
Guantánamo Bay and the Annihilation of the Exception

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Abstract

This article takes issue with prevailing characterizations of Guantánamo Bay as an instance of international law and US law's breakdown or withdrawal: a surmounting of the rule by the exception. Contentions along these lines circulating in international legal literature and, in a divergent sense, in the work of Italian philosopher Giorgio Agamben, are examined in a critical light. Against these accounts, this article argues that Guantánamo Bay is, to a hyperbolic degree, a work of legal representation and classification: an instance of the norm struggling to overtake the exception. Moreover, this article argues, strategies of detention, interrogation and control being utilized at Guantánamo Bay are being sustained in part through domestication, evisceration and avoidance of experiences of deciding on the exception. In short, this article maintains, experiences of the exception appear to be in retreat at Guantánamo Bay, rather than in ascendancy. The author develops this argument by reference to public records and official characterizations of decision-making at Guantánamo Bay. By way of a critical response, the author then presents a heterodox reading of Carl Schmitt's theorization of the exception, whereby the experience of exceptional decisionism is read away from Schmitt's preoccupation with the state. It is to such a renewed, diffuse sense of the exception within law, rather than to a vehement insistence upon the norm, that this article suggests turning in raising doubts about the ongoing work of the US Government at Guantánamo Bay.

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Is Guantánamo Bay, Cuba, as one scholar has described it, an ‘anomalous zone’?¹ In international legal terms, does Guantánamo Bay embody law’s absence, suspension or withdrawal – a ‘black hole’, as the English Court of Appeal has stated?² Is it a space that international law ‘proper’ is yet to fill and should be implored to fill – a jurisdiction maintained before the law, against the law or in spite of the law? These are some of the questions with which I began the research from which this article emanates.

I commenced, too, with a sense of unease with the responses to these questions that may be elicited from the surrounding international legal literature. Implicit or explicit in most international legal writing on Guantánamo Bay is a sense that it represents an exceptional phenomenon that might be overcome by having international law scale the heights of the Bush administration’s stonewalling. Guantánamo Bay’s presence and persistence on the international legal scene, such accounts imply, may be understood as a singular, grotesque instance of law’s breakdown – an insurgence of ‘utter lawlessness’ in the words of Lord Steyn of the House of Lords.³ Of this, I am not so sure.

By my reading, the plight of the Guantánamo Bay detainees is less an outcome of law’s suspension or evisceration than of elaborate regulatory efforts by a range of legal authorities. The detention camps of Guantánamo Bay are above all works of legal representation and classification. They are spaces where law and liberal proceduralism speak and operate *in excess*.⁴ This article will probe this intuition by examining law’s efforts in constituting the jurisdictional order of the Guantánamo Bay Naval Base (and, more specifically, Camps Delta and America at that Base). It will consider, in particular, the claim that the jurisdictional order of Guantánamo Bay renders permanent a state of the exception, in the sense (derived from the work of Carl Schmitt) of a space that ‘defies codification’ and subjects its occupants to the unfettered exercise of sovereign discretion.⁵ Such a claim has been put forward (usually without an express invocation of Schmitt) by a range of international legal commentators.⁶ It has

¹ Neuman, ‘Anomalous Zones’, 48 *Stanford L Rev* (1996) 1197, at 1128–1233.

² *R (on the application of Abbasi et al) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 at para. [32].

³ Steyn, ‘Guantanamo Bay: The Legal Black Hole’, 27th F.A. Mann Lecture, The British Institute of International and Comparative Law and Herbert Smith, Lincoln’s Inn Old Hall, London, England (25 Nov. 2003), available at <http://www.statewatch.org/news/2003/nov/17Guantanamo.htm>.

⁴ *Contra* Scheuerman, ‘Globalization, Exceptional Powers, and the Erosion of Liberal Democracy’, 93 *Radical Philosophy* (1999) 14.

⁵ C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (trans. G. Schwab, 1985 [1922]), at 13.

⁶ See, e.g., Amann, ‘Guantanamo’, 42 *Colum J Transnat’l L* (2004) 263, at 286, 329, and 347 (arguing that ‘the [US] executive [has] endeavor[ed] to shape society’s understanding . . . to deflect the discourse of rights and thus make judges see, and treat, certain persons as outlaws, beyond the reach of the law and unworthy of even the most basic rights that law ordinarily accords human beings’; characterizing the military commissions convened at Guantánamo Bay as ‘tribunals of exception’; and contending that ‘the central premise of [US] executive policy’ is that Guantánamo Bay is ‘a space within which no rule of law obtains’); Gathii, ‘Torture, Extraterritoriality, Terrorism, and International Law’, 67 *Albany L Rev* (2003) 335, at 368 (arguing that ‘territoriality – as used by the courts to summarily foreclose judicial intervention on behalf of the Guantanamo Bay detainees – is simply a façade for an anti-alien prejudice . . .’ and characterising Guantánamo Bay as an instance of ‘the rule of law [having been] suspended’).

also been famously put forward, with distinct and in many ways divergent implications, in the writings of Italian philosopher Giorgio Agamben. This article argues against that characterization, in both its legal scholarly and its Agamben-esque forms.

It will be contended here that understanding Guantánamo Bay as a domain of sovereign exception (and, as such, of political decision-making) in a Schmittian sense is a misnomer. Rather, Guantánamo Bay may be more cogently read as the jurisdictional outcome of exhaustive attempts to *domesticate* the political possibilities occasioned by the experience of exceptionalism – that is, of operating under circumstances not pre-codified by pre-existing norms. Far from emboldening sovereign and non-sovereign forms of political agency under conditions of radical doubt, the legal regime of Guantánamo Bay is dedicated to producing experiences of having *no option, no doubt* and *no responsibility*. Accordingly, in Schmittian terms, the contemporary legal phenomenon that is Guantánamo Bay may be read as a profoundly anti-exceptional legal artefact. The normative regime of Guantánamo Bay is one intensely antithetical to the forms of decisional experience contemplated by Schmitt in *Political Theology* and to modes of decisional responsibility articulated by other writers before and since.⁷ It is by reason of its norm-producing effects in *this* respect, I would argue, that the legal regime of the Guantánamo Bay detention camps and its replication beyond Cuba merit interrogation and resistance.

Section 1 of this article will present a brief sketch of the jurisdictional order of the Guantánamo Bay Naval Base, as constructed primarily in the final decade of the 20th century and the early part of the 21st. Section 2 will examine the claims to exceptionalism made in respect of this order, first as those claims are circulating in international legal scholarship, and second as they have been advanced in Giorgio Agamben's writings. Section 3 will put forward a critique of these diagnoses (both international legal scholars' and Agamben's), advancing an argument that the legal order of Guantánamo Bay is noteworthy for its insistence upon constraining or avoiding experiences of the exceptional, rather than for its rendering permanent and all-encompassing a sense of the exceptional. Finally, in Section 4, a further argument will be made for resistance to the necessitarian normative architecture of Guantánamo Bay through a re-invigoration of that sense of the exception that may be derived from the work of Carl Schmitt. This final argument will be predicated on a reading of the exception as a political experience that may be de-linked from notions of centralized, sovereign authority, reading Schmitt's decisionism away from Schmitt's fetishism of the state.

⁷ See, e.g., Derrida's discussion of responsibility as 'the injunction to *respond* . . . to respond to the other and answer for oneself before the other' and 'the experience of absolute decisions made outside of knowledge or given norms, made therefore through the very ordeal of the undecidable . . . exceed[ing] mastery and knowledge': J. Derrida, *The Gift of Death* (trans. David Wills, 1995), at 3, 5–6. See also Kierkegaard's meditation on the 'dreadful responsibility' borne by Abraham, 'being unable to make himself intelligible to others', not having any 'desire to show others the way': S. Kierkegaard, *Fear and Trembling* (trans. Alastair Hannay, 1985 [1843]), at 106–107.

1 The Legal Order of ‘Anomaly’

Guantánamo Bay is a 45 square mile area of Cuba occupied by the United States pursuant to a perpetual lease agreement entered into in 1903.⁸ Under that lease, the US obtained the right to use the area for coaling and naval operations.⁹ The text of the lease agreement provides *inter alia* that ‘the United States shall exercise complete jurisdiction and control over and within such areas’ while reserving to Cuba ‘ultimate sovereignty’.¹⁰ Accordingly, since December 1903, Guantánamo Bay has been operated as a US naval base, its area closed to private use, access and navigation without US authorization.¹¹ The base maintains its own schools, power system, water supply and internal transportation system.¹² According to recent accounts, ‘the base population has grown to 6,000, and... “in addition to McDonald’s, there are now Pizza Hut, Subway and KFC [franchises]. Another gym is being built, and town houses, and a four-year college opens next month”... The base commander describes it as “small-town America”’.¹³ Having previously been dedicated wholly to military and related purposes, in the early 1990s this ‘small town’ was refashioned as a detention camp for those seeking asylum in the United States.¹⁴

Between 1991 and 1996, more than 36,000 Haitian and more than 20,000 Cuban asylum-seekers were interned for varying periods in Guantánamo Bay, pursuant to US immigration policies of interdiction, administrative detention, off-shore processing and, wherever possible, repatriation.¹⁵ Thereafter, other than short-term operations in 1996 and 1997, the migrant processing operation at Guantánamo Bay was wound down. In January 2002, however, shortly after initiating a military campaign in Afghanistan, the United States began transferring hundreds of persons captured during military operations in Afghanistan to Guantánamo Bay, where they

⁸ Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, 23 Feb. 1903, US-Cuba T.S. No. 418. This agreement, as supplemented by a supplementary agreement of 2 July 1903, was confirmed in a treaty between the United States and Cuba, signed at Washington on 29 May 1934. See Treaty of Relations between the United States of America and the Republic of Cuba, 29 May 1934, US-Cuba T.S. No. 866, available at <http://www.yale.edu/lawweb/avalon/diplomacy/cuba/cuba001.htm>.

