GUANTÁNAMO: UNDERSTANDING THE NARRATIVE OF DEHUMANIZATION THROUGH THE LENS OF AMERICAN EXCEPTIONALISM AND DUALITY OF 9/11

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Naked and only wearing a diaper, Muhammad Saad Iqbal Madni was forced to urinate and defecate on himself.[1] He was housed in a

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refrigerator for 6 months and confined in grave-like spaces.[2] As part of the *frequent flyer* designation, he endured an "around the clock" shifting from cell to cell and cage to cage, in the attempt to guarantee sleep deprivation.[3] He was bruised, bloodied, and traumatized—months of kicks, punches, and tightly bound shackles.[4] Puss oozed from his perforated eardrum.[5] He had been probed anally.[6] He attempted suicide and several hunger strikes.[7] Captured in Indonesia, as part of the U.S. war on terror, he was held for years without legal representation or proof of any crimes.[8] He recalls his anguish at the hands of a multicultural team of captors, all working at the behest of the U.S. Government.[9] He details his first encounter with an American Intelligence Officer, "My name is Ron, we did a mistake in arresting you, but . . . ."[10] He cries and wipes his eyes.[11] His head slouches down, he is silent.[12] It would be six-and-a-half years before he was released from Guantánamo.[13] Physically free from his captors, but not really free at all.[14]

The nightmarish details described above represent the detention of many Guantánamo detainees. There are many firsthand accounts, photos,

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1. This firsthand account comes from Muhammad Saad Iqbal Madni. He is a thirty-one year-old Pakistani who was arrested in 2002 in Jakarta, Indonesia. Mr. Madni states he traveled to Indonesia to break the news of his father's death to his stepmother. He spent nearly seven years in detention. His detention centers around the issue of torture by proxy practice, often called extraordinary rendition. This practice engages foreign countries, such as Egypt, to act as interrogators of suspected terrorists. This ensures that the suspects are beyond the reach of the American legal system. Mr. Madni was never convicted of any crime, nor charged with one. His release came in 2009. *See* Carol Grisanti & Fakhar ur Rehman, *'I Wake Up Screaming': A Gitmo Nightmare*, NBC NEWS (Jan. 18, 2011), http://www.msnbc.msn.com/id/41128834/ns/world_news-south_and_central_asia; *see also Former Guantanamo Detainee Speaks*, NBC NEWS (Jan. 18, 2011), http://www.msnbc.msn.com/id/41128834/ns/world_news-south_and_central_asia (video report detailing his encounter with the American Intelligence Officer named Ron); *see generally* Jane Perlez, Raymond Bonner & Salman Masood, *An Ex-Detainee of the U.S. Describes a 6-Year Ordeal*, N.Y. TIMES (Jan. 5, 2009), http://www.nytimes.com/2009/01/06/world/asia/06iqbal.html?_r=2&pagewanted=1.

2. Grisanti & Rehman, *supra* note 1.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. Grisanti & Rehman, *supra* note 1.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. Grisanti & Rehman, *supra* note 1.

and documents which point to the continued saga of grotesque violations within Guantánamo's padlocked fences. But, much to the dismay of many, this is not a new story. The systemic nature of these violations finds historical roots that take us back to relive one of humanity's darkest chapters—a chapter we never thought we would revisit. Etched back in time, straddling the shared narrative of human and legal dimensions, a Guantánamo-like saga unfolded on the African slave ship *Amistad*.[15] The *Amistad* captives, much like the Guantánamo detainees, endured torture, sickness, and death.[16] Despite being situated centuries apart, the eerie similarity of the saga of the *Amistad* and that of Guantánamo intersects

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15. The *Amistad* Africans were seen as fresh hands and bodies that could work the profitable sugar and cocoa plantains of Cuba. These Africans were sold in 1839 in direct contravention of an 1817 treaty between Spain and Britain. *See The Amistad*, 40 U.S. 518, 519-21 (1841). This treaty prohibited the importation of slaves to Spanish colonies. The *Amistad* slaves were forced onto the goods ship named *Amistad*, which means "friendship." The slaves hailed from the Sierra Leone area of Africa. The *Amistad*, however, never reached the plantation fields of Cuba. Instead, the group of slaves, led by a slave named Cinque, engineered an uprising. *Id.* at 590. Through a myriad of events, the uprising ultimately failed, landing the slaves in the northeast region of the United States, where they were jailed. *Id.* at 519.

The *Amistad* slaves were initially put on trial for the killing of the ship's captain and most of the crew. Circuit Court Judge Thomas first ruled that the uprising by the *Amistad* slaves did not involve U.S. citizens, and occurred in international waters, and thus the court had no jurisdiction to bring criminal charges. But Judge Thomas also found that, although the *Amistad* slaves were not prisoners, the court had to decide if they were property, and if they were property, who exactly owned them. *Id.* at 520-21.

This led to a decision by Judge Judson on January 13, 1840, that the *Amistad* slaves were "born free" and kidnapped in violation of international law. *Id.* at 529. He ordered them to be transported back to Africa. *Id.* at 519. This, however, was not the end of the *Amistad* saga. The Administration appealed Judge Judson's decision, but it was affirmed by Circuit Judge Thompson. *Id.* The Administration again appealed to the United States Supreme Court. *Id.* at 532. At this point, the *Amistad* defense counsel included the aging former U.S. president, John Quincy Adams, who in court pleaded for the slaves' freedom and humanness. *Id.* at 520.

On March 9, 1841, the Supreme Court ruled that the *Amistad* slaves were kidnapped Africans, and this violated Spanish law, and thus they deserved their freedom. *Id.* They were free, and could stay in the U.S. or return to Africa. This ruling, however magnificent, still lacked any sincere statement about the atrocities of slavery. Instead, the ruling focused on a property rights issue. *Id.* at 520-23. Because, if the slaves of the *Amistad* were brought on the goods vessel from Africa prior to the 1820 treaty, the court would have ruled that they were mere property, just like the other items on the vessel, and sent back to Cuba along with the rest of the goods. *See The Amistad*, 40 U.S. 518 (1841); *see generally* Clifton H. Johnson, *The Amistad Case and its Consequences in U.S. History*, AMISTAD RESEARCH CTR., http://www.amistadresearchcenter.org/Docs/Johnson%20-%20The%20Amistad%20Case%20and%20Its%20Consequences.pdf (last visited Oct. 29, 2011).

16. *See The Amistad*, 40 U.S. at 519. *See also* Johnson, *supra* note 15.

both the prevailing law's inability to provide just relief to the persons involved, and its failure to provide meaningful societal awareness for the desecrated humans.[17] Both *Amistad* and Guantánamo are bound further by a mindset and legal system that allowed for the continued dehumanization of the captives.[18] The shared historical strands of *Amistad* and Guantánamo start with the captives being dehumanized, and end with the captives dehumanized. Their shared strands also reflect the stark commonality of the legal system's failure, seen through the Supreme Court's 1825 decision in the *Antelope*[19] case. The Court found that, regardless of how unjust and unnatural slave profiteering may be, it is not "contrary to the laws of nations."[20] The legacy of the opinion continues to reverberate today, fostering an atmosphere of continued

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17. The shared strands of yesteryears' *Amistad* and today's Guantánamo can be seen in the fundamental questions regarding the source and nature of executive power being asked in both situations, such as, under what authority can the executive capture, imprison and abuse people indefinitely without giving them the due process of law? Or, does the executive ever have authority to act without giving them any possibility of review by the judiciary? While the Supreme Court answered both questions in the negative in *Amistad*, and the captured individuals were released eventually, more than 170 prisoners in Guantánamo will not see any light at the end of the day. Long before Guantánamo, these fundamental questions of human rights was posed before the U.S. Supreme Court, as John Adams inquired of the Supreme Court in *Amistad*:

> "[h]ave the officers of the U. S. Navy a right to seize men by force, on the territory of New York, to fire at them, to overpower them, to disarm them, to put them on board of a vessel and carry them by force and against their will to another State, without warrant or form of law? I am not arraigning Lieut. Gedney, but I ask this Court, in the name of justice, to settle it in their minds, by what law it was done, and how far the principle it embraces is to be carried."

See Argument of John Quincy Adams, United States v. Cinque, (Feb. 24, 1841 and March 1, 1841), *available at* http://www.historycentral.com/amistad/amistad.html. John Quincy Adams challenged the executive's position in the Supreme Court, by asking precisely, "[whether the] Court to sanction such monstrous usurpation and Executive tyranny" by depriving the *Amistad* captives of the most fundamental rights. *Id.* Similar sentiments have been echoing in various court proceedings in the U.S. at various federal courts. *Id.* As Adams argued that overriding the jurisdiction of the courts "would be the assumption of a control over the judiciary by the President, which would overthrow the whole fabric of the [C]onstitution; it would violate the principles of our government generally and in every particular." *Id.* The Supreme Court in *Amistad* ruled that U.S. courts were bound to protect the rights of the Amistad captives. *Id.* The rights of the case "must be decided upon the eternal principles of justice and international law." *The Amistad*, 40 U.S. at 595. To rule otherwise would "take away the equal rights of all foreigners, who should contest their claims before any of our courts, to equal justice," or "deprive such foreigners of the protection given them" by "the general law of nations." *Id.* at 596.

18. *The Amistad*, 40 U.S. at 518. *See also supra* note 15, and accompanying text.

19. *The Antelope*, 23 U.S. 66 (1825).

20. *Id.* at 90, 115.

dehumanization through Guantánamo, crying out for a sliver of *justness* behind its texts. The opinion of the highest court in *Amistad*[21] haunts us, as its echo is heard inside the walls of Guantánamo through similar acts of human degradation.[22] Albeit, it is unfolding in a different theater of conflict, and indeed, drawn from different motives. Nonetheless, captives held at Guantánamo are still fighting against prevailing U.S. laws, and the societal awareness that accounts for their continued inhumane treatment. The slaves of *Amistad* were eventually freed.[23] But, many within Guantánamo have not been so fortunate, as they continue to languish in detention centers, in horrific confinement, yet to see the due process of law after almost a decade of detention.[24]

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21. 40 U.S. 518 (1841). *See also supra* note 15, and accompanying text.

22. *See* sources cited *infra* note 193. Many legal advocates, politicians, friends of the court, and other activists have called for the closing of Guantánamo and all detention centers associated with the war on terror. While some courts have ordered the release of detainees, the fear and specter of Guantánamo staying open indefinitely permeates the social and legal atmosphere.

23. *The Amistad*, 40 U.S. 518 (1841).

24. As *Boumediene v. Bush*, *infra* at Part III, opened the floodgates for habeas challenges by detainees, district court judges both held habeas merits proceedings and ordered detainees' releases in a number of cases. *See, e.g.*, Boumediene v. Bush, 579 F. Supp. 2d 191 (D.D.C. 2008) (granting writ as to Lakhdar Boumediene, Mohamed Nechla, Hadj Boudella, Mustafa Ait Idir, and Saber Lahmar; denying writ as to Bekacem Bensayah); Barhoumi v. Obama, 609 F.3d 416 (D.D.C. 2010) (denying writ); Al Odah v. United States, 648 F. Supp. 2d 1 (D.D.C. 2009) (denying writ); Al-Adahi v. Obama, No. 05-280, 2009 WL 2584685 (D.D.C. Aug. 21, 2009) (granting writ); Bin Mohammed v. Obama, 689 F. Supp. 2d 38 (D.D.C. Nov. 19, 2009) (granting writ). These are just a few of the habeas proceedings that have taken place. However, despite its promises, the Obama Administration seemed to be going in the opposite direction from what the Supreme Court has prescribed in *Boumediene*. The Administration continued to oppose attempts to apply *Boumediene* to prisoners held outside of Guantánamo. *See, e.g.*, Al Maqaleh v. Gates, 620 F. Supp. 2d 51 (D.D.C. 2009). This has prompted criticism both in media and legal parlance about the dangers of the current Administration's sudden about face vis-à-vis detainee rights. *See, e.g.*, Editorial, *The Next Guantánamo*, N.Y. TIMES, Apr. 13, 2009, at A20; *See* Basardh v. Bush, No. 05-CV-889 (ESH), 2009 WL 856345 (D.D.C. Mar. 31, 2009) (ordering release of Yasin Muhammad Basard); El Gharani v. Bush, 593 F. Supp. 2d 144 (D.D.C. 2009) (ordering the release of Mo-hammed el Gharani); Boumediene v. Bush, 579 F. Supp. 2d 191, 199 (D.D.C. 2008) (directing respondents to take all necessary diplomatic steps to facilitate the release of Petitioners Lakhdar Boumediene, Mohamed Nechla, Hadj Boudella, Mustafa Ait Idr); *See* Glenn Greenwald, *Guantánamo Death Highlights U.S. Detention Policy*, (Feb. 4, 2011), *available at* http://www.salon.com/news/opinion/glenn.greenwald/2011/02/04/guantanamo; *see also* Charlie Savage, *Closing Guantánamo Fades as a Priority*, N.Y. TIMES (June 25, 2010), http://www.nytimes.com/2010/06/26/us/politics/26gitmo.html; *see generally* Dina Temple-Raston, *One Case Down, Guantánamo Still Far From Closing*, NPR (Jan. 29, 2011) *available at* http://www.npr.org/2011/01/29/133310761/one-case-down-Guantánamo-still-far-from-closing.

