan v. Rumsfeld. The DTA was enacted after certiorari had been granted in Hamdan but before the case was heard,

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73 See supra note 57 and accompanying text.  
thus forcing the Court to consider the statute’s jurisdiction-stripping provisions as a threshold matter. The Court disposed of the jurisdictional issue expeditiously,\textsuperscript{79} and proceeded to the merits, rejecting the government’s argument that the prisoners stood outside the Geneva Conventions, and instead finding that the military commission system was unauthorized under the Uniform Code of Military Justice and contrary to Common Article 3 of the Geneva Conventions.

The \textit{Rasul} and \textit{Hamdan} decisions are enormously important, both for their willingness to resolve jurisdictional questions in the prisoners’ favor, and in the case of \textit{Hamdan}, to adjudicate their substantive rights claims. With \textit{Rasul}, there has been a tendency to describe, and lament, the case as “merely” jurisdictional. Indeed, the government’s position has been that \textit{Rasul} had no direct bearing on the substantive rights of the prisoners, and that in fact they have none.\textsuperscript{80} But even if merely jurisdictional, \textit{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.\textsuperscript{81} Robert Cover decried this “apologetic and statist orientation” of jurisdictional decisions for “prevent[ing] courts from ever reaching the threatening questions.”\textsuperscript{82} In this way, by Cover’s account, jurisdictional disposal of a case was a means of upholding state violence—and thereby doing state violence—while disclaiming personal culpability of the judges involved.\textsuperscript{83}

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

\textsuperscript{79} 126 S.Ct. 2749, 2762-2769 (2006).
\textsuperscript{80} Much of the parties’ debate over whether the prisoners possess constitutional or statutory rights has centered on footnote 15 of the majority opinion in \textit{Rasul}, which states:

\begin{quote}
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).
\end{quote}

\textsuperscript{82} Cover, \textit{Nomos and Narrative}, supra note 19, at 57.
\textsuperscript{83} \emph{Id.} at 156 (“[T]he judge—armed with no inherently superior interpretive insight, no necessarily better law—must separate the exercise of violence from his own person.”).
As the post-\textit{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 \textit{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 \textit{Rasul} repudiated the government contention that Guantánamo was beyond the reach of the courts, \textit{Hamdan} established that prisoners—at least those few facing trial by military commission—had certain enforceable rights. Thus did law intrude upon Guantánamo.

The significance of the \textit{Hamdan} decision can be measured by the speed with which the Administration moved for Congress to overturn it, which Congress did. With enactment of the Military Commissions Act of 2006 ("MCA"),\textsuperscript{84} Congress once more attempted to strip the courts of habeas jurisdiction over Guantánamo, and authorized a new military commission system to replace the one invalidated by the Court in \textit{Hamdan}. The MCA is remarkable in three ways: (1) its habeas-stripping provisions provoked a constitutional dispute on a core liberty concern,\textsuperscript{85} ultimately resolved in \textit{Boumediene}; (2) it attempts a unilateral re-interpretation of sections of the Geneva Conventions\textsuperscript{86}; and (3) it replaces the discredited military commission system with one that suffers from many of the same defects that troubled the Supreme Court in \textit{Hamdan}.\textsuperscript{87} At least until \textit{Boumediene} was decided, the cumulative result was to return the prisoners to a realm beyond law.


\textsuperscript{85} 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. Muneer I. Ahmad, \textit{Guantánamo Is Here: The Military Commissions Act and Noncitizen Vulnerability}, 2007 U. CHI. LEGAL F. 1 (2007).

\textsuperscript{86} Responding to the \textit{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) (defining the military commissions as \textit{per se} “regularly constituted courts” under Common Article 3 of the Geneva Conventions); 10 U.S.C § 948b(d)(2)(g) (declaring that the Geneva Conventions may not be invoked as a source of rights by enemy combatants); MCA, supra note 84, § 5(a) (barring the use of the Geneva Conventions as a source of rights in any habeas or other civil proceeding in which the U.S. or its agents are a party); id., § 6(a)(3)(A) (granted the U.S. President inherent authority to interpret the meaning and application of the Geneva Conventions, including the definition of “grave braches”).


\textsuperscript{87} See MCA, supra note 84, § 3 (adding Chapter 47A to Title 10 of the U.S. Code).
Of course, the government has never accepted the argument that Guantánamo is either lawless or beyond the law. Rather, it has insisted upon the lawfulness of its governance regime, as it must; even the most totalitarian of regimes claim to be operating in accordance with the law, and use the law, its language, forms, actors, and mythologies to legitimize its actions. By the government’s account, law is all around: contract law governs the agreement with Cuba granting the U.S. use of Guantánamo as a naval station; the Uniform Code of Military Justice applies to wrongdoing committed by military personnel and civilian contractors on the base; and international humanitarian law authorizes wartime detention of combatants.

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

But such competing claims to the existence of law at Guantánamo reveal the “Is there law?” question to be both political and jurisprudential. For the administration, the claim to law reflects a concern, and a contest, over the legitimacy of state power. I return to this inherent linkage between law and legitimacy in Section 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 are selective at best: For example, it relies upon international humanitarian law (IHL) for the principle that combatants may be detained for the

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duration of hostilities, but has sought to disclaim the applicability of other provisions of IHL, most notably Common Article 3 of the Geneva Conventions.

For human rights advocates, the claim to law is also a claim about state power, and its subordination to a set of norms and principles which originate outside the state, without the need for state consent, and yet have the force to bind it. While I am sympathetic to the human rights position, my experience at Guantánamo, and more importantly that of the prisoners, makes the assertion of law’s existence seem ever more fanciful. Indeed, looking from the lived experience of those on the 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, created by the Administration in the aftermath of Rasul, Abassi submitted written complaints that military police had sex in front of him while he prayed, and he argued that he should be considered a prisoner of war rather than an enemy combatant. But as the Associated Press reported:

[A]n Air Force colonel, whose identity remains blacked out [on the transcript], would have none of it. “Mr. Abassi your conduct is unacceptable and this is your final warning. I do not care about international law. I do not want to hear the words international law again. We are not concerned about international law,” the colonel insisted before having Abassi removed from the hearing so that the military could consider classified evidence against him. Abassi was freed in January 2005.92

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.”93

Here, then, we must acknowledge the inextricability of law and the state, and the special, though not exclusive, authority the state holds in defining what is law because of its monopoly on legitimate violence.

91 The Combatant Status Review Tribunal were created by the Administration after the Supreme Court decided the Rasul case, and the same day, the case of Hamdi v. Rumsfeld, 542 U.S. 507 (2004). For a fuller description of the origins and nature of the CSRT, see infra note 173 and accompanying text.
The challenge of the human rights movement is to establish law that transcends sovereignty. It remains to be seen, however, whether law can so exist, or if, liked a trapped animal, one limb isn’t always caught in state power. In this context, the Rasul, Hamdan, and now the 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 is the latest, but likely not the last chapter in the Guantánamo legal history. Like Rasul, it is affirms the jurisdiction of the federal courts to hear the prisoners’ habeas petitions, but it is all the 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 MCA was in violation of the Suspension Clause, and found that it was.\(^4\) 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,\(^5\) suggests anew the potential for transformative legal practice. And yet, 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—Fifth Amendment due process, or Sixth Amendment confrontation rights, for example—but only that they are entitled to contest their detention. Thus, while the Boumediene decision is undoubtedly historic with regard to the scope of executive authority, it merely returns the prisoners to the place they were four years ago, after Rasul.\(^6\)

\(^4\) Boumediene, 128 S. Ct. at 2229.

\(^5\) See Press Release, U.S. District Court for the District of Columbia, DC Chief Judge Meets with Judges to Discuss District Court Procedures for Guantanamo Cases, July 2, 2008 available at (http://www.dcd.uscourts.gov/public-docs/system/files/Guantanamo-PressRelease070208.pdf) (quoting Chief Judge Royce Lamberth as stating, “The judges of this Court are committed to deciding these cases [sic] as expeditiously as possible”). A flurry of case activity suggests that the district court is expediting these cases.