⁹ On the legal status of the Guantánamo Bay Naval Base, see generally Neuman, ‘Closing the Guantánamo Loophole’, 50 *Loyola L Rev* (2004) 1, at 34–44.

¹⁰ See *supra* note 8.

¹¹ By an executive order signed by the U.S. President on 1 May 1941, Guantánamo Bay was declared a ‘Naval Defensive Sea Area’ and a ‘Naval Air Space Reservation’: Executive Order 8749 of 1 May 1941, 6 Fed. Reg. 2252 (3 May 1941). As such, it is an area closed to all vessels and aircraft other than public vessels of the United States, vessels engaged in Cuban trade, and public aircraft of the United States.

¹² Neuman, *supra* note 1, at 1128.

¹³ Neuman, *supra* note 9, at 35 (footnotes omitted), quoting Gibbs, ‘Inside the Wire’, *Time*, 8 Dec. 2003, at 40 and Rosenberg, ‘New Chief Brings Guantánamo Up to Date’, *Miami Herald*, 25 Oct. 2003, at A15.

¹⁴ For information – historical and current – published by the U.S. navy about the naval base installed at Guantánamo Bay, see <http://www.nsgtmo.navy.mil>. See also the information published by the US military think tank GlobalSecurity.org, available at http://www.globalsecurity.org/military/facility/Guantanamo-bay_x-ray.htm.

¹⁵ See generally Koh, ‘America’s Offshore Refugee Camps’, 29 *U Rich L Rev* (1994) 139.

have since been held without charge as ‘unlawful combatants’.¹⁶ According to the International Committee of the Red Cross, the detention facilities at Guantánamo Bay held approximately 550 detainees as of 5 November 2004.¹⁷ In a 2001 Military Order and a series of subsequent orders issued by the Department of Defense, the US Executive has constructed an elaborate legal regime surrounding these persons.¹⁸

The particular, tailored features of this regime have been justified, above all, by the detainees’ unorthodox and peculiarly threatening status: hence the language of compound illegality. As ‘unlawful combatants’, Guantánamo Bay detainees are cast both beyond the pale of non-violent political discourse and beyond the legal bounds of warfare. Yet although the terminology applied to the Guantánamo Bay detainees implies an extra-legal status, these detainees have, since the outset, been the focus of painstaking work of legal classification. In a press briefing on 13 February 2004, given by Paul Butler, Principal Deputy Assistant Secretary of Defense for Special Operations and Low Intensity Conflict, Mr. Butler detailed an elaborate, multi-stage screening and evaluation process through which each detainee is passed. In Mr. Butler’s description, an ‘integrated team of interrogators, analysts, behavioural scientists and regional experts’ works alongside military lawyers and federal law enforcement officials to decipher and consider ‘all relevant information’. ‘[W]e have a process’, Mr Butler announced confidently, ‘and . . . that process will take its own course’.¹⁹

¹⁶ The characterization of detainees as ‘unlawful combatants’ or ‘enemy combatants’ rests, in part, on the claim that they do not satisfy the test for those engaged in the theatre of war (and thereby entitled to prisoner of war status) under Art. 4(2) of the Third Geneva Convention. See, e.g., *Hamdan v Rumsfeld*, [2004] U.S. Dist. LEXIS 22724, at 21–27. The term ‘unlawful combatant’ is, however, taken from a 1942 (pre-Geneva Convention) U.S. Supreme Court case: *U.S. ex rel. Quirin v. Cox*, 317 US 1 (1942). In that case, the US Supreme Court upheld the use of military commissions for German saboteurs who were captured on US soil. This term has never been defined by an international agreement: see Dahlstrom, ‘The Executive Policy Toward Detention and Trial of Foreign Citizens at Guantánamo Bay’, 21 *Berkeley J Int’L* (2003) 662, at note 2.

¹⁷ International Committee of the Red Cross, ‘Operational Update: US Detention Related to the Events of 11 September 2001 and its Aftermath – The Role of the ICRC’, 5 Nov. 2004, available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/66FGEL?OpenDocument>. Subsequent transfers have, however, reduced the number of persons being held at Guantánamo Bay: see Goldberg, ‘Guantánamo Prisoners Win Transfer Reprieve’, *Guardian Unlimited*, 14 Mar. 2005, available at <http://www.guardian.co.uk/usa/story/0,12271,1436904,00.html> (‘The Bush administration ran into its first roadblock in its plans to sharply reduce the prison population at Guantánamo Bay at the weekend, when a US judge forbade the transfer of 13 inmates to Yemen for fear they would be tortured. Saturday’s ruling by a US federal judge in New York marks an early victory for human rights organisations in their efforts to bar the administration from carrying out plans to bring down the prison population at Guantánamo by transferring inmates to Saudi Arabia, Egypt and Yemen . . . The Pentagon, however, appears equally determined to carry out the transfers, and halve the prison population at Guantánamo. At the weekend, it rendered three inmates to Afghanistan, Maldives and Pakistan’).

¹⁸ See Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, Military Order of 13 Nov. 2001, 66 Fed. Reg. 57,833 (2001). For Department of Defense policies, memoranda, orders, and fact sheets concerning Guantánamo Bay, see <http://www.globalsecurity.org/security/library/policy/dod>.

¹⁹ Briefing on Detainee Operations at Guantánamo Bay, 13 Feb. 2004, available at <http://www.defenselink.mil/transcripts/2004/tr20040213-0443.html>.

Thus, even before the 28 June 2004 rulings of the US Supreme Court in *Hamdi v Rumsfeld*²⁰ and *Rasul v Bush*²¹ affirmed the entitlement of Guantánamo Bay detainees to a 'meaningful opportunity to contest the factual basis for th[eir] detention before a neutral decisionmaker' and their capacity to invoke the jurisdiction of US federal courts,²² the Department of Defense had produced a panoply of regulations concerning the handling of detainees. These include mechanisms for annual administrative review of the necessity of each enemy combatant's detention and procedures for detainees' trial before specially convened Military Commissions.²³

Since the US Supreme Court's 28 June 2004 rulings, the normative and institutional network at Guantánamo Bay has become even denser. On 7 July 2004, the Deputy Secretary of Defense promulgated an order establishing a Combatant Status Review Tribunal. This Tribunal was charged with determining whether persons detained at Camps Delta and America (the detention camps now maintained at Guantánamo Bay, the former comprising six separate camps) have been properly classified as enemy combatants.²⁴ This, alongside the Military Commissions and the Administrative Review Board, added a third body to the line-up of specialist legal institutions convened at Guantánamo Bay. Later in the same month, the Secretary of the Navy produced a lengthy memorandum outlining procedures to govern this Tribunal's hearings, including (rather bizarrely) a standard form script for the conduct of a hearing.²⁵ Furthermore, by order of the Defense Secretary Donald Rumsfeld on 16 July 2004, a new Office of Detainee Affairs was created within the Pentagon to coordinate 'around 100 inquiries, investigations, or assessments' that were then said to be ongoing in respect of detainees' handling by US military police.²⁶

Far from a space of 'utter lawlessness' then, one finds in Guantánamo Bay a space filled to the brim with expertise, procedure, scrutiny and analysis. Amid the work of the Military Commissions, the Administrative Review Board, the Combatant Status Review Tribunal and the other inquiries mentioned above, it is not upholding the rule

²⁰ 124 S Ct 2633 (2004).

²¹ 124 S Ct 2686 (2004).

²² *Hamdi v Rumsfeld*, 124 S Ct 2633 (2004) at 2635 (*per* O'Connor J for the Court, with whom Rehnquist CJ, Kennedy, and Breyer JJ joined, Souter and Ginsburg JJ concurring in the judgment but dissenting with the reasoning in part, and Scalia, Stevens, and Thomas JJ dissenting); *Rasul v Bush* 124 S Ct 2686 (2004) at 2698 (*per* Stevens J for the Court, with whom Kennedy J concurred, Rehnquist CJ, Scalia, and Thomas JJ dissenting).

²³ See Administrative Review Procedures for Enemy Combatants in the Custody of the Department of Defense at Guantánamo Bay Naval Base, Cuba, Department of Defense Order, 11 May 2004, available at http://hrw.org/english/docs/2004/08/16/usdom9235_txt.htm, and Military Commission Instructions issued by the Department of Defense during 2003 and 2004, available at <http://www.globalsecurity.org/security/library/policy/dod/mil-commission-instructions2003.htm>.