While their shared experiences and associated social constructs place them in similar ontological dimensions, *Amistad* and Guantánamo diverge in their final destinations. This divergence is seen through Guantánamo's current ontology, which is based on an existential social construct that has largely been left out of the conversation. As a result, its associated legal dimensions face several difficulties in practice. First, Guantánamo's arrival in the post-9/11 social construct as a domesticated response to existential vulnerability has not been widely recognized.[25] Thus, blinders remain on our eyes preventing us from viewing Guantánamo's causal relationship with the overall U.S. detainee framework. Second, despite promises and expectations, eventual closure of the physical detention facilities at Guantánamo remains elusive.[26] Indeed, part of the difficulty lies in construing Guantánamo only as a legal representation, rather than seeing it in its expansive manifestation.[27] Third, as the legal process remains constricted within a narrow formalism, it fails to capture Guantánamo's reshaping impact on the broader detention framework.[28] As a result, the post-September 11 legal

25. I am imploring the reader of this article to develop the awareness to construe Guantánamo in a much broader narrative than what has been presented so far in the literature, as I see Guantánamo more as a response borne out of the existential needs for the U.S. I conclude in this article that Guantánamo not only represents a detention facility with a set of actors and set of legal rules, but it is an ontological space created as a direct response to existential threats, evolving in some aspects through a security-liberty conflict.

26. *See* sources cited *supra* note 24.

27. Here I draw attention to my main thesis in this article, which is to see Guantánamo more as a narrative—a phenomenon that goes beyond a set of legal mechanisms defining the detention facilities that the prisoners are confined indefinitely within, and the detention facilities and legal process surrounding the capture, release and jurisprudential fate of these detainees. This article evolves into describing the social construction process which takes Guantánamo from a facility as described in legal representation, to a phenomenon defined by time, space, and our perception. *See infra* Part III & IV.

28. My argument here is that Guantánamo continues to cast a disastrous spell on the overall jurisprudence surrounding detainees. As witnessed in a number of cases, through the various different terrorists brought to our attention, each time an incident occurs, before the alleged terrorists are brought within the justice mechanism, Guantánamo begins to arrive in our legal discourses. Therefore, as I have shown in this article, as long as Guantánamo remains open for business, the grey areas of law will continue to pervade any deterministic identification of adequate legal proceedings surrounding terrorism in the upcoming days. *See infra* Part II. *See also* Jack Bremer, *Detroit Bomber Rekindles Row Over Guantánamo Bay*, FIRST POST (Jan. 5, 2010), http://www.thefirstpost.co.uk/57955,news-comment,news-politics,detroit-bomb-plot-rekindles-row-over-Guantánamo-bay; *Dick Cheney: Torture Domestic Terrorists, Send to Guantanamo*, DAILY KOS (Feb. 24, 2010 8:10 AM), http://www.dailykos.com/story/2010/02/24/840205/-Dick-Cheney:-Torture-domestic-terrorists,-send-to-Guantanamo.

landscape has been revealed through wide-spread detainee abuse,[29] torture at secret foreign locations,[30] as well as revealing inconsistencies in handling detainees within the existing legal framework.[31]

Despite guidelines provided in the 2005 Detainee Treatment Act (DTA),[32] subsequent amendments,[33] and path-breaking Supreme Court decisions in *Hamdan v. Rumsfeld*[34] and *Boumediene v. Bush*,[35] the applicable legal standards for treatment of international detainees under U.S. custody and control continues to suffer from confusion. I seek to trace the roots of such failure in developing consistent detainee jurisprudence within the U.S. legal framework. Drawing upon the contemporary discourse on Guantánamo detainees[36] and applicable Supreme Court jurisprudence on procedural rights of foreign detainees,[37] this article embarks on an exploration of Guantánamo. My inquiry is based on evidence uncovered thus far in the continued dehumanizing

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29. *See* Walter Pincus, *Silence of 4 Terror Probe Suspects Poses Dilemma,* WASH. POST, Oct. 21, 2001, at A06. Back in 2001, the U.S. Government was considering a variety of tactics on detainees. As noted, the *Washington Post* reported that in an effort to extract information from the detainees, FBI and Justice Department investigators are considering, "using drugs or pressure tactics, such as those employed occasionally by Israeli interrogators, to extract information. Another idea is extraditing the suspects to allied countries where security services sometimes employ threats to family members or resort to torture." *Id.* Since then, a myriad of photos, and eye-witness accounts as well as a few freed detainees have detailed the torture employed by U.S. personnel. *See, e.g.*, Dana Priest & Joe Stephens, *Pentagon Approved Tougher Interrogations*, WASH. POST, May 9, 2004, at A01.

30. David Ignatius, *'Rendition' Realities*, WASH. POST (Mar. 9, 2005), *available at* http://www.washingtonpost.com/wp-dyn/articles/A18709-2005Mar8.html. Extraordinary rendition is excellently summed up in the words of columnist David Ignatius. He writes:

> Rendition is the CIA's antiseptic term for its practice of sending captured terrorist suspects to other countries for interrogation. Because some of those countries torture prisoners—and because some of the suspected terrorists "rendered" by the CIA say they were in fact tortured—the debate has tended to lump rendition and torture together. The implication is that the CIA is sending people to Egypt, Jordan or other Middle Eastern countries *because* they can be tortured there and coerced into providing information they wouldn't give up otherwise.

Id.

31. *See infra* Part II.

32. Pub. L. No. 109-148, 199 Stat. 2739; *see also infra* note 63.

33. Pub. L. No. 109-148, 199 Stat. 2739.

34. 548 U.S. 557 (2006).

35. 553 U.S. 723 (2008).

36. *See generally* SABY GHOSHRAY, *On the Judicial Treatment of Guantánamo Detainees in International Law, in* GUANTÁNAMO BAY AND THE JUDICIAL-MORAL TREATMENT OF THE OTHER 80 (Clark Butler ed., 2007).

37. *See* Saby Ghoshray, *Hamdan's Illumination of Article III Jurisprudence in the Wake of the War on Terror*, 53 WAYNE L. REV. 991 (2007).

saga of Guantánamo.[38] My methodology is premised on developing a phenomenological narrative of Guantánamo, by examining its ontological dimensions. As the events of Guantánamo unfold and its subjects and their constructs come unglued in my exploration, I hope to provide a more expansive interpretative gloss over America's detainee jurisprudence. My aspiration, to provide a better understanding of the relationship between detention framework and its supervisory social constraints, will be acquired through a more revealing narrative of Guantánamo.

With this objective in mind, I seek to trace in Part II of this article the evolving relationship between the Guantánamo narrative and the broader U.S. detention framework. Accordingly, Part II examines why a consistent U.S. detention framework is vitally important and is dependent on the closure of Guantánamo. This leads to a discussion in Part III, which prompts us to seek a deeper narrative for Guantánamo that goes beyond its physical representation. This leads to an explanation of the proposed relationship between dehumanization and erasure, while commenting on the full scope of that relationship in understanding Guantánamo in Part IV. Finally, this article concludes in Part V, by noting that at the heart of Guantánamo's broader narrative is the fundamental issue of American exceptionalism,[39] which, taken in conjunction with 9/11 provides a better interpretation of Guantánamo. This illumination can then be used to frame the dialogue surrounding the closure of Guantánamo.

I. RELATIONSHIP BETWEEN GUANTÁNAMO BAY AND AMERICA'S DETAINEE JURISPRUDENCE

The initial invention of the term "enemy combatants"[40] in 2002, followed by its inconsistent use through 2006, was specifically designed

38. *See infra* Part IV.

39. *See infra* Part V.

40. Immediately after 9/11, the United States Administration coined the term "enemy combatant" to broadly categorize individuals detained by the U.S. military and its allied forces in its global initiative on terrorism. This included those who have the maximum likelihood of being tried under the rules of military tribunal or any individuals that the United States government deemed to be members of al-Qaeda or the Taliban, or to be participants in armed conflict against the United States–these individuals were designated as "unlawful" or "enemy combatants." The original idea was driven by the assumption that, once the designation of "enemy combatant" was assigned to a person, he or she could be detained indefinitely and would have no right under the laws and customs of war or the Constitution to meet with counsel regarding detention or to understand the charges against the individual. This is in violation of the International Humanitarian Law under the guidelines provided in the four Geneva Conventions of 1949. *See* Geneva

to avoid well-settled norms and standards of International Humanitarian Law (IHL).[41] Although statutorily defined by the introduction of the Military Commissions Act (MCA),[42] legal scholars are convinced that[43]

Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. *See also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) 8 June 1977, 1125 U.N.T.S. 3; Geneva Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 8 June 1977, 1125 U.N.T.S. 609. The detainees of the war in Afghanistan have the legitimate right to Prisoner of War ("POW") status accorded to them under the Third Geneva Convention. Article 4.1 of the Third Convention states that "[POWs] are persons . . . . who have fallen into the power of the enemy" and "are members of the armed forces of a Party to the conflict." Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. Article 118 of the Convention (III) Relative to the Treatment of Prisoners of War, August 12, 1949, provides that "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities." *Id.* at art. 118. Clearly, the term "enemy combatant" does not have support in the corpus of laws that illuminate laws of war or international human rights law as scholars and activists repeatedly question the legitimacy of applying the term to deny prisoner of war status to the Taliban members who were captured in the battlefield in Afghanistan. The Bush Administration has used the term "unlawful combatant" or "enemy combatant" interchangeably and with effective use to stress that the detainees are not considered POWs. However, the Administration, in its zeal to combat terrorism, has failed to comply with its obligation under customary international law to make a clear distinction between combatants and noncombatants. As a result, many civilian noncombatants were captured and detained as enemy combatants, which has been documented heavily in the literature, and I shall refrain from rehashing it here. Although the phrase "enemy combatants" was initially adopted mostly to flout international law, the Bush Administration, under criticism both in the U.S. and abroad, implemented a series of measures to revise its policy regarding the designation of enemy combatants, as can be seen through measures in the MCA and DTA, as has been discussed in this article. *See infra* Part I and II.

41. The terms "international law," "international humanitarian law," "law of armed conflict," *"jus in bello"* and "laws of war" are interchangeable. While there is disagreement on the relative scope of the terms, they all point to the body of law that governs the *jus in bello* conduct of hostilities and the protection of victims within the meaning of the framework under the Hague and Geneva streams of law. *See* Karma Nabulsi, *Just and Unjust War, "Levée en Masse"* and *"Jus ad Bellum / Jus in Bello" in* CRIMES OF WAR, (Roy Gutman, David Rieff & Anthony G. Dworkin eds., 1999). *See also* Karma Nabulsi, *Jus ad Bellum / Jus in Bello, in* CRIMES OF WAR: A-Z GUIDE, *available at* http://www.crimesofwar.org/a-z-guide/jus-ad-bellum-jus-in-bello/ (last visited May 17, 2011).

42. The Military Commissions Act ("MCA") of 2006, Pub. L. No. 109-366, 120 Stat. 2600. The MCA enacted Chapter 47A of Title 10 of the United States Code, and is an Act of Congress (Senate Bill 3930) signed by President George W. Bush on October 17,

the U.S. detention practices are neither consonant with the standards of international law[44] nor supported by domestic constitutional law.[45] Whenever a new terrorist comes in contact with the U.S. law enforcement mechanism, a new set of dialogues surrounding detention and justice emerge. With it begins the frenzy of rights-based discussions, debate over military tribunals versus civilian court, or habeas rights versus indefinite detention[46]—this hackneyed saga repeats periodically. As the merry-go-round continues through the likes of the shoe bomber,[47] to the teenage Somali pirate,[48] to the underwear bomber,[49] to the falafel truck driving terrorist,[50]—the last decade since 9/11 has been the story of

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2006. Drafted in the wake of the Supreme Court's decision in *Hamdan*, the Act's stated purpose is to facilitate bringing to justice terrorists and other unlawful enemy combatants through full and fair trials by military commissions. The bill limits *habeas corpus* rights, and bipartisan critics contend that it is unconstitutional. This law has been used to detain "enemy combatants," including U.S. citizens indefinitely without access to a lawyer. *See generally* Amnesty International, *US Military Commissions Act of 2006—Turning Bad Policy Into Bad Law*, GLOBAL ISSUES (Sept. 29, 2006), http://www.globalissues.org/article/688/us-military-commissions-act-2006-turning-bad-policy-into-bad-law.

43. The illegality of U.S. detentions has been established by various scholars, as evidenced by various law review articles, governmental documents and Supreme Court opinions. This is an area I have discussed in an earlier article. *See* Ghoshray, *supra* note 36.

44. *See supra* note 41 and accompanying text.

45. *See supra* note 43.

46. *See* Ghoshray, *supra* note 36.

47. Richard Colvin Reid is infamously known as the shoe bomber. He pleaded guilty in 2002 to eight criminal counts of terrorism. After boarding American Airlines Flight 63 in Paris, France he tried to detonate explosive bombs that had been hidden in each of his shoes. *See* United States v. Reid, 214 F. Supp. 2d 84 (D. Mass. 2002).

48. Abdiwali Abdiqadir Muse, became widely known as the teenaged Somali pirate that took part in the hijacking of the *Maersk Alabama*, an American cargo ship. Muse was the only pirate to survive, and on May 19, 2009 he was indicted on multiple piracy charges. *See* U.S. v. Muse, 1:09-cr-00512-LAP (S.D.N.Y. May 19, 2009), *available at* http://gcaptain.com/wp-content/uploads/2009/05/case1-09-cr-00512-lap-us-v-muse-indictmentpdf.pdf.

49. Umar Farouk Abdulmutallab became notoriously known as the "underwear bomber," and also the "Christmas Day bomber." He was born on December 22, 1986, into an extremely wealthy Nigerian family and had a received good education. On December 25, 2009, he boarded Northwest Airlines Flight 253. While on the flight headed to Detroit, Michigan, he tried to detonate plastic explosives hidden in his underwear. *See* United States v. Abdulmutallab, No. 10-20005, 2011 WL 4345243 (E.D. Mich. Sept. 16, 2011).

50. United States v. Zazi, No. 10-CR-60 (JG), 2011 WL 2532903 (E.D.N.Y. June 24, 2011). *See infra* note 81 for a further discussion.

"confusion worse confounded."[51] Even if we step away from the fundamental discussion, whether or not international law is binding on U.S. courts on the question of detainee treatment,[52] the U.S. procedures have not matured since the paradigmatic shift post-9/11.[53] Despite aspirations across the legal spectrum to identify a universal source of law, America's post-detention legal framework remains mired in chaotic incoherency.[54] Unfortunately, tracing the roots of this incoherency has largely been left out of contemporary legal discourse.

