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# Guantanamo Forever: United States Sovereignty and the Unending State of Exception

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# Guantanamo Forever: United States Sovereignty and the Unending State of Exception

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STORMING THE COURT: HOW A BAND OF YALE LAW STUDENTS SUED THE PRESIDENT—AND WON. By Brandt Goldstein. New York: Scribner. 2005. Pp. 384. \$26.00 (cloth).

*Reviewed by Mary Anne Franks\**

No sacrifice is too great for our democracy, least of all the temporary sacrifice of democracy itself.

—Clinton L. Rossiter<sup>1</sup>

The name Guantanamo Bay is now inextricably linked with images of shackled men in orange jumpsuits and black hoods, with the designation of “enemy combatants,” and with the uncertain, possibly severe violence to which they are subjected. The camps, in their strange positioning between the rule of law and utter lawlessness, stand for the outer limit of U.S. sovereign power. Guantanamo functions as this limit in two simultaneous but paradoxical senses. The camps at Guantanamo are first and foremost a creation of the United States, and those detained there are held pursuant to the exercise of American sovereign power. At the same time, however, the U.S. government asserts that American courts have no jurisdiction, and U.S. laws do not apply, in Guantanamo. Guantanamo is thus a kind of no man’s land where traditional conceptions of human rights do not exist, and where U.S. sovereign power is allegedly impotent to guarantee the basic human rights that are the cornerstone of democracy.

The government has attempted to justify the extraordinary measures taken at Guantanamo—the tactics employed in capturing and keeping the prisoners, the creation of “enemy combatant” status, the use of torture or other questionable measures in extracting information from the prisoners, the denial of due process, and the trying of prisoners by military commissions rather than full courts—as necessary responses to an extraordinary situation: a post–September 11 world facing imminent danger from a shadowy and powerful enemy. In short, the U.S. government has justified the paradox of Guantanamo through the invocation of the state of emergency, or what Carl Schmitt called the state of exception.<sup>2</sup> The dark and

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<sup>1</sup> CLINTON L. ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* 314 (1948).

<sup>2</sup> See CARL SCHMITT, *POLITICAL THEOLOGY* (George Schwab trans., MIT Press 1985)

paradoxical dimension of the state of exception, as theorists such as Giorgio Agamben and Slavoj Žižek have pointed out, is that the state of exception, which is meant to be a temporary provisional suspension of the norm, often instead becomes the norm—the law—itself. As Agamben writes, “[T]he state of exception is not a special kind of law (like the law of war); rather, insofar as it is a suspension of the juridical order itself, it defines law’s threshold or limit concept.”<sup>3</sup> The consequences of this perpetual state of exception for the democratic project are becoming brutally clear in light of the seemingly endless “war on terror.”

But as Brandt Goldstein’s book, *Storming the Court: How a Group of Yale Law School Students Sued the President—and Won*,<sup>4</sup> vividly describes, Guantanamo Bay was already a legal no-man’s land grounded in a state of exception back in 1991, when Haitian refugees fleeing persecution were taken from their makeshift boats and detained in a tiny corner of Cuba. The historical background of that phenomenon is somewhat complex: in 1981, President Reagan issued an executive order authorizing the Coast Guard to interdict boats carrying Haitians toward the United States and giving the Coast Guard the power to immediately return the Haitians to their country. This order was based on an agreement between the Reagan administration and the Haitian dictator Jean-Claude “Baby Doc” Duvalier (p. 18). This was the only agreement of this kind that the United States had with any country (p. 18). President Reagan stated in a formal proclamation that fleeing Haitians “threatened the welfare and safety” of the United States.<sup>5</sup> However, this order expressly forbade the return of any Haitian who was a refugee. This was in keeping with the foundational principle of immigration law known as “non-return” or “non-refoulement” (p. 18). The 1951 Convention Relating to the Status of Refugees, which the United States ratified, held that “[n]o Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>6</sup> One of the specters that haunted the United States’ ratification of this Convention was an incident involving a ship called the *St. Louis*. In June of 1939, the *St. Louis*, carrying 900 Jewish refugees fearing for their lives, was turned away by both the United States and Canada (p. 28). With nowhere to go for refuge, the ship and its in-

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(1922).

