

# THE BLACK FLAG: GUANTÁNAMO BAY AND THE SPACE OF EXCEPTION

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**ABSTRACT.** The American prison camp at Guantánamo Bay has often been described as a lawless space, and many commentators have drawn on the writings of Giorgio Agamben to formalize this description as a 'space of exception'. Agamben's account of the relations between sovereign power, law and violence has much to offer, but it fails to recognize the continued salience of the colonial architectures of power that have been invested in Guantánamo Bay, is insufficiently attentive to the spatialities of international (rather than national) law, and is unduly pessimistic about the politics of resistance. Guantánamo Bay depends on the mobilization of two contradictory legal geographies, one that places the prison outside the United States to allow the indefinite detention of its captives, and another that places the prison within the United States in order to permit their 'coercive interrogation'. A detailed analysis of these interlocking spatialities – as both legal texts and political practices – is crucial for any critique of the global war prison. The relations between law and violence are more complex and contorted than most accounts allow, and sites like Guantánamo Bay need to be seen not as paradigmatic spaces of political modernity (as Agamben argues) but rather as potential spaces whose realization is an occasion for political struggle not pessimism.

*Key words:* law, torture, space of exception, 'war on terror', war prison

Even at this hour, beads of sweat crawled across his scalp. By the time the sun was up it would be another day for the black flag, which the Army hoisted whenever the temperature rose beyond reason. An apt symbol, Falk thought, like some rectangular hole in the sky that you might fall into, never to reappear. A national banner for Camp Delta's Republic of Nobody, populated by 640 prisoners from forty countries, none of whom had the slightest idea how long they would be here.

(Dan Fesperman,  
*The Prisoner of Guantánamo*)

## Bare life

In the early morning of 10 June 2006 three prisoners held at the military detention facility at the US Naval Station at Guantánamo Bay, Cuba, two from Saudi Arabia and one from Yemen, were found

dead in their cells. Although the three men had been detained without trial for several years and none of them had court cases or military commissions pending (none of them had even been charged), the commander of the prison dismissed their suicides as 'not an act of desperation but an act of asymmetric warfare against us'. Although the three men had been on repeated hunger strikes which ended when they were strapped into restraint chairs and forced by nasal tubes, the US Deputy Assistant Secretary of State for Public Diplomacy described their deaths as 'a Public Relations move to draw attention' – to what, she did not say – and complained that since detainees had access to lawyers, received mail and had the ability to write to families, 'it was hard to see why the men had not protested about their situation'. Although by presidential decree prisoners at Guantánamo are subject to indefinite detention and coercive interrogation while they are alive, when President George W. Bush learned of the three deaths he reportedly stressed the importance of treating their dead bodies 'in a humane and culturally sensitive manner'.<sup>1</sup>

It is in the face of contradictions such as these that many commentators have seen Guantánamo Bay as an iconic example of that paradoxical space which Giorgio Agamben describes as 'the state of exception'. In what follows I examine this characterization in detail, and pay particular attention to the tortured geographies that wind in and out of the war prison. I begin with a summary account of Agamben's argument, but while I will be critical of a number of his formulations I intend this article primarily as a critique of the Bush administration's political theology rather than Agamben's political philosophy.

Agamben's account turns on the rotations between sovereign power, the state of exception and bare life.<sup>2</sup> It is a sophisticated thesis, drawing on a heterodox group of European thinkers – Benjamin, Foucault, Heidegger and Schmitt – and relying on a series of argumentation sketches plucked from classical, medieval and early modern law to establish the modalities of sovereign power. Its pivot is the dismal

figure of *homo sacer*, a position Agamben says was conferred by archaic Roman law upon those who could not be sacrificed according to ritual (because they were outside divine law: their deaths were of no value to the gods) but who could be killed with impunity (because they were outside juridical law: their lives were of no value to their contemporaries). Critics have treated Agamben's reading as partial and partisan: 'extravagant' according to one and 'a myth' according to another.<sup>3</sup> But his purpose is neither textual nor historical. Instead, he projects this figure into the present, as a sort of cipher or bearer of what he calls 'bare life', by making two moves.

First, Agamben argues that *homo sacer* emerges at the point where sovereign power suspends the law, whose absence thus falls over a zone not merely of exclusion but of abandonment. The production of such a space – the state of exception – is central to Agamben's account of modern biopolitics. This space is produced through a speech-act, or more accurately a decision in the sense of 'a cut in life', that is at once performative and paradoxical. It is performative because it draws a boundary between politically qualified life and merely existent life exposed and abandoned to violence: 'bare life'. 'However sacred man is,' Benjamin wrote in his *Critique of Violence*, 'there is no sacredness in his condition, in his bodily life vulnerable to injury by his fellow men'.<sup>4</sup> If this remark is read as bodily life made vulnerable to injury (through a sovereign decision) then it becomes clear that bare life is at once 'immediately politicized but nevertheless excluded from the polis'.<sup>5</sup> The cut that severs bare life from politically qualified life is paradoxical, however, and all forms of life are thereby made precarious, because the boundary it enacts is mobile, oscillating: in a word (Agamben's word) *indistinct*. This is necessary not a contingent condition, moreover, and crucially affects both time and space. First, the exception implies a non-linear temporality: 'The exception does not subtract itself from the rule; rather, the rule, suspending itself, gives rise to the exception and, maintaining itself in relation to the exception, first constitutes itself as a rule'. Second, the exception – literally that which is 'taken outside' – is effected through a distinctive spatiality. For the exception 'cannot be included in the whole of which it is a member and cannot be a member of the whole in which it is always already included'. The mapping of such a space requires a topology, Agamben concludes, because only a twisted cartography of power is capable of folding such propriety into such perversity.<sup>6</sup>

Second, Agamben argues that in the contemporary world the state of exception has become the rule. Writing while Hitler's armies advanced on Paris, Benjamin had warned that 'the "state of emergency" in which we live is not the exception but the rule', and Agamben endorses and enlarges this claim.<sup>7</sup> Although he notes that concentration camps first emerged in colonial spaces of exception in Cuba and South Africa, he passes over these (and the colonial architectures of power that produced them) to focus on Nazi concentration camps and, in particular, Auschwitz. He treats the concentration camp as 'the materialization of the state of exception', 'the pure, absolute and impassable biopolitical space' in which juridical rule and bare life enter into 'a threshold of indistinction', through which 'law constantly passes over into fact and fact into law, and in which the two planes become indistinguishable'. Unlike Foucault, who identified the Third Reich as a paroxysmal space in which sovereign power and biopolitics coincided, however, Agamben insists that none of this is a rupture from the project of modernity. On the contrary, his narrative is teleological, and he identifies the camp as 'the hidden paradigm of the political space of modernity', and suggests that its operations have been unfurled to such a degree that today, through the multiplication of the camp as a carceral archipelago, the state of exception has 'reached its maximum worldwide deployment'. By this means that sovereign power has produced both an intensification and a proliferation of bare life. If this seems exorbitant, Agamben is perfectly undeterred. 'The normative aspect of law can thus be obliterated and contradicted with impunity,' he continues, through a constellation of sovereign power and state violence that 'nevertheless still claims to be applying the law'. In such a circumstance, he concludes, the camp has become 'the new biopolitical *nomos* of the planet' and 'the juridico-political system [has transformed] itself into a killing machine'.<sup>8</sup>

As Agamben has developed this critique it is, above all, the 'war on terror' that has come to be in his sights. He argues that the *locus par excellence* of this new state of exception is the US Naval Station at Guantánamo Bay, where from January 2002 men and boys captured during the US invasion of Afghanistan have been imprisoned. He draws parallels between the legal status of prisoners in this camp and prisoners in Auschwitz: their situations, so he says, are formally – 'paradigmatically' – equivalent. Prisoners of a war on terror who are denied the status of prisoners of war, Agamben argued

that their legal status is erased. They are not legal subjects but ‘legally unnameable and unclassifiable being[s]’, ‘the object of a pure *de facto* rule’ or a ‘raw power’ whose modalities are ‘entirely removed from the law and from judicial oversight’. In the detainee at Guantánamo, he concludes, ‘bare life reaches its maximum indeterminacy’.<sup>9</sup>

### Law, violence and the space of exception

Agamben often refers to the state of exception as the *space* of exception, but its spatiality has received little sustained analysis. Indeed, Michael Dillon has argued that:

The topology of sovereign power is not in fact a space at all. It is a dividing practice. As such it does work. That work is not simply or even primarily, however, to command the domain of the inside of law and of order. Rather, it is to effect a passage between inside and outside, law and violence...<sup>10</sup>

Dillon is I think correct – apart from his first sentence. Conceptions of space need not be limited to the container model that he rejects, and I prefer to treat space as a performance, a doing, because only in this way do I think it possible to show how the passages between inside and outside, law and violence, are effected.<sup>11</sup>

In what follows, I trace the convolutions of ‘inside’ and ‘outside’ through the instruments of law and violence. Agamben argues that the space of exception is typically produced through the declaration of a state of emergency that becomes the ground through which sovereign power constitutes and extends itself. Three days after the terrorist attacks on the Pentagon and the World Trade Center on 11 September 2001, President Bush declared a National Emergency ‘by reason of [those] attacks and the continuing and immediate threat of further attacks on the United States’. This was followed by a further declaration on 23 September 2001 to deal with ‘the unusual and extraordinary threat to the national security, foreign policy and economy of the United States’ by ‘grave acts of terrorism and threats of terrorism committed by foreign terrorists’. The emergency has been renewed in each subsequent year, and Agamben suggests that Bush ‘is attempting to produce a situation in which the emergency becomes the rule’: in which ‘provisional and exceptional measures’ are transformed into ‘a technique of government’. In fact, however, the

cascade of national emergencies did not begin with 9/11. Bush has continued no less than seven previous National Emergencies and declared eight others. For the United States, it seems, and despite the language used to proclaim them, national emergencies are not so ‘unusual and extraordinary’ after all. But what attracts Agamben’s attention, and what distinguishes the double emergencies declared in September 2001, is their proximity to a supposedly new kind of war (the ‘war on terror’) and the legal formularies that have been mobilized around it.<sup>12</sup>

Yet these emergencies and the war that they have been used to license involve a spatiality that is largely foreign to Agamben’s account. His brief history of the state of exception in Europe and the United States is shaped by the exigencies of war: the American Civil War, the Franco-Prussian War, the First World War and the Second World War. But his focus is on suspensions of national law during states of emergency declared by France, Germany, Italy, Britain and the United States. The connections between sovereign power and the state of exception are thus always framed by a single state, and the transnational implications receive little attention.<sup>13</sup> Yet most of the emergencies and ‘exceptional measures’ that have punctuated Bush’s presidency fold the national into the transnational. They address other states – Afghanistan, Cuba, Iran, Iraq, Libya, Macedonia and Serbia, Syria, and Zimbabwe among them – whose actions have, at one time or another, been held to pose a threat to the national security and foreign policy of the United States. The ‘war on terror’ has accentuated the political and juridical folds between the national and the transnational, but this process was underway long before 9/11, and the relations between sovereign power, law and spatiality have been complicated in two crucial ways that bear directly on Guantánamo Bay.

In the first place, the Westphalian model of sovereignty has been compromised as states have increasingly asserted prescriptive jurisdiction beyond their borders.<sup>14</sup> Legal scholar Kal Raustiala argues that ‘sovereignty has become progressively “unbundled” from territoriality’. Although extra-territoriality is central to the prosecution of the ‘war on terror’, American attempts to decouple law and location have a much longer history and do not derive uniquely from the global assertion of military force. Some of them have addressed transnational economic activities and criminal transactions that have effects within the United States; indeed, claims like this are made in most of the declarations

of National Emergency. Others have extended constitutional protections to citizens and (in certain circumstances) aliens beyond the borders of the United States; one of the central questions posed by Guantánamo Bay concerns the reach of US federal law and the access of prisoners to US courts to challenge their detention. That this is indeed a question bears emphasis. The Bush administration has resuscitated the doctrine of the unitary executive, in which the President's actions as commander-in-chief are supposedly beyond the law. This perverse reading of the Constitution holds that the executive can override both the judiciary and the legislature. As the profoundly conservative jurist-cum-philosopher Carl Schmitt had it, 'Sovereign is he who decides the exception': and Bush has insisted that he is 'the decider'. But national emergencies and the special powers that derive from their proclamation cannot be reduced to a decisionism; neither does the juridical process meekly fold its tent when it hears the martial drums of the commander-in-chief. As Amy Bartholomew argues, a succession of legal challenges in US courts has shown that 'law will not willingly abdicate its role to a state of exception and will continue to act as an obstacle to the arbitrary authority of the executive branch'.<sup>15</sup>

In the second place, international law also modulates the actions of the United States. The complicated spatiality that Agamben attributes to the (national) state of exception is compounded by the spatialities of international law, which by its very nature is decentred, without a unitary sovereign to ground or guarantee its powers; its provisions are distributed through a congeries of conventions, treaties and organizations. For this reason, nineteenth-century legal philosopher John Austin declared that international law is not really law at all: laws could only be 'properly so called' if they were 'commands of a sovereign', which made international law merely 'law by close analogy'.<sup>16</sup> As I will show below, the Bush administration would clearly like to have the United States regarded as the global sovereign, and it has repeatedly announced that its prosecution of the 'war on terror' will not be hamstrung by what it views as outmoded legal protocols. When he was Under Secretary of Defense for Policy, Douglas Feith declared that nothing in the Constitution required the President to seek the 'approval' of non-Americans before acting to protect the United States. This may have been rhetorically effective but it was also thoroughly disingenuous; it reduced international law to another decisionism when Feith knew very well that inter-

national law imposes obligations rather than merely invites approval. This presumably explains why he vilified 'legal lines of attack' as a form of 'asymmetric warfare' (*sic*) deployed to constrain America's 'global freedom of action'.<sup>17</sup> But legal constraints on the 'war on terror' were not so many external impositions and irritants; they were endorsed (and vigorously upheld) by law officers and others within the State Department and even the Pentagon. Although Bush claimed that he had the power to suspend the Geneva Conventions in prosecuting the war in Afghanistan, for example, he elected not to do so; instead, he asserted that they did not apply to those fighting for al-Qaeda or the Taliban. Yet the memoranda exchanged between the Departments of Justice and Defense and the State Department make it plain that Bush's actions were not undertaken without facing down a series of legal challenges. Other provisions of international law are non-derogable: in particular, the prohibition against torture is an absolute right to which there are no exceptions.<sup>18</sup> Here, too, as I will also show, the Bush administration engaged in a frenzy of legal argument (and legerdemain) in order to underwrite the 'coercive interrogation' of prisoners held at Guantánamo and other sites in the global war prison.