²⁴ Deputy Secretary for Defense, Memorandum: Order Establishing Combatant Status Review Tribunal, 7 July 2004, available at <http://www.globalsecurity.org/security/library/policy/dod/>

²⁵ Secretary of the Navy, Memorandum: Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba, 29 July 2004, available at <http://www.globalsecurity.org/security/library/policy/dod/>

²⁶ Porth, 'Pentagon Creates New Policy Office to Review Detainee Issues', 16 July 2004, available at <http://usinfo.state.gov/dhr/Archive/2004/Jul/19-804159.html>.

of law that seems tricky. Rather it is the possibility of encountering the yet-to-be-governed exception that seems difficult to contemplate.

2 The Claim to Exceptionalism

As framed by Carl Schmitt (primarily in his 1922 work, *Political Theology*), the exception is that domain within jurisprudence in which decision-making ‘cannot be subsumed’ by existing norms.²⁷ It is that space in which such norms are held open to suspension or transformation, and where programs of norm-implementation and norm-compliance cease to govern action and decision-making. Accordingly, the exception is synonymous with the attempt to exercise momentarily decisive agency or, as Schmitt put it, ‘principally unlimited authority’.²⁸ I will argue in Section 3 of this article that it is precisely this sort of agency that the legal regime of Guantánamo Bay is designed to negate.²⁹

To many commentators, however, the extraordinary procedural characteristics of the three primary legal institutions installed at Guantánamo Bay render the Guantánamo Bay Naval Base effectively ‘a prison outside the law’ (to quote the petitioners in *Rasul v Bush*)³⁰ or at least outside the pre-existing order of legality.³¹ Two eminent US constitutional lawyers, Professors Katyal and Tribe have, for instance, observed that ‘the [November 2001] Military Order’s procedural protections fall conspicuously short of those most Americans take for granted’. They concluded, further, that ‘its vagueness invites arbitrary and potentially discriminatory determinations’, it ‘installs the executive branch as lawgiver as well as law-enforcer, law-interpreter, and law-applier’ and, accordingly, it ‘authorize[s] a decisive departure from the legal

²⁷ Schmitt, *supra* note 5, at 13. For discussion of the exception as framed in Schmitt’s *Political Theology* in relation to its framing in the earlier *Die Diktatur* (1921), subsequent editions of the same, as well as in the later *Der Hüter der Verfassung* (1931) and *Legalität und Legitimität* (1932) and subsequent editions of those works, see McCormick, ‘The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers’, 10 *Canadian J L & Jurisprudence* (1997) 163.

²⁸ Schmitt, *supra* note 5, at 12.

²⁹ Cf. Frédéric Mégret’s discussion of the mobilization of the rhetoric of war – that which Mégret characterizes as ‘Schmittian posturing’ – as a means by which ‘the sovereign [may] rejuvenate its constituent power’ such that ‘on the heroic altar of sacrifice, liberalism can be saved from itself and its inherent meekness, and the way paved for the banal functioning of technocratic rules’: Mégret, ‘“War?” Legal Semantics and the Move to Violence’, 13 *EJIL* (2002) 361, at 368.

³⁰ Petitioners’ Brief on the Merits in *Rasul v Bush*; *Al Odah v Bush*, (US Supreme Court Nos. 03–334, 03–343) (2004) at 16.

³¹ See, e.g., *R ex rel. Abbasi v. Sec’y of State for Foreign & Commonwealth Affairs* [2002] EWCA Civ 1598, at para. [64] (a ‘legal black-hole’); International Committee of the Red Cross, ‘Guantánamo Bay: Overview of the ICRC’s work for Internees’, 30 Jan. 2004, available at <http://www.icrc.org> (stating that ‘the US authorities have placed the internees beyond the law’). For popular endorsement of this characterization in the press, see Weinstein, ‘Prisoners May Face “Legal Black Hole”’, *LA Times*, 1 Dec. 2002, at A1; Lewis, ‘Detainees From the Afghan War Remain in a Legal Limbo in Cuba’, *NY Times*, 24 Apr. 2003, at A1; Conchiglia, ‘Dans le trou noir de Guantánamo’, *Le Monde Diplomatique*, Jan. 2004, at 1, 20, and 23, available at <http://www.monde-diplomatique.fr> (a ‘black hole’); Opinion, ‘Guantánamo: Carcel Sin Ley’, *El Mundo*, 21 Jan. 2002, available at <http://www.el-mundo.es/papel/2002/01/21/indice.html> (a ‘prison without law’).

status quo'. Faced with what they construe as executive acts that 'do not comport with [the US] Constitution's structure' being justified by 'unilaterally defined emergenc[y]', these commentators propose recourse to the US Congress to ensure legislative extension to Guantánamo Bay detainees of constitutional guarantees of equal protection and due process of law, thereby '[re]establish[ing] the rule of law'.³²

Public international lawyers have, to a significant degree, echoed and compounded these concerns, lamenting that the Military Commissions 'fail[] to deliver to justice that the world at large will find credible' by 'authoriz[ing] the [US] Department of Defense to dispense with the basic procedural guarantees required by the Bill of Rights, the International Covenant on Civil and Political Rights (ICCPR) and the Third Geneva Convention of 1949'.³³ Following is an overview and brief analysis of such claims to exceptionalism made in respect of Guantánamo Bay, first in prevailing international legal scholarship, and second in the work of Giorgio Agamben.

A Appeals to the Exception in International Legal Scholarship

As indicated by the foregoing remarks, the exceptional status of Guantánamo Bay Naval Base has been a recurring theme of legal critiques of the internment, trial and interrogation practices that have been put into effect there.³⁴ In international legal literature, development of this theme typically entails a two-part discursive move. First, the regime of the Guantánamo Bay Naval Base is isolated and distanced from the ambit of routine legality. By expressly disavowing the entitlement of detainees to certain due process guarantees enshrined in international law and US constitutional law, the US executive has, it is said, sought to create an abomination: a 'legal no man's land';³⁵ a place 'beyond the rule of law'.³⁶ The current US administration, such accounts report, 'want[s] its own exceptional "rights-free zone" on Guantánamo'.³⁷ At Guantánamo

³² Katyal and Tribe, 'Waging War, Deciding Guilt: Trying the Military Tribunals', 111 *Yale LJ* (2002) 1259, at 1261, 1263, 1265, 1266, and 1308–1309. See also Neuman, *supra* note 9.

³³ Koh, 'The Case Against Military Commissions', 96 *AJIL* (2002) 337, at 338–339. See also Mundis, 'The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts', 96 *AJIL* (2002) 320, 328 (arguing that 'the use of military commissions will be difficult to reconcile with the U.S. obligations under the Geneva Convention). *Contra* Wedgwood, 'Al Qaeda, Terrorism and Military Commissions', 96 *AJIL* (2002) 328, at 332 and 334 (arguing that '[t]he [US] president's proposal for military commissions to try Al Qaeda suspects conforms to international law and does not represent any usurpation of civilian jurisdiction', that 'the jurisdiction of military commissions has been set by the bounds of international law directly incorporated within American law' and 'the jurisdiction of military commissions is defined by the norms of the customary law of nations, namely, the law of war').

³⁴ For examples, see *supra* note 31.

³⁵ Paust, 'Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, The Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions', 79 *Notre Dame L Rev* (2004) 1335, at 1346.

³⁶ Hope, 'Torture', 53 *ICLQ* (2004) 807 ('The place where the detainees are being held is beyond the rule of law').

³⁷ Koh, 'On American Exceptionalism', 55 *Stanford L Rev* (2003) 1479, at 1509 (arguing, at 1498, that 'the administration has opted . . . for a two-pronged strategy of creating extralegal zones, most prominently the U.S. Naval Base at Guantánamo Bay, Cuba, where scores of security detainees are held without legal recourse, and extralegal persons').

Bay, judgments are said to be ‘based on politics, not legal norms’.³⁸ Guantánamo Bay is cast as a ‘black hole’ and ‘[t]he nature of th[at] black hole’, it is said, ‘is that there is no way out, except through the good grace of the military’.³⁹

Next, this severance of Guantánamo Bay from the prevailing legal order – or the normative emptying out of this jurisdiction, ostensibly to make way for the political – is identified *per se* as a critical source of concern. As one scholar has observed, ‘[h]uman rights law abhors a vacuum’.⁴⁰ Horror is directed as much towards the apparent refutation of law’s claim to completeness as it is towards the perceived effects of this, namely, the inability to subject detainees’ indefinite detention, torture and degradation to third party question or constraint. Thus, Professor Jordan Paust has insisted ‘under international law, no locale is immune from the reach of relevant international law’. ‘Despite claims that certain persons, including “enemy combatants” or so-called “unlawful combatants,” have no rights’, he continued, ‘no human being is without protection under international law . . . in every circumstance, every human being has some forms of protection under human rights law’.⁴¹

The notion of a domain from which law has withdrawn (or where it has been forced into exile) is thus first generated as a definitive diagnosis of the Guantánamo Bay ‘problem’, then cast as intolerable. The encounter with this prospect has, in turn, occasioned two main types of response, each dedicated to affirming the comprehensiveness of the systemic order of national-international legality.