Therefore, I seek to trace the intersection of legal and political juncture that bears support in understanding why it is imperative to trace the inconsistencies in law within the U.S. detention framework. In this trajectory of the U.S. detention framework, the indelible footsteps of Guantánamo remain visible behind almost every instance of new terrorist detention. Thus, my inquiry does not stop in underscoring the extent to which shadows of Guantánamo loom large, rather it searches for a more definitive legal policy that can extricate Guantánamo detention from the existing cacophony of legal incoherency.

A. In Search of a Coherent, Cogent and Consistent Detainee Jurisprudence

Legal arguments for the indefinite detention of terrorism suspects have been seen in various attempts to establish that U.S. security needs are unique and isolated from the rest of the world since 9/11.[55] Thus, arguments are manufactured to justify applicable U.S laws' structural incongruence from the norms of international law.[56] Over sustained global hue and cry at the inhumane and continuous detention of terrorist suspects at Guantánamo, the U.S. government began a series of attempts to legalize indefinite detention,[57] which resulted in Combatant Status

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51. The saying, "confusion worse confounded" implies confusion made even worse. This term was made famous from the epic poem of the 17th Century by John Milton. *See* JOHN MILTON, PARADISE LOST, Bk. II, l, 995 (Barbara K. Levoalski ed., 2007).

52. *See supra* note 40 and accompanying text.

53. *See supra* note 40 and accompanying text.

54. *See supra* note 28 and accompanying text.

55. Here I introduce the grounds to develop parts of my argument in the later stages of the article with respect to American Exceptionalism. *See infra* Part V.

56. *See supra* note 40.

57. Here I draw attention to the phenomenon of Executive Unilateralism, which emerged as a direct result of the 9/11 attack on the U.S. *See* Saby Ghoshray, *False Consciousness and Presidential War Power: Examining the Shadowy Bends of Constitutional Curvature,* 49 SANTA CLARA L. REV. 165 (2009) for a full scope and expository legal analysis.

Review Tribunals (CSRTs).[58] Although their outcomes have been predominantly farcical, these CSRTs were enacted as a response to the Supreme Court's stringent rebuke against executive unilateralism[59] in both *Hamdi v. Rumsfeld*[60] and *Rasul v. Bush.*[61] While the constitutional limits of executive privilege were the focus of both *Rasul* and *Hamdi*, the decisions failed to become controlling law for enemy combatant detentions. Subsequent attempts[62] to circumvent the judicial impact of these opinions involved the enactment of the Detainee Treatment Act (DTA)[63] in 2005, followed by its statutory enhancement in the MCA in 2006.

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58. The Combatant Status Review Tribunal (CSRT) was created by the Bush Administration after the Supreme Court decisions in *Rasul* and *Hamdi* issued a strong rebuke against executive excesses in holding detainees in indefinite detention without due process rights. *See Boumedine v. Bush/Al Odah v. United States*, CENTER FOR CONSTITIONAL RIGHTS, http://ccrjustice.org/ourcases/current-cases/al-odah-v.-united-states (last visited Sept. 25, 2011). Yet, the CSRT remained hopelessly inadequate to provide the relief sought for the detainees. This has also been echoed by the Court in *Boumediene*. The Court found that the government procedure created in the CSRT and purportedly designed to confirm the enemy combatant status of each prisoner was an inadequate substitute for federal habeas review. *Boumediene*, 553 U.S. at 792. The Court found the procedure inadequate even though the Detainee Treatment Act (DTA) of 2005 authorized a limited review of its conclusions by the D.C. Court of Appeals. *Id.*

59. *See* Saby Ghoshray, *Hamdan's Illumination of Article III Jurisprudence in the Wake of the War on Terror*, 53 WAYNE L. REV. 991 (2007).

60. 542 U.S. 507 (2004).

61. 542 U.S. 466 (2004).

62. *See infra* note 63.

63. *See* Detainee Treatment Act of 2005, Pub. L. No. 109-148, 199 Stat. 2739 [hereinafter Detainee Treatment Act of 2005]. On December 30, 2005, the President signed into law the Detainee Treatment Act of 2005 ("DTA") under Title X of Section A of the defense appropriations bill Congress had earlier passed. The passage of the bill has been viewed in some parlance as a clear source of approved interrogation techniques for use on detainees in Department of Defense ("DOD") custody and makes clear that geographic considerations do "not limit the prohibition on the use of cruel, inhumane, or degrading treatment or punishment ('CID treatment')." Arsalan M. Suleman, *Detainee Treatment Act of 2005*, 19 HARV. HUM. RTS. J. 257 (2006). On a broader abstraction, the DTA amends the *habeas corpus* statute by seeking to eliminate all courts' jurisdiction over actions brought by or on behalf of Guantánamo detainees. The DTA grants exclusive jurisdiction to the District of Columbia Circuit Court of Appeals to hear challenges to decisions of the Combatant Status Review Tribunal ("CSRT"), an *ad hoc* proceeding that denies fundamental safeguards, including a neutral judge or jury, assistance of counsel, and the right to see and confront the government's evidence. See Hamdan v. Rumsfeld, 548 U.S. 557, 669-71 (Scalia, J., joined by Thomas and Alito, JJ., dissenting), where the dissent states that the DTA:

> [G]rants the D.C. Circuit authority to review, 'to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States'. . . . [T]he 'standards and procedures specified in'

Rasul and *Hamdi* opened the door for examining Guantánamo detainees' procedural rights in the subsequent opinion in *Hamdan v. Rumsfeld.*[64] *Hamdan* was successful in establishing a general framework of treating detainees captured on the battlefield by framing the judiciary's plenary authority under Article III of the Constitution,[65] while its progeny, *Boumediene*,[66] further limited the scope of executive authority. However, judicial decree and its actual implementation continued to be at odds and such remains the case today. This is

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> Order No. 1 include *every aspect* of the military commissions, including the fact of their existence and every respect in which they differ from courts-martial . . . . The D.C. Circuit thus retains jurisdiction to consider these claims on post-decision review, and the Government does not dispute that the DTA leaves unaffected our certiorari jurisdiction under 28 U.S.C. § 1254(1) to review the D.C. Circuit's decisions.

Id. Various scholars have noted that such elimination of judicial inquiry into the facts would be particularly troubling for the detainees, as they were never given a fair hearing to begin with. *See* Judith Resnik, *Opening the Door, Court Stripping: Unconscionable and Unconstitutional?*, SLATE (Feb. 1, 2006), http://www.slate.com/id/2135240. Prior to the decision in *Hamdan*, the DTA could mean indefinite executive detention without any meaningful opportunity to rebut the government's allegations, and could continue unabated. This is because the Detainee Treatment Act of 2005, §1005 reads: "(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider--(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantánamo Bay, Cuba . . . ." Detainee Treatment Act of 2005.

64. 548 U.S. 557 (2006).

65. The language I am specifically referring to is Art. III, § 2 of the Constitution, which states:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;--to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art III, § 2. This viewpoint has been corroborated by noted constitutional scholar Akhil Amar, who observed,

> With respect to cases arising under the Constitution, the need for mandatory jurisdiction of the national judiciary was manifest. The Framers expected that the national judges would uphold the Constitution by denying effect to any purported law inconsistent with it. In fact, the words "this Constitution" in the "arising under" category were specifically and self-consciously inserted by the Convention with the power of judicial review in mind.

Akhil Reed Amar, *A Neo-Federalist View Of Article III: Separating The Two-Tiers Of Federal Jurisdiction*, 65 B.U. L. REV. 205, 246-48 (1985) (specifically alluding to the Framers' intention during the Philadelphia Convention).

66. *See* Boumediene v. Bush, 550 U.S. 1301 (2007).

manifested by two distinct threads in U.S security detention policy.[67] While more than 200 detainees continue to be in indefinite detention at Guantánamo after almost a decade,[68] new terrorist circumstances have become quite prevalent.[69] This compounds the Guantánamo-style prolonged detention and legal darkness that straddle gray areas of legal infraction.[70] In the post-9/11 legal landscape, detention paradigms[71] continue to shift quite often within the U.S legal framework.[72] This shift occurs irrespective of the applicable context, whether in relation to international detainees or in response to legal processing of domestic terrorism detainees. In its embrace of the philosophy that the war does not end even when the fighting stops,[73] the U.S. Administration invoked the 1948 Supreme Court decision in *Ludecke v. Watkins.*[74] Even the D.C. Circuit Court joined in the executive unilateralism[75] to make indefinite detention the centerpiece of U.S. policy for fighting terrorism, as it

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67. *See* Ghoshray, *infra* note 70.

68. *See* Ghoshray, *supra* note 36.

69. *Id.*

70. I refer to the general legal environment that emerged post-9/11 in which simple criminal offenses have been upgraded to include serious charges against individuals on either questionable legal precedents, or incomplete evidence. *See* John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081, 1083, 1126 (2002); Marc Cooper, *Uncensored Gore,* L.A. WEEKLY, Nov. 13, 2003, http://www.laweekly.com/2003-11-20/news/uncensored-gore/; Charles Doyle, *The USA Patriot Act: a Legal Analysis*, CONG. RESEARCH SERV., RL 31377 (2002), *available at* http://www.fas.org/irp/crs/RL31377.pdf; Andrew Ayers, *UN Reports: The Financial Action Task Force: The War on Terrorism Will Not be Fought on the Battlefield*, 18 N.Y.L. SCH. J. HUM. RTS. 449, 458 (2002). *See generally* Saby Ghoshray, *Untangling the Legal Paradigm of Indefinite Detention: Security, Liberty and False Dichotomy in the Aftermath of 9/11*, 19 ST. THOMAS L. REV. 249 (2006).

71. An example of this is witnessed in the case of Mr. Vikram Buddhi, an Indian citizen. This case centers on an internet posting in December 2005, which urged revenge for the death of thousands of Iraqi people because of the unjust Iraqi war. It also included threatening remarks against former President George W. Bush. This internet posting was traced to the computer used by Vikram Buddhi, a Ph.D. student at Purdue University. On January 18, 2006, he was interrogated, but subsequently released by the Secret Service. In May 2006 he was picked up and jailed. The case went to trial, and a guilty verdict was returned. On December 11, 2009, he was given a four years nine months prison sentence. *See* Buddhi v. Holder, 344 Fed. App'x. 280 (7th Cir. 2009).

72. *See* Ghoshray, *supra* note 36, at 93-97.

73. *See infra* note 74.

74. Ludecke v. Watkins, 335 U.S. 160, 166 (1948) (noting the difficulty of deporting alien enemies during the time of actual hostility).

75. *See* Ghoshray, *supra* note 57.

revived the decades old *Hirota v. MacArthur*[76] to deny writs of habeas corpus writs to detainees. Thus, post-9/11 exigencies virtually guaranteed indefinite detention of terrorist suspects.

Despite wide-spread extolling of the liberal idealism of American jurisprudence in the contemporary construct, the disconnected reality is revealed through the recent retrenchment of civil liberties.[77] Despite the series of Supreme Court opinions repeatedly sustaining detainees' constitutional rights to challenge the legality of detention through the writ of habeas corpus,[78] relief has been rare. Only in exceptional cases where the individual case of a particular detainee may have been leaked through the media, the Red Cross, or the individual's lawyers, does a glimmer of hope for procedural review arrive. Thus far, only a handful of detainees have found this hope. Indeed, this does not come as a harbinger of light outside Guantánamo, but provides a stark reminder of the continued darkness inside Guantánamo—that we must probe further for meaning and for clarity.

Setting aside the cases of detainees in Guantánamo, let us ponder for a moment the recent legal paradigms applied to various other terrorist detainees. From the Lackawanna Six,[79] to Ali Al-Tamimi,[80] to Nazibullah Zazi,[81] to Jihad Jane,[82] the applicable detention protocol and

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76. 338 U.S. 197 (1948). *See id.* at 198 (noting that the military tribunal set up in Japan was not a tribunal of the United States. Thus, the U.S. courts have "no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed on these petitioners" all of whom were residents and citizens of Japan).

77. *See* Ghoshray, *supra* note 70.

78. *See* Ghoshray, *supra* note 36.

79. The Lackawanna Six were a group of childhood friends of a Yemeni-American decent who lived in the Buffalo, New York area. It was alleged that the Lackawanna Six were an al-Qaeda "sleeper cell." The group was convicted of providing support to al-Qaeda based on a previous trip and training at an al-Qaeda camp in 2001. United States v. Goba, 240 F. Supp. 2d 242, 258 n.20 (W.D.N.Y. 2003) (discussing the Lackawanna Six guilty plea); United States v. Goba, 220 F. Supp. 2d 182 (W.D.N.Y. 2002) (discussing the allegations against the Lackawanna Six).

80. Doctor Ali Al-Tamimi was born in Washington, DC on December 14, 1963. He worked in the biotechnology software area, and had obtained a high-level security clearance for some of his work. He was also an Islamic teacher. He was considered a person of interest in the 2001 anthrax case, in which envelopes containing anthrax spores were mailed to two Senators and various media offices. This resulted in five people dying and many infected. No formal charges were ever made against him. But later, with his connection to the Virginia Jihad Network, he was convicted of inciting terrorism and was given a life sentence. People v. Al-Timimi, No. 245211, 2004 WL 1254271 (Mich. Ct. App. June 8, 2004).

81. Najibullah Zazi was born in Afghanistan, became a legal U.S. resident, and lived in Colorado. He was arrested in September 2009 as part of a group accused of planning suicide bombings in the New York City subway system. He pleaded guilty and his sentencing is scheduled for the summer of 2011. He became largely recognizable due to a

the subsequent legal processes have gone on without any clear and concise direction. The panoply of these cases, some of which have already been adjudicated, and some waiting to go forward, provide a snapshot of the legal framework mired in conundrum and uncertainty. Neither the Department of Justice nor the prosecuting fraternity has any consistent direction for how to prosecute in most of these cases, which leaves complex hurdles for defense lawyers. Prosecutorial challenges set aside, from a rights perspective, the existing framework is quite nebulous for lawyers to navigate through. In the absence of clear guidelines, prosecutorial delays result in prolonged detention, or in some cases, preemptive pleading becoming the norm.[83] What is behind this confusing detention framework? Is there a single event or phenomenon that can explain it?