Several critics have described the Bush administration as waging 'a war on law', and the President plainly shares a Feith-based impatience with its scruples. 'International law?' Bush responded to a reporter in December 2003. 'I'd better call my lawyer. I don't know what you're talking about by international law'.<sup>19</sup> More particularly, it has become common to treat Guantánamo Bay as a 'lawless place' that is 'beyond the reach of national and international law'; a place where sovereign power has been mobilized 'outside the rule of law'; a wild zone subject to 'a lawless and prerogatory power', where 'the law is effectively suspended in both its national and international forms' and where sovereign power is extended 'in excess of the law'; a 'law-free zone'; and a legal 'black hole'. Agamben himself describes the state of exception as 'a kenomatic state', a vacant space limned by the 'emptiness of law'.<sup>20</sup> This has become a commonplace critique on both sides of the Atlantic, but I want to draw on the previous paragraphs to qualify its rendering of the global war prison in three ways. First, I seek to expose the architectures of colonial power which Agamben more or less ignores, because the shadows that fall over the contemporary space of exception are not limited to those of the

Twin Towers of the World Trade Center or the chimneys of Auschwitz: the imbrications of law and violence which shape the colonial present have a longer genealogy that needs to be recovered as part of the process of critique. Second, and following directly from these considerations, I address the international dimensions of law and violence that Agamben glosses over, not because I think these function as a *deus ex machina* whose activation can rescue *homines sacri* from their fate but, on the contrary, because international law – in its colonial past and in our colonial present – marks a crucial site of political struggle. Thirdly, this in its turn requires a careful consideration of the possibilities of resistance that is largely absent from Agamben's account, because there is nothing ineluctable about the production or proliferation of spaces of exception. These claims run throughout the discussion that follows, where I triangulate 'Guantánamo' from three points. First, I plot the contours of Euro-American exceptionalism in order to mark the colonial, colonizing gestures through which it has been both authored and authorized; Second, I rattle the colonial chain that yokes the law to violence in Guantánamo's past; finally, I trace the detailed legal and para-legal production of Guantánamo as a staging-post for the contemporary 'war on terror'. *En route*, it will become clear that Bush does indeed know what 'international law' is about – and that he has repeatedly called his lawyers.

### Euro-American exceptionalism

In their attempt to unravel the connections between what they call 'our brutal global state of war' and 'the age of Empire', Michael Hardt and Antonio Negri begin with the politico-juridical intersections between two exceptions, one European and the other American.<sup>21</sup> These intersections are also effacements, however, and to show why this is so I want to revisit Agamben's reading of the work of Carl Schmitt to draw out the shadows of colonial power cast by these two exceptions. Part of Schmitt's purpose was to show that in Europe in the sixteenth and seventeenth centuries the theological-moral model of the 'just war' sanctioned by the medieval Christian Church against infidels yielded to the secular-juridical model of a regulated and rationalized war between formally equivalent sovereign states. In this economy of death warring sovereigns were required to recognize each other as legal equals, and on the field of battle their subjects were obliged to recognize each other *as* subjects. There were thus,

at least in principle, mutually acknowledged limits to enmity and violence, and within this space – the space of the *jus publicum Europaeum* – sovereign power operated, so Schmitt claimed, through normative regulation. He argued that unlimited enmity and unrestrained violence were now bracketed and projected 'beyond the line' into the non-European (and specifically the 'New') world. As William Rasch puts it, 'Europe sublimate[d] its animality by establishing the Americas as an extralegal zone in which bestial deeds [could] be "acted out" far away'. Schmitt identified this zone of alterity – the space supposedly vacant for the play of colonial power – with 'the state of nature in which everything is possible' and also with the state of exception which 'bases itself in an obviously analogous fashion on the idea of delimited, free and empty space' understood as a 'temporary and spatial sphere in which every law is suspended'. For Agamben, however, this was no analogy. Instead, the state of nature and the state of exception emerge as 'but two sides of a single topological process in which what was presupposed as external (the state of nature) now reappears, as in a Möbius strip or a Leyden jar, in the inside (as state of exception)'.<sup>22</sup>

This is a contentious but highly effective fiction, a celebration of a particular constellation of political and economic power, and Schmitt's work has to be approached with the utmost critical vigilance (in relation to both Europe and 'not-Europe').<sup>23</sup> His central, elegiac point was that the line – a colonial meridian – had slowly dissolved by the early twentieth century, and that the wild zones of colonial violence had appeared within the ruins of the European order. What had happened, and according to Agamben is still happening, is that the 'juridically empty' space of the state of exception 'has transgressed its spatiotemporal boundaries and now, overflowing outside them, is starting to coincide with the normal order, in which everything again becomes possible'. The dissolution of the line should not be read as a reversion to Hobbes' state of nature, however, but rather as the emergence of the state of exception as what Agamben sees as 'the permanent structure of juridical-political *de*-localization and *dis*-location'. What was once confined is now loose in the world.<sup>24</sup>

Two conclusions follow from this rough outline that bear directly on the production of 'Guantánamo'. First, by implication, the space of normative regulation was produced by European states asserting their sovereignty over the world beyond the line and co-producing through those assertions



a vast colonial space of exception. But its 'topographies of cruelty', as Achille Mbembe calls them, cannot be reduced to and hence derived from a space of absolute lawlessness.<sup>25</sup> Colonial wars were raw, ruthless, feral; but the violence of colonialism was not confined to warfare. The law was intimately involved in the modalities of colonial violence, and international law bears the marks of those colonial predations; its locus is drawn not only through relations of sovereign states, therefore, but also through what Peter Fitzpatrick calls 'the colonial domination of people burdened by racial difference'.<sup>26</sup> This is not a peculiarity of international law, which shares in a generalized gallery of imaginative geographies where the other is marked as irredeemably other, and this cultural carapace is extremely important. The juridical and the cultural operate together, and the racializations that they jointly license have been given a particular force by President Bush's declaration of the 'war on terror' as a war of 'Civilization' against the barbarians at the gates (and within the walls). This invocation of an *indivisible* global civilization works to make the exception – understood as a zone of indistinction between the law and its suspension – *invisible* by conjuring a shape-shifting, nomadic enemy who inhabits the shadows beyond the human. This is a strategy that does not so much *sense* the presence of the enemy, the midnight scurrying in the skirting-board, as *produce* the enemy through the classifications of its own unnatural history. Schmitt himself warned that to confiscate the word 'humanity' and mobilize it to wage war would mean 'denying the enemy the quality of being human and declaring him to be an outlaw of humanity'. By this means, he continued, war can 'be driven to the most extreme inhumanity'. In short, 'to fight in the name of humanity does not eliminate enmity', as Andrew Norris observes: 'it only makes one's enemy the representative or embodiment of the inhuman'.<sup>27</sup> These reductions, given form through both the law and its suspension, reactivate a colonial past in a colonial present:

These fine ethnic distinctions effectively revive a colonial economy in which inhumanity, measured against the benchmark of healthier imperial standards, diminishes human rights and can defer human recognition. The native, the enemy, the prisoner and all the other shadowy 'third things' lodged between animal and human can only be held accountable under

special emergency rules and fierce martial laws. Their lowly status underscores the fact that they cannot be reciprocally endowed with the same vital humanity enjoyed by their well-heeled captors, conquerors, judges, executioners and other racial betters.<sup>28</sup>

Second, by extrapolation, the United States has sought not only to displace 'old Europe' (Rumsfeld's dismissive phrase) but also to arrogate to itself the power to draw new horizons of visibility and to constitute itself 'as the sovereign who transcends the law and thus assures its meaning and enforcement'. In seeking to occupy the space of the global sovereign, this strategy renders international law as 'normal law', 'law properly so called' in something like Austin's sense, by declaring its bracketing or suspension. The logic articulated through the 'war on terror' thus derives directly from Schmitt's political theology. It asserts that if 'international law is to be seen as universal and international politics as ethical,' then, as Costas Douzinas remarks, 'one power must be exempted from its operations, and through its forceful intervention and sovereign interpretation of the law, give it its desired seamlessness'. It also gives it its ruthlessness, for the humanism that this licenses is what Douzinas calls a 'military humanism' that effaces its uncounted others as so many mute bearers of bare life. This is the pivot around which the radical critique of American Empire turns. Where once the United States claimed to be exempt from the corruptions of European forms of sovereignty, Hardt and Negri argue that it now claims exemption from the law itself. And where once war was regulated, subordinated to international law, it is now regulating, exploiting the conjunctions between violence and the law.<sup>29</sup>

### Guantánamo and the colonial past

Colonialism frequently operates under the imprimatur of law, both in the past and (as the people of Palestine and Iraq know only too well) in the present, and its violent assaults on land, liberty and life are regularly authorized and articulated through legal formularies. The legislative and interpretive fields, the actions of rulers and judges, are thus suffused with violence. If their metropolitan operation 'takes place in a field of pain and death', as Robert Cover once observed presciently, then how much more anguished is their colonial mode of address? If their normal powers are 'realized in the flesh', as he also

remarked, then how much more painful is their emergency invocation?<sup>30</sup>

Guantánamo Bay bears the marks of these ligatures between colonialism, violence and the law. Its modern history has been shaped by military encounters between three imperial powers – Spain, the United States and the Soviet Union – and by enduring military occupation. Cubans rose against their Spanish occupiers three times in the nineteenth century: in 1868–1878, 1879–1880 and 1895–1898. One of the principal architects of the final War of Independence was the exiled writer José Martí, who was killed in a battle with the Spanish army just one month after he returned to the island. It was one of his poems that later provided the inspiration for the song ‘Guantánamera’. Alarmed by the strength and success of the revolutionaries, the Spanish military governor sought to cut off their support in the countryside through a policy of *reconcentración*. Hundreds of thousands of peasants were forcibly relocated into barbed-wire concentration camps close to the towns and cities, where many (some reports said as many as one half) of them were left to starve to death. An American Senator who travelled through the four western provinces described a landscape of terrible, terrifying indistinction: ‘It is neither peace nor war. It is concentration and desolation’. Public opinion in the United States was inflamed by press reports of these atrocities, but the desire for military intervention was also motivated by thoroughly instrumental economic and strategic interests. In fact the United States had made repeated attempts to purchase Cuba from Spain in the closing decades of the nineteenth century, and it was only after the last of these offers had been rejected in 1897 that Washington, buoyed by the rising tide of public opinion, found a pretext and in 1898 declared war on Spain. The ironies multiply. Then, as now, this was an image war. Photographs of the effects of Spain’s counter-insurgency operations heightened public condemnation of its oppressive colonial regime. This is the origin of the apocryphal telegram from William Randolph Hearst to Thomas Remington in Havana: ‘You furnish the pictures, and I’ll furnish the war’. And, as Daniel Ross wryly observes, ‘the American prize for its outrage at Spanish concentration camps in Cuba has become the right to run its own camp on the same territory’.<sup>31</sup>

When peace was concluded later that year Spain relinquished all its overseas possessions but Cuba, far from being free, remained under American military occupation for three further years. In 1901 the

United States stipulated its conditions for Cuban independence through provisions set out in the Platt Amendment to the Appropriations Bill in the US Congress that authorized continued financing of the occupation. The Cuban Constitutional Assembly rejected these provisions as an encroachment on the independence and sovereignty of the island, but the United States insisted that military occupation would not end without their incorporation into the constitution. They were narrowly endorsed by the Assembly in 1902, and reserved to the United States the right to intervene in the future ‘for the preservation of Cuban independence’ and, to that end, required Cuba to sell or lease to the United States ‘lands necessary for coaling or naval stations’.<sup>32</sup> Accordingly, Guantánamo Bay was leased from Cuba in February 1903 ‘for the time required for the purposes of coaling and naval stations’ and the United States was permitted ‘to do any and all things necessary to fit the premises for use as coaling and naval stations only, and for no other purpose’ (emphasis added). The lease could only be terminated with the consent of both parties or through the unilateral abandonment of the base by the United States. Its central provision read thus:

While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas.