\(^6\) The Supreme Court did provide the lower courts with some significant guidance that should make post-Boumediene litigation more fruitful than the post-Rasul litigation was. 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 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.
II. TECHNIQUES OF LEGAL ERASURE: LEGAL ABSURDISM AND RADICAL INDETERMINACY

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.97 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.”98

Absurdity abounds at Guantánamo. Before Rasul, iguanas were protected under the Endangered Species Act but prisoners were protected by no law.99 Under pressure from the federal courts, the administration determined several men, whose “enemy combatant” status had never been substantiated, to be “no longer enemy combatants,” even though, as a federal judge noted, they had never been “enemy combatants” in the first place.100 A habeas lawyer was falsely accused of smuggling contraband—namely, a pair of athletic underwear—in to a prisoner, ostensibly by wearing them in himself.101 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,102 and in the topsy-turvy universe of Alice

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in Wonderland, 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 re-construct reality, in a bid to reconstitute normalcy. It is Josef K., Garcin, and Alice who are made to feel foolish, and not their keepers. Thus do these texts launch into narrative contest with the known and understood worlds of their readers. Similarly, the law of Guantánamo is embedded in the story of Guantánamo, and that story is made and re-made through narrative contest.

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

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

> Journalists who were permitted to view an interview session from behind a glass wall ... were shown an interrogator and detainee sharing a milkshake and fries from the base’s McDonald’s and appearing to chat amiably. It became apparent to reporters comparing

103 LEWIS CARROLL, ALICE IN WONDERLAND & THROUGH THE LOOKING GLASS (1946).
104 See Neil A. Lewis, Fresh Details Emerge on Harsh Methods at Guantanamo, N.Y. TIMES, Jan. 1, 2005, at A11 (“Military officials have gone to great lengths to portray 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.”).
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. ¹⁰⁵

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

Nowhere was the staging of Guantánamo more evident than in the military commissions. Whereas the vast majority of Guantánamo prisoners have never been charged with a crime, and never will be, the government has charged a select few, including Omar, with alleged war crimes, to be tried by military commission. Trials are so common a feature in our popular culture that it is difficult not to view them through a theatrical lens. In the military commissions, however, theater was not merely a metaphor, but an ambition. The general suspicions that attaches to military trials,¹⁰⁶ combined with the gross procedural and substantive irregularities of these military commissions, led critics to call the proceedings nothing more than show trials. Mindful of this criticism, and seeking to rebut it, the administration sought to perform the commissions’ legitimacy, and in so doing only further undermined it.

The commission process was established by presidential order in November 2001,¹⁰⁷ and the first prisoners were charged and referred before a commission in 2004.¹⁰⁸ 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;¹⁰⁹ many of these charges were vindicated by the Supreme Court’s

¹⁰⁵ Id.
¹⁰⁹ See, e.g., NAT’L ASS’N OF CRIM. DEF. LAWYERS, ETHICS ADVISORY COMM., OPINION 03-04 (2003); NAT’L INST. OF MIL. JUST., STATEMENT ON CIVILIAN ATTORNEY
wholesale invalidation of the commissions in *Hamdan*. In their original incarnation, the commission rules permitted testimony obtained through torture, the liberal use of secret evidence, and exclusion of the defendant from his own trial. Evaluating 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.” Mounting domestic and international criticism—some of it


The Military Commissions Act creates a third version of the military commissions. The first version was radically altered by a comprehensive rules change in March 2004. That next version was invalidated by the Supreme Court in *Hamdan*, after which the MCA was enacted. See infra note 216 and accompanying text.

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.


But see id. at 2809 (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 2848 (Thomas, J., dissenting) (same).

Mary M. Cheh, *Should Lawyers Participate in Rigged Systems? The Case of the Military Commissions*, 1 J. NAT’L SECURITY L. 375, 378 (2005). As Cheh notes, however, id. at n. 17, there were those who believed the commissions to meet fundamental standards of justice. 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,” noted, “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, 126 S. Ct. 2749 (2006).
coming from within the commission prosecutor’s own office—exerted enormous pressure on the government to shore up the legitimacy of the commission process, much of which was done on a purely cosmetic level.

The government went to great lengths to make the commission look as much like a real court, even as they were emptied of the substantive rights that ordinarily inhere in a courtroom. Although there was no judge in these proceedings, the presiding officer was ordered to wear a robe (and ours carried a gavel); although this was a commission and not a court, the commission room, formerly a dental clinic, was swathed with blue velvet curtains and rich, dark wood furniture so as to look like a courtroom. The curtains only went two-thirds of the way up the wall, after which the painted cinder block of the weathered building

114 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 AND THE LAW, REPORT AND RECOMMENDATIONS ON MILITARY COMMISSIONS (Jan. 4, 2002); ABA TASK FORCE ON TREATMENT OF ENEMY COMBATANTS, REPORT TO THE HOUSE OF DELIGATES 2 (2003) (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, American Bar Association, to the President of the United States (Feb. 27, 2008), available at http://www.abanet.org/poladv/letters/antiterror/2008feb27_detainees_l.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. CRIM. DEF. LAWYERS, ETHICS ADVISORY CMTE., OPINION 03-04 (2003); Letter from Barry M. Kamins, President, Association of the Bar of the City of New York, to Senator Leahy et al. (March 12, 2008), available at http://www.nycbar.org/pdf/report/Guantanamo_MC311.pdf.

115 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:

> While 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 UK have been unable to accept that the US military tribunals proposed for those detained at Guantánamo Bay offer sufficient guarantees of a fair trial in accordance with international standards.

116 See infra note 134 and accompanying text.

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

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

were exposed. But two thirds was just far enough for the curtains to fill
the frame of the cameras in the room, which broadcast proceedings on a
closed-circuit system. For those of us appearing as defense lawyers in
the commissions, we knew we were on a hastily constructed set, where
costume and props and scenic design attempted to consecrate the once-
barren space. In our very first commission session we were handed a
document listing speaking parts for the presiding officer, the lawyers,
and our client, and ordered, with no apparent sense of irony, to follow
“the script.”

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. Describing this
phenomenon of self-legitimation, they write:

\[\text{[A]ll forms of serious social conflict are channeled into}
\text{public settings that are heavily laden with ritual and}
\text{authoritarian symbolism. Each discrete conflict is}
\text{treated as an isolated “case”: the participants are brought}
\text{before a judge in a black robe who sits elevated from the}
\text{rest, near a flag to which everyone in the room has}
\text{pledged allegiance each day as a child; the architecture}
\text{of the courtroom is awesome in its severity and in its}
evocation of historical tradition; the language spoken is}
\text{highly technical and intelligible only to the select few}
\text{who have been “admitted to the Bar.” This spectacle of}
symbols is both frightening and perversely exciting. It}
signifies to people that those in power deserve to be
there by virtue of their very majesty and vast learning.
When disseminated throughout the culture (through, for
example, the schools and the media), these symbols help
to generate a belief not only in the authority of the law,
but in authority in general.}\]

The Gabel and Harris critique exposes the ritual and symbolism
deployed in long-standing legal systems, and the role that they
play in upholding and perpetuating obedience to political authority. At
Guantánamo, however, the commissions were erected on a nearly blank
slate: the last American military commission was convened in 1942.

Thus, the commissions at Guantánamo did not require the excavation of
socio-cultural artifacts buried deep within the legal system. Rather,

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120 See Email of Keith Hodges, “Initial Session Trial ‘Script’” With Presiding Officer (and no
other members), Jan. 3, 2006 (copy on file with author).
121 Peter Gabel & Paul Harris, Building Power and Breaking Images: Critical Legal Theory
122 Id. at 372.
123 See Ex Parte Quirin, 317 U.S. 1 (1942).
because we were witnessing the creation of a legal system nearly from scratch, the installation and instantiation of authority were on blatant display.

In the commissions, the trappings of law substituted for law itself. At every turn, the government maintained that the prisoners at Guantánamo had no rights whatsoever, under any source of law, even when they were being tried criminally. Moreover, while the administration claimed they had legal authority to convene the commissions (a position repudiated by the Supreme Court in *Hamdan*), there were few formal rules governing the commission. The only substantive requirement for the commissions was that they be “full and fair,”¹²⁴ a phrase that the prosecution and the presiding officer repeated *ad nauseum*,¹²⁵ and one that expanded, or more typically contracted, to meet the particular substantive challenge being raised.