<sup>3</sup> GIORGIO AGAMBEN, *STATE OF EXCEPTION* 4 (Kevin Attell trans., Univ. of Chicago Press 2005) (1942).

<sup>4</sup> BRANDT GOLDSTEIN, *STORMING THE COURT: HOW A BAND OF YALE LAW STUDENTS SUED THE PRESIDENT—AND WON* (2005).

<sup>5</sup> Proclamation No. 4865, 46 Fed. Reg. 48,107 (Sept. 29, 1981).

<sup>6</sup> United Nations Convention Relating to the Status of Refugees, art. 33, adopted July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150.

habitants were forced to return to Nazi Germany, where all but a handful of the passengers were killed (p. 28).

The U.S. government's formal attempt to comport with the Convention was motivated in part by this disturbing history. The administration, through what was then called the Immigration and Naturalization Service (INS), sent officers to the Coast Guard cutters to conduct interviews to determine which Haitians qualified as refugees. Between 1981 and 1991, the INS rejected 99.9% of the Haitians picked up by the Coast Guard on the high seas. Out of 23,000 Haitians interviewed during this time, only twenty-eight were brought to the United States. At the same time, the United States accepted hundreds of thousands of refugees from other countries (p. 18).

The popular and democratically elected Jean-Bertrand Aristide was toppled by a military coup in 1991, and the new government began a campaign of beating and killing those perceived to be Aristide supporters. Haitians who attempted to flee to the United States were picked up by the Coast Guard and given perfunctory interviews. Only about a third of all the refugees who were interdicted during this time were "screened in" as having credible fears of persecution. The George H. W. Bush Administration resumed the practice of forced repatriation for those Haitians who had been "screened out," but legal challenges led to a judicially ordered suspension of this policy. With hundreds of Haitians still aboard Coast Guard cutters, the majority of whom had been "screened out," the U.S. Naval Station in Guantanamo was opened to house them. Both the "screened-in" and the "screened-out" Haitians were detained in squalid camps surrounded by barbed wire and informed that their detention would be indefinite. They were denied access to counsel and simply left waiting in what were effectively prisons.

In 1992, with the numbers of fleeing Haitians soaring into the thousands, President Bush issued what has since become known as the "Kenebunkport Order," which mandated the immediate return of any refugee attempting to reach the United States by sea from Haiti (p. 129). This policy on its face seemed to violate the Convention. The Bush administration rationalized this direct return policy by arguing that the successful entrance of any intercepted Haitians would encourage a flood of economic migrants to undertake voyages that would endanger their own lives and overwhelm Coast Guard resources. The administration also widely publicized its impression that most Haitians were not fleeing genuine persecution, but rather were merely in search of better economic prospects. Additionally, the public perception that many Haitians were HIV-positive played a significant role in amassing support for this policy (pp. 56–57).

Goldstein focuses on the story of one Haitian woman who was successfully "screened in" at Guantanamo only to find herself denied entry to the United States when she tested positive for HIV (pp. 112–14). Yvonne Pascal (a pseudonym) and her husband had been democracy activists in Haiti. One night soldiers came to Yvonne's home and beat her so badly with

rifle butts, boots, and fists that she miscarried on the floor in a pool of blood. Yvonne felt she would be killed the next time the soldiers came for her and also feared that she was endangering her two children by remaining in Haiti, so she squeezed into a severely overcrowded boat and began the long, arduous journey to the United States. Eventually intercepted by the Coast Guard, the passengers were taken aboard a cutter and their boat was blown up. Yvonne was interviewed shortly after her arrival in Guantanamo and was determined to have a credible fear of persecution. She was then tested for HIV and was told that she was positive. Because of her HIV status, Yvonne was told that she would be indefinitely detained in Guantanamo rather than sent to the United States as she had expected. She was not informed of the details of her condition or what kind of treatment she would need. The group of Yale students, led by Professor Harold Koh and assisted by numerous other lawyers, had two separate cases to develop: one challenging President Bush's direct return policy, and the other challenging the blood testing of "screened-in" Haitians without the benefit of counsel or other procedural safeguards, as well as the subsequent denial of parole to these detainees.