Amy Kaplan argues that this language imposes a hierarchy between recognition and consent, ‘rendering Cuban sovereignty over Guantánamo Bay contingent on the acknowledgment of the United States, in exchange for which Cuba agrees to cede sovereignty over part of the territory it never controlled’. Many commentators have argued that in doing so the lease locates Guantánamo in an ambiguous space between the ‘ultimate sovereignty’ of Cuba and the ‘complete jurisdiction’ of the United States.<sup>33</sup>

In 1959, following the revolution, the government of Cuba tried unsuccessfully to terminate the lease, and since then it has maintained that the presence of American armed forces on Cuban soil is an illegal occupation (as President Fidel Castro puts it,

'a knife in the heart of Cuba's sovereignty'). At the height of the Cuban missile crisis in October 1962, President John F. Kennedy rejected the advice of his Secretary of Defense Robert McNamara to propose a timetable for US withdrawal from Guantánamo as a *quid pro quo* for the removal of Soviet medium-range missiles and bombers from the island. Kennedy also ignored requests from both Khrushchev and Castro to return Guantánamo to Cuba. The base's perimeter was strengthened as a symbolic frontier between capitalism and communism, and Guantánamo remained under American occupation throughout the Cold War and beyond. Over the years the base provided logistical support for US military interventions in Cuba as well as the Dominican Republic, Guatemala, Grenada, Nicaragua and Panama. Before the final decade of the twentieth century, however, its role was being reassessed, and in 1988 James H. Webb, Secretary of the Navy, thought it 'reasonable to conclude that we will lose our lease in Guantánamo Bay in 1999'. His conclusion was premature; the lease was retained. From 1991 to 1994 Guantánamo Bay was used to provide detention camps for 36 000 refugees from the military coup in Haiti who were denied entry into the United States, and again in 1994–1995 to imprison 21 000 Cubans seeking asylum in the United States. The forced repatriation of the detainees was justified on the grounds that they were not entitled to constitutional protection until they were at or within the borders of the United States.<sup>34</sup> This claim traded on Guantánamo's ambiguous location, but the construction of detention camps also violated the terms of the lease, which allowed the land to be used as a coaling or naval station and, as I noted above, 'for no other purpose'. A prison camp is an illegal appendix to the original agreement, and yet it became the central mission of the base.<sup>35</sup>

When Kaplan describes Guantánamo as 'haunted by the ghosts of empire', she is surely correct. She also suggests that its history reveals 'a logic grounded in imperialism, whereby coercive state power has been routinely mobilized beyond the sovereignty of national territory and outside the rule of law'. Much of that is accurate too; but, as I have shown, the base has also emerged through a long process of legal argument, and it subsists through legal formularies – bundles of memoranda and minutes, acts and amendments, treaties and the terms of the lease itself – that, taken together, have produced a legal impasse: a stand-off between the United States (which insists it has a right to occupy

Guantánamo) and Cuba (which has declared the continued occupation illegal). For this reason it seems necessary to add that the space of Guantánamo also derives from law at a standstill. It is a zone of indistinction where the legalized and the extra-legal cross over into one another.<sup>36</sup>

### Guantánamo and the colonial present

The Bush administration has made much of the presumptive novelty of the 'war on terror', but the selection of Guantánamo as a prison camp, the designation of its inmates as 'unlawful combatants' and the delineation of a regime of interrogation do not depart from the historical templates that shaped the base's colonial history and their mobilization of legal protocols. In particular, Fleur Johns argues that:

The plight of the Guantánamo 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 are above all works of legal representation and classification. They are spaces where law and liberal proceduralism speak and operate *in excess*.<sup>37</sup>

This seems to me to be exactly right; but what is the imperative behind such excess? What demands such an involuted legalism through which the law is contorted into ever more baroque distinctions? The answer is, in part, a matter of indeterminacy: the Bush administration did not speak with a single voice (until the President spoke). For far from the reactivation of the prison camps at Guantánamo signalling the retreat of law from the field of battle, there was a vigorous debate between the Departments of Defense and Justice and the State Department over the prosecution of the 'war on terror'. Legal advisers and political principals constantly invoked legal precedents and advanced legal interpretations to support their rival claims. The result, as Christiane Wilke argues, was that Guantánamo was not placed outside the law: 'the applicable legal regulations [were] too dense to allow such a claim'. But the result of these contending arguments – which eventually spilled over into the courts – was to confine prisoners in what Wilke calls 'a place of *rightlessness* in a context that [was] not *lawless*'.<sup>38</sup> And this supplies the other part of the explanation: the President and his closest advisers were determined to treat the prisoners at



Guantánamo as legal objects rather than legal subjects in order to wage the 'war on terror' through their very bodies. This virulently biopolitical strategy involved indefinite detention and 'coercive interrogation' but, as I now show, these required the administration to mobilize two radically different, contradictory legal geographies.

### Extra-territoriality and indefinite detention

The immediate objective, on which both sides seem to have agreed, was to place selected prisoners taken during the war in Afghanistan beyond the reach of any federal district court that might entertain a *habeas corpus* petition. A writ of *habeas corpus* orders a prisoner to be brought before a court to determine whether s/he has been imprisoned lawfully. Congress granted all federal courts jurisdiction under title 28 of the United States Code to issue such writs to release from custody prisoners held by state or federal agencies in violation of the Constitution.<sup>39</sup> Here the ambiguous status of Guantánamo was assumed to confer a distinct advantage over other sites that had been considered to be similar to the US bases on Midway and Wake. These were former Pacific Island Trust territories administered by the United States that were included within the federal district of Hawaii. Guantánamo, it was argued, was beyond the reach of any district court because, while the United States exercised 'complete jurisdiction' over the base, it was 'neither part of the United States nor a possession or territory of the United States'.<sup>40</sup> One White House counsel revealed the administration's double-speak with unusual clarity: Guantánamo's indeterminate location 'would eliminate an important legal ambiguity' by denying prisoners held there access to US courts. The reactivation of the Cuban camps thus produced precisely the space envisaged in the President's Military Order of 13 November 2001, in which it would be possible to detain and try suspects 'for violation of the laws of war and other applicable laws' – in effect, *acknowledging* the supremacy of the rule of law – while simultaneously *suspending* 'the principles of law and rules of evidence generally recognised in the trial of criminal cases in the United States district courts'.<sup>41</sup>

This performance of the space of Guantánamo would eventually be contested. In December 2003 the US Court of Appeals for the 9th Circuit provided a radically different reading of the original lease. The majority noted that in attributing 'ulti-

mate sovereignty' to Cuba, the lease implied that Cuba's sovereignty was residual in a temporal sense, from which it followed that, during its occupation of the base, 'the United States possesses and exercises all of the attributes of sovereignty'. Since Cuba does not retain any substantive sovereignty while the base is occupied by the United States, the court concluded that 'sovereignty vests in the United States', a finding which (as it recorded) is consistent with the conduct of the United States, which has routinely treated Guantánamo 'as if it were subject to American sovereignty'. In short, the majority determined that Cuba is the reversionary sovereign while the United States is the temporary sovereign: but sovereign none the less.<sup>42</sup> In June 2004, the Supreme Court in a separate case ruled that it had jurisdiction to hear *habeas corpus* petitions from those imprisoned at Guantánamo. The administration had contested the extra-territorial application of federal law but the majority argued that '[w]hatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the *habeas* statute with respect to persons detained within the territorial jurisdiction of the United States'. The majority did not think it necessary to establish sovereignty; the Achilles' Heel of the administration's case arose precisely because the United States exercised 'complete jurisdiction and control' over Guantánamo, in which case it was within the territorial jurisdiction of the United States. Since the government accepted that District Courts had jurisdiction over federal agents and other American citizens employed at Guantánamo, and since non-resident aliens had access to United States courts to hear petitions of *habeas corpus*, the majority found that 'the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing'. In his dissenting opinion, however, Justice Scalia complained that in its ruling 'the Court boldly extends the scope of the *habeas* statute to the four corners of the earth'. Scalia roundly dismissed arguments based on jurisdiction; what was crucial, he insisted, was that Guantánamo was not 'a sovereign dominion'. Hence 'the Commander in Chief and his subordinates had every reason to expect that the internment of combatants at Guantánamo Bay would not have the consequence of bringing the cumbersome machinery of our domestic courts into military affairs'.<sup>43</sup>

This was precisely their expectation. The admin-

istration's original provisions and determinations, elaborated through a series of detailed memoranda, were designed to produce a convergence between sovereign power and governmentality through what Judith Butler describes as 'a law that is no law, a court that is no court, a process that is no process'. She sees this as an instrumental, expedient, para-legal tactic, in which both detention and trial are determined by discretionary judgements that 'function within a manufactured law or that manufacture law as they are performed'.<sup>44</sup> 'Guantánamo' was taken to signify not only an ambiguous space – a grey zone over which the United States claims jurisdiction but not sovereignty – but also a place of indeterminate time:

As a territory held by the United States in perpetuity over which sovereignty is indefinitely deferred, the temporal dimensions of Guantánamo's location make it a chillingly appropriate place for the indefinite detention of unnamed enemies in what the administration calls a perpetual war against terror.<sup>45</sup>

### **Intimate geographies and 'coercive interrogation'**

But the imperative of indefinite detention, extending the emergency ad infinitum, jibed against a second objective that interrupted its limbo with the counter-imperative of speed.<sup>46</sup> This is where battle was joined between Defense and Justice on one side and the State Department on the other. The first group argued that the 'war on terror' had inaugurated a new paradigm that required interrogators 'to quickly obtain information from captured terrorists and their sponsors', and in their view this rendered 'obsolete [the] Geneva [Convention]'s strict limitations on questioning of enemy prisoners'.<sup>47</sup> That being so – and law officers in the State Department protested that it was not so: 'a decision that the Conventions do apply [to all parties in the war in Afghanistan] is consistent with the plain language of the Conventions and the unvaried practice of the United States' – interrogations would have to be conducted beyond the prosecutorial reach of both the federal War Crimes Act and the Geneva Conventions. Accepting the advice of Defense and Justice, Bush declared that none of the provisions of the Geneva Conventions applied to al-Qaeda prisoners. He also accepted that he had the authority 'under the Constitution to suspend [the] Geneva [Conventions] as between the United States and

Afghanistan', and his favoured legal advisers outlined several ways in which he might do so. Signatories to the Conventions have the right to 'denounce' them, but they are required to give one year's written notice and, if this takes place during an armed conflict, their repudiation is stayed until the end of hostilities. Not surprisingly, Bush decided not to invoke this option (though he reserved the right to do so in future); he preferred the expedient of deeming Taliban prisoners to be 'unlawful combatants' who 'did not qualify as prisoners of war under the Geneva Conventions'.<sup>48</sup> Although there are established procedures to determine the status of prisoners taken during armed conflict, the White House insisted that these were only to be invoked where there was doubt. And in the view of the President's inner circle, reinforced by their political theology, there could never be any doubt.<sup>49</sup>

Here was sovereign power at its most naked, and when the first prisoners from Afghanistan arrived at Guantánamo Bay in January 2002, it was viscerally clear that they were to be reduced to bare life. All legal protections had been visibly withdrawn from them. Photographs of their transportation and incarceration at once displayed and reinforced their reduction to something less than human. They had been chained, gloved, ear-muffled and masked throughout their twenty-seven-hour flight, and arrived soaked in their own bodily waste. Otherwise, the chairman of the Joint Chiefs of Staff explained, they would 'gnaw through hydraulic lines at the back of a C-17 to bring it down'. As they slowly shuffled down the ramp in their jumpsuits, one reporter wrote: '[They] don't look natural. They look like giant bright orange flies'. Then were led off to their makeshift steel-mesh cages at Camp X-Ray.<sup>50</sup> The Department of Defense published its own photographs of their arrival, shackled between guards, kneeling and bound, or transported on stretchers to interrogation and the camp and its cell-blocks, and Butler is surely right to conclude that this was done 'to make known that a certain vanquishing had taken place, the reversal of national humiliation, a sign of successful vindication'.<sup>51</sup>