One response among legal critics has been to appeal to a variety of legal institutions to subject the Guantánamo Bay Naval Base to their purview, under the rubric of existing law and institutional procedures. Thus, while Professors Katyal and Tribe advocate congressional action within the US, international lawyers and others have instigated litigation and complaint procedures in a wide range of settings, from the US and UK courts to the Inter-American Commission on Human Rights and the United Nations’ Working Group on Arbitrary Detention.⁴² Others, like Paust above, have turned to the law review as a forum in which to avow the breadth of international law’s reach and the pertinence and inviolability of its precepts.⁴³

A second approach has been to insist upon the necessity of reshaping the law to fit the ostensibly novel phenomena thrown up by the events of 11 September 2001, including the demand for indefinite detention of those suspected of terrorist allegiances.

³⁸ Koh, *supra* note 33, at 341.

³⁹ Fletcher, ‘Black Hole in Guantánamo Bay’, 2 *ICJ* (2004) 121.

⁴⁰ Amann, *supra* note 6, at 315.

⁴¹ Paust, *supra* note 35, at 1346, 1350–1351.

⁴² See *Rasul v Bush*; *Al Odah v. United States*, 124 S Ct 2686 (2004); *Rumsfeld v Padilla* 124 S Ct 2711 (2004); *R ex rel. Abbasi v. Sec’y of State for Foreign & Commonwealth Affairs* [2002] EWCA Civ 1598; Inter-American Commission on Human Rights, Adoption of Precautionary Measures, Detainees in Guantanamo Bay, Cuba (12 Mar. 2002), available at <http://www.ccr-ny.org>; Working Group on Arbitrary Detention, Opinion No. 21/2002 (United States of America) (E/CN.4/2003/8/Add.1).

⁴³ See, e.g., Paust, *supra* note 35; Jinks and Sloss, ‘Is the President Bound by the Geneva Conventions?’, 90 *Cornell L Rev* (2004) 97 (arguing that the US President is indeed bound by the Geneva Conventions, formally and effectively); Condorelli, ‘The Relevance of the Obligations Flowing from the UN Covenant on Civil and Political Rights to US Courts Dealing with Guantánamo Detainees’, 2 *ICJ* (2004) 107.

This too is based upon the invocation of emergency or exceptional circumstances, albeit to a very different end. ‘Terrorist attacks’, US constitutional law scholar Bruce Ackerman has written, ‘will be a recurring part of our future. The balance of technology has shifted. . . [and] we urgently require new constitutional concepts to deal with the protection of civil liberties. Otherwise, a downward cycle threatens’. Ackerman goes on to propose ‘a newly fashioned emergency regime’ so as to permit ‘short-term emergency measures[,] but draw[ing] the line against permanent restrictions’, thereby ‘rescu[ing] the concept [of emergency power] from fascist thinkers like Carl Schmitt, who used it as a battering ram against liberal democracy’.⁴⁴

Oren Gross has likewise announced, quoting Fred Schauer, that ‘the exception is no longer invisible’. Recent confrontations with ‘acute exigency’ have, according to Gross, demanded that law be reformulated in profound ways. ‘Taken together, the panoply of counterterrorism measures put in place since September 11th has created’, he writes, ‘“an alternate system of justice” aimed at dealing with suspected terrorists’.⁴⁵ Gross, however, diverges from Ackerman in the following significant respect. Although, according to Gross, ‘[s]eparation between normalcy and emergency along geographic lines has once again been resorted to’ and ‘the anomalous nature of Guantánamo . . . has been invoked once again’, those juridical mechanisms designed to keep emergency and normalcy separate have, in Gross’ view, repeatedly broken down.⁴⁶ ‘[T]he exception has merged with the rule’, in Gross’ account, such that ‘belief in our ability to separate emergency from normalcy . . . is misguided and dangerous’.⁴⁷

Gross nevertheless reaffirms the necessity and tenability of just such a distinction when he argues for the imperative of ‘going outside the legal order’ in order to tackle ‘extremely grave national dangers and threats’.⁴⁸ While purporting to reject a normalcy-emergency distinction, Gross reinstates it in the form of a division between, on the one hand, ‘extremely grave . . . dangers’ such as require ‘extra-legal’ adventures and, on the other, conditions under which such adventures are not justifiable. Coming full circle, Gross argues that accommodating such extra-legal adventures will serve the ultimate goal of ‘preserv[ing] enduring fidelity to the law’ by fostering a combination of frank political self-explanation on the part of government officials, open and informed public deliberation, and robust individual rights protection on the part of courts in all but the overt extra-legal case.⁴⁹

⁴⁴ Ackerman, ‘The Emergency Constitution?’, 113 *Yale LJ* (2004) 1029, at 1029, 1030–1031, and 1044. For criticism of Ackerman’s proposals, see Cole, ‘The Priority of Morality: The Emergency Constitution’s Blind Spot’, 113 *Yale LJ* (2004) 1753 and Tribe and Gudridge, ‘The Anti-Emergency Constitution’, 113 *Yale LJ* (2004) 1801.

⁴⁵ Gross, ‘Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?’, 112 *Yale LJ* (2003) 1011, at 1016–1017, 1076.

⁴⁶ *Ibid.*, at 1076.

⁴⁷ *Ibid.*, at 1022, 1089. For Gross’ reading of Schmitt’s theory of the exception, see Gross, ‘The Normless and Exceptionless Exception: Carl Schmitt’s Theory of Emergency Powers and the “Norm-Exception” Dichotomy’, 21 *Cardozo L Rev* (1999–2000) 1825.

⁴⁸ Gross, *supra* note 45, at 1097.

⁴⁹ *Ibid.*

Among international lawyers, as opposed to US constitutional lawyers, reform discussions tracing their impetus to exigency have tended to focus on the question of international humanitarian law's possible obsolescence.⁵⁰ On the whole, however, international lawyers seem reluctant to engage in the sort of thought experiments in which Ackerman and Gross trade, that is, to entertain the prospect of international law's wholesale reconfiguration to accommodate the apparent exigencies of recent times.

Regardless of the divergence in proposals that have emerged (or not) from the foregoing writings, these legal scholarly characterizations of Guantánamo Bay overwhelmingly rely on the archetype of the exception, taking a separation from normalcy and an apparent play-off between legal and political power as their starting points.⁵¹ In almost all of the preceding accounts, both the configuration of Guantánamo Bay as a detention camp, and the violence that has accompanied this, are imagined as non-legal or quasi-legal phenomena. The encounter with such phenomena, moreover, is understood to necessitate some effort of conquest or accommodation on the part of law and lawyers, so as to close the circle of legal systematicity once more. But for efforts in this respect, they – law and lawyers – are imagined to stand well apart from the events under way at the Guantánamo Bay Naval Base, and (with a few significant exceptions, namely those who have advised the Bush administration) to remain exempt from responsibility for conditions there. It is this set of assumptions with which I will take issue in Section 3 of this article, after first discussing the further theorization of the exception, and its relationship to the detention camp, in the work of Giorgio Agamben.

B Giorgio Agamben and the State of the Exception

Giorgio Agamben has argued that the Military Order of November 2001 (by which the indefinite detention and trial of alleged enemy combatants at Guantánamo Bay was authorized) 'produced a legally unnamable and unclassifiable being' in the person of the detainee.⁵² This rendered each detainee 'the object of a pure de facto

⁵⁰ See, e.g., White House, Memorandum for the President from Alberto R. Gonzales, 'Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban, 25 Jan. 2002, available at http://www.hereinreality.com/alberto_gonzales_torture_memo.html ('[T]he war against terrorism is a new kind of war. It is not the traditional clash between nations adhering to the laws of war . . . In my judgment, this new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions'). For discussion of this argument, see Vierucci, 'Is the Geneva Convention on Prisoners of War Obsolete? – The Views of the Counsel to the US President on the Application of International Law to the Afghan Conflict', 2 *ICJ* (2004) 866; Paust, 'War and Enemy Status After 9/11: Attacks on the Laws of War', 28 *Yale LJ* (2003) 325.

⁵¹ See Gross, *supra* note 45, for discussion of the prevalence of an assumption that emergency may be separated from normality in legal scholarship. As noted above, such a separation continues to operate in Gross' account (notwithstanding his apparent dismissal of the emergency-normality distinction), in so far as Gross' extra-legal measures model presumes a capacity to distinguish the case that occasions a foray into extra-legal measures from the case that does not.

⁵² G. Agamben, *State of Exception* (trans. K. Attell, 2005), at 3–4. See also Rauff, 'Interview with Giorgio Agamben – Life, A Work of Art Without an Author: The State of Exception, the Administration of Disorder and Private Life', 5 *German LJ* (2004), available at <http://www.germanlawjournal.com/article.php?id=437>

rule’, subject to ‘a detention . . . entirely removed from the law’.⁵³ According to Agamben, this embodies a juridical phenomenon – the ‘state of exception – that arose historically from the merging of two precepts: the extension of military power into the civil sphere (under the rubric of a state of siege) and the suspension of constitutional norms protecting individual liberties by governmental decree.’⁵⁴ This merger, Agamben characterizes as bringing into being a ‘kenomatic space, an emptiness of law’⁵⁵ in which the sovereign affirms its authoritative locus within the legal order by acting to suspend the law altogether.⁵⁶ As such, it is expressive of a ‘dominant paradigm of government in contemporary politics’.⁵⁷ [US President George W.] Bush’, Agamben claims, ‘is attempting to produce a situation in which the emergency becomes the rule, and the very distinction between peace and war . . . becomes impossible’.⁵⁸

Unlike the commentators cited in the preceding section, Agamben is at pains to point out that this ‘state of exception’ is neither removed from the legal order, nor creates ‘a special kind of law’. Rather, it ‘defines law’s threshold or limit concept’.⁵⁹ Agamben maintains that the ‘state of exception’ is juridical in form and effect – a vital scene for the development and deployment of governmental techniques of rule. *Within* the juridical order, the state of exception is said to embody an emptiness of law, ‘a space devoid of law, a zone of anomie in which all legal determinations . . . are deactivated’.⁶⁰ More precisely, the state of exception is ‘neither external nor internal to the juridical order’; it is rather a ‘zone of indifference, where inside and outside do not exclude each other but rather blur with each other’.⁶¹ In Agamben’s account, law ‘employs the exception . . . as its original means of referring to and encompassing life’

⁵³ Agamben, *supra* note 52, at 4.