B. Why is the Closure of Guantánamo Important?

What does Guantánamo have to do with such transmogrification of the U.S. legal framework as it relates to security detention? To understand Guantánamo from a deeper perspective we must go beyond legal representation. This perspective is largely absent in contemporary discourse, except one recent scholarship by Professor Muneer Ahmad, to whose article I owe an amount of intellectual debt.[84] This exploration requires us to carve out an existential phenomenological[85] space for

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store's security camera footage which showed him purchasing "unusually large quantities of hydrogen peroxide and acetone products from beauty supply stores in the Denver metropolitan area." United States v. Zazi, No. 09-CR-663 (RJD), 2010 WL 2710605 at *5 (E.D.N.Y. June 30, 2010).

82. Colleen Renee LaRose became infamously known as Jihad Jane. She was born on June 5, 1963, and was a junior high school dropout. She converted to Islam and soon became radicalized. She was arrested and charged with terrorism-related crimes. It is alleged that LaRose was recruiting Islamic terrorists to wage jihad. She is also accused of planning to kill the Swedish artist who had made a drawing depicting the head of the Prophet Muhammad on the body of a dog. United States v. LaRose, No. 10-CR-123 (E.D. Pa. Mar. 4, 2010) (indictment alleging conspiracy to use the internet to recruit in support of violent jihad).

83. I refer to a multitude of cases, where detainees, after being subjected to years of indefinite detentions, wilted under pressure and pleaded to charges simply to have hope for release at some point in time.

84. *See* Muneer I. Ahmad, *Resisting Guantánamo: Rights at the Brink of Dehumanization*, 103 NW. U. L. REV. 1683 (2009).

85. In general, the *phenomenology* space holds that the sense of space is the basis of all social experiences and perceptions of experiences. In this context, the context of space goes beyond the understanding of physical space, and it extends to all the perceptions and shared social experiences that are contained in that space. Here I bring in the concept of phenomenological space to examine the evolution of Guantánamo from a different

Guantánamo in our construct, rather than restricting Guantánamo with the hackneyed description of a physical detention facility. Extracting Guantánamo from a physical description of objects and persons interrelated by a set of laws is not easy. Guantánamo is nestled within a physical facility. It evolved in existence through legal representation, devoid of social constructs that expands its narrative. In establishing this legal representation, Guantánamo has been described by various monikers as "an anomalous zone,"[86] or "a legal black hole,"[87] or "a legal outer space."[88] When we hear Guantánamo, images of chained detainees,[89] or torture facilities,[90] or barbed wire fence impervious to the prying eye of the world,[91] are conjured up in our mind. Neither the imagery, nor the associated legal representations can give Guantánamo the deeper, more fundamental phenomenological ascendance—a vital ingredient for our collective construct to see the truth, and discern the comprehensive nature of this dark saga of human history.

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perspective than that contained in the existing discourse, with a view to get a fuller understanding of its evolution, impact, and future. *See generally*, DAVID MORRIS, THE SENSE OF SPACE (2004).

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

87. *See* Steyn, *infra* note 120.

88. Guantánamo Bay, or "Gitmo," as it is often called, is located in the southeastern end of Cuba. Camp Delta is located in Guantánamo Bay and has the capacity to hold over 2,000 persons in detention. As GlobalSecurity.org details, "Guantánamo is central to the Bush Administration's strategy to prevent judicial review of the legal status of prisoners," and is the "legal equivalent of outer space." *See Guantánamo Bay—Camp Delta*, (Jan. 22, 2009, 5:10 PM), http://www.globalsecurity.org/military/facility/Guantánamo-bay_delta.htm.

89. *See* Pincus, *supra* note 29.

90. According to published reports that trickled out about Guantánamo, harsh interrogation techniques were authorized in March 2002 by top officials of the CIA, leading to questionable confessions and the death of a detainee. *See* Brian Ross & Richard Esposito, *CIA's Harsh Interrogation Techniques Described*, ABC NEWS (Nov. 18, 2005), http://abcnews.go.com/WNT/Investigation/story?id=1322866. According to former and current intelligence officers and supervisors, a list of six "Enhanced Interrogation Techniques" have come out in public that were used on a dozen top al-Qaeda targets incarcerated in isolation at secret locations on military bases in regions from Asia to Eastern Europe. *Id.* Notorious among the techniques is water boarding, in which the prisoner is bound to an inclined board, feet raised and head slightly below the feet. Cellophane is wrapped over the prisoner's face and water is poured over him. *Id.* Unavoidably, the gag reflex kicks in and a terrifying fear of drowning leads to almost instant pleas to bring the treatment to a halt. *Id.*

91. *See A day in the life at Guantánamo: The Eerie Images of Leg Irons and 'Life Lessons' at America's Darkest Prison*, MAIL ON-LINE WORLD NEWS, (Apr. 4, 2010, 8:49 AM), http://www.dailymail.co.uk/news/worldnews/article-1262769/A-day-life-prisoners-Guantánamo-The-eerie-images-leg-irons-life-lessons-boredom-Americas-darkest-prison.html.

Thus, expounding upon humanity's fall from grace, I place Guantánamo at the same ontological space shared by the human desires and characteristics that formed the saga of *Amistad* described at the beginning of this article. At the ephemeral level, Guantánamo's announced reincarnation in 2002,[92] from being a temporary processing center for Haitian asylum seekers[93] to a detention center for terrorist detainees,[94] represents a mere physical facility's invigorative transformation. This transformation was sold to the larger public as a protection of humanity from manifest evil.[95] On a deeper level, however,

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92. *See generally Guantánamo Bay—Camp Delta*, *supra* note 88 and accompanying text.

93. Since the U.S. obtained Guantánamo Bay on lease through a treaty with Cuba, the outpost has been used as temporary detention facility for various refugees. *See* "Treaty Defining Relations with Cuba," US-Cuba, art. III, May 29, 1934, 48 Stat. 1683, T.S. No. 866; "Lease of Lands for Naval and Coaling Stations," US-Cuba, art. III, Feb. 16-23, 1903, 31 Stat. 898, T.S. No. 418. A supplemental lease agreement, executed in July 1903, obligates the United States to pay an annual rent in the amount of "two thousand dollars, in gold coin of the United States" and to maintain "permanent fences" around the base. *See also* "Lease of Certain Areas for Naval or Coaling Stations," US-Cuba, arts. I-II, July 2, 1903, T.S. No. 426. See BRANDT GOLDSTEIN, STORMING THE COURT (2005), for a history of Haitian detention at Guantánamo. *See also* Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391 (1994); The Lowenstein Human Rights Clinic, *Aliens and the Duty of Nonrefoulement:* Haitian Centers Council v. McNary, 6 HARV. HUM. RTS. J. 1 (1993).

94. *See* Pincus, *supra* note 29.

95. I would argue here that an understanding of the scope and implication of this concept of evil is a necessary ingredient in American Foreign Policy. The question becomes how we can connect the Administration's embrace of this idea of "evilness" with the human rights violations in Guantánamo. Historically, the concept of evil has been the staple food for politicians and U.S. Administrations for a long time. We do not need to look far to find the supporting evidence. During the Cold War, the former Soviet Union used to be chastised as the "Evil Empire." Saddam Hussein used to be compared with Hitler or the Devil incarnate during Gulf War I. And when President Clinton was dodging and weaving from his Monica Lewinsky woes, Slobodan Milosevic became the new personification of evil as the mainstream media began running articles about "the new face of evil." As for Osama Bin Laden, he has been the very convenient manifestation of pure evil for almost two decades, despite reported fighting by Osama Bin Laden and his loyal lieutenants alongside the U.S. Special Operations forces in Afghanistan to drive out the "evil" Soviet Empire. But, as it appears, that was then, and this is now.

The players and the theaters may have changed, but the concept of "evil" has not. It is therefore vitally important that we understand the social construction process of how manifestation and perpetuation of evil becomes a socially mediated phenomenon. In this framework, once the personification of evil is complete, the framework of liberating the populace from the clutches of this evil becomes the preeminent and ordained objective, which enables the government to adopt whatever means necessary to confront this evil. The next stage in this social construction process involves stripping the evil from human personhood, which in turn makes indefinite detention or torture of such evils a more

it represents a superpower's response to an existential threat to its security. In its response, the superpower must embark on whatever means necessary to ensure that security.[96] The providers of such a security mechanism have preference for the-end-to-the-means over means-to-the-end in their quest to conquer this manifest evil. For the most part, it seems the public, foreign and domestic, was content with the process. Percolating beneath this means-to-the-end have been two

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socially accepted and sanctified process. Thus, whatever the ends, a rationale can be created to justify the means. It is now very easy to understand how this framework can create a distorted sense of reality by giving the appearance that the American military action is not only being divinely inspired, but it is placing the righteous masses against evil. Under this very convenient scenario, the governmental machinery wants the masses to believe that this world would be a much safer place, wherever the U.S. led coalition forces can confront and contain such evil. In this framework, the list of evil doers is never diminished, but rather increases. Various Presidents invoking military responses to any perceived belligerent actions or behaviors by the leaders of Nicaragua, Iran, and North Korea are examples of this phenomenon. Therefore, by declaring certain individuals or ethno-religious groups evil, the process develops the needed rationale to continue organized violence against designated evil.

Let us consider this further. Is it just a matter of selecting the right personification of evil and bombing the right city? Is it likened to the forces of light and good expunging from the earth the forces of darkness and bad? The truth is, however, much more complex. By designating a country as an "Axis of Evil" or "Evil Empire," the process of injecting illusionary realities, combined with the phenomenon of false consciousness, begins to take shape by embracing the concept of evil. How did embracing the concept of evil become so easy? What are the factors that create a fertile ground for the concept of evil to impregnate the collective consciousness of the masses? There are two distinct threads that run parallel in the development of U.S. foreign policy. First, there is the sense of vulnerability and the second is the issue of isolationism. With the development of newer technologies comes the increased possibility of threats. One such threat is al-Qaeda's weapons of mass destruction coming to the shores of America. The sense of America's vulnerability has been a common theme shaping its foreign policy since the days of the Cold War. This sense of vulnerability is random in nature, but easily captures the American minds and hearts with selective invocation and active persuasions from politicians. This selective nature unfolds with each new foreign policy crisis. The randomness, however, reveals a manipulative pattern. The Bush Administration reaches deep within its foreign policy repository and infects the national consciousness with the urgency of a renewed sense of vulnerability. The collective masses are reminded of evil that must be conquered. Once the masses are injected with the false reality of this evil, it becomes easier to manipulate the law to impose war power-like authority on U.S citizens. The logical framework of the argument, however, cannot be sustained with these observations. Can the self-proclaimed leader of the free world remain vulnerable from threats to its security? If this is indeed the case, can the security be enhanced by shrinking liberty contemporaneously? I do not want to delve into the false dichotomy of the security-liberty duality at this juncture, as this is an area I have examined in great detail in the latter part of this article. *See infra* Part IV. *See also* Saby Ghoshray, *Untangling the Legal Paradigm of Indefinite Detention: Security, Liberty and False Dichotomy in the Aftermath of 9/11*, 19 ST. THOMAS L. REV. 249 (2006).

96. *See* Ghoshray, *supra* note 95.

ontological dimensions[97]—perpetuation of evil[98] and dehumanization of individuals[99]—that are the very manifestation of such evil, who are

97. The concept of ontological dimension was given the most significant postmodern interpretation by the philosopher Heidegger. According to Heidegger's views, the world unfolds as a set of ontological dimensions that can be explored and nature becomes a set of epistemological potentials that can be utilized for human understanding. Known for his existential and phenomenological exploration of the question of being, Heidegger stressed on construction of ontological variables to understand the construction of "being." *See generally* STEVEN HEINE, EXISTENTIAL AND ONTOLOGICAL DIMENSIONS OF TIME IN HEIDEGGER AND DÖGEN (1985); TAYLOR CARMAN, HEIDEGGER'S ANALYTIC: INTERPRETATION, DISCOURSE, AND AUTHENTICITY IN BEING AND TIME (2003). Here I want to draw attention to the fact that, in his work, Professor Muneer Ahmad also examines Guantánamo's ontological space to extract meaning beyond the rights narrative. *See generally*, Ahmad, *supra* note 84. However, my analysis differs in the construction and compartmentalizing of this ontological space for establishing this monograph's objective of examining Guantánamo's relationship with both the duality of 9/11 and American exceptionalism.

98. Drawing from the methodologies used in complex analysis, I bring in the concepts of ontological and epistemological dimension in this article. Introduced and popularized in the 1970s to understand complex paradigms in an organizational or social framework, ontological and epistemological constructs were created by social scientists. *See* G. BURRELL & G. MORGAN, SOCIOLOGICAL PARADIGMS AND ORGANIZATIONAL ANALYSIS (1979). *See also* NORMAN BLAIKIE, APPROACHES TO SOCIAL INQUIRY: ADVANCING KNOWLEDGE (2007). The concept of epistemology and its ontological counterparts were known in the early times of Plato. *See generally* Phil Johnson & Catherine Cassell, *Epistemology and Work Psychology: New Agendas*. 74 J. OCCUPATIONAL & ORGANIZATIONAL PSYCHOL. 125-43 (2001). Despite, however, the long histories of these methodologies for the construction of social realities, awareness of their clear distinctions were only recently made clear. *See* Dennis Gioia, *Give It Up!: Reflections on the Interpreted World (A Commentary on Meckler and Baillie)*, J. MGMT. INQUIRY 285, 285-92 (2003). Given the complexity of the narrative of Guantánamo, I brought in a different framework through which to understand the phenomenon's full scope, evolution, and future trajectory. Therefore, we can construe ontological dimension as the set of dimensions that allows us to understand the nature of a phenomenon, whereas epistemology is the dimension through which we perceive that phenomenon. In this sense, according to the scholars mentioned above, both ontological and epistemological assumptions give us the meaning that something can be described in accordance with what someone believes about the state of that complex framework, such that the reality of that phenomenon is understood from a mediated social interpretation. The concept of ontological dimensions brought to distinguish between human cognitive experience of social and natural reality and its independent existence prior to that cognition. More specifically, where ontology provides us with the vehicle through which to construe independent existence, decoupled from cognitive bias, epistemology alerts us to the causal relationships amongst variables such that our reality is constructed outside of the individual through the multitude of sensory stimuli that shapes our experience. According to Gioia, "[t]he reality people confront is the reality they construe." Gioia, *id.* at 287.