While the Supreme Court upheld the direct return policy,<sup>7</sup> the Yale team prevailed in the Eastern District of New York in the second case,<sup>8</sup> and Yvonne and other HIV-positive detainees were granted entry into the United States (pp. 287, 291). The government had argued that because Guantanamo was not within the United States, U.S. laws—including constitutional rights to due process—simply did not apply. Judge Sterling Johnson expressed his disbelief that any person detained through U.S. actions could be subjected to arbitrary and capricious conduct merely because they were held outside of the country (p. 276). However, Judge Johnson's decision was ultimately vacated (p. 300). Guantanamo was not shut down, as the students involved in the case had hoped, but instead went on to become the present-day detention site for so-called "enemy combatants."

In an eerie repetition of history, the "enemy combatant" detainees shipped to Guantanamo were, like the Haitian detainees before them, denied the protections of U.S. laws, even though their very presence in Guantanamo was a direct consequence of the exercise of U.S. law. Then, as now, although the U.S. exercises sovereign power in its arrest and detainment of alleged enemy combatants, it simultaneously disclaims the power (and obligation) to protect the basic rights of human beings under its jurisdiction.

The due process rights guaranteed by the Fifth Amendment were not designed to protect only the morally upstanding, the innocent, or those with

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<sup>7</sup> See *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993).

<sup>8</sup> See *Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993) (vacated by Stipulated Order Approving Class Action Settlement Agreement (Feb 22, 1994)).

citizenship. The plain language of the Fifth Amendment is that “*No person shall be . . . deprived of life, liberty, or property, without due process of law*”<sup>9</sup>—not refugees, not migrants, and especially not those who are suspected or accused of committing a crime. If one reads the Fifth Amendment this way, the properly universal aspect of due process is not incidental to liberal democracy; it is essential to it. This is what could be called the radically Kantian or even the radically Christian principle of the law—all humans should be treated with basic respect and dignity *whether they deserve it or not*—and to evaluate a human being according to whether he or she possess traits we admire, or even according to the evil he or she may have done, is nothing other than the negation of that principle.<sup>10</sup> On this reading, due process guarantees the *form* of respect to all human beings, and this is at least as vital, if not more so, to the ethical and existential intelligibility of those who carry out the law as much as it is to the welfare of those upon whom the law is carried out.

The dangers of abandoning the form of this essential respect in order to counter those who do not share this respect—who commit atrocities and seek to destroy the very principle of liberal democracy—can be thought of in terms of Nietzsche’s deceptively simple warning from *Beyond Good and Evil*: “Whoever fights monsters should see to it that in the process he does not become a monster.”<sup>11</sup> It is not merely a question of consistency; rather, it is a deeper metaphysical question about what remains if you sacrifice everything. When we take exception to that which is essential to democracy—even and especially for reasons of protecting democracy—we take exception to democracy itself. As Žižek points out, the ominous implication of John Ashcroft’s claim that “terrorists use America’s freedom as a weapon against us” is that “in order to defend ‘us,’ we should limit our freedoms.”<sup>12</sup> But if we do this, we effect mere reaction or retaliation, rather than preserving the necessary foundation for the return of real democracy. In fact, by taking exception to what we wish to preserve, we turn our backs on the possibility of that return. This concern is heightened when the exception is taken in a self-perpetuating context, for example, in the war against terror, a war that the U.S. government admits may be unending. In such situations, the exception is destined to become the rule.

Another reason the state of exception is antithetical to democracy is that it involves the exercise of sovereign power. According to Agamben, sovereign power is the power to decide the state of exception; the sover-

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<sup>9</sup> U.S. CONST. amend. V (emphasis added).