⁵⁴ *Ibid.*, at 5.

⁵⁵ *Ibid.*, at 6, 48. See ‘kenosis’ in *Oxford English Dictionary* (2nd edn., 1989), ‘*Theol.* [a. Gr. *kénwsij* an emptying, f. *kénōein* to empty, with reference to *Phil.* ii. 7 *autòn kénwse* ‘emptied himself’]. The self-renunciation of the divine nature, at least in part, by Christ in the incarnation’.

⁵⁶ Agamben, *supra* note 52, at 35 (‘The sovereign, who can decide on the state of exception, guarantees its anchorage to the juridical order’).

⁵⁷ *Ibid.*, at 2. See also at 6–7, 14. Judith Butler argues in somewhat similar terms that ‘the new war prison constitutes a form of governmentality that considers itself its own justification and seeks to extend that self-justificatory form of sovereignty through animating and deploying the extra-legal dimension of governmentality’: Butler, ‘Indefinite Detention’ in her *Precarious Life: The Powers of Mourning and Violence* (2004), at 50–100, 98. While justice cannot be done to Butler’s argument in the space of a footnote, I regard her characterization of the ‘lawlessness’ of Guantánamo Bay as overestimating the determinacy of ‘a [judicial] judgment . . . supported by evidence’ and underestimating the extent to which the acts of ‘deeming’ that she regards as characteristic of the Guantánamo Bay regime are routine within a liberal legal order.

⁵⁸ Agamben, *supra* note 52, at 22.

⁵⁹ *Ibid.*, at 4.

⁶⁰ *Ibid.*, at 50.

⁶¹ *Ibid.*, at 23. Cf. Schmitt, *supra* note 5, at 7 (‘Although [the sovereign] stands outside the normally valid legal system, he nevertheless belongs to it, for it is he who must decide whether the constitution needs to be suspended in its entirety’), and at 12–13 (‘[T]he norm is destroyed in the exception. The exception remains, nevertheless, accessible to jurisprudence because both elements, the norm as well as the decision, remain within the framework of the juristic’).

so as to 'bind[] and, at the same time, abandon[] the living being to law'.⁶² Law binds itself to 'bare life' – *zōē* or biological life as such – in the space of the exception, whereby every outside, every limit of life and every possibility of transgression comes to be included within the purview of 'a new juridico-political paradigm'.⁶³

Of the November 2001 Military Order, Agamben observes that 'it radically erases any legal status of the individual' by reason of the detainees held thereunder enjoying neither 'the status of POWs as defined by the Geneva Conventions' nor 'the status of persons charged with a crime according to American laws'.⁶⁴ Accordingly, Agamben declares the operations at Guantánamo Bay 'de facto proceedings, which are in themselves extra- or antijudicial' but which have nonetheless 'pass[ed] over into law' such that 'judicial norms blur with mere fact'.⁶⁵

Agamben thus endorses, albeit in his own distinct terms, the claim that much of the legal scholarship surrounding Guantánamo Bay makes: that this jurisdiction represents a special, original case within the juridical order: 'a zone of indistinction in which fact and law coincide'.⁶⁶ In so doing, Agamben implies the existence, or pre-existence, of a juridical zone – a space of non-exceptional character – in which fact and law *do not* coalesce; a secondary sphere in which maintaining 'the very distinction between peace and war' *is or was possible*. Agamben's discussion of the 'nourish[ment]'⁶⁷ that the exception affords law suggests some other domain where, but for the exception, law might hold back (or be held back) from its voracious colonization of the preconditions of life and of politics ('the normal situation').⁶⁸

Following the work of Duncan Kennedy and other legal scholars, however, one may read the juridical deployment of fact/law, peace/war, detainee/prisoner of war, law/politics, law/life 'argument-bites' as one of those operations by which 'legal arguers generate the experience of necessity'.⁶⁹ Read according to Kennedy's semiotic schema, Agamben's suggestion that, but for the state of exception, these sort of oppositions might hold and remain separable (however 'fictitious[ly]'⁷⁰) seems, itself, a

⁶² Agamben, *supra* note 52, at 1.

⁶³ G. Agamben, *Homo Sacer: Sovereign Power and Bare Life* (trans. D. Heller-Roazen, 1998), at 170. For Agamben's glosses on the Foucauldian concept of biopolitics and on Hannah Arendt's work on the primacy given to natural, human life in modern politics, see further at 1–12, 119–135, 160–165. For an illuminating discussion of this book, see Fitzpatrick, 'Bare Sovereignty: Homo Sacer and the Insistence of Law', in A. Norris (ed.), *Politics, Metaphysics and Death: Essays on Giorgio Agamben's Homo Sacer* (forthcoming, 2005).

⁶⁴ Agamben, *supra* note 52, at 3.

⁶⁵ *Ibid.*, at 29.

⁶⁶ *Ibid.*, at 26.

⁶⁷ Agamben, *supra* note 63, at 27 ('Law is made of nothing but what it manages to capture inside itself through the inclusive exclusion of the *exceptio*: it nourishes itself on this exception').

⁶⁸ Agamben, *supra* note 52, at 31 ('[T]he state of exception appears . . . in the order for the purpose of safeguarding the existence of the norm and its applicability to the normal situation'). Cf. Agamben's characterization of a state of exception 'in which exception and normal conditions are temporally and locally distinct' as a 'fictitious state of exception' that has 'collapsed' (Agamben, *supra* note 52, at 59).

⁶⁹ Kennedy, 'A Semiotics of Legal Argument', in Academy of European Law (ed.), *Collected Courses of the Academy of European Law* (1994), iii, Bk 2, at 309–325, 319.

⁷⁰ Agamben, *supra* note 52, at 59.

necessitarian ‘argument-bite’ (state of exception/normal situation) open to cataloguing and interrogation within this very grid. This, as Kennedy points out, does not entail any overarching assertion of indeterminacy,⁷¹ nor does it indicate that Agamben’s analysis does not work or must be corrected.⁷² Agamben’s characterization of the state of the exception might work so well precisely *because* it more or less replicates, rather than upsets, familiar, necessitarian operations of legal argumentation.⁷³ Reading Agamben in this way suggests that he might be ‘at least somewhat naïve about [legal argument’s] simultaneously structured and indeterminate (floating) character’, that is, about the characteristic operations of law and legal argument.⁷⁴ From this vantage point, the ‘Eureka!’ tone of Agamben’s recent writings, his claim to be remedying the woeful shortcomings of public law theory, and his heralding the ‘deactivat[ion]’ of law’s hold on life and the ‘[de]contaminat[ion]’ of politics from law might be approached with some scepticism.⁷⁵

One might question too Agamben’s assertion that the Guantánamo Bay detainees have been stripped of legal status, and thereby of all but bare life.⁷⁶ Law frequently declares (indeed celebrates) a dearth of the normative where critical scrutiny discloses a hyper-regulatory abundance. Consider the rhetoric of the ‘free market’. The legal emptiness of the market is declared repeatedly and used to justify the erosion or suppression of regulatory initiatives pertaining to consumer protection, workers’ rights and environmental standards.⁷⁷ At the same time, laws and rules of many sorts – securities laws, antitrust laws, contract laws, accounting standards, etc. – proliferate unabated in the very same space.⁷⁸ In a comparable way, the records surrounding

⁷¹ Kennedy, *supra* note 69, at 319 (‘I make no general assertion that law is always indeterminate, or that it is always possible to argue both sides of a question . . . as a matter of fact, it is *not* always possible to argue both sides’).

⁷² On the contrary, Agamben’s account has ‘worked’ to the extent of gaining extraordinary purchase in legal, political, and activist literature. As Fitzpatrick observes, ‘[e]ven the higher journalism seems to have been reached’ by Agamben’s influence: Fitzpatrick, ‘Bare Sovereignty: Homo Sacer and the Insistence of Law’, 5(2) *Theory and Event* (2001), at note 2, available at http://muse.jhu.edu/journals/theory_&_event. See further Fitzpatrick, *supra* note 63.

⁷³ It must be acknowledged, nevertheless, that Agamben shows some awareness of these operations: see Agamben, *supra* note 52, at 35 (‘Schmitt’s theory of the state of exception proceeds by establishing within the body of the law a series of caesurae and divisions whose ends do not quite meet, but which, by means of their articulation and opposition, allow the machine of law to function’).

⁷⁴ *Ibid.*, at 325–326.