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

Our military co-counsel, Lieutenant Colonel Colby Vokey, attempted to gain some clarity on the question of what jurisprudence would be relevant to the decisionmaking of the commission. In the course of voir dire of the presiding officer, he attempted to learn what caselaw, if any—domestic or international, criminal or civil, military or civilian—would be followed, to which the presiding officer responded, “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.”¹²⁶ Leaving aside the circularity of this argument, it contemplates counsel divining the law through a system of pinging—motions citing various cases like so many bursts of energy issuing into an ocean of unknowable dimension, with the hope that they

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¹²⁵ Carol Rosenberg, *Pre-Trial Hearings for Detainees Elicit Criticisms, Defense, MIAMI HERALD*, Jan. 16, 2006, at International News (quoting military defense attorney, Army Maj. Tom Fleener, “If I hear ‘full and fair trial’ one more time, it’s going to make me sick”).
¹²⁶ Draft Transcript of Proceedings at 447, United States v. Omar Ahmed Khadr, No. 05008, (April 5, 2006) (on file with author). Later in the same proceeding, the presiding officer elaborated: “I think that we will look to international law, I think that we will look through military law, I think that we will look through federal criminal law. I think that we will look at a lot of sources to—to flesh out the procedural rules that govern this proceeding. The purpose or the obligation of counsel is that as they see issues and they need it resolved, they file motions, they brief motions, they cite what they think is appropriate authority, and then I decide it. If counsel have a question as to the—what law is applicable, then—then it’s their obligation to file a motion.” *Id.* at 448.
might actually hit something and signal the existence and location of applicable law.

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

Our faith in the system had never been very strong. In the several months of Omar’s commission case, we filed nearly 40 motions, including motions to adopt the rules of discovery and rules of evidence applicable in courts-martial. The commission managed never to decide these motions, and many other substantive ones like it, before the Hamdan decision came down. One decision it did issue, however, is worthy of mention. The defense had moved to disqualify the commission appointing authority (the rough equivalent of a convening authority in courts-martial) for bias, and in support of that motion had moved for the production of the appointing authority in order to demonstrate his bias through examination. The presiding officer denied our motion to produce the appointing authority, finding that we had proffered only the areas on which we would question the witness, and not what the witness would actually say.127 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.128 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.”129 By uttering the words “Alice in Wonderland,” we unwittingly had made the motion disappear.

This ruling was among the last official actions taken by the commission before the Supreme Court shut it down. Tellingly, it reflected a preoccupation with the dignity of the commission, as a stand-in for legitimacy, and demonstrated the speed with which the commission could move if it wanted, even as our substantive motions languished. Indeed, the commission system had issued a rule ordering

127 United States v. Khadr, Presiding Officer Ruling on Defense Motion for the Production of Mr. Altenburg, June 7, 2006 (copy on file with author).
128 United States v. Khadr, Defense Renewed Motion to Compel Production of Mr. Altenburg, June 21, 2006 (copy on file with author).
129 United States v. Khadr, Presiding Officer Ruling on Defense Motion to Renew Their Motion for the Production of Mr. Altenberg [sic], June 22, 2006 (copy on file with author).
that that commissions be treated with dignity.\textsuperscript{130} The illegitimacy of the commissions was established less than a week later, suspending all issues before the commission, substantive and frivolous alike, though not before we filed a revised motion including an appendix of the hundreds of Supreme Court decisions and briefs and federal appellate, district, and state court opinions that reference \textit{Alice in Wonderland}.\textsuperscript{131} The \textit{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.

The Supreme Court’s invalidation of the military commission system in \textit{Hamdan} led Congress to authorize a new system as part of the MCA,\textsuperscript{132} thus overcoming the Court’s objection that the original commissions lacked congressional authorization.\textsuperscript{133} In 2007, a new military commission system was unveiled, to renewed criticism, including sharp accusations of political interference in the system made by its former chief prosecutor, Air Force Colonel Morris Davis.\textsuperscript{134} 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 bring a case to completion in August 2008—that of Bin Laden’s driver, Salim Hamdan. That case, which featured closed proceedings and secret witnesses, ended in a conviction of Hamdan for providing material support for

\textsuperscript{130} “The decorum and dignity to be observed by all at the proceedings of these Military Commissions will be the same as that observed in military and Federal courts of the United States.” U.S. Dep’t of Defense, Presiding Officers Memorandum #16, Rules of Commission Trial Practice Concerning Decorum of Commission Personnel, Parties and Witnesses, Feb. 16, 2006 (“POM 16”), available at http://www.defenselink.mil/news/Feb2006/d20060217POM16.pdf. POM 16 specifically mandates that “[a]ll communications, whether written or oral, should be couched in civil, non-sarcastic language, focusing on the factual or legal disputes.” Id. Rule 6(a) (emphasis added).

\textsuperscript{131} United States v. Khadr, Defense Renewed Motion to Compel Production of Witness (Mr. John D. Altenburg, Jr.) (Revised), June 26, 2006.

\textsuperscript{132} See MCA supra note 84, § 3.

\textsuperscript{133} See Hamdan, 548 U.S. at 590-95.

\textsuperscript{134} See Josh White, \textit{From Chief Prosecutor to Critic at Guantanamo}, WASH. POST, April 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. \textit{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, \textit{Guantanamo trials put generals at odds}, REUTERS, Aug. 13, 2008, available at http://news.yahoo.com/s/nm/20080813/ts_nm/guantanamo_hearings_dc. Zanetti went on to describe Brigadier General Thomas Hartmann, the legal advisor to the military commissions convening authority, as “abusive, bullying and unprofessional.” \textit{Id.} Hartmann has insisted that he “viewed it as his mission to get the trials moving in a fair and transparent manner. He acknowledged telling prosecutors he wanted cases that would ‘capture the public’s imagination.’” \textit{Id.}
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 maintains that even after completing the remaining months of his sentence, Hamdan may still be detained indefinitely as “enemy combatant.”

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. 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, 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. 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. As others have noted, the inauguration of a seemingly permanent “war on terrorism” transforms the exception into the prevailing paradigm of governance.

136 See William Glaberson, Panel Sentences Bin Laden Driver to a Short Term, N.Y. TIMES, Aug. 7, 2008, at A1. A New York Times editorial lambasted the government for pursuing its case against such a low-level figure as Hamdan, and for affording such a 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.” The United States v. the Driver, N.Y. TIMES, Aug. 10, 2008, at WK9.
137 See Presidential Military Order, supra note 56, § 1(f) (“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”).
139 Id.
140 GIORGIO AGAMBEN, STATE OF EXCEPTION (Kevin Attell trans., 2005).
Agamben demonstrates that the theoretical difficulty with the state of exception is that it cannot exist strictly within or strictly outside of law: either the positive law sanctions the exception, in which case law is donut-shaped, or the exception is extra-legal, in which case the exercise of expanded state power in times of emergency demonstrates the limits of law’s dominion.\textsuperscript{142} Law and lawlessness are inextricably linked, not unlike the normalcy of small-town Guantánamo and the deviance of the camps.

How, then, are we to understand the relationship between law and lawlessness? How do we know when a state of exception is sanctioned by law, and when it is not? As I have suggested previously, law instantiates norms. It is normalizing. But the domain of law is, by necessity, constituted in reference to the lawless. At Guantánamo, we see that law is all around, but it only reaches so far. To place someone outside the law, while simultaneously maintaining that that is the law, is to reveal law’s limit, the lawlessness of law.\textsuperscript{143} 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.\textsuperscript{144} In this sense, “states of exception are ones in which politics replaces law.”\textsuperscript{145} But as Tushnet also notes, if one accepts the central insight of the Legal Realism, that politics always displaces law, then there are no states of exception.\textsuperscript{146} Rather, emergencies “merely surface the usually hidden role of politics in determining the content of law.”\textsuperscript{147}

Gerald Neuman similarly has criticized “anomalous zones” such as Guantánamo, which he describes as “geographical exceptions to policies otherwise regarded as fundamental”.\textsuperscript{148} Consistent with Tushnet’s analysis, Neuman warns that such zones “may become, quite literally,
sites of contestation of the polity’s fundamental values,” thus revealing the political dimension to such suspensions of law.