<sup>10</sup> See IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 36 (James W. Ellington trans., Hackett Publishing 1993) (1785).

<sup>11</sup> FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL: PRELUDE TO A PHILOSOPHY OF THE FUTURE* 89 (Walter Kaufmann trans., Vintage International Publishers 1989) (1886).

<sup>12</sup> SLAVOJ ŽIŽEK, *WELCOME TO THE DESERT OF THE REAL: FIVE ESSAYS ON SEPTEMBER 11 AND RELATED DATES* 107 (2002).

eign is one who decides both what falls within and what falls outside its power.<sup>13</sup> John Locke offered perhaps the easiest way to conceive of why this power cannot comport with democracy. Locke perceived that the greatest danger to good and just government was arbitrariness. He believed that the power to exercise absolute and capricious power constitutes the very essence of despotism. Something must intervene between the intense and arbitrary passions of the individual and the subjects whom he wishes to control or punish. For Locke, that something is the system of ordered government, or what he termed the social contract. Locke's notion of the social contract is built around the belief that no agent should have the power to place another human being into his absolute and arbitrary power. If an agent is allowed to have that power, there is no democracy, only tyranny.<sup>14</sup>

Agamben resurrects the ancient Roman designation of the "*homo sacer*" (literally, sacred man) to demonstrate the absolute and arbitrary power of the sovereign.<sup>15</sup> In ancient Roman law, *homo sacer* designated a person who could be killed with impunity. Killing a *homo sacer* was not considered homicide, and his death also bore no sacrificial value. Agamben writes that the *homo sacer* is excluded from society's recognition or protection, and that his existence consists of "bare life," a life stripped of dignity or basic human rights.<sup>16</sup> Agamben gives many modern-day examples of *homo sacer*, the most vivid of which is the "Muselmann." The term "Muselmann" was concentration camp slang for an inmate who had lost the will to live, who seemed to exist in a grey area between life and death, a walking corpse. A Muselmann was someone who had been broken down by the absolute and arbitrary power exerted upon him by the soldiers and commandants who might on one day bring him extra food and blankets and the next day torture him. The Nazis perfected the art of the perpetual state of exception; the concentration camp itself was an exception, with the inhabitants excluded from all law. This is fundamentally different from being punished by the law; the inmates were not prisoners in any normal juridical sense, but rather were outside the law, beyond the reach of the protection of the form of the law, completely subject to the whims of their captors.<sup>17</sup>

Agamben draws a parallel between the legal status of concentration camp inmates and the status of those detained under the original Patriot Act of October 2001. "What is new about President Bush's order," he

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<sup>13</sup> See AGAMBEN, *supra* note 3, at 35.

<sup>14</sup> See JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 17 (C.B. Macpherson ed., Hackett Publishing 1980) (1689).

<sup>15</sup> See GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* (Daniel Heller-Roazen trans., Stanford University Press 1998) (1995).

<sup>16</sup> See *id.*

<sup>17</sup> In an interesting linguistic irony, the German word "Musulmann" literally translates into "Muslim," although the slang term did not of course refer to actual Muslims in the camps.

writes, “is that it radically erases any legal status of the individual, thus producing a legally unnamable and unclassifiable being . . . . Neither prisoners nor persons accused, but simply ‘detainees,’ they are the object of a pure de facto rule, of a detention that is indefinite not only in the temporal sense but in its very nature as well, since it is entirely removed from the law and from judicial oversight.”<sup>18</sup> Žižek provides his own example of the United States acting as sovereign in relation to numerous present-day manifestations of *homo sacer* by referring to the confusion of Afghani citizens after September 11, who did not know if American war planes flying overhead would drop food or bombs.<sup>19</sup> The United States could choose to be both the humanitarian and the aggressor, according to no set principle or consistent form. Those over whom the United States could exercise this power were completely vulnerable to whichever choice was made. The U.S. government arguably maintained the same relationship with the Haitian detainees at Guantanamo—sometimes the camp officials would provide very good care and treatment to the inhabitants, but at other times the officials treated them very badly and kept the camps in terrible condition. Either way, the detainees were completely subject to the whims of those who oversaw the camps.