Camp X-Ray was thrown up in a matter of weeks as a short-term expedient; it was closed in April 2002 when detainees were transferred to cells in the new, more modern Camp Delta, which was intended for long-term incarceration. It consists of four internal camps: Camps 1, 2 and 3 are maximum-security facilities in which prisoners are confined to individual cells with varying levels of restriction and privilege, and Camp 4 is a medium-security fa-

cility in which prisoners live in communal dormitories. The movement of prisoners through the four levels depends on their cooperation with their captors and, in particular, their willingness to provide intelligence of value in the 'war on terror'. And yet a senior CIA analyst soon concluded that many of the prisoners were minor players or wholly innocent people who had been turned in by warlords and local militia, police officers and villagers to settle old scores or to receive bounties of thousands of dollars ('This is enough money to take care of your family, your village, your tribe for the rest of your life'). This was later confirmed by a detailed analysis of Combatant Status Review Board Letters (written determinations produced by the US government) by Seton Hall Law School, which concluded that 93% of the detainees were captured not by US troops at all but by Pakistan or the Northern Alliance and turned over to US custody, and that on the government's own admission 55% of the detainees had not committed any hostile acts against the United States or its coalition allies. Only 8% were characterized as al-Qaeda fighters, and while many were associated with the Taliban in one way or another the detainees include few if any of the ministers, governors, mayors or police chiefs who held office under the Taliban: many were simply conscripts. 'Evidence' used to determine their status as 'enemy combatants' included possession of a Kalashnikov rifle (hardly unusual in the gun-cultures of Afghanistan and the Pakistan border) or a Casio watch (capable of being used as a bomb timer) or the use of a guesthouse (commonplace in Afghanistan).<sup>52</sup>

While this is truly dreadful, our horror ought not to be measured by the innocence or guilt of the prisoners – which in any case is subject to the judicial process denied to them – but by the calculated withdrawal of subjecthood from all of them. The legal determinations of the location of Guantánamo Bay worked in concert with the imaginative geographies of the 'war on terror' to produce what Butler calls 'a zone of uninhabitability':

The exclusionary matrix by which subjects are formed requires the simultaneous production of a domain of abject beings.... The abject designates here precisely those 'unlivable' and 'uninhabitable' zones of social life which are nevertheless densely populated by those who do not enjoy the status of the subject, but whose living under the sign of the 'unlivable' is required to circumscribe the do-

main of the subject. This zone of uninhabitability will constitute the defining limit of the subject's domain.<sup>53</sup>

If the prisoners were 'bodies that mattered', to continue to speak with Butler, then in Washington measures were being contemplated to ensure that they mattered *only* as bodies: as biopoliticized bare life. Throughout the discussion that follows, it is necessary (if extraordinarily difficult) to remember that the Bush administration insisted repeatedly that prisoners would be treated in a manner 'consistent with' the Geneva Conventions. But such a claim – however implausible it turns out to be – relegates the treatment of prisoners to a matter of policy not law; it is not an acknowledgement that the actions of the United States are *subject to* the Geneva Conventions, and this lexical slippage creates a space of executive discretion (Schmitt's 'decision') that would otherwise be (and as a matter of fact *is*) closed by international law.<sup>54</sup> It is through this space, through its performative reductions, that the abstractions of geopolitics are folded into the intimacies of the human body. For this reason, it is also necessary to keep in mind this passage from J. M. Coetzee's *Waiting for the Barbarians*:

[M]y torturers ... were interested only in what it means to live in a body, as a body, a body which can entertain notions of justice only as long as it is whole and well, which very soon forgets them when its head is gripped and a pipe is pushed down its gullet and pints of salt water are poured into it until it coughs and retches and flails and voids itself.<sup>55</sup>

For it was torture that preoccupied the highest reaches of the Bush administration.

Here too Guantánamo conferred a distinctive and, so it was argued, a double advantage. First, it allowed Camp Delta to be constructed as what Joseph Margulies describes as 'the ideal interrogation chamber'. Prisoners are at their most vulnerable when they are first captured, and the art of interrogation is to reopen that window of opportunity for productive questioning. Ideally, this requires a closed space, isolated from interruptions from the outside world – for which the island camps are ideal – so that captors may exert the greatest possible control over their captives and thereby elicit what the US Army's Field Manual 34–52 (Intelligence Interrogation) hails as their 'willing cooperation'. The Manual emphasizes that international law pro-

scribes torture and coercive interrogation, and requires military interrogators to comply with the Geneva Conventions. The US Army has developed its own counter-interrogation strategies as part of its Survival, Evasion, Resistance and Escape (SERE) programmes, however, and these SERE techniques were made available to interrogators at Camp Delta. In addition, the CIA has its own handbooks which, like the SERE techniques, seek to capitalize on the prisoners' sense of vulnerability by reproducing moments of 'significant traumatic experience'.<sup>56</sup> It is thus dismally ironic that, as Corine Hegland remarks, 'even as the CIA was deciding that most of the prisoners at Guantánamo didn't have much to say, Pentagon officials were getting frustrated with how little the detainees were saying'.<sup>57</sup> In the summer of 2002, Alberto Gonzales, Counsel to the President and now Attorney-General, was busily considering advice from the Department of Justice about the bearing of the international Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment as implemented by title 18 (Part I, Chapter 113C) of the United States Code on the conduct of interrogations outside the United States. Under §2340A of the Code, 'whoever *outside* the United States commits or attempts to commit torture' or conspires to commit torture is guilty of a criminal offence (emphasis added). This presented the White House with a real prisoner's dilemma, of course, because Guantánamo had been selected as a site of indefinite detention because it was *outside* the United States. But – the second advantage of the island camps – the Department of Justice pointed out that the relevant provisions of the Code defined the United States as 'all areas under the jurisdiction of the United States', including all places and waters 'continental or insular'. In addition, according to the lease, the United States exercised 'complete jurisdiction' over the base. Through this contorted legal geo-graphing, Guantánamo was *outside* the United States in order to foreclose *habeas corpus* petitions from prisoners held there and *inside* the United States in order to forestall prosecutions for torturing them. As Voltaire put it: 'Those who can make you believe absurdities can make you commit atrocities'.<sup>58</sup>

The memorandum also provided an intricate parsing of definitions of 'torture' that not only raised the bar at which the conjunction of violence and pain turned into torture but made this threshold the property of the torturer. First, 'only the most extreme forms of physical or mental harm' would

constitute torture: severe pain that would 'ordinarily' be associated with 'death, organ failure or serious impairment of bodily functions', or severe mental suffering that produced 'prolonged mental harm'. This allowed 'a significant range of acts that though they might constitute cruel, inhuman or degrading treatment fail to rise to the level of torture'. Second, a defendant could only be convicted if these consequences were a known and intended outcome of his or her actions: 'Where a defendant acts in good faith, he acts with an honest belief that he has not engaged in the proscribed conduct'. If these sophistries were not enough, Gonzales was finally, implausibly but chillingly assured that 'criminal statutes' could not infringe on the President's 'complete' and 'ultimate' authority over the conduct of war, including the interrogation of prisoners.<sup>59</sup>

This memorandum had been prepared with CIA rather than military interrogations in mind, but the lines were already becoming blurred. In October 2002 the Joint Chiefs of Staff were presented with recommendations from the Joint Task Force charged with conducting 'Department of Defense/Interagency' interrogations at Guantánamo to allow a graduated series of increasingly 'aggressive' techniques to be used against prisoners who had 'tenaciously resisted' current methods. Category I techniques involved direct questioning, yelling and deception; Category II techniques involved the use of stress positions, hooding, removal of clothing and forced shaving, and the induction of stress through aversion ('such as fear of dogs'); Category III techniques involved convincing the prisoner that death or severe pain were imminent for him and/or his family, 'exposure to cold weather or water', and 'use of a wet towel and dripping water to induce the misperception of suffocation'. The Department of Defense authorized the first two categories and noted that while all the techniques in the third category may be 'legally available' their approval was not warranted 'at this time'.

If the skeletal list of approved techniques seems unremarkable, even banal, this is the result of two strategic omissions. First, the list contained *no limits* on the use of these techniques, and in a remarkably pointed exchange the General Counsel for the Navy, Alberto Mora, urged William Haynes, the General Counsel for the Department of Defense, 'to think about the techniques more closely:'

What did 'deprivation of light and auditory stimuli' mean? Could a detainee be locked in

a completely dark cell? And for how long? A month? Longer? What precisely did the authority to exploit phobias permit? Could a detainee be held in a coffin? Could phobias be applied until madness set in?

Seen thus, Mora insisted, there was no clear line between these techniques and torture.<sup>60</sup>

Second, the list was concerned entirely with instruments and provided no consideration of their effects. Since the end of the Second World War the United States has developed a consistent interrogation protocol that centres on sensory deprivation and self-inflicted pain. According to historian Alfred McCoy, 'the method relies on simple, even banal procedures – isolation, standing, heat and cold, light and dark, noise and silence – for a systematic attack on all human senses'. Early experiments showed that subjects could stand only two or three days of being goggled, gloved and muffled in a lighted cubicle, while forced standing for eighteen to twenty-four hours produced 'excruciating pain' as ankles swelled, blisters erupted, heart rates soared and kidneys shut down. These 'no-touch' techniques leave no marks, but they create 'a synergy of physical and psychological trauma whose sum is a hammer-blow to the fundamentals of personal identity': they deliberately ravage the body in order to 'un-house' the mind.<sup>61</sup> I say 'un-house' advisedly because, as Mark Bowden notes, torture works to make space and time, 'the anchors of identity', become 'unmoored' so that the victim is marooned in a surreal 'landscape of persuasion' where everything becomes 'tangled'. If Wittgenstein was right to say that the limits of our language mean the limits of our world, then it should be clear why Elaine Scarry describes torture as a deliberate 'un-making' of the world. Pain does not simply resist language – located beyond the sphere of linguistic communication – 'but actively destroys it, bringing about an immediate reversion to a state anterior to language, to the sounds and cries a human being makes before language is learned'.<sup>62</sup> If prisoners are reduced to bare life through torture, violently cast into a world beyond language, then the act of remembering their trauma is both infinitely fragile and, in its potentiality, profoundly political. For the attempt to give voice to their physical pain gives the lie to those who would ventriloquize its infliction as 'intelligence-gathering'.<sup>63</sup>

In January 2003, Secretary of Defense Donald Rumsfeld withdrew his permission for the use of Category II techniques and convened a Working

Group to prepare an assessment of 'Detainee Interrogations in the Global War on Terrorism'. Its final report was not circulated to those who had been critical of the original recommendations. In effect, the Pentagon was now pursuing what Jane Mayer describes as a 'secret detention policy' whose guidelines followed the memorandum of the previous August to the letter. The report found that, because Guantánamo is within the United States for the purpose of title 18, 'the torture Statute does not apply to the conduct of US personnel at GTMO'. It reaffirmed the inadmissibility of the Geneva Conventions and noted that the US government would reject any attempt by the International Criminal Court to assert jurisdiction over US nationals. And in reaffirming the ultimate authority of the President its authors made an astonishing appeal to the precedent set by the Nuremberg tribunals: 'The defense of superior orders will generally be available for US Armed Forces personnel engaged in exceptional interrogations except where the conduct goes so far as to be patently unlawful'. The report suggested a range of thirty-five interrogation techniques from 'asking straightforward questions' and providing or removing privileges through hooding, 'mild physical contact' and dietary or environmental manipulation to 'exceptional' measures that included isolation, twenty-hour interrogations, forced shaving, prolonged standing, sleep deprivation, 'quick, glancing slaps', removal of clothing and 'use of aversions' ('simple presence of dog'). Rumsfeld approved twenty-four of them. Although he withheld approval of all the 'exceptional' measures other than isolation, however, the list of authorized techniques contained none of the crucial limitations and said nothing about their effects. There was thus considerable latitude for coercive interrogation to slide through cruel, inhuman and degrading treatment into outright torture. If this were not enough, Rumsfeld also accepted that 'interrogators [ought to be] provided with reasonable latitude to vary techniques' for reasons that included the degree of resistance and 'the urgency of obtaining information'.<sup>64</sup>

I have no way of knowing how much 'latitude' that final clause was intended to allow; I simply make two observations. First, testimony from prisoners released from Guantánamo makes it clear that the red lines, such as they were, were repeatedly crossed. There have been consistent, credible reports of enforced nudity; exposure to extremes of temperature; deprivation of food, water and pain medication; induced disorientation through loud



music, strobe lighting and sleep deprivation; menacing by dogs; prolonged short-shackling in foetal positions; sexual taunting and assault; immersion in toilet bowls to induce a fear of drowning; and isolation for months at a time.<sup>65</sup> Second, notwithstanding the limitations placed on military interrogations, the CIA had been authorized to use six 'enhanced' techniques since March 2002, which included forcing prisoners to stand, handcuffed and shackled, for more than forty hours; forcing them to stand naked in a cold cell for prolonged periods and frequently dousing them with cold water; and simulated drowning ('waterboarding'). The CIA ran its own prison within the complex (within Camp Echo, which was built to house detainees who were awaiting hearings before Military Commissions), but the CIA and the military frequently worked in concert because Guantánamo was the designated operating base for a Joint Interagency Interrogation Facility.<sup>66</sup> In an interview following the three suicides, McCoy put it like this:

Guantánamo is not a conventional military prison. It's an ad hoc laboratory for the perfection of CIA psychological torture. Guantánamo is a complete construction. It's a system of total psychological torture, designed to break down every detainee contained therein, designed to produce a state of hopelessness and despair.<sup>67</sup>

Indeed, the commander of JTF Guantánamo, Major-General Geoffrey Miller, described the facility as a central 'laboratory for the war on terror'. In September 2003 he led a specialist team to Iraq to assess the Army's detention and interrogation operations, and recommended the introduction of 'new approaches and operational art' developed at Guantánamo to facilitate the 'rapid exploitation' of prisoners for 'actionable intelligence'. By the winter of 2003 to 2004, journalist Seymour Hersh concluded, 'Abu Ghraib had become, in effect, another Guantánamo'.<sup>68</sup>

During the summer of 2005, when Senator John McCain proposed an amendment to the Defense Appropriation Bill that would ban cruel, inhuman or degrading treatment or punishment of anyone in US custody anywhere, the Vice-President insisted that the CIA should be exempt – it required 'extra latitude' (that word again) – and the White House vigorously rejected any such measure that would 'restrict the President's authority [not ability] to protect Americans from terrorist attack'. The bill

passed the Senate 90–99 and the House 308–122, but when the President reluctantly signed the Detainee Treatment Act into law at the year's end he added a defiant signing statement insisting that he would interpret its provisions in a manner consistent with 'constitutional limitations on the judicial power' and his own executive powers to protect national security, and he made it clear that he reserved the right to waive those restrictions in 'special situations'. Thus the hermeneutic circle – the mutuality of interpretation – is hammered flat until it fits the Oval Office.<sup>69</sup> However, it turns out that the Act contained its own Catch-22 inserted by Senator Lindsey Graham. In March 2006 lawyers for the Department of Justice reminded a district court that, under the provisions of the Act, prisoners at Guantánamo only had the right to appeal their designation as enemy combatants – not to seek protection against their treatment there. As Human Rights Watch put it, 'The law says you can't torture detainees at Guantánamo, but it also says you can't enforce that law in the courts'.<sup>70</sup>

### The global war prison

I hope this analysis helps to explain why three young men imprisoned at Guantánamo took their own lives, and why the Bush administration (at various levels) responded in the way it did. After the three suicides, the President announced that he would like to close Guantánamo because it gave critics what he called 'an excuse' to say that the United States was not upholding the very values it claimed to be defending. In fact, transfers to the island camps were suspended in September 2004, and there are plans to transfer many detainees to other sites in the global war prison. But this does not herald the end of Guantánamo.