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

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

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

149 Id.
150 See generally PETER FITZPATRICK & ALAN HUNT EDs., CRITICAL LEGAL STUDIES (1987).
151 Our military co-counsel, Colonel Vokey, questioned the use of the term “Commission Law” by the presiding officer, with only comic effect:

DC [Defense Counsel]: By “Commission Law,” sir, are you referring to the Military Commission Orders, the?
Presiding Officer: Regulations, the Military Commission’s Instructions, the Presidential Military Order, the POMs [Presiding Officer Memoranda], and anything else that applies. We use Commission Law as a shorthand for trying to encapsulate all that.
DC: All right, sir, but the term, “Commission Law,” is not really law, is it?
Presiding Officer: Do you have a question, Colonel Vokey?
DC: Well the term, “Commission's Law,” was that developed by yourself, or as a Presiding Officer?
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----
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 law necessarily covers, and covers up:

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.152

The political goal of producing convictions was also on blatant display in the commissions. When the commissions were first established, military defense lawyers were assigned for the sole purpose of convincing charged prisoners to plead guilty.153 Emails from within

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.


152 Cover, Folktales of Justice, supra note 88, at 174-75.

153 See Marie Brenner, Taking on Guantánamo, VANITY FAIR, Mar. 2007, at 328 (quoting Judge Advocate General (JAG) defense attorney, Air Force Colonel Will Gunn as stating: “It was made clear to me that our access to [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
the prosecutor’s office confirmed suspicions that the process would not permit fair trials. As one prosecutor wrote, “[W]hen I volunteered to assist with this process and was assigned to this office, I expected there would be a minimal effort to establish a fair process and diligently prepare cases against significant accused. Instead, I find a half-hearted and disorganized effort by a skeleton group of relatively inexperienced attorneys to prosecute fairly low-level accused in a process that appears to be rigged.”

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

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. Rather than a static legal category, it has proven fluid and fundamentally political. Similarly, the seemingly fixed meaning of “war crime,” well-established in international law, has been re-determined by the administration. Each of these examples is discussed in greater detail below.

1. The Indeterminacy of “Enemy Combatant”

The “enemy combatant” term emerged in popular parlance before the administration attempted to endow it with legal meaning. Media accounts used the term to describe suspected terrorists, and attributed it to *Ex Parte Quirin*.

As Peter Jan Honigsberg has demonstrated, the administration has proffered at least six different definitions of the term,
often times conflating distinct categories established in international humanitarian law. Rather than review each etymological turn, I seek here to highlight three competing definitions, each of which emerged to meet the political demands of the particular moment.

International humanitarian law distinguishes between lawful and unlawful belligerents, where lawfulness entitles the belligerent to POW status upon capture, and to immunity from prosecution under domestic law for taking up arms. Both lawful and unlawful combatants may be detained for the duration of hostilities. The administration’s use of “enemy combatant” at times conflates both categories and at other times seems to create a third.

The presidential order purporting to authorize the detention of individuals at Guantánamo provides one important definition of “enemy combatant”. 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)

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159 See generally Knut Ipsen, Combatants and Non-Combatants, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 65-68 (Deiter Fleck ed., 1995); Jean-Marie Henckaerts and Louise Doswald-Beck, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, Vol. 1, 3-24 (Cambridge 2005). International Humanitarian Law (IHL) is based on a fundamental principle of distinction: all parties to an armed conflict must distinguish between combatants and civilians. By definition, a combatant’s status as a member of the armed forces of a party to an armed conflict vests the individual with a right to directly engage in hostilities provided those acts comport with other IHL provisions governing lawful targets and methods of attack. Thus, in addition to enjoying POW status, a legal presumption exists conferring immunity on lawful combatants for acts committed during periods of armed conflict, in effect, barring prosecution of such combatants for the “mere fact of fighting.” Ipsen, supra at 68. In contrast, a civilian’s presumed status as a non-combatant confers on him immunity from attack. But where a civilian directly participates in hostilities, he generally forfeits this immunity and will be treated as an unlawful combatant. Because unlawful combatants lack the protective shield of POW status, if captured, an unlawful combatant can be subject to domestic prosecution under a state’s criminal law.
160 See Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (noting that the capture and detention of combatants—whether lawful or unlawful—to prevent their return to the battlefield is recognized by “universal agreement and practice” as “important incidents of war”).
162 Presidential Military Order, supra note 56. The presidential military order did not itself use the term “enemy combatant,” but soon after its promulgation, administration officials began using “enemy combatant” as a shorthand for those subject to the order. The order also requires that it be in the interest of the United States that such individual be subject to the order, though this adds no substantive requirement to the “enemy combatant” definition. Id. at § 2(a)(2).
has knowingly harbored one or more individuals described in subparagraphs (i) or (ii)”. Arguably, it is this class of people to whom the “enemy combatant” term was applied in the popular media. Thus, this iteration of the “enemy combatant” category is a creation of the executive, and requires nothing more than a unilateral, presidential determination that there was “reasonable 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, for example, the definition narrowed considerably. Yaser Hamdi was a U.S. citizen captured in Afghanistan, detained at Guantánamo, and then transferred to a military brig in South Carolina following discovery of his citizenship. When the Supreme Court considered the legality of his detention as an “enemy combatant,” Justice O’Connor, writing for the Court, noted that “[t]here is some debate as to the proper scope of this term, and the Government has never provided any court with the full criteria that it uses in classifying individuals as such,” 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.” Suddenly, the requirements of the Presidential Military Order of either membership in Al Qaeda or participation in terrorism have dropped away, and conveniently so: the U.S. alleged that Hamdi had affiliated with the Taliban, and not Al Qaeda, and alleged that he was with a Taliban unit that was engaged in battle against the Northern Alliance, not acts of international terrorism. Accepting the government’s new definition, the Court held that although Hamdi’s detention was authorized by Congress, due process required “a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.”

In Rasul, heard the same Term as Hamdi, the government proffered the same “enemy combatant” definition as in Hamdi, only to change it again once the two cases were decided. Whereas Hamdi concerned the legality of the detention of a U.S. citizen as an “enemy combatant,” Rasul involved noncitizen prisoners at Guantánamo Bay.

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164 Id. at 516.
165 Id. (citing Brief for Respondents). 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, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696).
166 Hamdi, 542 U.S. at 510.
167 Id. at 509.
who sought to challenge the legality of their detention in U.S. courts. The *Rasul* decision did not address the substantive definition of “enemy combatant,” and instead limited its inquiry to whether the federal habeas statute granted the courts jurisdiction over the Guantánamo prisoners’ cases, and concluded that it did.\(^{169}\) The import of these two cases was immediately apparent: even when Congress had granted detention authority over “enemy combatants,” that detention could be challenged in federal court, and at least where U.S. citizens were involved, the fundamental notice and hearing requirements of due process attached. Thus, the Supreme Court seemed to set the stage for meaningful federal court inquiry into the government’s “enemy combatant” definition.

In an effort to avoid such scrutiny, the government hastily constructed a process it termed the Combatant Status Review Tribunal (“CSRT”),\(^{170}\) which provided rudimentary and incomplete notice to each prisoner of the basis of his detention, as well as a flawed and perfunctory hearing process in which to contest that basis.\(^{171}\) But in inventing a process, the government also invented a new substantive definition of “enemy combatant,” this time defining it as “an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.”\(^{172}\) Once more, the definition shifted, this time expanding massively beyond the battlefield of Afghanistan, and expanding well beyond actual engagement in armed conflict against the United States.\(^{173}\)

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\(^{169}\) Id. at 483-484.


\(^{172}\) Wolfowitz Memo, supra note 170, at ¶a.

\(^{173}\) Arguably, the “enemy combatant” definition has been modified again since the CSRT was created. When Congress enacted the Military Commissions Act (MCA), no generalized definition of “enemy combatant” was provided. Instead Congress distinguished for purposes of jurisdiction under the MCA a “lawful enemy combatant” from an “unlawful enemy combatant,” only the latter of which could be tried under the MCA. *See* Military
Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. § 948-50; 18 U.S.C. § 2441; and 28 U.S.C. § 2241(c)-(e)) (2006), at § 948(d)(a) ("[M]ilitary commissions under this chapter shall have jurisdiction ... [over] alien unlawful enemy combatant[s]."). This distinction between “lawful” or “unlawful” complicated the existing CSRT definition. Pursuant to the Wolfowitz Memo of July 7, 2004, a CSRT was tasked solely with determining if a prisoner was an “enemy combatant,” defined therein as one “who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.” Wolfowitz Memo, supra note 170, at ¶ a. No determination was made of whether a prisoner’s combatancy was “lawful” or “unlawful.”