⁷⁵ *Ibid.*, at 1 (lamenting that ‘there is still no theory of the state of exception in public law’) and at 88 (observing that ‘[p]olitics has suffered a lasting eclipse because it has been contaminated by law’ and suggesting that ‘only beginning from the space thus opened will it be possible to pose the question of a possible use of law after the deactivation of the device that, in the state of exception, tied [law] to life [and violence]’).

⁷⁶ *Ibid.*, at 3. See also Rauff, *supra* note 52.

⁷⁷ See Olsen, ‘The Family and the Market: A Study of Ideology and Legal Reform’, 96 *Harvard L Rev* (1982–1983) 1497, at 1502–1504; Casebeer, ‘The Empty State and Nobody’s Market: The Political Economy of Non-Responsibility and the Judicial Disappearing of the Civil Rights Movement’, 54 *U Miami L Rev* (2000) 247; Chamallas, ‘Book Review: The Market Excuse’, 68 *U Chicago L Rev* (2001) 579.

⁷⁸ See Schwarcz, ‘Private Ordering’, 97 *Northwestern UL Rev* (2002) 319; A. C. Cutler, V. Haufler, and T. Porter (eds.), *Private Authority and International Affairs* (1999); B. Fried, *Discrediting the Free Market: The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement* (1998), at 21, 46–47, 52–56.

Guantánamo Bay suggest that the interactions of detainee and detainer in that jurisdiction are experienced as almost entirely pre-codified by the dictates of legal status.⁷⁹ It is by this means, rather than, as Agamben has suggested, through ‘obliterat[ion] and contradict[ion]’ of the normative aspect of law, that governmental violence is being effected, or so it will be argued in Section 3 of this article.⁸⁰

By focusing, at the outset, on the ‘abandoned’ being of the detainee in isolation (a humanitarian rather than a political impulse),⁸¹ Agamben neglects the particular, precarious experience of deciding that remains central to Schmitt’s theory of the exception. For Schmitt, on whose work Agamben purports to draw,⁸² the exception ‘cannot be circumscribed factually and made to conform to a preformed law’.⁸³ The decision on and in the exception cannot, accordingly, be derived from the content of any code or norm, nor can responsibility for its taking be deflected; it is ‘a decision in the true sense of the word’.⁸⁴ Agamben likewise maintains that the sovereign decision that occurs in the space of the exception – President Bush’s decision in relation to Guantánamo Bay, as he casts it at one instance⁸⁵ – ‘is the position of an undecidable’.⁸⁶ The ‘necessity’ triggering a state of the exception, Agamben writes, ‘ultimately come[s] down to a decision, but that on which it decides is, in truth, something undecidable in fact or law’.⁸⁷ The law remains in force in the state of exception, Agamben maintains, but ‘the normative aspect of law’ is ‘obliterated’.⁸⁸

Yet Agamben’s characterization of the state of exception amounts, in effect, to an insistence upon the historical and theoretical pre-codification of the decision thereon – pre-codification that negates its exceptionalism in Schmittian terms. Tracing a number of historical and etymological lineages, Agamben declares these to have culminated in an ‘extreme phase of the separation of the rights of man from the rights of

Agamben has acknowledged the proliferation of regulation in spaces of apparent emptiness. See Rauff, *supra* note 52, at paras. [19] and [11], in which Agamben responded to the question ‘But do we not also observe, at the same time, the enlargement of the whole legal system and a tremendous increase in legal regulation?’, as follows:

‘[B]oth elements of the system coexist with one another, and . . . they both are driven to the extreme, so much so, that they seem at the end to fall apart. Today we see how a maximum of anomy [*sic*] and disorder can perfectly coexist with a maximum of legislation’:

⁷⁹ See *infra* notes 100 to 107 and related text.

⁸⁰ *Contra* Agamben, *supra* note 52, at 87 (‘[T]he state of exception has today reached its maximum worldwide deployment. The normative aspect of law can thus be obliterated and contradicted with impunity by a governmental violence that – while ignoring international law externally and producing a permanent state of exception internally – nevertheless still claims to be applying the law’).

⁸¹ On the notion of abandonment, see Agamben, *supra* note 63, at 58–60, 110–111. On the separation between humanitarianism and politics – between the life of ‘man’ and the life of the citizen – see Agamben, *supra* note 63, at 126–135.

⁸² See, e.g., Agamben, *supra* note 52, at 23–24.

⁸³ Schmitt, *supra* note 5, at 6.

⁸⁴ *Ibid.*

⁸⁵ See *supra* note 58 and related text.

⁸⁶ Agamben, *supra* note 63, at 27. See also Agamben, *supra* note 52, at 29–30.

⁸⁷ *Ibid.*, at 30.

⁸⁸ *Ibid.*, at 31, 36–38, 40, 87.

the citizen',⁸⁹ such that 'the state of exception has today reached its maximum worldwide deployment'.⁹⁰ On one hand, Agamben declares the Military Order of November 2001 to have created a compulsion to decide upon the undecidable. On the other, he characterizes the space of that decision (and of detainee-detainer interaction) so as to suggest that its dynamics have been pre-codified and rendered 'permanent' by the onward march of history and language.⁹¹

Agamben imagines the camp (and the detention camps at Guantánamo Bay, specifically)⁹² as 'the structure in which the state of the exception – the possibility of deciding on which founds sovereign power – is realized normally'.⁹³ From this 'extreme phase', Agamben would lead his readers in 'clear[ing] the way for a long-overdue renewal of categories in the service of a politics in which bare life is no longer separated and excepted, either in the state order or in the figure of human rights'.⁹⁴ What is this if not a (partially) pre-codified program, or at least a call for compliance and implementation? What is this if not an affirmation of the norm in the sense of an 'attempt to spell out in detail the case in which law suspends itself'?⁹⁵ Agamben would nevertheless have us believe that the *telos* of his account runs in a contrary direction:

Of course, the task at hand is not to bring the state of exception back within its spatially and temporally defined boundaries in order to reaffirm the primacy of a norm and of rights that are themselves ultimately grounded in it . . . To live in the state of exception means . . . ceaselessly to try to interrupt the working of the machine that is leading the West toward global civil war.⁹⁶

3 The Order of Exceptionalism and the Annihilation of the Exception

In arguing against Agamben and others that the experience of the exception anticipated by Schmitt is in retreat at the Guantánamo Bay Naval Base, it is important to acknowledge the extent to which the legal order of Guantánamo Bay often *looks* and *sounds* like a domain operating as one of 'pure' sovereign discretion and thus

⁸⁹ Agamben, *supra* note 63, at 133.

⁹⁰ Agamben, *supra* note 52, at 87.

⁹¹ See, e.g., *ibid.*, at 6 ('since "the state of exception . . . has become the rule" . . . it . . . lets its own nature as the constitutive paradigm of the juridical order come to light', quoting Benjamin, 'über den Begriff der Geschichte', in R. Tiedemann and H. Schweppenhäuser, *Gesammelte Schriften* (1942), i, pt. 2, at 697), at 9 ('the state of exception has by now become the rule', citing C. L. Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (1948), at 313) and at 32 (reporting that the 'paradigm' of the state of exception described by Schmitt 'has today reached its full development').

⁹² *Ibid.*, at 3. Notwithstanding his specific reference to the Nov. 2001 Military Order and the jurisdiction established thereby, Agamben maintains that 'we find ourselves virtually in the presence of a camp every time such a structure [the materialization of the state of exception] is created . . . whatever its denomination and specific topography': see Agamben, *supra* note 63, at 174.

⁹³ See *ibid.*, at 170.

⁹⁴ *Ibid.*, at 134.

⁹⁵ Schmitt, *supra* note 5, at 13, 14.

⁹⁶ Agamben, *supra* note 52, at 87.

exceptionalism. Lawyers for the US Justice Department have asserted that the US President has unlimited discretion to determine the appropriate means for interrogating enemy combatants detained at Guantánamo Bay and elsewhere.⁹⁷ Likewise, counsel for the US Government contended, before the US Supreme Court, that '[a] commander's wartime determination that an individual is an enemy combatant is a quintessentially military judgment, representing a core exercise of the Commander-in-Chief authority'.⁹⁸

By assuming the affect of exceptionalism, the normative order of Guantánamo Bay has soaked up critical energies with considerable effectiveness, for it is the exception that rings liberal alarm bells. Accordingly, the focus falls on less than 600 persons being abused in Cuba, rather than upon the millions subjected to endemic sexual, physical and substance abuse in prisons across the democratic world. In a similar way, attention is captured by the violation of rights of asylum-seekers, rather than by the over-representation of immigrants in the most informal and vulnerable sectors of the contemporary economy.⁹⁹

For detention decisions taken at Guantánamo Bay to correspond to Schmitt's understanding of the exception, however, '[t]he precondition as well as the content of jurisdictional competence in such a case must necessarily be unlimited'. 'From the liberal constitutional point of view', Schmitt wrote, 'there would be no jurisdictional competence at all. The most guidance the constitution can provide is to indicate who can act in such a case.'¹⁰⁰ Yet in respect of Guantánamo Bay, both the content and competence of the US executive is repeatedly cast as pre-codified in presidential and governmental statements. At times, the 'code' is said to be that of 'freedom', 'democracy' or 'justice'.¹⁰¹

⁹⁷ Memorandum from Jay S. Bybee, Assistant Attorney General to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. 2340–2340A (1 Aug. 2002) at 39 ('Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President').