Therefore it can be argued that the purpose of the ontological and epistemological frameworks is to create the awareness that reality and knowledge of individuals in the postmodern framework is based on social construction crafted via mediation, through the

set of subjectivities and interrelationships among these social subjectivities. It can be argued that the perception of existence and reality may not be connected because perception of existence is a socially constructed and socially mediated phenomenon. For example, in order to perceive an object on a piece of paper, we need two dimensions; the same object can only be perceived via three dimensions in space. Similarly, by creating ontological dimensions, we can perceive a socially constructed event or phenomenon. In this framework, ontology and epistemology refer to the understanding that ontology may be seen as a subject as epistemology, such that, a complex phenomenon may evolve through the presence of a set of ontological variables, but their full potential could be known through a higher number of variables, but some of them may never come to reality. The more complex a phenomenon, the more it becomes an epistemological issue rather than an ontological phenomenon.

Here, two clear variables or dimensions working together attempt to develop a socially constructed phenomenon: the perpetuation of "evil" and the "dehumanization of individuals." Both are interrelated ontological dimensions; without one the other cannot inform us of the process of social mediation that I am referring in this article. *See supra* note 97. Therefore, "perpetuation of evil" can be construed as one of the ontological dimensions, which must exist in association with other dimensions in order for the desired particularized construct to evolve. Without perpetuation of "evil" construction of individual dehumanization—the very process of decoupling personhood from a human individual—is not possible. Therefore, by perpetuation of "evil," I refer to the social construction through socially mediated stimulus variables through which the coordinated events altogether allow us to develop that anti-personhood through a broader meaning of "evil."

99. Here I refer to the process by which, humans, nation states, and groups, from time immemorial have attempted to take away individual human personhood. Existing behind the idea of humanization is the awareness that an individual human person needs a set of stimuli, a set of existential elements that enables that human to express his or her personhood. In a repressive authoritarian supervisory mechanism, the perpetrator of dehumanization cuts off that stimuli, thereby decoupling that individual from the source of its human expression with the objective of eventually shutting down the entire process of human existence. In this sense, dehumanization is a socially mediated process which allows the transformation of ordinary, typical people into undesirable entities. Dehumanization is the process of detaching every human aspect from the "being," such that, via the mediated process of dehumanization, the individual becomes an entity. Typically, dehumanization is unleashed upon the most hated, the most undesired elements of society. My central thesis in this article revolves around bringing awareness to the social construction that proceeds along two parallel lines: that of creating such an entity as the very personification of evil so that stripping them of their humanness becomes a much easier process. Once the process is complete, it becomes easier to torture, maim, and kill those individuals. Therefore, perpetuation of evil and dehumanization have to work together to develop efficiently a construct of certain individuals, be it an ethnic minority, certain religious groups, or certain individuals, such that projecting them as non-human and mere entities makes it easier for the oppressor to deny them basic human rights. *See generally* ASHLEY MONTAGU & FLOYD MATSON, THE DEHUMANIZATION OF MAN (1983). I bring in this ontological dimension of "dehumanization of individuals" because, according to postmodern theory, particularized concept sometimes requires specific particularized theory. According to postmodern logic, if we are visiting a dangerous place, our approach should be able to perceive that danger. I am proposing that the socially mediated events and resulting human construct

occluded from the view of the general public for most of the time.[100] Indeed, thorough understandings of these underlying dimensions are needed for full appreciation of the narrative of Guantánamo.

The framework supporting the concept of evil may be unstable on the surface, but it is incumbent upon us to understand the genesis of the theory of evil within the context of conquering the existential threat to security. The concept of evil has long been a staple for politicians and U.S. Administrations.[101] One need not look far to find the supporting evidence.[102] Once the personification of evil is complete, the framework of securing the populace from these threats becomes more efficient—as it then becomes the sacred duty of the U.S. Government to liberate American citizens and other citizens of the world from such evil.[103] This distorted sense of reality pervading the populace makes it easier for dehumanization to continue, as the existential evil must be destroyed at

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require us to pay close attention to a proper construction. According to Freud's idea of unconscious motivation, clearly in the context of Guantánamo, terrorist individuals, constructed out of a specific ethno-religious background, have captivated common Westerners' imagination in such a way that both the elements of "evilness" and the requirement to dehumanize those evil entities are percolating through the human awareness. In order to identify the social context through which it becomes permissible and fashionable to continue incarceration and torture of fellow humans, the very aspect of humanity must be decoupled from individuals. Ironically, the human paradox lies in the fact that it is humans that are both adept and efficient in engaging in the process of dehumanization. As philosopher Theodor W. Adorno observed, "[m]an is the ideology of dehumanization." *See* MARK HALPERN, LANGUAGE AND HUMAN NATURE 164 (2009).

100. Here I fall back to Freud's idea of unconscious motivation, such that the social mediation progresses in such a seamless way that the artificial construction of evil and the formation of the individual dehumanization process proceeds in a way that participates in the process and the general public becomes completely unaware of the social construction. In the absence of an objective discourse prevailing within the society, certain social constructions, because of the shaping aspect of social mediation, become part of the natural phenomena as if they have been in existence forever.

101. The concept of evil has long been a staple for politicians and U.S. Administrations. One need not look far to find the supporting evidence. During the Cold War, the former Soviet Union used to be chastised as evil. *See* President Reagan, Speech to the House of Commons, (June 8, 1982), *available at* http://www.fordham.edu/halsall/mod/1982reagan1.html. See Saby Ghoshray, *False Consciousness and Presidential War Power: Examining the Shadowy Bends of Constitutional Curvature*, 49 SANTA CLARA L. REV. 165 (2009), where I examine this concept in detail.

102. During the Cold War, the former Soviet Union used to be chastised as the "Evil Empire." *See* Editorial, *To the Summit, and Beyond*, N.Y. TIMES, Sept. 20, 1987, at A26. Saddam Hussein used to be compared with Hitler or the Devil during Gulf War I. *See* Mary McGregory, Editorial, *Bush Needs to Hone Foreign Policy Skills*, SEATTLE POST-INTELLIGENCER, June 16, 1992, at A11. *See also* M. Gregg Bloche, Op-Ed., *War Crimes, For Milosevic, to Win Is to Lose*, L.A. TIMES, Aug. 26, 2001, at M6.

103. *See* MONTAGU & MATSON, *supra* note 99.

any cost—a rationale used so craftily against the detainees at Guantánamo. Therefore, whatever the ends, a rationale can be created to justify the means to achieve them. It is now very easy to understand how this framework can create a distorted sense of reality. This distorted appearance that the American detention measures are divinely inspired, placing the righteous masses against the solitary figure of evil, allows for the dehumanization to continue. Under this very convenient scenario,[104] the governmental machinery wants the masses to believe that this world would be a much safer place—even if it means some "evil" humans are stripped of their human dignity.[105] What does systematic dehumanization do to other humans? Why have the conversations surrounding Guantánamo mostly left out the aspect of dehumanization? To me, systematic dehumanization is largely predicated on relegation of a section of humanity with minimal to no rights. However, for the time being, let us leave the rights discussion suspended for a later stage so that we can focus on developing a better comprehension of the shaping effect of Guantánamo as a phenomenological event on the broader U.S. detention framework. Now we will peel away Guantánamo's existential and psychological dimensions.

On the surface it seems the U.S. detention framework applied to detainees captured in war zones fighting U.S. forces has no ontological relationship with the detention framework applied to individual instances of terrorist detention. However, as long as the concept of Guantánamo is alive in the minds of the law enforcement community, no processing of a detainee can be decoupled, and thus, analyzed independent of Guantánamo. Because Guantánamo is an ontological space in itself, it pervades beyond individual events and engulfs anything and everything that falls within its ontological sphere of influence. This becomes apparent as we trace the genesis of Guantánamo further.

Guantánamo was created as a response to an unprecedented event. The response alternatives did not have a pre-codified legal framework. Rather, sets of alternative means of legal response have been abstracted

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104. *Id.*

105. Human dignity is, in my mind, the life force of making the human person inviolable. By referring to human dignity, I generally refer to the broader scope and meaning of inherent human dignity that illuminates the life of all human persons. Every human, by virtue of its existence, must possess an inherent human dignity. Such dignity does not depend on forced social conditions, born out of inequality of race, class, and gender, as this dignity is neither earned nor achieved. This human dignity percolates underneath the existence and evolution of each human person, giving the human life both its inviolability and sacred characteristic. See Saby Ghoshray, *Tracing the Moral Contours of the Evolving Standards of Decency: The Supreme Court's Capital Jurisprudence Post-Roper*, 45 J. CATH. LEGAL STUD. 561 (2007) for a detailed exposition.

from the codified norms of international law and made to fit the desired goal. Unfortunately, a logical abstraction of the norms of international law would be contradictory to domestic aspirations[106] and thus would not be palatable for domestic consumption.[107] In addition, the U.S. Administration did not have the answers to all the possible legal outcomes that might emerge should a deterministic legal framework be applied vis-à-vis the terrorist detainees.[108] Thus, absent absolute clarity with respect to procedural steps, the Administration resorted to a nebulous framework, designed to be an all-encompassing legal vacuum adept at suspending procedural due process rights for the unforeseeable future, and yet, achieve the desired means to lock away the "evil."[109]

It became clear as time passed that some detainees have no relationship to the crime they have been charged with,[110] yet allowing the justice mechanism to follow its logical contour was not an option for the Administration on two grounds.[111] First, the domestic political agenda was not conducive to the possibility of "release" of manifest "evil."[112] Second, the public has been sold the story of an existential threat and the valor of protection against such evil.[113] Releasing detainees held at Guantánamo will not only be monumentally embarrassing for the Administration, but also spear the bubble of the convenient narrative of good vs. evil.

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106. Here I refer to the domestic aspiration that emerges as a faulty manifestation of American Exceptionalism, an area I examine in greater detail later in this article. *See infra* Part IV. The central argument here is that the attacks of 9/11 have shaken the core of the American psyche and persona to such an alarming extent that any outcome of terrorists' detention that may evolve in any form of acquittal or receiving a lower quantum of punishment will not be palatable to the domestic constituency of the U.S. Administration. Despite strong foundations of international law related to hostilities that we have seen so far, the U.S. Administration has been extremely leery of adopting legal responses embracing the ideals of international law for fear of domestic backlash. For a detailed legal landscape post-9/11, *see generally*, Ghoshray, *supra* note 95.

107. *Id.*

108. By determinist framework, I refer to the legal framework in which it might be possible to articulate the justice mechanism and the potential quantum of punishment based on the nature of the crime. Since the attacks of 9/11, the debates continued whether the terrorist detainees should be brought under the laws of war paradigm or law enforcement framework. From the Administration's point of view, both have advantages and disadvantages. The problem comes from the fact that due to domestic aspirations, the Administration wanted to ensure any legal proceedings will ensure maximum punishment to the terror suspects. However, if a robust and just legal mechanism were to follow, it may not be able to ascertain such outcomes.

109. Ghoshray, *supra* note 95.

110. *See supra* note 83.

111. *See infra* Part V.

112. *See* MONTAGU & MATSON, *supra* note 99.

113. *See id.*

As a result, the government created more layers, as revealed through the litany of procedural framework including the Combatant Status Review Tribunal.[114] Despite their appearance of legal maturity, these procedures provided no deterministic outcome related to detention relief. In time both the Guantánamo detainees and domestic terror suspects became embroiled in prolonged detention—which matured into a systemic phenomenon.[115] In this way, the engulfing influence of Guantánamo grew out of its legal representation as a physical facility and evolved into the phenomenological space. In this newly minted space, Guantánamo began exerting its influence across the wide spectrum of the law enforcement community, which became subconsciously aware of its ontological existence. Whenever there is a perception of a threat, actual or manufactured, construction of evil becomes easier. This enables a construction of sending the terrorist to Guantánamo.[116] Guantánamo also provides law enforcement with the much needed flexibility to determine what means must be resorted to in order to guarantee a desired outcome.[117]

Indeed, Guantánamo or a Guantánamo-like detention facility allows for the detainee to be thrown into a framework where his procedural due process rights can be temporarily or permanently suspended, depending on the desired outcome.[118] Time and repetition not only enabled the security apparatus of the state to develop the systematic methodology, but allowed the general construct to morph into a way of life, far removed from exception and initial quandary. Thus, Guantánamo started acting like a vacuum that would attract anything procedurally undefined, legally indefensible, theoretically nebulous, or deterministically uncertain.[119]

Does that mean Guantánamo is a black hole, as the prevailing legal literature seems to suggest and the above characteristics support to some

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114. *See* Detainee Treatment Act of 2005, *supra* note 63.

115. *See Boumediene*, 553 U.S. 723.

116. *See* Ghoshray, *supra* note 36.

117. *See infra* Part IV.

118. *See infra* Part IV.