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

The practical effect of this glaring inconsistency was addressed directly by the presiding judges in the military commission trials of Salim Hamdan and Omar Khadr. On June 4, 2007, the military judges in both cases issued identical rulings dismissing claims against Khadr and Hamdan on grounds the military commissions lacked jurisdiction because neither Hamdan nor Khadr were properly determined to be “unlawful enemy combatants” under the MCA definition, but only “enemy combatants” under the CSRT definition. United States v. Hamdan, Decision and Order—Motion to Dismiss for Lack of Jurisdiction, June 7, 2007, available at http://www.scotusblog.com/movabletype/archives/Hamdan%20order%206-4-07.pdf; United States v. Khadr, Order on Jurisdiction, June 4, 2007, available at http://www.scotusblog.com/movabletype/archives/Brownback6-4-07.pdf. The Administration filed a motion to reconsider in the Khadr case but the decision was affirmed in a considerably longer decision explaining in full the inconsistencies between the MCA and CSRT definitions. United States v. Khadr, Disposition of Prosecution Motion for Reconsideration P 001, June 29, 2007, available at http://www.scotusblog.com/movabletype/archives/2007/06/court_1.html. In response, on July 4, 2007 the Administration filed an interlocutory appeal to the newly created Court of Military Commission Review arguing the CSRT’s determination that Khadr was an “enemy combatant” encompassed the MCA’s “unlawful enemy combatant” definition sufficient to establish the military commission’s jurisdiction over Khadr’s case. Brief on Behalf of Appellant, United States v. Khadr, CMCR No. 07-001 (filed July 4, 2007), available at http://www.scotusblog.com/movabletype/archives/US%20brief%20re%20Khadr%20at%20CMCR.pdf. In its first ever decision, the Court of Military Commission Review held that while military commissions created under the MCA only had jurisdiction over “unlawful enemy combatants”—thus confirming the earlier decision that a CSRT determination of “enemy combatant” status was insufficient to establish jurisdiction—military judges presiding over military commissions can independently determine whether a prisoner is an “unlawful enemy combatant.” United States v. Khadr, CMCR No. 07-001, Sept. 24, 2007, available at http://www.scotusblog.com/movabletype/archives/CMCR%20ruling%209-24-07.pdf. Khadr’s case was thus allowed to proceed to determine whether Khadr was in fact an “unlawful enemy combatant.” The court did however reject the Administration’s claim that there was no significant legal difference between an “enemy combatant,” as defined by a CSRT, and an “unlawful enemy combatant.” Citing to the Wolfowitz Memo, the court noted that a CSRT determination of “enemy combatant” status functioned only to justify the
It is difficult to see the CSRT definition as other than a bill of attainder-style categorization, as it was invented after the individuals whose detention the government sought to justify were already in custody. Unlike Yaser Hamdi, who looked much like a traditional combatant found on the battlefield in Afghanistan, the CSRT definition had to contend with, and rationalize, the detentions of individuals at Guantánamo who had been picked up in places as remote from the battlefield as Gambia, Zambia, and Bosnia.174 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 the alleged chauffeur for Osama Bin Laden,175 or individuals alleged to be mere acquaintances of suspected Al Qaeda operatives.176 The government’s unfolding “war on terrorism” required an “enemy combatant” definition that was global in reach and extended beyond the ordinary indicia of combatancy.

The government readily conceded the breadth of its new “enemy combatant” definition, agreeing with a federal habeas judge that it would encompass a “little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities,” ... a person who teaches English to the son of an al Qaeda member, ... and a journalist who knows the location of Osama Bin Laden but refuses to disclose it to protect her

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source. 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,” despite the fact that the applicable definition was invented only after these reviews were to have been performed, and indeed, conflicted with competing definitions being proffered by the government. Interestingly, even the rudimentary CSRT proceedings concluded that some of the Guantánamo prisoners were not, in fact, “enemy combatants,” further undermining the claim that they previously had been subject to multiple levels of review. But rather than state explicitly, and honestly, that these individuals were not “enemy combatants,” the government insisted on referring to them as “no longer enemy combatants.” 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 Orwellian, but the judge chose a more familiar characterization: he called it “Kafkaesque.”

2. The Indeterminacy of “War Crime”

Just as the executive branch has defined and re-defined “enemy combatant,” so, too has it attempted to re-determine the meaning of the term “war crime,” the legal predicate for criminal liability before a military commission. The Uniform Code of Military Justice authorizes the use of military commissions to try violations of the law of war, as well as other authorized offenses. Prior to the enactment of the Military Commissions Act, neither the charges for crimes to be heard before commissions nor their elements were defined by Congress, but instead were provided by the Executive. Moreover, none of the

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178 Wolfowitz Memo, supra note 170, at ¶ a.
179 It is questionable whether any such reviews ever were performed. In litigation challenging the CSRT determinations, the government resisted court orders to produce complete records of its “enemy combatant” determinations even for the CSRTs, much less reviews purported to have been performed beforehand. Yet in a decision rendered February 1, 2008, the United States Court of Appeals for the District of Columbia denied the Administration’s petition for rehearing en banc, thus affirming an earlier panel decision ordering the government to produce classified evidence used for CSRT determinations of whether a prisoner was an “enemy combatant.” Bismullah v. Gates, 514 F.3d 1291 (D.C. Cir. 2008).
181 Id. at 127 n. 3.
183 Wolfowitz Memo, supra note 170, at ¶ a.
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.\(^{185}\) In addition, the principal charge against Omar—“murder by an unprivileged belligerent”\(^{186}\)—has never been recognized as a war crime, either.\(^{187}\)

Enactment of the Military Commissions Act cured the defect of the commissions lacking congressional authorization, but merely implicated Congress in the re-definition of “war crime.” The MCA includes a catalogue of charges deemed triable by military commission, along with their elements, including conspiracy.\(^ {188}\) 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.”\(^ {189}\) This statement is proven demonstrably false by Congress’s stubborn inclusion of conspiracy as an offense “traditionally triable by military commissions,” despite the contrary historical record.\(^ {190}\)

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.\(^ {191}\)

With specific regard to Omar’s case, Congress engaged in the kind of linguistic legerdemain that further undermines faith in the integrity of the Guantánamo legal regime. At the time of the MCA’s enactment, Omar was the only prisoner to be charged with “murder by an

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\(^{185}\) *Hamdan*, 126 S. Ct. at 2780 (Stevens, J., plurality opinion). Justice Kennedy did not reach this issue. *Id.* at 2809 (Kennedy, J., concurring).


\(^{190}\) See *Hamdan*, 126 S. Ct. at 2780-2786 (plurality opinion). But see MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 38-41 (2007) (discussing inchoate and collective responsibility in international law, including juse of joint criminal enterprise theory).

\(^{191}\) 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,* __ GONZAGA L. REV. __ notes 155-66 and accompanying text (forthcoming 2008).
unprivileged belligerent.” Like conspiracy, this charge was unknown to the law of war, and in this sense was an invention of the Executive. Indeed, the charge turned the law of war on its head by making the status of the offender, rather than that of the victim, determinative of the existence of a war crime. Whereas an unprivileged combatant could be charged for murder under domestic law, he could only be charged with a war crime if the victim was a protected person, such as medical or religious personnel, civilians not taking active part in hostilities, or military personnel placed hors de combat (for example, by detention or injury).

The MCA appears to acknowledge the legal infirmity of the “murder by an unprivileged charge,” as evident from its omission from the statute’s catalogue of charges. Instead, the MCA includes the charge of “murder in violation of the law of war.” An earlier section of the statute includes the well-recognized war crime offense of “murder of a protected person,” but “murder in violation of the law of war” appears to contemplate some other class of murder that also is a war crime. No such offense exists. The very purpose of this section of the statute is to codify law of war offenses, but by incorporating “violation of the law of war” into the definition of the offense, the MCA renders the definition circular. It is this opaque offense with which Omar was charged following enactment of the MCA.

For Omar, and I suspect for many of the other prisoners, it was difficult to accept that he would ever get a fair trial before the commission. His legal consciousness was of law’s manipulability and its cover for political power. His experience, both before and during (and after) the commission demonstrated that at Guantánamo law was

192 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 note 8.