Soon after the Supreme Court ruled in *Rasul v. Bush* in June 2004 that federal courts could hear *habeas corpus* petitions from those imprisoned at Guantánamo, the National Security Council halted transfers from Afghanistan, and the Pentagon ordered the expansion of its prison at Bagram 50km north of Kabul. In 2002 the US Army had converted a vast machine shop at the former Soviet aircraft maintenance base into a short-term collection and screening centre ('Bagram Temporary Internment Facility'). Its purpose was to interrogate prisoners transported forward from operating bases elsewhere in Afghanistan, who would then be released, imprisoned in Afghan jails or transferred to Guantánamo. This makes the process seem more

systematic than it was; subsequent investigations concluded that the new, 'non-linear battlespace' required considerable improvisation in the management of prisoners, and this resulted in the development of *ad hoc* procedures, serious mistakes in screening prisoners, and extraordinary delays in releasing those detained by mistake. In March 2004 175 people were held at Bagram in wretched conditions. An inspection found that the building had inadequate ventilation, sanitation and lighting, and that its roof had multiple leaks. The capacity of the makeshift prison was 275, but during the following year, after the flights to Guantánamo were suspended, it held as many as 600 people at any one time. Since the President had decreed that the Geneva Conventions would not apply to those taken prisoner during the war in Afghanistan, the US military referred to them not as prisoners of war but 'Persons Under Control' (PUC). They were held in large wire cages, and the conditions remained rudimentary. One former prisoner described the compound as being 'like the cages in Karachi [Zoo] where they put animals'. Significantly, the Pentagon has released no images of its detention operations at Bagram, unlike those at Guantánamo, and its slick web page on 'detainee affairs' is silent about conditions there. More: since the Rasul decision was limited to Guantánamo, prisoners at Bagram continue to have no *habeas* rights; they are not allowed to appear before the military panels reviewing their continued imprisonment; they have no right to hear the allegations against them; and they have been denied access to lawyers. Camp X-Ray may have closed at Guantánamo, but for all practical purposes it has been transplanted to Bagram.<sup>71</sup> As the Taliban resurgence continues to gain strength, and British and Canadian troops conduct ever more aggressive counter-insurgency operations in the southern countryside, the number of prisoners held there is likely to increase. It is impossible to be precise, however, because no details about the transfer of prisoners from coalition to American custody have been released and the prison remains shrouded in secrecy.

By the spring of 2005 it was clear to two reporters that the wheel had turned full circle and that Bagram was part of a radical plan to reconfigure the global war prison. In the summer, negotiations were under way to transfer those who would no longer be held at Guantánamo to Afghanistan, Saudi Arabia and Yemen, where they would be incarcerated in new maximum-security jails financed and constructed by the United States. In April 2006

the Pentagon announced that it planned to repatriate a further 140 prisoners 'who have been determined to be no longer enemy combatants'. But the State Department announced that they would not be released until it was satisfied that they would be treated humanely on their return. Particular concern was expressed about Algeria, Egypt, Saudi Arabia, Uzbekistan and Yemen. According to one official, 'We don't want to send people to a country where we are going to find out two weeks later that they've been tortured'. This is particularly rich coming from an administration that has done everything in its power to facilitate the torture of prisoners in its own camps, but it is stupefying when Guantánamo is wired to the system of extraordinary renditions through which prisoners are made to disappear to torture chambers in those same countries (and others) or to a network of CIA 'black sites' for 'enhanced interrogation'.<sup>72</sup>

To date, 267 prisoners have been released from Guantánamo and eighty more have been transferred to their own countries for continued detention. But this is not a process of emptying the island prison. On the contrary; around 470 people remain incarcerated, and construction of new camps has continued. Two new maximum-security camps have been designated for the indefinite, potentially permanent detention of suspected members of al-Qaeda and other terrorist groups who, it was originally announced, were unlikely to go before a military tribunal for lack of evidence but whom the administration 'does not want to set free or turn over to courts in the United States or other countries'. Camp 5 opened in May 2004 and an even larger Camp 6 was scheduled for completion by September 2006. Together the two will house around 300 prisoners. In September 2006 fourteen prisoners were transferred from the CIA's black sites to Guantánamo, and the President insisted that they would be tried before military tribunals. He defended the 'alternative set of procedures' to which they had been subjected in CIA custody as 'safe, lawful and necessary', and it is hardly surprising that he was equally adamant that the tribunals would admit evidence obtained through 'coercive interrogation'.<sup>73</sup>

The aggrandizement of sovereign power is characteristic of colonial regimes, and the obsession with torture is a commonplace of colonial violence. These colonial dispositions are marginalized by Agamben's metropolitan predilections, but there are intimate connections between the methods used by the United States and those used by France in

Algeria, Britain in Africa and Israel in Palestine. In addition, from the School of the Americas (now the Western Hemisphere Institute for Security Cooperation), originally based in Panama and since 1984 at Fort Benning in Columbus, Georgia, the United States has trained more than 60 000 soldiers and police officers from the Caribbean and Central and South America in counter-insurgency methods that include coercive interrogation and torture.<sup>74</sup> What is novel about the current situation is that the obsession with torture does not breed in darkness, in the secret shadows of the state; it flowers in the threshold between the legal and the extra-legal. This does not mean that Guantánamo is a transparent space; its effectiveness for those beyond its cages lies precisely in its being a space of *constricted* visibility. Much of what takes place there is still hidden from the public gaze, but enough is seen for the envelope of fear to send its message.<sup>75</sup> For the national security state thrives on fear: the fear of terrorism to legitimate its actions, and the fear of torture to intimidate those it casts as its enemies. In this sense, the 'war on terror' is *both* a war on law *and* a war fought through the law ('law as tactic', as Foucault might say). Margulies notes that 'twin legal systems – the separation of powers and the laws of war – limit war's reach and regulate its conduct'. The Bush administration has sought to deconstruct both pillars through executive assertion and juridical legerdemain; it engorges and feeds upon the grey zone between the legal and the extra-legal.<sup>76</sup>

These considerations have important political implications. I have tried to show that the law is not outside violence, and that the 'war on terror' twists their embrace into ever more frenzied and furtive couplings. 'If we want to resist the reassertion of the form of sovereignty at work today in the war on terror,' then Julian Reid argues that 'it is essential that we focus upon this complicity of law and force: in other words, the complicity of the bio-political and the sovereign'.<sup>77</sup> This means, among other things, that law becomes the site of political struggle not only in its suspension *but also in its formulation, interpretation and application*.

I understand Kaplan's pessimism about purely legal forms of opposition. She fears that the Supreme Court's decisions over Guantánamo, which have been widely interpreted as reversals for the administration, could still be enlisted in the service of 'a shadowy hybrid legal system coextensive with the changing needs of empire'. Their capacity to rein in the discretionary exercise of executive pow-

er over the fate of prisoners is strictly limited, she argues, because they do not resolve the ambiguous geo-graphing of Guantánamo on which the administration has capitalized.<sup>78</sup> Kaplan was writing before the most recent Supreme Court ruling in June 2006 that struck down the military tribunals set up to try the Pentagon's prisoners as illegal under both federal and international law. In a five to three verdict, the Court found that the President had exceeded the bounds placed by Congress on his executive authority through the Uniform Code of Military Justice and its incorporation of the Geneva Conventions. Accordingly, it reminded the administration that 'nobody in enemy hands can be outside the law'. Contrary to the President's military order, therefore, the Court determined that all prisoners taken during armed conflict, including members of al-Qaeda and the Taliban, are protected under Common Article 3 of the Geneva Conventions: they must not be tortured or subjected to cruel, inhuman or degrading treatment, and they must be tried before regularly constituted courts that provide generally recognized judicial guarantees. The decision has been described as 'the most significant rebuke' to the President's assertion of executive power since he took office and 'a sweeping victory for the rule of law', while supporters of the administration have criticized the majority on the Court for its 'willingness to bend to world opinion' and its attempt to suppress what the indefatigable John Yoo called 'creative thinking'.<sup>79</sup>

Yet Kaplan's reservations have considerable traction here too. The ruling covers the conditions under which prisoners may be held and tried, but it has no direct bearing on their continued detention. The Pentagon circulated a memorandum accepting that Common Article 3 would now apply to all prisoners under its control, but no comparable statement was issued about the treatment of prisoners held by the CIA. In September a new Army Field Manual was released that authorized nineteen interrogation techniques and expressly outlawed hooding, forced nudity, beating, threatening with dogs, deprivation of food, water or medication, sexual humiliation and 'waterboarding'. But the CIA was not only exempted from these provisions: the administration proposed legislation that would make its 'alternative set of procedures' lawful. The President also announced that he would comply with the Court's ruling on tribunals, but his advisers capitalized on Justice Breyer's emollient qualification: 'Nothing prevents the President from returning to Congress to seek the authority he believes he

needs'. The administration's legal officers urged Congress to pass new legislation that would deny prisoners access to lawyers before interrogation, retain the use of military tribunals, and authorize evidence obtained by hearsay and coercion. As John Yoo explained, the proposed legislation would countermand *Hamdan* by affirming that 'the Geneva Conventions are not a source of judicially enforceable individual rights'.<sup>80</sup>

Even so, all is not lost. These responses confirm the political struggle involved. In fact, the administration's aggressive restatement of its preferences met with considerable scepticism in Congressional hearings, and senior military lawyers urged the Senate Armed Services Committee to endorse the substance of the Supreme Court ruling. They insisted that the integrity of the Uniform Code of Military Justice be retained and that the protections afforded by the Geneva Conventions be respected.<sup>81</sup> In doing so, they made common cause with a host of others who have tried to resist the reduction of human beings to bare life in the global war prison. For the prisoners at Guantánamo, this has involved challenges from politicians, civil servants and lawyers inside as well as outside the Bush administration, and from prominent national and international political, juridical and human rights organizations, all of which confound attempts to place them outside the law. It has also included the painstaking recovery of the experiences of prisoners at Bagram, Guantánamo, Abu Ghraib and elsewhere by Amnesty International, Human Rights Watch, the Center for Constitutional Rights and others, all of which confound attempts to place them outside language. And the prisoners themselves have refused to be reduced to bare life: insisting on their individual dignity, standing their ground before hostile military tribunals, and undertaking directly biopolitical modes of resistance, including hunger strikes and suicide attempts that culminated in the deaths of those three young men in June 2006.

All of this matters because, while I think Agamben is wrong to represent the space of exception as the paradigmatic space of political modernity, I do believe it is a *potential* space whose artful brutalities must be – and are being – resisted at every turn. To repeat: there is nothing ineluctable about the triumph of the security state or the generalization of the space of exception, and I conclude in that spirit by hoisting a different black flag over Guantánamo Bay. Howard Ehrlich celebrates the anarchist flag with these words:

The black flag is the negation of all flags. It is a negation of nationhood which puts the human race against itself and denies the unity of all humankind. Black is a mood of anger and outrage at all the hideous crimes against humanity perpetrated in the name of allegiance to one state or another....

Black is also a color of mourning; the black flag which cancels out the nation also mourns its victims, the countless millions murdered in wars, external and internal... But black is also beautiful. It is a color of determination, of resolve, of strength, a color by which all others are clarified and defined.<sup>82</sup>

Let us make it so.