119. My contention here is that the mechanism surrounding Guantánamo continues to provide a 'catch all' for all legal uncertainties, for all residual legal outcomes wherever there is a potential that a particular terrorist act may not receive the "desired" outcome from the court system. Whether it is because of the nature of evidence available or because of the legal theories available at the time of prosecution, the overarching theme has been to sweep that event into the Guantánamo framework. Therefore, I argue that because of that overpowering mechanism continuing to shape any terrorism-related legal event, it is not theoretically possible to construct a definitive or deterministic legal framework.

extent?[120] Let me provide some interpretive gloss to an existing construct. From the broader characterization that law is opaque in a region due to its inability to penetrate the region to either bring the events under the law's ambit or develop adequate legal representation of entities within the region, it may justifiably be called a legal black hole. Normal practice of civilized society exists under guidance of law, by imparting a legal construct on any living or physical entity. Therefore, the legal commentators understood a suspension of law or its absence as a manifestation of a legal black hole within Guantánamo.[121] As the astronomical black hole is opaque to light, similarly, Guantánamo is revealed as somewhat opaque to legal illumination; hence, the characterization of a legal black hole. I see this characterization as only partially correct. The related conversation is surprisingly silent on the rest of the story—a story which makes Guantánamo more of a black hole. Let us borrow from physics to further illustrate.

Classical physics defines a black hole as the entity that has an enormous gravitational pull by means of which it attracts anything and everything that comes within its territory.[122] Thus, a black hole can be seen as a giant vacuum which will attract and inhale everything without ever disclosing the identity of the material it has devoured. I want to bring this physical manifestation of Guantánamo and place it within a legal context. Like an astronomical black hole devours all other celestial bodies surrounding it,[123] I see the phenomenological construct of Guantánamo attempting to devour any and all other legal events that share the same ontological space with it—that is, any alleged instances of terrorism involving American interests. This is where the correct representation of Guantánamo as a narrative of legal black hole must be understood. Attention must be given to the sweepingly overpowering phenomenon that has existed for more than a decade now, and with no end of attenuation in sight. Unless this specter of sending an individual

120. *See* Lord Johan Steyn, *Guantánamo Bay: The Legal Black Hole*, TWENTY-SEVENTH F.A. MANN LECTURE, British Institute of International and Comparative Law and Herbert Smith, held at Lincoln's Inn Old Hall (Nov. 25, 2003), *available at* http://statewatch.org/news/2003/nov/guantanamo.pdf. *See also* Richard Phillips, *'Friend of the Court' Applications Denounce Guantánamo Bay Detentions as Illegal*, WORLD SOCIALIST, (January 19, 2004), http://www.wsws.org/articles/2004/jan2004/guan-j19.shtml. *See generally* Neal R. Sonett, *Guantanamo: Still a Legal Black Hole*, 33 HUMAN RIGHTS 1, 8-9 (2006).

121. *See supra* note 120.

122. *See generally* VALERI PAVLOVICH FROLOV & IGOR DMITRIEVICH NOVIKOV, BLACK HOLE PHYSICS: BASIC CONCEPTS AND NEW DEVELOPMENTS (1998); RANDELL L. MILLS, THE GRAND UNIFIED THEORY OF CLASSICAL PHYSICS (2010), *available at* http://www.blacklightpower.com/theory/bookdownload.shtml.

123. *See* sources cited *supra* note 122.

into Guantánamo goes away, it is very difficult to take the next step in America's detainee jurisprudence. Therefore, it is of utmost importance that Guantánamo be decoupled from the legal discourse within American jurisprudence.

This decoupling, however, is not possible without the proper closure of Guantánamo—not only a legally difficult proposition[124] but an event that has existential ramifications for the American domestic political agenda.[125] Like the way a black hole distorts the traversal path of celestial objects near its sphere of influence, I see Guantánamo distorting not only the constitutional curvature,[126] but also the possible trajectory of

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124. Here I draw attention to the continuous saga of defining Guantánamo within a legal framework and the inability by the successive Administrations to come to an agreement as to a definitive outcome for Guantánamo. *See supra* notes 24, 108 and accompanying text. However, the crux of the story lies in the fact that a deterministic outcome of Guantánamo is always going to be unpalatable for American domestic consumption. Let us examine this in further detail. A decision on Guantánamo in the most deterministic sense would most likely evolve in two possibilities: (i) closure of Guantánamo and bringing the remaining detainees under some sort of robust justice mechanism by means of which they are processed through a guilt determination phase, followed by a punishment procedure or (ii) continue to operate as a prison facility, but bring the prisoners under some sort of justice mechanism. Each one of these possibilities entails the potential for release of prisoners as evidence suggests a majority of prisoners may not have any culpability or prosecutable evidence against them. Since widespread acceptance has domestic political consequence for any Administration, the closure may not happen in the near term. The broader consequence of Guantánamo revolves around American Exceptionalism and American response to its existential threat via 9/11, an area I discuss later in this article. *See infra* Part IV & V.

125. *See supra* note 124 and accompanying text.

126. In the traditional sense, the constitutional space is envisaged to be a linear multi-dimensional space in which the distance between the information set and the solution set is constructed via Euclidean geometry of straight lines. According to the basic mechanistic view of the universe, space is conceptualized as formed by linearly placed multi-dimensional space. The Framers expressed themselves appropriately in accordance with the prevailing conception of scientific paradigms of their time. In this framework, the contours of this constitutional space are created by the statutes and texts created by the Framers under the assumption that all possible abuses of power at the highest level had been considered with due incorporation of relevant checks and balances. That the Framers envisioned a constitutional space containing Newtonian references of physical characteristics is evident in their exclusive invocation of forces and counter forces. Under this Newtonian framework, the Constitution ought to be assumed as a discrete multi-dimensional space, providing the necessary checks and balances under a linearly applicable force in nature. Reminding ourselves that the shortest distance between two points is assumed to be a straight line, the controlling assumption is that the existing legal paradigm can fully evaluate the outcome of a legal scenario. The legal reasoning proceeds by constructing a set of linearly placed stimuli or sources of information along the constitutional space. The determinacy of the Newtonian framework can be tested if a legal outcome could be determined with reasonable certainty.

Setting aside the subjectivity inherent within the legal paradigm, the concept of ontological dimensions and epistemological manifestation introduces sufficient distortion in the constitutional space, causing us to question the sustainability of the Newtonian framework envisioned by the Framers. Here, I am not challenging the existing modalities of law on grounds of inadequacy. Rather, I am questioning whether some aspects of jurisprudence have lagged behind in their ability to incorporate the shared wisdom of other disciplines. However, as I believe that through every legal consequence, we must question the outcome, that is, we must verify whether the law is operating within perceptible bounds of logical certainty, as the law must reinvent itself with every significant change that society goes through. Therefore, in light of our enhanced understanding of the relationship between law and the society within which it operates, jurisprudence may be slow in reacting to the change in pace. This was echoed by Professor Tribe: "legal problems in general, and constitutional problems in particular, have not always kept pace with widely shared perceptions of what makes sense in thinking and talking about the state, about courts, and about the role of both in society." Laurence H. Tribe, *Essay: The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics*, 103 HARV. L. REV. 1, 2 (1989). I do not hold the view that the legal universe is parallel to the Newtonian framework premised on checks and balances on every conceivable action that is untenable. I do, however, reject the framework that rests on the static assumption of conceiving an exhaustive set of actions within the changing dynamics of the society, and expecting legal solutions for all such actions. The assumption that every legal question can be answered within a legal environment in which a counterbalancing force provides adequate checks and balances has failed to address some particularized conflict of law situations, and is too farfetched. Thus, lending credence to the concept of curved space of the Constitution as proposed by Professor Tribe, I bring in the concept of constitutional curvature to inquire if we should incorporate a different notion of the Constitution itself. As Professor Tribe noted:

> Newton's conception of space as empty, unstructured background parallels the legal paradigm in which state power, including judicial power, stands apart from the neutral, 'natural' order of things. In the realm of physics, Einstein trenchantly criticized the world view in which 'space as such is assigned a role in the system of physics that distinguishes it from all other elements of physical description. It plays a determining role in all processes, without in its turn being influenced by them. Though such a theory is logically possible, it is on the other hand rather unsatisfactory. Newton had been fully aware of this deficiency, but he had also clearly understood that no other path was open to physics in his time.' In Einstein's view, space is not the neutral 'stage' upon which the play is acted, but rather is merely one actor among others, all of whom interact in the unfolding of the story. Einstein's brilliance was to recognize that in comprehending physical reality the 'background' could not be abstracted from the 'foreground.' In the paradigm inspired by Einstein, '[s]pace and time are now dynamic quantities: when a body moves, or a force acts, it affects the curvature of space and time—and in turn the structure of the space-time affects the way in which bodies move and forces act.'

Id. at 7 (alterations in original) (quoting ALBERT EINSTEIN, THE MEANING OF RELATIVITY 140 (5th ed. 1956). Therefore, by constitutional curvature, "I am referring to the very nature of the Constitution itself here, as opposed to the interpretive technique of static versus dynamic. While static constitutionalism is frozen in the eighteenth century

any legal event. In order for a legal event to proceed to its logical conclusion, it must traverse forward, sometimes in a linear fashion, often times, however, embracing non-linearity.[127] But, if the trajectory can never decouple itself from a larger gravitational pull, it will never reach its logical legal conclusion. This is where the closure of Guantánamo has the most significant socio-legal phenomena,[128] the immediacy of which must be both internalized and achieved. I would submit that consistent detainee jurisprudence is not possible without adequate closure of Guantánamo—the anatomy of which I dissect below.

C. Dissecting the Question of Adequate Closure of Guantánamo

Since announcing his candidacy, President Barack Obama emphasized his intention to close Guantánamo,[129] a sentiment echoed in a subsequent announcement by Attorney General Eric Holder.[130] Like the legal maneuverings surrounding the attempt to sanctify administrative actions at Guantánamo that, at times, revolved around legal fiction,[131] the

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meaning of the text and statutes, dynamic constitutionalism traces its meaning with the evolving context of the current times. I have dissected this issue in greater detail in an earlier work." Ghoshray, *supra* note 101, at 201.

127. Tribe, *supra* note 126 (referring to embracing of non-linearity as a departure from traditional linear paradigm).

128. As I continue to discuss in this article, Guantánamo is beyond legal representation as the phenomenon of Guantánamo should be seen as in the interaction between the legal mechanism and societal aspiration. Therefore, it should be seen as a phenomenon whose legal ramifications depends on sociological factors but evolves in time because of such factors.

129. President Obama had issued two executive orders to reverse course from the policies of the earlier Administration with respect to executive detainees and the Geneva Conventions. The first order requires that executive detention facilities operate in conformity with Common Article 3 of the Geneva Conventions. *See* Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities, Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009). The second intended to provide more due process-based interrogation standards by requiring that Common Article 3 sets the minimum standard of treatment for executive detainees and that the Army Field Manual be read in conformity with Common Article 3. *See* Ensuring Lawful Interrogations, Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

130. *See* Jane Mayer, *The Trial: Eric Holder and the Battle over Khalid Sheikh Mohammed*, THE NEW YORKER, February 15, 2010, http://www.newyorker.com/reporting/2010/02/15/100215fa_fact_mayer#ixzz1BumFyFqH.

131. The idea of legal fiction draws its source from the fact that law is inanimate and evolution of law requires legal actors to manifest themselves in contemplation of law. In such manifestation, fictitious accounts or events are constructed to give animated meaning in order to project reality into inanimate beings. Therefore, an act or an event can evolve as representation of a fictitious act or event to satisfy law's needs.

reality of physical closure has also remained more of a fiction.[132] The executive unilateralism that shaped the genesis and evolution of Guantánamo during the Bush Administration[133] was conspicuous by its absence during the formative years of the Obama Administration. Unfortunately, however, the early promise of the current Administration has not resulted in finding even a modicum of hope for the closure of Guantánamo. To be fair to the Obama Administration, although they have yet to achieve closure, it has not been because of lack of intention, but more so due to their inability to comprehend the nature of Guantánamo.[134] Much like everyone else, even this apparently well-intentioned Administration failed to internalize the phenomenological expanse of Guantánamo.

What do I mean by closure of Guantánamo? On the surface, it might seem that I am referring to the closure of Guantánamo as a physical facility, an eventuality which will mean bringing the existing detainees under a deterministic and predictable legal framework. In reality, however, this closure must be seen as the closure of a phenomenon, one which extends beyond the physical limit of a detention facility and exists in the metaphysical construct of people. Although the closure of the actual detention facility is a necessary event, it is not necessarily a sufficient one to achieve the closure of Guantánamo in the truest sense.[135] Therefore, when referring to the closure of Guantánamo, we must separate the physical detention unit from its phenomenological whole, as the closure of the smaller physical subset does not automatically guarantee the closure of the greater phenomenon. In my view, the broader phenomenon of Guantánamo arrived at our ontological

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132. I draw attention to the fact that the closure of the physical detention facility is being contemplated only for the purpose of describing the scope and manifestation of law. Such an outcome is far from achieving reality.

133. *See* Ghoshray, *supra* note 36.

134. This theory of a unitary executive has been debated in recent days because President Bush has been claiming unitary executive privilege when it comes to his leadership role as president. *See, e.g.*, Symposium, The Accountable Executive, 93 MINN. L. REV. 1741, 1744-45 (2009). In essence, the unitary executive privilege asserts that all executive authority is solely in the President's domain. *Id.* at 1741. But, for example, in the domain of war or declaring war, I have detailed that "the concept of the unitary executive does not have legitimacy in the prevailing political and judicial parlance. The President cannot declare war without the Congress's approval. Only Congress can declare war. Since arguably, no legislative act declaring a state of war was issued in connection with the broadly named War on Terror, then the prevailing legal framework based on the Laws of War model is not validated, and thus [is] not applicable." Ghoshray, *supra* note 70, at 270.