193 See Rome Statute of the International Criminal Court art. 8(2), July 17, 1998, 2187 U.N.T.S. 90 (omitting any reference to an individual’s status—whether lawful or unlawful—as determinative to the definition of a “war crime” within the jurisdiction of the International Criminal Court); Yoram N Dreinin, The Conduct of Hostilities Under the Law of International Armed Conflict 233 (Cambridge 2004) (arguing that a combatant’s unlawful status does not, alone, constitute a war crime; rather, only where an unlawful combatant commits a serious breach of the International Humanitarian Law—e.g., murder of a protected person—can he be prosecuted under international law).

194 10 U.S.C. § 950v(a)(2) (2006). The MCA properly defines a protected person to include “any person entitled to protection under one or more of the Geneva Conventions, including—(A) civilians not taking an active part in hostilities; (B) military personnel placed hors de combat by sickness, wounds, or detention; and (C) military medical or religious personnel.”

195 United States v. Khadr, Charge Sheet, supra note 44.

everywhere\textsuperscript{197} and nowhere at the same time. As for his lawyers, we were not blind to the overwhelming politics of the process. And yet, in this rights-free environment, we elected to pursue a primarily rights-based strategy, not merely in federal habeas proceedings, but in the commission at Guantánamo as well. The question is, why?

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

As I have discussed thus far, we believed the commission to be a purely political apparatus, devoid of legal legitimacy, and yet, rather than boycott the proceedings, we participated in them. What is more, despite our keen awareness that the system was built upon a rights-free edifice, we insisted on making rights-based arguments in the commission, 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\textsuperscript{198}; we argued that Omar had rights as a child, under international treaty,\textsuperscript{199} as well as customary international law; and we argued that human rights law applied, and could not be displaced by international humanitarian law.\textsuperscript{200}

This rights-based strategy might seem futile given the malleability of law and the contingency of its structures and definitions at Guantánamo—on full display in the ever-shifting nature of such seemingly bedrock questions as who is an “enemy combatant” and what is a “war crime”—for so long as the political context in which rights reside can be redefined, so, too, can the rights themselves.\textsuperscript{201} Moreover, the danger of such a strategy is not merely futility, but complicity in the commission’s project of self-legitimation, a concern that haunted us throughout the process. Indeed, one of the most sobering events for me

\textsuperscript{197} See Sarat, “...The Law is All Over”, supra note 196, 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”).

\textsuperscript{198} These arguments were made before the Supreme Court decided \textit{Hamdan v. Rumsfeld}, in which it found the protections of Common Article 3 of the Geneva Conventions applicable to the prisoners. \textit{See supra} note 79 and accompanying text.


\textsuperscript{201} This is consistent with the view of many Critical Legal Studies scholars.
in the commissions came in the first session, in which I had made a
lengthy legal argument. During a break, a presiding officer from another
case thanked me for the quality of my presentation and said that I had
elevated the process. Although I did not create it, I had helped to hold
up the commission’s curtain of legitimacy.

The 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, 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. 202

A. Rights Tactics and Rights Strategies

The lawyer’s instinct, if not the human one, is to appeal to a higher
authority when confronted with profound, seemingly irremediable
injustice in the primary forum of contest. In the military commissions,
that higher authority was a federal habeas court which, unlike the
commission, stood independent of the Executive, and enjoyed a
legitimacy to which the commission could only aspire. As a tactical
matter, therefore, we sought in the commission proceedings to dramatize
the irregularity of the commission, in contrast to the proceedings a
criminal defendant could expect in a regular court—either a military
court martial or federal district court. Rights were an effective discourse
strategy for this project, for they provided instantly recognizable handles
for the comparison: the right to see the evidence against you, the right to
confront witnesses, the right to competent counsel were all so familiar
within the American courtroom that their invocation in the
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.” 203

Also helpful is Abel’s observation that even though a reflection of
power, law nonetheless can be a source of countervailing power as well,
because state power is divided among the branches and therefore

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202 For a discussion of the distinction between tactics and strategy, see MICHEL DE CERTEAU,
THE PRACTICE OF EVERYDAY LIFE (Steven Rendall trans., 1984).
203 RICHARD L. ABEL, POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST
potentially heterogeneous.\textsuperscript{204} Such heterogeneity creates opportunities for even non-state actors to wield power, strategically and interstitially, working the gaps and crevices within a complex state apparatus. Notably, recourse to the habeas court proved to be the most successful strategy in challenging the legitimacy of the military commissions; the \textit{Hamdan} case, which invalidated the original military commission system at Guantánamo, was brought via a collateral habeas action.

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

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

The fact of divided government and diffuse power\textsuperscript{205} does not, of course, compel the exercise of countervailing power. Just as our rights-based arguments were rejected in the commissions, fallen victims to the government’s unswerving assertion that the prisoners lacked rights of any kind, so too could the courts, Congress, and the public reach the same conclusion. But the existence of multiple sources of power also permits different relationships between law and power. This is to say that the value of rights may vary across space and time. As a creation of the Executive housed within the cultural and command structures of the military, the commissions were institutionally situated far differently than the Article III habeas courts, and subject to different political pressures than Congress. The appeal of rights, their narrative and jurisprudential meaning, can be expected to vary with the narrative

\begin{itemize}
\item \textsuperscript{204} Richard Abel, \textit{Speaking Law to Power: Occasions for Cause Lawyering}, in \textit{CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES} 69, 102-04 (Austin Sarat & Stuart Scheingold eds., 1998).
\item \textsuperscript{205} See generally Michel Foucault, \textit{The History of Sexuality: Volume One} (Robert Hurley trans., Vintage Books 1978).
\end{itemize}
frame of the audience. Thus, the repeated failure of rights-based arguments in the commissions was not necessarily itself a failure, if competing arbiters of rights, in both the popular and legal imaginations, were to come to different conclusions.

In many ways, our rights-based strategy was focused less on U.S. institutions and more on Canada. This reflects a geopolitical view that Omar’s continued detention, and his trial by military commission, are partially the function of Canadian acquiescence to American power. To date, Canada has not publicly criticized either Guantánamo or the trial by military commission of Omar. In contrast, other countries, most notably Great Britain, have rejected both the detention and trial by military commission of their citizens, stating publicly the unacceptability of these practices, and expending political capital in order to end them.

As a result of these efforts, all Britons have been released from Guantánamo, suggesting that international political arrangements circumscribe Omar’s legal predicament at Guantánamo. The political domain, then, includes not only the U.S., and not only U.S.-Canada relations, but the domestic politics of Canada.

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. The narrative that emerged was that as an Australian, Hicks was entitled to rights which the military commissions failed to afford. Hicks ultimately plead guilty to a single charge and was transferred back to Australia 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.

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206 See supra note 115 and accompanying text.
208 See, e.g., Raymond Bonner, A Lawyer in Marine Corps Khaki Wins 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).
Thus, even if rights-based arguments fall flat in the U.S., Omar’s circumstances might be improved if rights-based arguments were to alter political discourse in Canada. This strategy could be viewed as reducing rights to politics, and deploying rights as mere political devices. But once more we see how the value of rights can vary. We know that rights discourse, in the current historical moment, has more purchase in Canada than in the United States. A rights-based strategy therefore feeds into what is essentially ongoing interlocutory review of Omar’s case by the Canadian government (admittedly, governed by its own political process, but a different politics), which is in 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.”\(^{211}\) The strategy sought to subject the “law” of the commissions to the scrutiny of a range of political actors. In this sense, our strategy did 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.\(^{212}\) In so doing, we “drag[ged] the courtroom into politics.”\(^{213}\)

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.\(^{214}\) 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.\(^{215}\) Rights become the faith story for many of us, holding out hope for a gradualist, liberal perfection of the injustice in the world.

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213 Id. at 483.
214 See infra Section IV.
215 See Gabel & Harris, *supra* note 121, at 375-79 (advocating a power-based lawyering as preferable to rights-based approaches).
B. Rights Theories

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

1. Rights as Recognition

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

216 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, GUANTANAMO BAY: Hearings May Consider Torture, MIAMI HERALD, March 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 that 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, which challenged the legality of the commissions, the Pentagon had announced its intention to forbid evidence obtained torture. See Carol Rosenberg, GUANTANAMO: U.S. Bans Any Evidence Resulting From Torture, MIAMI HERALD, March 23, 2006, at A3. The rule, eerily titled “Certain Evidentiary Determinations,” was issued on March 24, 2006. See Dep’t of Defense, Military Commission Instruction No. 10, March 24, 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.