⁹⁸ Brief for the Respondents, *Hamdi v Rumsfeld*, 124 S Ct 2633, 159 L Ed 2d 578 (2004) at 25.

⁹⁹ Cf. D. Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (2004), at 300 ('Occupying the field, the humanitarian vocabulary can channel attention to a limited range of questions').

¹⁰⁰ Schmitt, *supra* note 5, at 7.

¹⁰¹ See, e.g., Press Release: 'President Speaks to the United Nations General Assembly', Office of the Press Secretary, 21 Sept. 2004, available at <http://www.whitehouse.gov/news/releases/2004/09/20040921-3.html> ('Freedom is finding a way in Iraq and Afghanistan – and we must continue to show our commitment to democracies in those nations . . . I have faith in the transforming power of freedom'); Press Release: 'Remarks by the President at "ask President Bush" Event', Office of the Press Secretary, 30 Aug. 2004, available at <http://www.whitehouse.gov/news/releases/2004/08/20040830-4.html> ('The Taliban can't stop this movement toward liberty because freedom is universal. Freedom is inherent in people's souls . . . Freedom is powerful in this world . . . Liberty is a powerful, powerful agent of change'); Press Release: 'President Discusses Progress in the War on Terror', Office of the Press Secretary, 12 July 2004, available at <http://www.whitehouse.gov/news/releases/2004/07/20040712-5.html> ('[W]e are extending the peace by supporting the rise of democracy, and the hope and progress that democracy brings, as the alternative to hatred and terror in the broader Middle East'); Press Release: 'President Signs Defense Appropriations Bill', Office of the Press Secretary 10 Jan. 2002, available at <http://www.whitehouse.gov/news/releases/2002/01/20020110-5.html> ('This cause is noble, and this cause is just. And we will stay on this cause until we have achieved our objective. You're delivering justice; not revenge, but justice, to agents of terror').

At other times, it is that of God.¹⁰² On still further occasions, constitutional norms are invoked to frame a decision.¹⁰³ The acts of the would-be sovereign, in each case, are characterized by repeated references to some higher source of competence and direction, overt deference to a pre-determined programme in the course of implementation, and insistence upon the conduit or vessel-like status of executive authority.

A little lower down the hierarchy, Secretary of the Navy Gordon England, speaking about the annual administrative review process at a press briefing on 23 June 2004, conceded: '[T]here's no question there's judgment involved. I doubt if many of these are black and white cases. I would expect most are going to be gray'. When pressed to define his role in the process, he confirmed that he was the one to make the final decision regarding release, transfer or continued detention in respect of each detainee, in the wake of an Administrative Review Board assessment. 'I operate and oversee, organise the process, and I also make the ultimate decision', he stated.¹⁰⁴

Secretary England went on, however, to convey an impression of this judgment as one cabined by broad policy directives, notions of reasonableness, and the institutional demand for standardization: '[W]e do have some guidelines; . . . the boards do have some guidelines', he assured the audience, '[e]very board doesn't have a different standard'. He continued: '[I]t will be a judgment based on facts, data available . . . the best decision a reasonable person can make in this situation'. '[I]t's what is the situation today and going forward in terms of a threat to America. And that is what we will decide, and that's what the decision will be based on'.¹⁰⁵

From expressing the decision he would be taking in personal, case-specific terms, Secretary England thus moved rapidly into the mode of generalization, depersonalization and necessity. 'His' decision became 'the' decision of the reasonable person, made not to assess the individual detainee's responsibility, but rather to assess his or her proximity to a generalized 'threat to America'.

Such an approach is also discernible in the Military Order issued by President Bush in 2001, pursuant to which the Military Commissions were convened before which Guantánamo Bay detainees were, until their suspension in November 2004, in the process of being tried. The 'findings' upon which the jurisdiction created by that order is predicated cast the steps taken thereby as inexorable reactions to a state of affairs of immeasurable proportions and persistent duration. Attacks by international terrorists are said to have 'created a state of armed conflict that *requires* the use of the

¹⁰² Press Release: 'Remarks by the President at "ask President Bush" Event', Office of the Press Secretary, 30 Aug. 2004, available at <http://www.whitehouse.gov/news/releases/2004/08/20040830-4.html> ('Freedom is not America's gift to the world; freedom is the Almighty God's gift to each man and woman in this world'). For discussion of Bush's invocations of a divine mandate, see Cooperman, 'Bush's References to God Defended by Speechwriter: President Does Not Claim Divinity Is on His Side, Gerson Concedes', *Washington Post*, 12 Dec. 2004, at A06.

¹⁰³ See, e.g., Yoo, 'War and the Constitutional Text', 69 *U Chi L Rev* (2002) 1639.

¹⁰⁴ Special Defense Department Briefing with Secretary of the Navy Gordon England, 23 June 2004, available at <http://www.defenselink.mil/transcripts>.

¹⁰⁵ *Ibid.*

United States Armed Forces'.¹⁰⁶ Likewise, it is said to be 'necessary for individuals subject to [the] order . . . to be detained', just as the issuance of the order itself is stated to be 'necessary to meet the emergency'.¹⁰⁷ Although expressed in terms of 'an extraordinary emergency', this order frames the Presidential decisions embodied in its text as matters of exigency – in other words, as non-decisions – dictated by a 'state of armed conflict'. The only acknowledgement of discretion is buried in the final paragraph of the order's 'findings', where the President is said to have 'determined that an extraordinary emergency exists for national defense purposes'. The exercise of sovereign discretion is, accordingly, cast as a derivative matter: a question of classification after the fact.

One could, of course, read these claims as exercises in public relations, designed to cloak the deployment of unfettered sovereign power in the guise of liberal proceduralism. Yet regardless of how one might characterize the 'real' intent behind the military mandates governing Guantánamo Bay, the *experience* of decision-making reported by figures such as Secretary England seems, to a significant degree, to be one of deferral and disavowal – as though his job were more a matter of implementation than decision. Speaking of the determination, by the Combatant Status Review Tribunal, that one of the first 30 detainees to be heard by the Tribunal was not, in fact, an 'enemy combatant', Secretary England explained: '[I]n this case we – we set up a process, we're following that process, we're looking at all the data . . . Determinations were made he was an enemy combatant. We now have set up another process; more data is available. Time has gone by . . . I believe the process is doing what we asked the process to do, which is to look at the data as unbiased as you can, from a reasonable person point of view . . . and I believe the process is working . . .'¹⁰⁸ This is not the language of Schmittian exceptionalism. Rather, it is suggestive of efforts to construct a series of normatively airtight spaces in which the prospect of agonizing over an impossible decision may be delimited and, wherever possible, avoided. As such, the jurisdiction created at Guantánamo Bay is constituted, in Schmittian terms, in the liberal register of the norm (indeed, an overdetermined version thereof).¹⁰⁹

This brings me to my final point, which is to sketch a reading of Schmitt whereby the experience of exceptional decisionism that his work evokes may be de-linked from the notion of self-founding, all-encompassing sovereignty and, as such, deployed *against* the centralization of political authority. I wish to suggest, moreover, that the political possibilities attendant upon such a de-frocked, wayward sense of the exceptional

¹⁰⁶ See *supra* note 18, at Section 1(a) (emphasis added).

¹⁰⁷ *Ibid.*, at Section 1(e) and 1(g) (emphasis added).

¹⁰⁸ US Defense Department News Briefing, 8 Sept. 2004, available at <http://usinfo.state.gov/dhr/Archive/2004/Sep/09-891868.html>

¹⁰⁹ Agamben is not wholly at odds with this claim: see Agamben, *supra* note 52, at 5 ('it is important not to forget that the modern state of exception is a creation of the democratic-revolutionary tradition and not the absolutist one'). On 'overdetermination', from which the foregoing usage is extrapolated, see Freud, 'The Aetiology of Hysteria' and 'Fragment of an Analysis of a Case of Hysteria ("Dora")', both in P. Gay (ed.), *The Freud Reader* (1995), at 98–110, 108 and 172–238, 203; Althusser, 'Contradiction and Overdetermination', in L. Althusser, *For Marx* (trans. B. Brewster, 1977), at 87–128.

are ripe for reinvigoration in resistance to the initiatives being undertaken at Guantánamo Bay. The legally sanctioned, indefinite detention of persons at Guantánamo Bay might be countered not through a return to the normative, but through an insistence upon the prevalence of the exception in these terms.

4 Of the Exception, the Decision and Resistance

When Schmitt wrote of the ‘independent meaning of the decision’, he rejected the assumption (attributed to Robert von Mohl) ‘that a decision in the legal sense must be derived entirely from the content of a norm’. Likewise, as noted above, Schmitt observed that the exception occasioning a decision ‘cannot be circumscribed factually and made to conform to a preformed law’.¹¹⁰ He went on, nevertheless, to attempt to do precisely this. Envisaging the jurisdictional competence exercised in the decisional space of the exception as ‘necessarily unlimited’ and insisting on its correspondence with an absolute, indivisible sovereignty, Schmitt himself sought to anchor the exception to a preformed law of political order.¹¹¹ Accordingly, the prospect of sovereignty operating as ‘a play between two [or more] parties’ was, in Schmitt’s assessment ‘contrary to all reason and all law’.¹¹² ‘The law’ in this context seemingly referred to some predetermined mandate higher than the law of liberal constitutionalism that would, according to Schmitt’s account, always be susceptible to suspension by the sovereign.