135. Here I draw attention to the context beyond the closure of the physical facility.

experience when the detention facility began its new manifestation post-9/11.[136]

While a victory on paper for the human rights lawyers and progressive legal activists might center on the physical closure of the detention facility, there might never be an end to the complex phenomenon called Guantánamo. The closure of the phenomenon requires a complete understanding of the non-physical aspect centering on acknowledging the existence of a much deeper ontological representational space. This representational space straddles both the physical and philosophical dimensions as it exists in the juncture between socio-legal and domestic political spheres. In this shared space, manifestation of the two entities, Guantánamo and 9/11, become synonymous as they travel through a continuum to create a unique duality. It seems in our minds that we cannot think of 9/11 without Guantánamo, and alternatively, we cannot think of Guantánamo without 9/11. Given the depth and the indelible mark 9/11 has imprinted both in American history and in the American psyche, it is vitally important to decouple the ontological existence of Guantánamo from its metaphysical duality of 9/11. This is because, in a unique way, the deep wound of 9/11 and the existential threat it carries with it provides the American psyche with the relief that comes from this unique phenomenological evolution of Guantánamo—through its interplay between evil and its conquest.[137] The pursuit of this conquest, unbeknownst to its ardent consumers, forgets the meaning of dehumanization[138] as it is carefully cloaked under the interplay. Therefore it is vitally important to understand Guantánamo both through its more expansive manifestation and its consequences, intended or unintended.

D. Why It is Difficult to Frame a Closure of Guantánamo

Contemporary legal discourse vis-à-vis Guantánamo closure is premised on identifying the appropriate legal framework for categorizing and processing the remaining detainees in the physical facility.[139] At the surface level, the discussion revolves around topics ranging from congruency of U.S. detention policy with the applicable international

136. The reason I talk about a new manifestation is because Guantánamo has been in existence as a detention facility well before 9/11. It was designed as an isolated landmass from the sovereign nation of Cuba. It was leased by America to house Haitian asylum seekers and refugees.

137. *See infra* Part V.

138. *See infra* Part IV.

139. *See generally* Ghoshray, *supra* note 36.

norms,[140] to something along the lines of comparative advantages between criminal law and military law in framing appropriate legal process.[141] This is where the complexity of understanding Guantánamo begins. The distinction between criminal law and military law is premised on resolving straightforward questions surrounding the nature of alleged acts of terror, the characteristics of the actors, and the geo-political attributes of the theater in which the act is to have been committed.[142] The closure of Guantánamo at the phenomenological level must be understood at a deeper fundamental level by recognizing the tension between neutral transparencies[143] versus inertia of symmetry[144]—an area I shall now shed some revelatory gloss over.

To adjudicate a legitimate legal event within the context of customary international law,[145] the narrative process must breed neutral transparencies in the system. Without neutral transparency between the events and underlying supervisory mechanism, it is not possible to construct a legitimate legal framework. Even if we consider Guantánamo as a straightforward legal representation of the physical space and living entities within the space, there is neither neutrality nor normalcy in this space. At the very least, a modicum of neutral transparency is required to begin the necessary dialogue for the closure of Guantánamo. As revealed through discussion thus far, and as explained later in this article, the path to achieving neutral transparency is severely impeded by the problem of inertia of symmetry at an ontological level. In an earlier passage, I

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140. *See id.*

141. *See id.*

142. *See id.*

143. By neutral transparency I draw attention to the transparent set of factors or variables that must illuminate the legal representations and the legal outcomes because of the over arching dominance of domestic agenda, American existential psychosis, and embrace of the manifestation of evils, areas I have discussed earlier. It is very difficult in practice to interject any modicum of neutrality in any discourse surrounding Guantánamo.

144. By symmetry in this context, I draw attention to the symmetrisizing pattern with which U.S. Administration and law enforcement officials have conducted the capture, processing, and detention of detainees within a framework where, as I have shown throughout this article as have scholars elsewhere, human rights have mostly been suspended, both by means of indefinite detention and the torturous existence of detainees. Continued practice has imposed upon the security handlers of these detainees a certain sense of accepted norm, any departure from which is confronted with resistance. Much the same way in physical dynamical phenomena the inertia acts upon a physical object to prevent any change from its initial status.

145. *See* Michael J. Matheson, *Session One: The United States' Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. INT'L L. REV. 419, 420 (1987).

discussed how practices bordering on legal illogicality[146] and their repetitions over the years have created a systemic adherence to illegal means, which in turn has evolved into a highly symmetric system of compliance among the enforcement and security agencies.[147] When it comes to Guantánamo, this symmetry-bred inertia prevented a constructive framework for closure to gain momentum within administrative discourse.

To understand this adherence to symmetry,[148] let us retrace the very genesis of Guantánamo. Not its original manifestation as the conduit to process Haitian refugees, but its new manifestation since 2002. In this reincarnation, Guantánamo exists in an ontological space where 9/11 and Guantánamo come in and out of duality along a multi-dimensional continuum. Here we cannot separate Guantánamo from 9/11, nor can we understand Guantánamo in the splendid isolation of its uniqueness. The events of September 11 posed such an existential threat to America that the very foundation of its vaunted exceptionalism was shattered to smithereens. Despite having eliminated or sufficiently contained most potential 9/11-like threats,[149] the existential fear remained within the American psyche.[150] This is the phenomenon of 9/11. This is also why most cannot separate 9/11 from Guantánamo—it is the framework of

146. Here I draw attention to the legal maneuvering that U.S. Administrations have employed while trying to put the gloss of legality over acts at and surrounding the detention in Guantánamo. But these acts have been established by legal scholars as acts without support in contemporary international jurisprudence.

147. *See supra* note 144.

148. Here I refer to the monolithic tendency of an individual within a symmetric social order to follow the lead, often referred to as 'like lambs to the slaughter.' Robot-like, the collective needs of an individual thus are driven by an artificially created rationality. Individuals under the influence of a dominating power, whose societal needs have been carefully designed and sublimated into its deeper consciousness, suffer from the effects of bounded rationality.

In this existence, the individual rationalizes not only her false needs, but also her requirement of symmetry within the environment, in such a way that rationality cannot extend the artificial barrier imposed upon her current consciousness. This distorted rationality is therefore a vital ingredient in the perpetuation of symmetry. *See* Ghoshray, *supra* note 57.

149. As domestic American history for the decade since 9/11 would suggest, the U.S. has not faced any 9/11-type security threats. This has been achieved in part by the international alignment to secure against terrorists threats, counter measures initiated and implemented across the globe, and continued cooperation amongst the various security agencies across the globe.

150. As I argued earlier, the all-pervasive fear of terrorism impregnated deep in the American psyche since 9/11 has been manifested in the post-9/11 legal landscape. Some of these manifestations involve indefinite detention, excessive domestic surveillance, expansive governmental reach in breaching individual privacy, and expanded immigration restrictions. *See* Ghoshray, *supra* note 57.

existential threat that spawns the inertia of symmetry. Therefore, this inertia must be decoupled from the symmetry in order for any meaningful dialogue to even begin to take shape. The daunting query before us is how to achieve that.

This is difficult. In their heightened awareness of the existential threat, both the Administration and the security community seek to adhere to the symmetry[151] because adhering to symmetry protects them from making ill-advised moves with regard to Guantánamo, which means a desire to maintain the status quo.[152] And this status quo of indefinite detention can be maintained by continuing to embrace the ontological dimension of Guantánamo that is inseparable from 9/11. In a uniquely illogical way, both the Administration and the security community seek existential solace from the Guantánamo phenomena. Thus, at the most fundamental level, the decoupling from symmetry needs erasure of threat. Unless this existential threat is erased from the American psyche, the adherence to symmetry will continue, which in turn will not allow any constructive dialogue based on neutral transparency to emerge. Despite the plea for change in U.S. detention policy,[153] this existential threat has taken a life of its own vis-à-vis Guantánamo. I suggest we internalize Guantánamo as a manifestation of this threat. This beckons us to understand Guantánamo in a new light.

II. WHY THE NARRATIVE OF GUANTÁNAMO IS TO BE SEEN THROUGH A NEW LIGHT

The discussions thus far have centered on establishing the closure of Guantánamo as the necessary stepping stone for achieving consistency in U.S. detention framework. Success in framing this closure is predicated on internalizing its narrative at a more fundamental level. In this Section, I focus on developing this narrative.

By now, scholars have provided a variety of representations for Guantánamo, from calling it a black hole,[154] to a lawless zone,[155] to a

151. *See supra* note 144.

152. The requirement to maintain the status quo emerges from the drive to retain symmetry. *See* Ghoshray, *supra* note 57, at 182.

153. Here I draw attention to the broader U.S. paradigm which has manifested itself as overly aggressive, excessively indefinite, and mostly operating outside the legal norms of U.S. jurisprudence. Therefore, I embark in this article to examine the narrative of Guantánamo in detail in order to understand a hidden construct of the U.S. detention policy that has largely been kept out of our legal discourses.

154. *See* Steyn, *supra* note 120.

155. Numerous commentators have alluded to this position, describing Guantánamo as a place where there has been a general desecration of international law as it is pitted

place for legal absurdism.[156] Others documented the plethora of executive, legislative and judicial actions surrounding Guantánamo,[157] and provided competing interpretations of the legal status of inhabitants of Guantánamo.[158] The legality of actions inside or in relation to Guantánamo has been thoroughly dissected, as has been the relevant Supreme Court jurisprudence, as it evolved through *Rasul*,[159] *Hamdi*,[160] *Hamdan*,[161] and *Boumediene*.[162] In this context, I shall refrain from engaging in discussions as to whether the promises of *Rasul* and *Hamdi* have been fulfilled,[163] or whether *Hamdan* and *Boumediene* pose a new set of doctrinal difficulties to appropriately deal with the procedural rights of detainees in this discourse,[164] areas both other scholars and I have discussed.[165] Instead, I seek to explore Guantánamo as a narrative. This is a narrative borne out of existential phenomenology, which resides

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against the coercive dimension of U.S. detention framework. *See generally* Mark A. Drumbl, *The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, the Geneva Conventions, and International Criminal Law*, 75 GEO. WASH. L. REV. 1165 (2007); *see also* Carlos Manuel Vázquez, *The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide*, 101 AM. J. INT'L L. 73 (2007).

156. *See* Ahmad, *supra* note 84, at 1716-26.

157. *See generally* Ghoshray, *supra* note 36.

158. *Id.*

159. Rasul v. Bush, 542 U.S. 466.

160. Hamdi v. Rumsfeld, 542 U.S. 507.

161. Hamdan v. Rumsfeld, 548 U.S. 557.

162. Boumediene v. Bush, 553 U.S. 723.

163. While the constitutional limits of executive privilege were the focus of both *Rasul* and *Hamdi*, the narrow scope of these opinions neither eliminated the vestige of uncertainty from the Constitution's indeterminate texts, nor did they become controlling laws for enemy combatant detentions. In addition, the opinions did not exactly prohibit the President from invoking the affirmative grants of the Constitution as he circumvented the judicial impact of these decisions by continuing the Military Commissions Act and the Detainee Treatment Act. In its refusal to collide with the executive branch, the *Rasul* Court deliberately left open issues related to the shared power paradigm, which set the stage for the path-breaking opinion later in *Hamdan*. In addition, if we compare *Rasul* and *Boumediene* side by side, we get a picture of the trajectory of the Supreme Court jurisprudence between 2004 and 2008. While *Rasul* holds that the federal habeas statute, 28 U.S.C. § 2241 (2006), provides for habeas jurisdiction over the detention of Guantánamo prisoners, *Boumediene* holds that the habeas-stripping provisions of the Military Commissions Act violated the Suspension Clause, U.S. CONST. art. I, § 9, cl. 2.

164. Here I refer to the broader implications of both *Hamdan* and *Boumediene*. Despite heightened expectations from the Court, the opinions generally left open substantive issues of implementation and decided the contentious issue of detainee due process on narrower grounds.

165. *See* Ghoshray, *supra* note 36.

within a continuum of duality that has an all-encompassing effect on our cognitive construct.[166]

A central concept of quantum physics is the postulation of wave-particle duality,[167] where matter exhibits both the properties of "wave" and "particle," without either, its full behavior cannot be revealed.[168] While paradoxical, this fundamental property of matter provides an elegant example of how in the phenomenological world, full manifestation of an event may depend on uncommon interpretation. It is against this construct that I suggest readers examine Guantánamo, through the paradox that Guantánamo and 9/11 are synonymous, that they coexist as a duality much like the wave-particle duality expounded in quantum physics some decades back.[169] Just as matter cannot assert its full manifestation without being in the continuum created by both particle and wave, Guantánamo cannot be understood simply through the representation of the physical description, but must be accompanied with the discourse surrounding 9/11. By the same token, a narrative of 9/11 remains deliberately incomplete without an anatomical dissection of Guantánamo. That is why any closure dialogue on Guantánamo, taken in its isolation, becomes difficult, both in legal and practical terms.[170]

Taken with the narrative of 9/11, I seek to dissect Guantánamo along four predominant threads—rights,[171] dehumanization,[172] erasure,[173] and

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166. *See* Saby Ghoshray, *Untangling the CSI Effect in Criminal Jurisprudence: Circumstantial Evidence, Reasonable Doubt and Jury Manipulation,* 41 NEW ENG. L. REV. 533 (2007) (providing a general understanding of how cognitive constructs, evolving from our shared experiences, perceptions and exigencies eventually help us in arriving at conclusions regarding legal determinism).

167. *See* ROBERT EISBERG & ROBERT RESNICK, QUANTUM PHYSICS OF ATOMS, MOLECULES, SOLIDS, NUCLEI, AND PARTICLES 59-60 (1985) ("For both large and small wavelengths, both matter and radiation have both particle and wave aspects . . . . But the wave aspects of their motion become more difficult to observe as their wavelengths become shorter . . . . For ordinary macroscopic particles the mass is so large that the momentum is always sufficiently large to make the de Broglie wavelength small enough to be beyond the range of experimental detection, and classical mechanics reigns supreme."). *See also* WALTER GREINER, QUANTUM MECHANICS: AN INTRODUCTION (2001).

168. *See* EISBERG & RESNICK, *supra* note 167.

169. *Id.*

170. *See* Mayer, *supra* note 130. *See also* Barabara Slavin, *Foreign Policy: Closing Guantánamo Proves Difficult*, NPR, Sept. 22, 2010, http://www.npr.org/templates/story/story.php?storyId=130039637.