While these 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 the December 30, 2005 date of enactment 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), but permits such statements if made prior to the DTA date of 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. at § 948r(d). Notably, the vast majority of prisoner interrogation at Guantánamo took place prior to enactment of the DTA.
that the government had chosen to prosecute a child for alleged war crimes. I repeated allegations that Omar had been tortured, and called the commission a “sham.”

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

The following day, I argued that the Chief Prosecutor had violated his ethical obligations as a prosecutor, thereby committing prosecutorial misconduct. In particular, I argued that his comments contravened the rules governing extrajudicial pretrial statements.

Moreover, although the MCA purports to prohibit all statements obtained through torture whether made before or after enactment of the DTA, id. at § 948r(b), another provision of the MCA permits the introduction of evidence by the government while protecting against disclosure of the sources or methods interrogation if they are classified, so long as the military judge finds that the evidence is “reliable” and otherwise admissible. Id. at § 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. at § 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.


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. D.C.’s 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, make extrajudicial comments which serve to heighten condemnation of the accused.” D.C. RULES OF PROF’L CONDUCT R. 3.8(f). Rule 3.6 concerns extrajudicial statements that may create a threat to the impartiality of the judge or jury. Id. R. 3.6.

See Prosecution Response to Defense Motion To Order [sic] Prohibiting Prosecution From Making Inappropriate Extrajudicial Statements and Requiring Prosecution to Take Steps to
his distaste for the “torture” and “sham” comments, and expressed an inclination to hold the prosecution and defense to the same standard with respect to extrajudicial statements. After a lengthy argument in which I parsed the relevant ethical rules and their comments and reviewed the leading cases, I arrived at a moment of exasperation. My doctrinal analysis had failed to persuade the presiding officer that the rules themselves apply a higher standard to prosecutors because of the power disparity inherent in prosecution. He likewise appeared to reject my argument that just as the power to prosecute strengthens the hand of the prosecutor, so does the weight of an indictment often compel the defense to speak publicly, and aggressively, on behalf of his client. I had exhausted the caselaw—which, I believe, stood clearly on our side—to no avail.

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

I went on for some time longer, not quite sure how or where to land this argument. Finally, I blurted, “[H]e hasn’t had available to him the opportunity to speak, the opportunity to say anything. He could not even give his name, raise his hand and say, ‘I am here.’”

Though the transcript does not reflect it, I remember pausing here, feeling dizzy, and wondering, as the presiding officer later would, what this had to do with anything. We lost the motion.

Only later did I come to understand that by claiming rights, we were demanding recognition—raising one’s hand, not waiting to be called on before answering, “I am here.” The government had sought to remove Omar and the other prisoners not only from the ambit of law, but from the world. They chose Guantánamo because it was remote, then cloaked


223 Id. at 198, 201.

224 Id. at 201.
it in darkness—refusing to disclose the names or identities of those there,\textsuperscript{225} 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.\textsuperscript{226} The statement, “I am here,” is an insistence upon Omar’s legibility in the world,\textsuperscript{227} 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 invisibility. The assertion of rights helped 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.”\textsuperscript{228} For Minow, the claim to rights is a bid to be heard, a hailing device that “initiates a form of communal dialogue.”\textsuperscript{229} 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.\textsuperscript{230} The result is not necessarily substantive equality, but instead what Minow terms “an equality of attention.”\textsuperscript{231} 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


\textsuperscript{226} I am grateful to Martha Minow for suggesting this frame.

\textsuperscript{227} See \textit{JAMES C. SCOTT}, \textit{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).


\textsuperscript{229} Id. at 1875.

\textsuperscript{230} \textit{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.”).

\textsuperscript{231} \textit{Id.} at 1879.
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 same text.\textsuperscript{232}

Rights, then, are intertextual, and while litigant and adjudicator may not hold equal interpretive power, they are bound by a shared interpretive project.\textsuperscript{233}

Minow’s insight reminds us that when Omar attempts to proclaim (through his lawyers or otherwise), “I am here,” the ambition is to proclaim it to somebody, and in so doing, to insist upon his place in the community. Minow’s claim is not that rights assertion creates community, but that it reconfirms it.\textsuperscript{234} Here, then, is a limiting principle to rights claims: they cannot create community where community does not already exist. Put another way, the ability of the rights claimant to gain even the “equality of attention” of which Minow writes requires a baseline of consent of the community that the claimant belongs to. The return to the realm of belonging requires the community’s consent to admission.

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

Minow’s conception of rights and community is consistent with Hannah Arendt’s notion of citizenship. Linda Bosniak has incisively mapped the multiple dimensions that citizenship can occupy,\textsuperscript{235} but for Arendt, political citizenship—membership in the polity—was

\textsuperscript{232} Id. at 1879-80.
\textsuperscript{233} Robert Cover expressed this ideas 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 19, at 33.
\textsuperscript{234} Minow, supra note 228, at, 1873.
fundamental. She defined citizenship as “the right to have rights,”\(^{236}\) by which she meant that one could not gain the benefit of first-order rights, such as a right against deprivation of life or liberty, if one was not, a priori, deemed a member of the political community. Arendt wrote with regard to statelessness. The extraordinary violence done to Jews during World War II, she argued, was possible only through political dispossession. Once Jews were removed from any national polity, they lost that a priori right to have and claim rights. The consent to Jewish membership in the polity having been revoked, so, too, was the Jews’ ability to claim rights that flow from membership in a polity. For Arendt, and for Minow, rights presuppose politics, and not the other way around. It is this critical insight that proves fatal to Omar and the other prisoners at Guantánamo.

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.\(^{237}\) Rather, time and again, the fundamental question has been whether the prisoners have the right to have rights, or in Minow’s formulation, whether they have the right to “the basic equality of consideration,” or more simply, the right not only to speak (“I am here!”), but to be heard. This demand to be heard is exactly what the Guantánamo habeas litigation has been about since its inception in 2002, and it is what the government has resisted and rejected ever since.

2. Rights as Resistance

Habeas corpus, whose history has been explored exhaustively by others,\(^{238}\) 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

\(^{236}\) ARENDT, supra note 6, at 376.

\(^{237}\) 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, 126 S. Ct. at 2796 (“Common Article 3 . . . is applicable here and . . . requires that Hamdan be tried by a regularly constituted court . . . .”).

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, is the idea that a confrontation between the state and the individual unmediated by rights reduces the individual to bare life, or naked life, 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. It is this rights-free confrontation that permits torture—the hand of the state encumbered by no law other than the laws of physics. And it is this unmediated confrontation that permits the transmogrification of a child into a terrorist. For Arendt, to be a citizen is to be human, and to be anything else is merely, and barely, life.

The conception of rights as a bare protection interposed between the individual and state violence is intuitively familiar to the anti-death penalty advocate, and to criminal defense lawyers generally. But the American legal embodiment of citizenship as rights is Dred Scott. 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. 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

239 AGAMBEN, supra note 14.
240 Id.
242 See generally Austin Sarat & Nasser Hussain, supra note 143.
244 Id.
prefigured by the state iconography that placed the prisoners outside the realm of human understanding, and therefore of outside of humanity itself.\textsuperscript{245}

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

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

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

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

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

Put another way, our rights-based strategy could be understood as interposing a protective membrane between Omar and the state. In this way, we wanted to mediate, and moderate, the relationship between the state and Omar, with the hope of ultimately transforming the relationship from one of potentate and biological mass to one more recognizable as warden and prisoner. This was a form of resistance to Omar’s mistreatment, which required the state to either stop its violence, or engage in it in the public forum of the court. This approach had some

\textsuperscript{245} See supra Sec. I.B.
success, as the worst of the mistreatment of Omar and the other prisoners stopped once the government was forced to grapple with it in the daylight of federal court. And yet, Omar’s other fundamental material conditions—indefinite detention, and trial before a substandard tribunal—remained the same, just as the fundamentals of Guantánamo have remained largely the same for the hundreds of other prisoners.

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

When I have rehearsed these arguments for others, particularly lawyers, the response I have often gotten is that we did the best that we could, and that there was no alternative. To argue the existence of rights, and to do so forcefully, is to fulfill the professional obligation of a lawyer. But this strikes me as too weak a conception of professional obligation. I believe that the rights-based approach has been worthy and necessary, but not merely because it was a form of last-resort lawyering. 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,” for it capitalizes on what law can accomplish, even as it recognizes what it cannot.