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## Notes

1. Julian Barnes and Carol Williams, 'Guantánamo's first suicides pressure U.S.', *Los Angeles Times*, 11 June 2006; James Risen and Tim Golden, '3 Prisoners commit suicide at Guantánamo', *New York Times*, 11 June 2006; Josh White, 'Three detainees commit suicide at Guantánamo', *Washington Post*, 11 June 2006; Andrew Buncombe, 'Washington condemns first suicides by Guantánamo inmates as "a PR exercise"', *Independent*, 12 June 2006. There had been many previous suicide attempts but, consistent with these responses, their numbers were reduced by the simple expedient of reclassifying most of them as 'manipulative self-injurious behaviour': David Rose, *Guantánamo: America's War on Human Rights* (London: Faber, 2004), pp. 64–66.
2. Agamben's *Homo Sacer* project comprises several volumes that he says 'should form a tetralogy'. Those published to date are: *Homo Sacer: Sovereign Power and Bare Life* (trans. Daniel Heller-Roazen) (Stanford: Stanford University Press, 1998; first published in Italian in 1995) [which he identifies as *Homo Sacer I*]; *State of Exception [Homo Sacer II. I]* (trans. Kevin Attell) (Chicago, IL: University of Chicago Press, 2005; first published in Italian in 2003); and *Remnants of Auschwitz: The Witness and the Archive [Homo Sacer III]* (trans. Daniel Heller-Roazen) (New York: Zone Books, 1999; first published in Italian in 1998).
3. Peter Fitzpatrick, 'Bare sovereignty: *Homo Sacer* and the insistence of law', in Andrew Norris (ed.), *Politics, Metaphysics and Death: Essays on Giorgio Agamben's Homo Sacer* (Durham, NC: Duke University Press, 2005) pp. 49–73, 51–55; Rainer Maria Kiesow, 'Law and life', *loc. cit.*, pp. 248–261, 255. It will be apparent from these criticisms that the significance of Agamben's argument does not de-



- pend on any parallels that might be drawn between the Roman Empire and the New Rome on the banks of the Potomac. What matters is less his reading of *homo sacer* than his elaboration of 'bare life'.
4. Walter Benjamin, 'Critique of violence', in Marcus Bullock and Michael W. Jennings (eds) *Walter Benjamin: Selected Writings, Volume 1, 1913–1926* (Cambridge, MA: Harvard University Press, 1996), pp. 236–252. Benjamin adds: 'What is here pronounced sacred was according to ancient mythical thought the marked bearer of guilt: life itself'. We might remind ourselves that *sacer* means both 'sacred' and 'accursed', but Agamben recognized this tension in his previous writings only to reject it in *Homo Sacer*.
  5. Catherine Mills, 'Agamben's messianic politics: biopolitics, abandonment and happy life', *Contretemps*, 5 (2004), pp. 42–62, 46. This is a critical distinction: 'bare life' is poised between political life (*bios*) and biological or existent life (*zoë*).
  6. Agamben, *Homo Sacer*, pp. 18–20, 25, 28, 37. My understanding of Agamben and the exception is indebted to Nasser Hussain, Melissa Ptacek, 'Thresholds: sovereignty and the sacred', *Law and Society Review*, 34 (2000), pp. 495–515; Andrew Norris, 'The exemplary exception: philosophical and political decisions in Giorgio Agamben's *Homo Sacer*', in Norris (ed.) *Politics, metaphysics and death*, pp. 262–283.
  7. Walter Benjamin, 'On the concept of history', in Howard Eiland and Michael W. Jennings (eds) *Walter Benjamin: Selected Writings, Volume 4, 1938–1940* (Cambridge MA: Harvard University Press, 2003), pp. 389–400.
  8. Agamben, *Homo Sacer*, pp. 12, 123, 170–171, 174, 176; Agamben, *State of Exception*, pp. 86–87; cf. Michel Foucault, 'Society Must Be Defended': *Lectures at the Collège de France 1975–1976* (New York: Picador, 2003), p. 260. In classical political theory the *nomos* referred to the matrix of conventions through which political and ethical conduct was sanctioned, endorsed and accepted. The *nomos* performed three core functions: (1) the assignment of places; (2) the nomination of the powers that derive from them; and (3) the delineation of their perimeters. This brings into focus the active sense of geo-graphing required by Agamben's discussion, because the *nomos* may be seen as a paradigmatic performance of space: 'paradigmatic' because it is accepted, taken for granted, and so serves as a template for political-moral ordering (*ordnung*); and 'performance' because it is activated as a concrete 'taking place' or localization (*ortung*). The fulcrum of Agamben's argument is that the ordering of space that constitutes the *nomos* is produced not only by 'the determination of a juridical and territorial ordering (of an *Ordnung* and an *Ortung*)' but, above all, by 'a "taking of the outside", an exception (*Ausnahme*): *Homo sacer*, p. 19. For further discussion, see Claudio Minca, 'The return of the camp', *Progress in Human Geography*, 29 (2004), pp. 405–412. It should be noted, however, that Agamben's treatment of the camp as a 'paradigm' in the sense of exemplar involves him in a series of logical, self-referential difficulties that pose serious problems for his (crucial) claim about the generalization of the camp: see Norris, 'Exemplary exception', pp. 273–278. Agamben provides his own gloss on paradigms in 'What is a paradigm?', European Graduate School, Saas-Fee, Switzerland, August 2002, at <http://www.egs.edu/faculty/agamben/agamben-what-is-a-paradigm-2002.html>.
  9. Agamben, *State of Exception*, pp. 3–4; Ulrich Rauff, 'An interview with Giorgio Agamben: life, a work of art without an author: the state of exception, the administration of disorder and private life', *German Law Journal*, 5 (2004). After these comments were published, a second iconic site emerged: Abu Ghraib prison, west of Baghdad, where from August 2003 men, women and boys captured during the US invasion of Iraq were imprisoned. I discuss the connections between these and other sites in 'Vanishing points: law, violence and exception in the global war prison', in Derek Gregory and Allan Pred (eds) *Violent Geographies: Fear, Terror and Political Violence* (New York: Routledge, 2007), pp. 317–344.
  10. Michael Dillon, 'Correlating sovereign and biopower', in Jenny Edkins, Véronique Pin-Fat and Michael J. Shapiro (eds) *Sovereign Lives: Power in Global Politics* (New York: Routledge, 2004), pp. 41–60, 56. Cf. 'The sovereign is the point of indistinction between violence and law, the threshold on which violence passes over into law and law passes over into violence': Agamben, *Remnants*, p. 32.
  11. Gillian Rose, 'Performing space', in Doreen Massey, John Allen and Philip Sarre (eds) *Human Geography Today* (Cambridge: Polity Press, 1999), pp. 247–259.
  12. Agamben, *Homo Sacer; State of Exception*, pp. 2, 22; for a comprehensive list of National Emergencies see Harold Relyea, 'National Emergency Powers', Congressional Research Service, The Library of Congress, Washington, DC, 15 September 2005.
  13. Agamben, *State of Exception*, pp. 11–22.
  14. This model (named for the Treaty of Westphalia that ended the Thirty Years War in 1648) divides the world into sovereign states that are responsible for their own laws; it regards all states as equal before the law, requires all states to respect the legal existence of other states, and renders inviolable the territorial integrity of every state.
  15. Kal Raustiala, 'The geography of justice', *Fordham Law Review*, 73 (2005), pp. 2501–2560; Peter Swan, 'American Empire or Empires: alternative juridifications of the New World Order', in Amy Bartholemew (ed.), *Empire's Law* (London: Pluto Press, 2006), pp. 137–160, 158 n. 35.
  16. According to Austin, the sovereign has the authority to 'abrogate the law at pleasure'. Prefiguring Schmitt's dictum, Austin insisted that a sovereign who is bound to observe the law is no sovereign: 'Supreme power limited by positive law is a flat contradiction in terms'. See John Austin, *The Province of Jurisprudence Determined* ed. by Wilfred E. Rumble (Cambridge: Cambridge University Press, 1995; first published in 1832), p. 254.
  17. Amy Bartholemew, 'Empire's law and the contradictory politics of human rights', in Bartholemew (ed.) *Empire's Law*, pp. 161–189, 161–162. Feith was enlarging on an extraordinary sentence from the US National Defense Strategy (2005): 'Our strength as a nation-state will continue to be challenged by those who employ a strategy of the weak, using international fora, judicial processes and terrorism' (p. 5). See US Department of Defense, Special Briefing, 18 March 2005. For contrary views as to the importance of international law in counter-terrorism and the 'war on terror' and its extensions, see Michael Byers, *War Law: International Law and Armed Conflict* (London: Atlantic Books, 2005); Helen Duffy, *The "War on Terror" and the Framework of International Law* (Cambridge: Cambridge University Press, 2005).
  18. The only other absolutely non-derogable rights are the right not to be enslaved and the right not to be prosecuted for something that was not an offence at the time it was committed. See Lisa Hajjar, 'Torture and the future', *Interventions: Middle East Report Online*, May 2004; Joan Fitzpatrick, 'Protection against abuse of the concept of "Emer-



- gency”, in Lawrence Henkin and John Lawrence Hargrove (eds) *Human Rights: An Agenda for the Next Century* (Washington, DC: American Society of International Law, 1994).
19. ‘President discusses year-end accomplishments in Cabinet meeting’, at <http://www.whitehouse.gov/news/releases>, 11 December 2003; Philippe Sands, *Lawless World: America and the Making and Breaking of Global Rules* (London: Allen Lane, 2005), p. xii.
  20. Amy Kaplan, ‘Homeland insecurities: reflections on language and space’, *Radical History Review*, 85 (2003), pp. 82–93; 91–92; idem., ‘Where is Guantánamo?’, *American Quarterly*, 57 (2005), pp. 831–858, 832; Judith Butler, ‘Indefinite detention’, in her *Precarious Life: The Powers of Mourning and Violence* (London and New York: Verso, 2004), pp. 50–111; pp. 51, 56, 64; Michael Ratner, ‘The Guantánamo prisoners’, in Rachel Meeropol (ed.), *America’s Disappeared: Secret Imprisonment, Detainees and the ‘War on Terror’* (New York: Seven Stories Press, 2005), pp. 31–59, 33; Johan Steyn, ‘Guantánamo Bay: the legal black hole’, 27th F.A. Mann Lecture, 25 November 2003; Scott Michaelsen and Scott Cutler Shershow, ‘The Guantánamo “Black Hole”: The law of war and the sovereign exception’, *Middle East Report Online*, 11 January 2004; Agamben, *State of Exception*, pp. 6, 86. See also Oliver Klemens, Jesko Fezer, Kim Forster and Sabine Horlitz, ‘Extra-territorial spaces and camps: judicial and political spaces in the “war on terrorism”’, in Anselm Franke, Rafi Segal and Eyal Weizman (eds) *Territories: Islands, Camps and Other States of Utopia* (Berlin: KW – Institute for Contemporary Art, 2003), pp. 22–28.
  21. Michael Hardt and Antonio Negri, *Multitude: War and Democracy in the Age of Empire* (New York: Penguin, 2004), pp. 5–10.
  22. Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* trans. Gary Ulmen (New York: Telos, 2003; first published in German in 1950). My understanding of Schmitt has been facilitated by William Rasch, ‘Human rights as geopolitics: Carl Schmitt and the legal form of American supremacy’, *Cultural Critique*, 54 (2003), pp. 120–147; Matti Koskeniemi, ‘International law as political theology: how to read *Nomos der Erde?*’, *Constellations*, 11 (2004), pp. 492–511; Agamben, *Homo sacer*, pp. 36–37.
  23. Schmitt substitutes teleology for history; his account of a ‘virtuous past’ in which war within Europe was subject to rationalization and regulation is a projection of political theology on to the plane of absolutism: Koskeniemi, ‘International law’, p. 499.
  24. Agamben, *Homo sacer*, pp. 17–18 (emphasis added).
  25. Achille Mbembe, ‘Necropolitics’, *Public Culture*, 15 (2003), pp. 11–40. Mbembe works with both Schmitt and Agamben to expose the conjunctions between colonial modernity, sovereign power and what he calls ‘the work of death’. He sometimes makes the conjuncture conditional: ‘the colonies are the locus par excellence where the controls and guarantees of judicial order can be suspended’; ‘the colonies might be ruled over in absolute lawlessness’ (p. 24; emphases added). But the tenor of his argument is to treat colonial power as synonymous with lawlessness, and this means that he cannot adequately register the ways in which law and violence march hand in hand.
  26. Rasch, ‘Human rights’, pp. 127–128; Peter Fitzpatrick, ‘“Gods would be needed...”: American Empire and the rule of (international) law’, *Leiden Journal of International Law*, 16 (2003), pp. 429–466, 448. Richard Falk emphasizes that international law has a contradictory constitution, operating under the sign of colonialism as an instrument of both rule and resistance, ‘a Frankenstein that cannot be consistently controlled by its inventors’: ‘Orientalism and international law: a matter of contemporary urgency’, *Arab World Geographer*, 7 (2004), pp. 103–116, 109. But as we will see, the law produces its own monsters too.
  27. Rasch, ‘Human rights’, p. 130; Carl Schmitt, *The Concept of the Political*, trans. by George Schwab (Chicago, IL: University of Chicago Press, 1996; first published in German in 1932) p. 54; Andrew Norris, ‘“Us and Them”: the politics of American self-assertion after 9/11’, *Metaphilosophy*, 35 (2004), pp. 249–227; see also Matt Coleman, ‘The naming of “Terrorism” and evil “outlaws”: geopolitical place-making after 11 September’, *Geopolitics*, 8 (2004), pp. 87–104.
  28. Paul Gilroy, ‘“Where ignorant armies clash by night”: homogeneous community and the planetary aspect’, *International Journal of Cultural Studies*, 6 (3) (2003), pp. 261–276, 263; see also Derek Gregory, *The Colonial Present: Afghanistan, Palestine, Iraq* (Oxford: Blackwell, 2004).
  29. Anne Orford, ‘The destiny of international law’, *Leiden Journal of International Law*, 17 (2004), pp. 441–476, 444; Costas Douzinas, *The End of Human Rights* (Oxford: Hart, 2000), p. 329; idem., ‘Humanity, military humanism and the new moral order’, *Economy and Society*, 32 (2003), pp. 159–183; Hardt and Negri, *Multitude*, pp. 9, 22.
  30. Robert Cover, ‘Violence and the word’, *Yale Law Journal*, 95 (1986), pp. 1601–1629; Nasser Hussain, ‘Towards a jurisprudence of emergency: colonialism and the rule of law’, *Law and Critique*, 10 (1999), pp. 93–115; idem., *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: University of Michigan Press, 2003).
  31. Louis Pérez, *Cuba Between Empires, 1878–1902* (Pittsburgh: University of Pittsburgh Press, 1983), pp. 55–56; Ada Ferrer, *Insurgent Cuba: Race, Nation and Revolution 1868–1898* (Chapel Hill: University of North Carolina Press, 1999); W. Joseph Campbell, ‘Not likely sent: the Remington-Hearst “telegrams”’, *Journalism and Mass Communication Quarterly*, 77 (2000), pp. 405–422; Daniel Ross, *Violent Democracy* (Cambridge: Cambridge University Press, 2004), p. 128.
  32. The US invoked these provisions to support its military interventions in 1906, 1912, 1917 and 1920. The Platt Amendment was abrogated in 1934 when a new treaty was signed between the US and Cuba, but this did not affect the lease of Guantánamo.
  33. Louis Pérez, *Cuba under the Platt Amendment, 1902–1934* (Pittsburgh: University of Pittsburgh Press, 1986); Alfred de Zayas, ‘The status of Guantánamo and the status of the detainees’, Douglas Mc.K. Brown Lecture, University of British Columbia, November 2003; Kaplan, ‘Where is Guantánamo?’, p. 836.
  34. Minutes of the National Security Council meeting, 20 October 1962, at the Avalon Project at Yale Law School, <http://www.yale.edu/lawweb/avalon>; ‘U.S. Military: Strength Through Flexibility’, Remarks by James H. Webb, National Press Club, Washington, DC, 13 January 1988; de Zayas, ‘The status of Guantánamo’. The initial camps for Haitian refugees were set up around radio antennas on the south side of the base and identified by radio call signs (Camp Alpha through Camp Golf); later camps were set up on the north side of the base and given call signs from the opposite end of the phonetic alphabet (including Camp X-Ray).
  35. This is not a partisan conclusion. In December 2003 the US Court of Appeals for the Ninth Circuit concluded that since the Cuban revolution the US government ‘has purposely