Schmitt’s resistance to the diffusion of decisional power on the exception was undoubtedly bound up with his critique of the pluralism of the Weimar Republic and his hopes for a state order beyond it.¹¹³ Yet one need not follow the suggestive perplexities of Schmitt’s exception down his particular centralizing route. Instead one could identify the absence of precodification characteristic of the exception with immersion in the contingencies of the social and the ubiquity of power. Far from circumscribing the exception, acknowledgement of the immersion of decision-making in the social, and thus the impossibility of a sovereign state retaining a monopoly on decision, allows the exception to retain its exceptional character. Schmitt himself acknowledged this when he wrote: ‘[T]here is no irresistible highest or greatest power that operates according to the certainty of natural law’.¹¹⁴

Only when the question ‘who decides?’ forms part of the ‘concrete case that [the law] cannot factually determine in any definitive manner’ is the potential of the exception to ‘confound the unity and order of the rationalist scheme’ held open, as Schmitt contemplated.¹¹⁵ Schmitt himself wrote: ‘[a] distinctive determination of which individual person or which concrete body can assume [the authority to decide]

¹¹⁰ Schmitt, *supra* note 5, at 6 (emphasis added).

¹¹¹ *Ibid.*, at 7.

¹¹² *Ibid.*, at 9.

¹¹³ For a helpful critique of Schmitt’s reliance on the political givens of a unified people, identified with a unified state (one which, at the same time, takes seriously Schmitt’s critique of liberal democracy), see Mouffe, ‘Carl Schmitt and the Paradox of Liberal Democracy’, 10 *Canadian J L & Jurisprudence* (1997) 21.

¹¹⁴ Schmitt, *supra* note 5, at 17.

¹¹⁵ *Ibid.*, at 9–10.

cannot be derived from the mere legal quality of a maxim'.¹¹⁶ Were authority to decide on the exception already known to be monopolized, then the exception would no longer embody 'the power of real life [to] break[] through the crust of a mechanism that has become torpid by repetition': that is, the crust of acceptance of the norm or, what Kierkegaard termed 'comfortable superficiality'.¹¹⁷ Schmitt's exception, accordingly, evokes a political experience that is amenable to delinking from Schmitt's fetishism of the state. The exception, in this sense, arises from the vertiginous combination of, on one hand, responsibility assumed and, on the other, faith in one's determinative authority and autonomy relinquished. In this mode, I believe, it offers scope for interruption of the normative order of Guantánamo Bay.

To delink the experience of deciding on/in the exception from the sovereign state is not to deny Schmitt's claim that such a decision entails (indeed, derives its political character from) an effect of 'group[ing] . . . according to friend and enemy'; that is, that every decision involves a would-be exclusion.¹¹⁸ Nor is it to configure the state as 'an association that competes with other associations', the sort of pluralism targeted by Schmitt in *The Concept of the Political*.¹¹⁹ Rather, it is to argue that Schmitt's decisionism is not necessarily contingent upon an insistence upon the state's (or any self-sustaining sovereign's) monopolization of all political decisions (that is, decisions in/on the exception).¹²⁰ Nor, for that matter, is it contingent upon any theorization of the structure of the political order *per se* (whatever Schmitt might say).¹²¹ Rather, it is possible to conceive – indeed, proceeding from Schmitt's open characterization of the exception,¹²² it is almost impossible not to conceive – as both political and exceptional a much broader range of decisions, approached by or among a much broader range of agents, aggregations or arrogations, than those which Schmitt entertained as such. That is, in the sense of their 'def[y]ing general codification', involving, potentially, a

¹¹⁶ *Ibid.*, at 31.

¹¹⁷ *Ibid.*, at 15, quoting S. Kierkegaard, *Repetition* (1843).

¹¹⁸ C. Schmitt, *The Concept of the Political* (trans. G. Schwab, 1996), at 37. For discussion of this 'moment of closure' in the context of a Schmitt-inspired critique of deliberative democracy, see Mouffe, *supra* note 113, at 26–28.

¹¹⁹ Schmitt, *supra* note 118, at 44.

¹²⁰ Here one might return to Foucault and, in particular, to the force of diffusion in his writing that seems, at times, curiously constricted in Agamben's revisitations of the same. See, e.g., M. Foucault, *The History of Sexuality: An Introduction* (trans. R. Hurley, 1990 [1978]), at 136–137 ('This death that was based on the right of the sovereign is now manifested as simply the reverse of the right of the social body to ensure, maintain, or develop its life . . . [T]his formidable power of death . . . now presents itself as the counterpart of a power that exerts a positive influence on life, that endeavours to administer, optimize, and multiply it, subjecting it to precise controls and comprehensive regulations. Wars are no longer waged in the name of a sovereign who must be defended; they are waged on behalf of the existence of everyone; entire populations are mobilized . . .').

¹²¹ Schmitt would surely have resisted such a contention: see, e.g., Schmitt, *supra* note 118, at 45, 47 ('To the state as an essentially political entity belongs . . . the real possibility of deciding in a concrete situation upon the enemy . . . A human group which renounces these consequences of a political entity ceases to be a political group, because it thereby renounces the possibility of deciding whom it considers to be the enemy and how he should be treated').

¹²² Schmitt, *supra* note 5, at 31–32 ('Looked at normatively, the decision emanates from nothingness').

‘think[ing] [of] the general with intense passion’ and thereby ‘becom[ing] instantly independent of argumentative substantiation’.¹²³

5 Conclusion

International lawyers’ and activists’ appeals to the Geneva Conventions¹²⁴ and the appeals by legal theorists, activists and commentators to the work of Giorgio Agamben¹²⁵ both lay claim to the juridical phenomenon of Guantánamo Bay by way of invoking a code and seeking to follow that code to an exit point and/or a point of origination. The foregoing critique has been directed against this particular invocation of Agamben’s work, and its relationship to prevailing invocations of international law, rather than to that work or that law as such (amenable, as it is, to many readings that would defy the accounts presented above). In so far as it pursues this end, the effect of such commentary is to *compound* efforts to curtail the experience of deciding on/in the exception – efforts that are already well under way at Guantánamo Bay. For notwithstanding all the liberal heartache that they provoke, the law and legal institutions of Guantánamo Bay are working to negate the exception *in tandem with*, rather than in opposition to, what Schmitt identified as ‘[t]he tendency of liberal constitutionalism to regulate the exception as precisely as possible’.¹²⁶

To corrode the experience of the exception in this way is to eviscerate the experience of politics as Schmitt characterized it. That is, it is to lose or avoid the experience of deciding in circumstances where no person or rule offers assurance that the decision that one takes will be the right one or, indeed, whether one does in fact exert the decisive authority that one envisages oneself to hold. The exception poses, as Schmitt observed, ‘a case of extreme peril’ because it permits both righteousness and self-knowledge to be placed at risk; because the decision taken remains ‘independent of the correctness of its content’.¹²⁷ Notwithstanding all the talk of threats that surrounds Guantánamo Bay, it is this sense of peril that is lacking within its legal order. Moreover, it may be, in part, the absence of such a risk that contributes to the strange assurance with which Secretary England announces, as he did at a press briefing on 8 September, ‘we have a lot of very bad people’ in detention at Guantánamo Bay.¹²⁸

It is, therefore, to a renewed sense of the exception and the decision that ‘emanates from nothingness’¹²⁹ within law, rather than to a vehement insistence upon the

¹²³ *Ibid.*, at 13, 15, 31, in the second instance, quoting S. Kierkegaard, *Repetition* (1843).

¹²⁴ See, e.g., Koh, *supra* note 33; Jinks and Sloss, *supra* note 43; and Butler, *supra* note 57.

¹²⁵ See, e.g., Pease, ‘The Global Homeland State: Bush’s Biopolitical Settlement’, 30:3 *boundary 2* (2003) 1, at 13–16 and note 5; Balfour and Cadava, ‘The Claims of Human Rights: An Introduction’, 102.2/3 *The South Atlantic Quarterly* (2004) 277, at note 24; Hutnyk, ‘Razor Wire Imperialism’, 489 *Weekly Worker* (17 July 2003), available at <http://www.cpgb.org.uk/worker/489/detention.html>.

¹²⁶ Schmitt, *supra* note 5, at 14.

¹²⁷ *Ibid.*, at 31.

¹²⁸ US Defense Department News Briefing, 8 Sept. 2004, available at <http://usinfo.state.gov/dhr/Archive/2004/Sep/09-891868.html>

¹²⁹ Schmitt, *supra* note 5, at 32.

norm, that I suggest turning in order to raise doubts about the work of Secretary Rumsfeld, Secretary England and the other 'good' people of Guantánamo Bay. By understanding Guantánamo Bay as a legal order dedicated to the annihilation or codification of the exception, we may come to appreciate the scope for political action within such a juristic zone. Recognizing in herself or himself Schmitt's exceptional decision-maker, the functionary implementing a programme might come to experience that programme as a field of decisional possibility and impossibility, with all the danger and difference that that implies. It is precisely this experience that critics of the Guantánamo Bay programme might strive to evoke in Secretary England and in the other officials upon whose concrete decisions that programme depends, as well as in the audiences with which they – critics and officials alike – perpetually dance.