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.

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

The lawyers representing the Guantánamo prisoners have done extraordinary work. Over a period of six years, they have filed hundreds of motions, secured Supreme Court victories in two cases, and obtained certiorari in a third. In addition, they have engaged in the kind of multi-dimensional advocacy that is frequently urged among social change theorists, 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. Despite these efforts, three realities remain: (1) not a single prisoner has been released as the result of a court order; (2) not a single prisoner has had the opportunity to meaningfully contest the legality of his detention; and (3) perhaps most damning, the issue before the Supreme Court in 2008 was, functionally, the same as that brought before the Court 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. And yet, the seemingly sweeping victories of Rasul and Boumediene co-exist 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 on the part of many detainees, a moment of hope. For the first time since their capture, there was someone on their side. And though many of lawyers had difficulty establishing or maintaining trust with their clients, given the extraordinary conditions of Guantánamo, I believe that many of the detainees 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 detainees’ 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, expresses the failures of Rasul’s promise and the resulting despondency:

[One day] the military gave me a piece of paper that laid out the allegations against me. I had been in Guantanamo 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 Guantanamo 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 Guantanamo, but my despair would return within a day of their departure.

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, the appearances before judges: all of these suggested that there was law at Guantánamo, and worse, signified the existence of law, and law-as-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,

250 See Luban, supra note 98.
251 Al Dossari, supra note 10.
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, of unending detention and the persistence of legal forms such as “enemy combatancy,” the CSRTs and the military commissions, that some prisoners have charted an alternative path of action and protest. This has taken many forms: throwing at guards a cocktail of feces, urine and saliva known as an “A bomb”;252; refusing to meet with their lawyers253; boycotting or disrupting military commission proceedings254 (for those few who have them); suicides and suicide attempts255; and hunger strikes.256 In each of these, the prisoners make use of what little they have in order to engage in resistance. Bereft of any weapon with which to strike their captors, they use the refuse of their own bodies, demonstrating once more that Guantánamo is about the body. Unable to make any meaningful decision about the time they eat, the time they exercise, or the time the lights come on or go off, they exercise their agency by refusing their lawyers; forced into irregular and unfair military commissions, they choose no process at all; pushed to the brink of bare life, they choose no life at all.

Despite the range of resistance activities that exist at Guantánamo, it is the hunger strike on which I want to focus, and which I want to 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.257 There have been as many as

254 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).
257 Id. at 1377.
two hundred prisoners on hunger strike at any one time. 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.

Sami al-Haj is one of the prisoners who remained on hunger strike. A Sudanese journalist for Al Jazeera, al-Haj has been at Guantánamo for six years, on various and shifting charges terrorist affiliations. On January 7, 2007, the fifth anniversary of his imprisonment at Guantánamo, al-Haj began his hunger strike, 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:

First, the prisoner refuses food and drink. Initially, officials try to persuade the prisoner otherwise, offering food and liquids. If those are refused, the prisoner is taken to a medical facility and fed intravenously. If the prisoner refuses I.V. fluids, as many have, or pulls the tube out, then the government places the prisoner is strapped into a restraint chair—it’s manufacturer states, “It’s like a padded cell on wheels!” and doctors force a feeding tube up the prisoner’s nose, down the throat, and into the stomach. This is done twice a day, without the consent of the prisoner, even when the prisoner is competent to give such consent. 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.

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.”

As in countless struggles before theirs, prisoners at Guantánamo have used hunger strikes for multiple purposes: building solidarity,
demanding improved treatment, drawing attention to their plight.\textsuperscript{268} Indeed, like so much else at present-day Guantánamo, the hunger strikes have a precedent in the experience of Haitians detained there in the early 1990s,\textsuperscript{269} 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.\textsuperscript{270} Hunger strikes are typically described and understood as non-violent, and many of them are just that. But the persistence of a small number of Guantánamo prisoners in their hunger strikes despite the government’s forced-feeding regime suggests another motivation. While peaceful in their execution, the hunger strikes seem intended to provoke the enactment of violence upon the hunger striker.\textsuperscript{271}

For al-Haj and others, who know that day after day, their continued hunger strike will bring only more painful forced feedings, their hunger strikes seem more than just a passive form of resistance. It is not that they would choose death rather than suffer further at Guantánamo. Indeed, al-Haj 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.”\textsuperscript{272} Now that the forced feeding regime is in place, its brutality established and its ineluctability clear, the actions of the hunger strikers are better


\textsuperscript{269} 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-9/11 Guantánamo prisoners have been supportive of their clients’ hunger strikes, the Haitians’ lawyers were more interventionist, and tried to persuade their clients to stop their hunger strikes. Id. at 204.


\textsuperscript{272} Stafford-Smith Memo, supra note 261, at 4.
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, 2008.273

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

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

[T]he normative world-building which constitutes “Law” is never just a mental or spiritual act. A legal world is built only to the extent that there are commitments that place bodies on the line. The torture of the martyr is an extreme and repulsive form of the organized violence of institutions. It reminds us that the

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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.274

Thus, just as Law is realized in the body of the prisoner, so, too, is the prisoner’s resistance.275

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.276 Like the colonizer and the colonized, the struggle at Guantánamo is “between brute realities and resistant bodies.”277 As Homi Bhaba suggests, this resurgence of the body is the consequence of radical dehumanization.278 The colonized body is conditioned to violence, thereby gaining a “visceral intelligence dedicated to the survival of the body and spirit,”279 or as Fanon wrote, “The muscles of the colonized are always tensed.”280

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 suggests they still may). Al-Haj thought that his protest might force his captors to return to their own humanity,281 and for more than a year it did not (though ultimately he

275 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 (April 16, 1963), available at http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.
276 See FANON, supra note 43, at 1-62.
277 Homi Bhaba, Framing Fanon, Forward to FANON, supra note 43, at vii, xxv.
278 Id.
279 Id. at ix.
281 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
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. In this way, rights claims are a domesticated hunger strike, a rhetorical, abstracted and comparatively unmessy form of engaging state power. For the government to continue its practices at Guantánamo, it must crash through the protective membrane of rights that we assert, just as it must force the feeding tube down Sami al-Haj’s throat. Both strategies possess transformative potential, but each may have to settle for being resistance and nothing more, but also, nothing less.

My point is not to argue that the prisoners’ hunger strikes have been more effective than the lawyers’ right-based litigation, or vice versa, 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 power. 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 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 in so doing may provide sustenance to their clients by demonstrating in direct and appreciable ways the lawyers’ willingness not just to provide legal representation, but to vouch for the 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.

appeared at my case, 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 10.

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 also 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.
Notably *New York Times* columnist Nicholas Kristof took up al-Haj’s cause, writing about him on numerous occasions.\(^{283}\)

But there are at least three critical differences between the lawyers’ and the prisoners’ strategies. First, in the hunger strike, the prisoner expresses his own agency. Indeed, key to the forced confrontation with state power is that there is no intermediary. In this way, the lawyer is not merely absent, she is rejected. Second, for the government to crash through rights claims is a metaphysical violence; for it to force feed the prisoners is physical violence, flesh on flesh, the body and will of one human being struggling against the body and will of another. Finally, by rejecting rights and achieving no better, but also no worse result, the hunger striker demonstrates the weakness of rights at Guantánamo, as if to say, asserting rights is no more effective than throwing them away. And yet, paradoxically, if we accept that the end goal of the radical hunger striker is life and not death, humanity and not bare life, then the hunger strike is for rights, for it is the right to have rights which many of the prisoners understand to constitute their humanity. As al-Haj wrote in his diary, “I will continue the struggle until we get our rights.”\(^{284}\)

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 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 Bhaba\(^{285}\)

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

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\(^{285}\) Bhaba, *supra* note 277, at xxxi.
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 11th social organization of violence. Understanding this intervention as a resistance practice rather than a transformative act yields three benefits. First, it enlarges the time frame for action and result, de-centering the transformative “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.\footnote{See generally \textit{DE CERTEAU}, supra note 202.} 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; still others can be exploited. Unlike the traditional litigation model, which presupposes a beginning, middle and perhaps most importantly, 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. This maintenance of humanity, or its restoration, is the prerequisite for freedom.