- acted in a manner directly inconsistent with the terms of the Lease and the continuing Treaty' and 'has used the Base for whatever purposes it deemed necessary or desirable'. Gherebi v. Bush, 35.2F.3d, 18072–18073 (9th Cir., 2003). The Court further argued that these actions have a direct bearing on sovereignty over Guantánamo: see below, pp. 413–414.
36. Kaplan, 'Where is Guantánamo?', pp. 832, 836; cf. Agamben, *State of Exception*, p. 48, who describes the state of exception as both 'an emptiness and standstill of law' (emphasis added).
  37. Fleur Johns, 'Guantánamo Bay and the annihilation of the exception', *European Journal of International Law*, 16 (2005), pp. 613–635, 614.
  38. Christiane Wilke, 'War vs. Justice: Terrorism cases, enemy combatants and political justice in US courts', *Politics and Society*, 33 (2005), pp. 637–669, 62; emphasis added.
  39. *Habeas corpus* has been described as 'the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action' (Harris v. Nelson, 394 U.S. 286, 290–291 (1969)), but its genealogy is more complicated and contradictory than this liberal reading implies: see, e.g. Husain, 'The "Writ of Liberty" in a regime of conquest: Habeas corpus and the colonial judiciary', in his *Jurisprudence*, ch. 3.
  40. Neil Smith argues that the 'liminal legal geography' of Guantánamo derives from the legal script written for Puerto Rico, another spoil of the Spanish-American War. In 1901 the US Supreme Court found that 'whilst in an international sense [Puerto Rico] was not a foreign country ... it was foreign to the United States in a domestic sense'. This decision forms part of a series known as the Insular Cases (1901–1922) that addressed the extension of constitutional provisions to territories where the United States exercises jurisdiction and control rather than sovereignty. Although the base was leased and not annexed, the Insular Cases have played a significant role in the juridification of Guantánamo, but they have been invoked in support of as well as against the rights of the detainees. See Neil Smith, *The Endgame of Globalization* (New York: Routledge, 2005) pp. 167–169; Kaplan, 'Where is Guantánamo?', pp. 837, 841–845.
  41. 'Detention, treatment and trial of certain non-citizens in the war against terrorism', Military Order, 13 November 2001; 'Possible Habeas jurisdiction over aliens held in Guantánamo Bay, Cuba', Memorandum from Patrick F. Philbin and John C. Yoo, Deputy Assistant Attorneys General, US Department of Justice, to William J. Haynes II, General Counsel, US Department of Defense, 28 December 2001; both reprinted in Karen J. Greenberg and Joshua L. Dratel (eds) *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005), pp. 25–28; 29–37; Transcript of interview with Bradford Berenson, PBS *Frontline*, 14 July 2005. David Bowker, a State Department lawyer, confirmed the determination of the Vice-President to find 'the legal equivalent of outer space – a lawless universe ... where detainees would have no legal rights and US courts would have no power to intervene': Michael Isikoff and Stuart Taylor, 'The Gitmo Fallout', *Newsweek*, 17 July 2006.
  42. Gherebi v. Bush, 35.2F.3d, 18060, 18067–18069 (9th Cir., 2003); see also Raustalia, 'Geography of justice', pp. 2535–2542. Raustalia notes that a similar conclusion may be drawn from the lease's assignment of 'complete control and jurisdiction' over Guantánamo to the United States; in his view, 'complete' implies a 'special sort of control' fully consistent with the assignment of temporary sovereignty to the United States (p. 2541).
  43. Rasul v. Bush, 321F.3d, 1134 (S. Ct., 2004). The Supreme Court's landmark ruling was subsequently challenged by the Detainee Treatment Act (2005) that, *inter alia*, limited jurisdiction to the validity of the decision to detain a non-citizen as an 'enemy combatant'; it also reaffirmed that 'For the purposes of this section, the term "United States", when used in a geographic sense ... does not include the United States Naval Station, Guantánamo Bay, Cuba'. (see below, p. 416).
  44. Butler, 'Indefinite detention', pp. 58, 62; Johns, 'Guantánamo Bay', radicalizes this interpretation: for her, Guantánamo Bay is 'more cogently read as the jurisdictional outcome of attempts to domesticate the political possibilities occasioned by the experience of exceptionalism'. The regime at Guantánamo Bay, so she suggests, 'is dedicated to producing experiences of having no option, no doubt and no responsibility'.
  45. Kaplan, 'Where is Guantánamo?' p. 837.
  46. Butler says much less about this second imperative, though she does acknowledge that the withdrawal of legal protections from the prisoners and their indefinite detention are effected through their constitution as 'less than human': pp. 75–76, 98. Johns is silent on the question.
  47. This argument rests on the claim that the Geneva Conventions contain within themselves the contingent circumstances of their formulation, but this is precisely the grounds on which Cuba seeks to revoke the lease of Guantánamo Bay: it too was drawn up in contingent circumstances that no longer obtain. The United States unilaterally disavows the circumstances in the first case and upholds them in the second. In doing so, it also follows Schmitt's claim that 'irregular combatants' and changes in the apparatus of war both place considerable pressure on the framework of international law; William Scheuerman, 'Carl Schmitt and the road to Abu Ghraib', *Constellations*, 13 (2006), pp. 108–124, 118–121.
  48. Rose, Guantánamo, p. 30; 'Application of treaties and laws to al Qaeda and Taliban detainees', Draft memorandum for William J. Haynes III, General Counsel, Department of Defense, from John Yoo (Deputy Assistant Attorney General) and Robert Delabundy (Special Counsel), 9 January 2002; 'Application of treaties and laws to al Qaeda and Taliban detainees', Memorandum for Alberto Gonzales, Counsel to the President, and William J. Haynes III, General Counsel, Department of Defense, from Department of Justice, 22 January 2002; 'Comments on your paper on the Geneva Conventions', Memorandum for Counsel to the President, from William H. Taft IV, Legal Adviser, Department of State, 2 February 2002; 'Humane treatment of al Qaeda and Taliban detainees', Memorandum from the President, 7 February 2002; in Greenberg and Dratel (eds) *Torture Papers*, pp. 38–79, 67, 69; pp. 81–117, 102, 129, 134. In the Draft memorandum it was conceded that 'there remains the distinct question whether such determinations would be valid as a matter of international law' but, in a passage deleted from the final version of 22 January, the authors had insisted that it would be 'implausible' to claim 'that all obligations imposed by the Geneva Conventions are absolute and that non-performance is never excusable' (p. 69).
  49. For reviews of these determinations see Kenneth Watkins, 'Warriors without rights? Combatants, unprivileged belligerents and the struggle over legitimacy', Occasional Paper, Program on Humanitarian Policy and Conflict Research, Harvard University, winter 2005; de Zayas, 'The status of Guantánamo'; G.H. Aldrich, 'The Taliban, Al Qaeda and the determination of illegal combatants', *American Journal*