The concepts of sovereignty and exception can also help explain the widely contradictory reports of the treatment of enemy combatants at Guantanamo and the prisoners of Abu Ghraib. On the one hand, U.S. officials report that the camp inhabitants are given copies of the Koran, provided halal meals, and allowed to pray three times a day;<sup>20</sup> on the other hand, there are reports of torture, abuse, and humiliation on a truly horrific scale.<sup>21</sup> Again the power of the sovereign is clear: the sovereign can decide what falls outside of the law, and that which falls outside the law can be subjected to the most generous of gestures or to the cruelest of tortures.

On the subject of torture, recent liberal attempts to put “torture on the table” highlight yet another aspect of sovereign power instating the exception, and illustrate perhaps better than anything else the toll on humanity that it exacts. Alan Dershowitz has famously opined that he is “not in favor of torture, but if you’re going to have it, it should damn well have court approval.”<sup>22</sup> The gist of his argument for legalizing torture follows the familiar liberal logic that if something bad is going to be done, it is better for it to be out in the open so as to prevent the worst excesses. Dershowitz is fond of positing the “ticking bomb scenario,” in which he

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<sup>18</sup> AGAMBEN, *supra* note 3, at 3–4.

<sup>19</sup> Slavoj Žižek, *Are We in a War? Do We Have an Enemy?*, LONDON REV. BOOKS, May 23, 2002, at 3.

<sup>20</sup> Press Release, American Forces Press Service, Rumsfeld Defends Servicemembers Accused of Running Gulag (June 1, 2005).

<sup>21</sup> U.N. Econ. & Soc. Council [ECOSOC], *Situation of Detainees at Guantanamo Bay*, ¶¶ 50–52, U.N. Doc. E/CN.4/2006/120 (Feb. 15, 2006).

<sup>22</sup> Žižek, *supra* note 19 (quoting Jonathan Alter, *Time to Think About Torture*, NEWSWEEK, Nov. 5, 2001, at 45).



justifies torture as the only means of obtaining information that would save hundreds of lives. Žižek, in his critique of Dershowitz's position, does not disagree with the sentiment that Dershowitz expresses in this scenario. Žižek posits that we can all imagine that given such a specific situation we might indeed resort to torture. Žižek's critique focuses squarely on the way Dershowitz wants to turn this genuine exception into a state of exception: "it is absolutely crucial that one does not elevate this desperate choice into a universal principle: given the unavoidable and brutal urgency of the moment, one should simply do it."<sup>23</sup> The reason for this, Žižek emphatically insists, is that only by refusing to elevate an action we were brutally compelled to make can we retain "the sense of guilt, the awareness of the inadmissibility of what we have done."<sup>24</sup>

The inhumanity of the state of exception does not necessarily lie in the act of making an exception. It is possible that there are times that we are forced to commit violence, and deny the humanity of another, to preserve peace or save lives. But even if this can be shown to be necessary, such measures remain inadmissible and unjustifiable in the realm of the law. By formalizing and justifying the extreme measures we might be compelled to take in order to save innocent lives or defend democracy—by writing it into our law and rendering explicit our sovereign power—we absolve ourselves of guilt and anaesthetize ourselves to the horror of what we have done. The state of exception allows us to take refuge in a systemized principle and point to it as our reason and our defense; in fact we should be called upon to answer for every case of inhumanity perpetrated in the name of our country. The state of exception in the mode of absolute sovereign power—in the mode of current government power—is unacceptable precisely because it is only falsely temporary, only falsely exceptional. A state of exception that denies the formal protection of basic human dignity of all persons will be neither temporary nor ultimately protective of that dignity. If we continue to exercise our power through the state of exception, and inscribe inhumanity into our law, we will lose more than the war on terror.

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<sup>23</sup> Žižek, *supra* note 19.

<sup>24</sup> ŽIŽEK, *supra* note 12, at 103.