- of *International Law*, 96 (2002), pp. 891–898. When Combatant Status Review Tribunals were finally established, the record of their proceedings confirmed Butler's characterization. Defendants were told that the tribunals followed US law but legal representation was not necessary because they were not legal proceedings. When one defendant repeatedly raised the issue of international law, he was told: 'I don't care about international law. I don't want to hear the words "international law" again. We are not concerned with international law'. See *Guantánamo and Beyond: The Continued Pursuit of Unchecked Executive Power* (Amnesty International, 13 May 2005), pp. 54–55.
50. See David Rose, *Guantánamo: America's War on Human Rights* (London: Faber and Faber, 2004); Gregory, *Colonial Present*, p. 66.
  51. Butler, 'Indefinite detention', p. 77. See also Naomi Klein, 'The true purpose of torture', *Guardian*, 14 May 2005, who suggests that the Department of Defense released its photographs of caged prisoners at Guantánamo in order to confirm the absolutism of American power: to intimidate – to terrorize – not only individuals but the collective will to resist. In releasing the photographs, however, the Pentagon was hoist on its own petard. It now complains that the media continue to use the stock images of the defunct Camp X-Ray to illustrate contemporary conditions at Guantánamo.
  52. Tim Golden and Dan Van Natta Jr, 'US said to overstate value of Guantánamo detainees', *New York Times*, 21 June 2004; Rose, *Guantánamo*, p. 42; Michelle Faul, 'Gitmo detainees say they were sold', *Associated Press*, 31 May 2005; Mark Denbeaux, Joshua Denbeaux and 'The Guantánamo detainees: the Government's story' at [law.shu.edu/news/Guantánamo\\_report\\_final\\_2\\_08\\_06.pdf](http://law.shu.edu/news/Guantánamo_report_final_2_08_06.pdf), May 2005.
  53. Judith Butler, *Bodies that Matter: on the Discursive Limits of 'Sex'* (New York: Routledge, 1993), p. 3.
  54. Nigel Rodley, 'Looking-glass war', *Index on Censorship* (2005), pp. 54–61; 55; Butler, *Precarious life*, pp. 80–81. It is exactly this space that the Supreme Court sought to close in its majority ruling on 29 June 2006. It found that the President acting as Commander-in-Chief has no authority to contravene the Uniform Code of Military Justice nor the international law of war that it incorporates, and determined that Common Article 3 (common to all four Geneva Conventions) applies to anyone captured in a military conflict: thus torture and cruel, inhuman and degrading treatment are expressly forbidden by law. *Hamdan v. Rumsfeld*, 415 F.3d 33 (S. Ct., 2006).
  55. J.M. Coetzee, *Waiting for the Barbarians* (New York: Vintage, 2000; first published in 1980), p. 12.
  56. Joseph Margulies, *Guantánamo and the Abuse of Presidential Power* (New York: Simon & Schuster, 2006), pp. 26–27, 31, 39–40, 121; Mark Benjamin, 'Torture teachers', *Salon.com*, 29 June 2006.
  57. Corine Hegland, 'Who is at Guantánamo Bay?', 'Guantánamo grip', and 'Empty evidence', all in *National Journal*, 3 February 2006.
  58. If this makes Guantánamo a 'third space', it is also a powerful reminder that such spaces, however transgressive they may be, are not inherently liberating.
  59. 'Standards of conduct for interrogation under 18 USC §§ 2340–2340A', Memorandum for Alberto Gonzales, Counsel to the President, from Jay S. Bybee [written by John Yoo], Assistant Attorney General, Department of Justice, 1 August 2002; Memorandum for Alberto Gonzales, Counsel to the President, from John Yoo, Deputy Assistant Attorney General, Department of Justice, 1 August 2002; in Greenberg and Dratel (eds), *Torture Papers*, pp. 172–217, 218–222; 202–203. The second memorandum did not promise the President complete absolution because 'it would be impossible to control the actions of a rogue (*sic*) prosecutor or judge' (p. 218). These determinations were repudiated as soon as the memorandum became public in June 2004, and was conveniently replaced by new guidelines just one week before Congressional hearings on Gonzales' nomination as Attorney General. In those meetings, however, Gonzales reaffirmed that 'there is no legal obligation under [the Convention Against Torture] on cruel, inhuman or degrading treatment with respect to aliens overseas'. For commentaries, see Tom Engelhardt, 'George Orwell ... meet Franz Kafka', at <http://www.tomdispatch.com>, 13 June 2004; David Cole, 'What Bush wants to hear', *New York Review of Books*, 17 November 2005; Lisa Hajjar, 'Torture and the lawless "New Paradigm"', *Interventions: Middle East Report Online*, at <http://www.merip.org/mero>, 9 December 2005.
  60. Greenberg and Dratel (eds), *Torture Papers*, pp. 228, 223, 237; 'Statement for the record: Office of General Counsel involvement in interrogation issues', Memorandum from Alberto J. Mora, General Counsel of the Navy to Vice-Admiral Albert Church, Inspector General, Department of the Navy, 7 July 2004;
  61. Alfred W. McCoy, *A Question of Torture: CIA Interrogation from the Cold War to the War on Terror* (New York: Metropolitan Books, 2006), pp. 8, 35, 46. Amnesty International describes these techniques as producing 'as grave an assault on the human person as more traditional techniques of physical torture' (pp. 56–57) and in its judgement against the use of these techniques by British security forces in Northern Ireland in 1977 the European Human Rights Commission described them as 'a modern system of torture' (p. 57). The parallels with Guantánamo are exact: see pp. 125–131.
  62. Mark Bowden, 'The dark art of interrogation', *Atlantic Monthly*, October 2003; Elaine Scarry, *The Body in Pain: the Making and Unmaking of the World* (New York: Oxford University Press, 1985), p. 4. 'As the content of one's world disintegrates,' she adds, 'so the content of one's language disintegrates: as the self disintegrates, so that which would express and project the self is robbed of its sources and subject' (p. 35).
  63. *Ibid.*, pp. 12–14. For a brilliant reflection on these matters that engages directly and sympathetically with Agamben, see Jenny Edkins, 'Testimony and sovereign power after Auschwitz: Holocaust witnesses and Kosovo refugees', in her *Trauma and the Memory of Politics* (Cambridge: Cambridge University Press, 2003), pp. 175–214.
  64. 'Request for approval of counter-resistance strategies', Memorandum for Commander, Joint Task Force 170 from LTC Jerald Phifer, Director J2, 11 October 2002; 'Counter-resistance techniques', Memorandum for Chairman of the Joint Chiefs of Staff from General James Hill, US Southern Command, 25 October 2002; Memorandum for Secretary of Defense from William J. Haynes II, General Counsel, Department of Defense, 27 November 2002; Draft Working Group Report on Detainee Interrogations in the Global War on Terrorism, 6 March 2003; Working Group Report on Detainee Interrogations in the Global War on Terrorism, 4 April 2003; 'Counter-resistance techniques in the war on terrorism', Memorandum from Secretary of Defense for the Commander US Southern Command, 16 April 2003, in Greenberg and Dratel (eds), *Torture Papers*, pp. 228, 223, 237, 241–285, 265–266, 286–359, 291, 360–365, 365.
  65. See, David Rose, 'How we survived jail hell', *Observer*, 14

- March 2004; Severin Carrell, 'US guards at Guantánamo tortured me, says UK man,' *Independent*, 24 April 2005; 'Detention in Afghanistan and Guantánamo Bay: statement of Shafiq Rasul, Asif Iqbal and Rhuheh Ahmed', Center for Constitutional Rights, New York, 26 July 2004; *Guantánamo and Beyond*; 'Testimony of Guantánamo detainee Jumah al-Dossari', Amnesty International, 7 November 2005; Mark Oliver, "'They couldn't take away my dignity'", *Guardian*, 18 November 2005; Moazzam Begg and Victoria Brittain, *Enemy Combatant: A British Muslim's Journey to Guantánamo and Back* (New York: Free Press, 2006); *Report on Torture and Cruel, Inhuman and Degrading Treatment of Prisoners at Guantánamo Bay, Cuba* (New York: Center for Constitutional Rights, July 2006).
66. Dana Priest and Scott Higham, 'At Guantánamo, a prison within a prison', *Washington Post*, 17 December 2004; Douglas Jehl, 'Classified report warned on CIA's tactics in interrogation', *New York Times*, 9 November 2005; Brian Ross and Richard Esposito, 'CIA's harsh interrogation tactics described', *ABC News*, 18 November 2005. The Director of the CIA insisted that none of these techniques constituted torture, but an editorial in the *Washington Post*, asked: 'If an American pilot is captured in the Middle East, then beaten, held naked in a cold cell and subjected to simulated drowning, will [CIA Director] Goss say that he has not been tortured?' 'Director for Torture', *Washington Post*, 23 November 2005.
  67. 'Guantánamo: a history of torture', transcript of interview with Alfred McCoy at <http://www.informationclearinghouse.info/article/13597.htm>.
  68. Seymour Hersh, *Chain of Command: The Road from 9/11 to Abu Ghraib* (New York: HarperCollins, 2004), p. 41; for a full discussion, see Gregory, 'Vanishing points'.
  69. Josh White, 'President relents, backs torture ban', *Washington Post*, 16 December; Charlie Savage, 'Bush could bypass new torture ban', *Boston Globe*, 4 January 2006. Until George W. Bush assumed power, signing statements had been issued 322 times since 1817, but in his first term alone, Bush issued them 435 times. He has used them most frequently to assert the unsurpassable power of 'the unitary executive' over that of both the legislature and the judiciary: Philip W. Cooper, 'George W. Bush, Edgar Allan Poe and the use and abuse of Presidential signing statements', *Presidential Studies Quarterly*, 35 (2005), pp. 515–532; Jennifer van Bergen, 'The unitary executive', *Counterpunch*, 12 January 2006.
  70. Josh White and Carol Leonnig, 'US cites exception in torture ban', *Washington Post*, 3 March 2006.
  71. Rasul v. Bush, 321 F.3d 1134 (S. Ct., 2004); Department of the Army, Inspector General, Detainee Operations Inspection, 21 July 2004, in Greenberg and Dratel (eds), *Torture Papers*, pp. 630–907, 688, 707–708; Emily Bazelon, 'From Bagram to Abu Ghraib', *Mother Jones*, March/April 2005; Tim Golden and Eric Schmitt, 'A growing Afghan prison rivals bleak Guantánamo', *New York Times*, 26 February 2006. Bagram also housed one of the CIA's secret prisons in a cluster of metal shipping containers; it replaced the infamous 'Salt Pit' in an abandoned brick factory north of Kabul: Dana Priest and Barton Gellman, 'US decries abuse but defends interrogations', *Washington Post*, 26 December 2002; Dana Priest, 'CIA avoids scrutiny of detainee treatment', *Washington Post*, 3 March 2005; idem., 'CIA holds terror suspects in secret prisons', *Washington Post*, 2 November 2005. But coercive interrogations were also used by the US military at Bagram, including prolonged standing, hooding and blindfolding, stress positions, intimidation by attack dogs, sleep deprivation, and sexual abuse. The deaths of two prisoners in military custody, who had been hung in chains from the ceiling of their cells, were acknowledged to have been homicides: *The Threat of a Bad Example* (Amnesty International, AMR 51/114/2003, 19 August 2003); Suzanne Goldenberg and James Meek, 'Papers reveal Bagram abuse', *Guardian*, 18 February 2005; McKenzie Funk, 'The man who has been to America', *Mother Jones*, September/October 2006.
  72. Tom Engelhardt, 'Into the shadows', at <http://www.Tom-Dispatch.com>, 5 April 2004; Dana Priest and Joe Stephens, 'Abu Ghraib is just the most notorious of a network of detention centers', *Washington Post*, 23 May 2004; Jonathan Steele, 'A global gulag to hide the war on terror's dirty secrets', *Guardian*, 14 January 2005; Douglas Jehl, 'Pentagon seeks to transfer more detainees from base in Cuba', *New York Times*, 11 March 2005; Adrian Levy and Cathy Scott-Clark, "'One huge US jail'", *Guardian*, 19 March 2005; Josh White and Robin Wright, 'Afghanistan agrees to accept detainees', *Washington Post*, 5 August 2005; Tim Golden, 'US says it fears detainee abuse in repatriation', *New York Times*, 30 April 2006; Gregory, 'Vanishing points'.
  73. Dana Priest, 'Long-term plan sought for terror suspects', *Washington Post*, 2 January 2005; Julian Borger, 'US plans permanent Guantánamo jails', *Guardian*, 3 January 2005; David Stout, 'CIA detainees sent to Guantánamo', *New York Times*, 6 September 2006; Dan Eggen and Dafna Linzer, 'Secret world of detainees grows more public', *Washington Post*, 7 September 2006.
  74. Neil MacMaster, 'Torture: from Algiers to Abu Ghraib', *Race and Class*, 46 (2) (2004), pp. 1–20; Lesley Gill, *The School of the Americas: Military Training and Political Violence in the Americas* (Durham, NC: Duke University Press, 2004); Jennifer Harbury, *Truth, Torture and the American Way: The History and Consequences of US Involvement in Torture* (Boston, MA: Beacon Press, 2005).
  75. Hence 'Guantánamo is both a shameful secret and a public emblem of power': Susan Willis, 'Guantánamo's symbolic economy', *New Left Review*, 39 (2006), pp. 123–131, 123. Its partial visibility also distracts the public gaze from what happens at other Guantánamos, such as Bagram, and at the CIA's black sites.
  76. Margulies, *Guantánamo*, p. 45. Instrumentalism is not confined to the Bush administration, and neo-liberalism and neo-conservatism display the same Janus face to the law. On the one side, they consistently disparage the law (the appeal to 'the unitary executive' beyond juridical oversight, the assault on 'activist judges', and the clarion call for 'de-regulation'). On the other side they assiduously write new laws that restrict democratic politics, roll back human rights and reify the free market.
  77. Julian Reid, 'The biopolitics of the War on Terror', *Third World Quarterly*, 26 (2005), pp. 237–252, 241; see also Timothy Brennan and Keya Ganguly, 'Crude wars', *South Atlantic Quarterly*, 105 (2006), pp. 19–35, 25–28.
  78. Kaplan, 'Guantánamo', pp. 851–854. Humphreys offers a more optimistic view of judicial intervention – which, as he says, is strikingly absent from Agamben's account – but he too concludes that, in the cases decided by the Supreme Court, this has not been 'truly decisive': Stephen Humphreys, 'Legalizing lawlessness: On Giorgio Agamben's *State of Exception*', *European Journal of International Law*, 17 (2006), pp. 677–687, 687.
  79. Hamdan v. Rumsfeld, 415 F.3d 33 (S. Ct., 2006); William Branigin, 'Supreme Court rejects Guantánamo war crimes

- trials', *Washington Post*, 29 June 2006; Dana Milbank, 'It's Bush's way or the highway on Guantanamo Bay', *Washington Post*, 12 July 2006;
80. Jonathan Weisman, 'Battle looms in Congress over military tribunals', *Washington Post*, 13 July 2006; Kate Zernik, 'White House prods Congress to curb detainee rights', *New York Times*, 13 July 2006; Pauline Jelinek, 'Army bans some interrogation techniques', *Washington Post*, 6 September 2006; Julian Barnes, 'CIA can still get tough on detainees', *Los Angeles Times*, 8 September 2006; Kate Zernik and Neil Lewis, 'Plan for tribunals would hew to the first series', *New York Times*, 7 September 2006; Adam Liptak, 'Interrogation methods rejected by military win Bush's support', *New York Times*, 8 September 2006.
81. Kate Zernik, 'Military lawyers urge protections for detainees', *New York Times*, 14 July 2006; Jonathan Weisman, 'Senators gain momentum to change military tribunal system', *Washington Post*, 15 July 2006.
82. Howard Ehrlich, 'Why the black flag?' in his *Reinventing Anarchy, Again* (San Francisco, CA: AK Press, 1996), pp. 31–32.