171. Guantánamo appeared in contemporary legal discourse through a "rights" based narrative, arguing for the adequate rights of detainees. I discuss an expanded scope of such rights in this article. *See infra* at Part III.

172. *See infra* Part IV.

173. *See infra* Part IV.

exceptionalism.[174] The narrative constructed out of these four distinct dimensions would allow us to witness the entire event trajectory of the phenomenological evolution of Guantánamo, from its genesis, and evolving trajectory, to the necessary closure framework. These dimensions help us to internalize the cognitive framework of the security establishment as we begin to understand the ontological elements behind some of the necessary elements of Guantánamo, such as initial capture of the detainees,[175] the processing paradigm associated with such capture,[176] a series of legally promiscuous maneuverings,[177] to continued indefinite detention. These narrative dimensions also allow us to understand the psychological framework behind torture,[178] extraordinary rendition,[179]

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174. *See infra* Part IV.

175. Detainees have come from all parts of the world. The Pentagon has produced a list which contains the names and citizenship of 558 people that were detained in Guantánamo for the years 2004-2005. *See Full list of Guantánamo detainees issued by Pentagon*, THE SUNDAY TIMES, April 20, 2006, http://www.timesonline.co.uk/article/0,,11069-2143034,00.html. *See also* Ghoshray, *supra* note 36, at 115; JOSEPH MARGULIES, GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER 63-84 (Simon & Schuster 2007).

176. *See* sources cited *supra* note 175 and accompanying text.

177. *See* sources cited *supra* note 175 and accompanying text.

178. *See* Ghoshray, *supra* note 36, at 81.

179. Extraordinary rendition is excellently summed up in the words of columnist David Ignatisu. He writes:

> Rendition is the CIA's antiseptic term for its practice of sending captured terrorist suspects to other countries for interrogation. Because some of those countries torture prisoners—and because some of the suspected terrorists "rendered" by the CIA say they were in fact tortured—the debate has tended to lump rendition and torture together. The implication is that the CIA is sending people to Egypt, Jordan or other Middle Eastern countries *because* they can be tortured there and coerced into providing information they wouldn't give up otherwise.

David Ignatius, *'Rendition' Realities*, WASH. POST, March 9, 2005, at A21, *available at* http://www.washingtonpost.com/wp-dyn/articles/A18709-2005Mar8.html. The concept of outsourcing torture under the guise of extraordinary rendition is a painful reality to many detainees. One such documented case is that of Canadian citizen Maher Arar, who was a victim of the U.S. policy of extraordinary rendition. He was detained by U.S. officials in 2002, accused of terrorist links, and handed over to Syrian authorities, who tortured him. Arar spoke publicly about his torture by the Syrians:

> Without no warning the interrogator came in with a cable. He asked me to open my right hand. I did open it. And he hit me strongly on my palm. It was so painful to the point that I forgot every moment I enjoyed in my life. This moment is still vivid in my mind because it was the first I was ever beaten in my life. Then he asked me to open my left hand. He hit me again. And that one missed and hit my wrist. The pain from that hit lasted approximately six months. And then he would ask me questions. And I would have to answer very quickly. And then he would repeat the beating this time anywhere on my, on my body. Sometimes he would take me to a room where I could,

and more importantly, media's role in partially occluding inhumane dimensions of Guantánamo at times.[180]

A. Understanding Guantánamo from a Rights Paradigm

Do we need to see Guantánamo as a rights narrative? What theoretical framework do we have from which to understand Guantánamo from a rights narrative? We are prompted into this inquiry because most of the progressive legal conversations view Guantánamo as a right-free zone,[181] a legal nether region where rights have been suspended, as also echoed by Professor Ahmad.[182] In this narrative of rights, I see invocation of rights continuing along fluid lines. Sometimes legal rights subconsciously merge into human rights or exit out of them—sometimes they are subsumed under broader fundamental rights. These result in the emergence of diverging strands of rights within the rights-based narrative of Guantánamo. Therefore, granulating these commingled rights under distinct threads of legal, human and fundamental doctrines will help in understanding the legal narrative. It is critical in the unfolding story of Guantánamo to understand what we mean by "detainees' rights have been suspended," as suggested previously.[183] I ask a more fundamental question: under what scenario can rights be suspended? Whose rights can be suspended? Who can suspend rights?

Rights can be suspended if the bestowal process contains the adequate construct to suspend them, perhaps an impossible or even a circular argument. But fundamentally, rights have to be created or their existence mutually agreed upon or admitted into the prevailing construct for them to be suspended. They cannot be unilaterally disinherited from people by advancing the argument of evilness.[184] Despite its recognition of certain inherent inalienable rights for individuals within American

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> where I was alone, I could hear other prisoners being tortured, severely tortured. I remember that I used to hear their screams. I just couldn't believe it, that human beings would do this to other human beings.

Maher Arar, *The Horrors of Extraordinary Rendition*, (Letelier-Moffitt International Human Rights Awards and Institute for Policy Studies, Oct. 18, 2006), *available at* http://www.counterpunch.org/arar10272006.html.

180. *See* Victor Davis Hanson, *The World Goes Silent on Guantánamo?* THE CORNER (Mar. 9, 2010), http://www.nationalreview.com/corner/195938/world-goes-silent-Guantánamo/victor-davis-hanson.

181. *See* Ghoshray, *supra* note 36.

182. *See id. See also* Ahmad, *supra* note 84 (describing the construct of "suspension of rights" in Guantánamo).

183. *See* Ghoshray, *supra* note 36.

184. *See* Ghoshray, *supra* note 57, at 184-93.

jurisprudence,[185] it was never recognized for the "evil-doers"[186] at Guantánamo. I mention this development, not because rights were

185. The Bill of Rights contains numerous rights called enumerated rights, which are different than unenumerated rights. Unlike unenumerated rights, enumerated rights are explicitly mentioned in the Constitution. The unenumerated rights have not been explicitly mentioned, but the Supreme Court has long held that the Constitution protects those rights. The difficulty in distinguishing between enumerated rights and unenumerated rights has created significant constitutional confusion. Commenting on unenumerated rights, Randy Barnett says, "The purpose of the Ninth Amendment was to ensure that all [enumerated and unenumerated] individual natural rights had the same stature and force after some of them were enumerated as they had before; and its existence argued against a latitudinarian interpretation of federal powers." *See* Randy Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 2 (2006). *See id* at 13. *See also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (asserting that these rights come from a broad principle of equality and democratic process). The Ninth Amendment to the United States Constitution addresses rights of the people that are not specifically enumerated in the Constitution. *See* U.S. CONST. amend. IX. As part of the Bill of Rights, the Ninth Amendment reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. Justice Arthur Goldberg, Chief Justice Warren, and Justice Brennan expressed the opinion that the Ninth Amendment is relevant to interpretation of the Fourteenth Amendment. This opinion is reflected in the case of *Griswold v. Connecticut*, 381 U.S. 479 (1965):

> [T]he Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights . . . . I do not mean to imply that the . . . . Ninth Amendment constitutes an independent source of rights protected from infringement by either the States or the Federal Government . . . . While the Ninth Amendment—and indeed the entire Bill of Rights—originally concerned restrictions upon *federal* power, the subsequently enacted Fourteenth Amendment prohibits the States as well from abridging fundamental personal liberties. And, the Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement.

Id. at 490-93.

186. The phrase "axis of evil" was made famous in the State of the Union Address on January 29, 2002. President George W. Bush, State of the Union Address (Jan. 29, 2002), *available at* http://stateoftheunionaddress.org/2002-george-w-bush. President Bush described three nations, Iraq, Iran, and North Korea as governments who sponsored terrorism and were interested in possessing weapons of mass destruction. *Id.* An understanding of the scope and implication of this concept of evil is a necessary ingredient in American foreign policy. Historically, the concept of evil has been the staple for politicians and the U.S. Administration. We don't need to look far to find the supporting evidence. During the Cold War, the former Soviet Union used to be chastised as the "Evil Empire." *See* Editorial, *To the Summit, and Beyond*, N.Y. TIMES, Sept. 20, 1987, http://www.nytimes.com/1987/09/20/opinion/to-the-summit-and-beyond.html.

I discussed this concept of evil and quest for invulnerability by Americans in a lecture. I argued that the violations in both Guantánamo Bay and Abu Ghraib are not isolated incidents, but are different manifestations of a deep-rooted problem nestled in the American political agenda. In this context, I recognize that there exist five primary

suspended or denied, but rather because the discussion should turn on whether these rights were ever envisioned for humans that were brought to Guantánamo for the purpose of detention. The existential threat posed by the detainees was so overpowering, as revealed through the narrative of evil, or what Professor Muneer Ahmad alludes to as the narrative of monstrosity,[187] that certain rights were never envisioned for individuals painted as the bearer of that existential threat. Therefore, if a right has never been introduced within a construct, can it ever be suspended? The rights inquiry for Guantánamo detainees should center on this frame, as conversations must continue to develop a more deterministic rights framework for the two-hundred or so detainees who are yet to have their day in court.[188]

B. Legal Rights

Legal rights are not created in a vacuum. Whenever there is a physical entity or a living entity residing within that physical space, legal rights ought to be created. Universally, we can frame legal rights as those that are created whenever a physical space or a living entity is recognized. Therefore, whenever any combination of physical space and living entity is recognized, legal rights are created. These legal rights act as a supervisory framework that defines the movement of living entities within the physical space without taking away the set of inherent inalienable rights to which all humans are entitled.[189] As I have

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prongs which, when taken together, can explain the genesis of these two seemingly isolated events. *See* Saby Ghoshray, *Understanding Guantánamo and Abu Ghraib: Looking Through The Prism of American Political Agenda Abroad*, Address at The University of Mary Washington Conference: Arrogance of Power: Being American after 9/11 (April 1-3, 2005). These factors are: (1) American agenda of perpetuating an undefined yet expanding concept of evil, (2) perpetual quest for invulnerability, (3) isolationism and faulty multiculturalism post-9/11, (4) policy of exaggeration and (5) dehumanization of the enemy. These factors, coupled with the asymmetric alignment of power in today's world and lack of political ethics in American foreign policy can very well explain the genesis of Guantánamo Bay and Abu Ghraib. *Id.*

187. By narrative of monstrosity, I draw attention to the social process in which, by emphasizing the severe lack of certain socially accepted characteristics, or by pointing to the existence of certain so called abhorrent characteristics, broader society both invents and propagates the image of a monster in designated individuals. I have discussed this phenomenon in detail in an upcoming work. *See generally,* Saby Ghoshray, *The Predictable Arbitrariness of Female Execution: Looking Through the Prism of Gender Roles, Male Dominance and Monsterization* (forthcoming 2012). *See also* Ahmad, *supra* note 84 at 1698.

188. *See generally* Ahmad, *supra* note 84.

189. Here I draw attention to the fact that rights are not created without the concomitant existence of a vehicle to protect, immerse, and carry forward these rights.

established through discussions so far, the supervisory regime at Guantánamo went to great lengths to deny legal rights to detainees most of the time.[190] Despite a few cases of individual detainees emerging through obscurity, as revealed through their successes in advancing the Supreme Court jurisprudence,[191] the legal rights narrative at Guantánamo has largely been that of non-recognition. The appearance of providing legal rights has been a carefully orchestrated event, as revealed through various firsthand accounts from lawyers and rights groups.[192] Despite publicly admitting to the contrary,[193] there has been a systemic and

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For an individual, his or her individuality within the vortex of physical space could be seen as part and parcel of that vehicle to assert rights through the desire to define his or her own existence. In this construct, individuality flows through a set of inherent desires, manifested via a set of actions, as long as those actions do not conflict with other actions. Thus, the right to individuality could be seen as an inalienable right of an individual, as long as his or her actions do not come in conflict with other persons' rights to individuality. Here individuality is protected by a zone of coercive interference from the supervisory regime, be it the captor, the government, or the oppressor. For a discussion of rights of an individual, consider a noteworthy commentary by Randy Barnett. He describes this presumption of liberty:

> As long as they do not violate the rights of others (as defined by the common law of property, contract and tort), persons are presumed to be "immune" from interference by government. This presumption means that citizens may challenge any government action that restricts their otherwise rightful conduct, and the burden is on the government to show that its action is within its proper powers or scope. At the national level, the government would bear the burden of showing that its acts were both "necessary and proper" to accomplish an enumerated function, rather than, as now, forcing the citizen to prove why it is he or she should be left alone. At the state level, the burden would fall upon state government to show that legislation infringing the liberty of its citizens was a necessary exercise of its "police power"—that is, the state's power to protect the rights of its citizens.

Randy E. Barnett, *A Ninth Amendment For Today's Constitution,* 26 VAL. L. REV. 419, 432 (1991).

190. *See* Ghoshray, *supra* note 36, at 83-97.

191. *See id.* at 73.

192. *See* Ahmad, *supra* note 84.

193. Professor Laurence Tribe writes that President Bush's executive order on military tribunals is severely flawed and calls for using civilian tribunals. *See* Laurence Tribe, *Trial by Fury: Why Congress Must Curb Bush's Military Courts*, THE NEW REPUBLIC, Dec. 10, 2001. *See also* Neal Kumar Katyal & Laurence Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002); David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil Over the Guantánamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131 (2008) (providing a comprehensive commentary of procedural flaws of the detention mechanism); Glenn M. Sulmasy, *The Legal Landscape After Hamdan: The Creation of Homeland Security Courts*, 13 NEW ENG. J. INT'L. & COMP. L. 1 (2006).

deliberate effort by the Administration to deny basic rights, as seen from the images of the very first shackled detainee being loaded on a helicopter on his way to Camp Delta in Guantánamo.[194] Suspension of rights, to loosely connote the broader narrative of rights denial of Guantánamo, has been legally sanctioned from the very outset.[195] Some actions remained and continue to remain within the sphere of illegality, such as inhumane torture, which has not been seen by a civilized nation since the slave trade days.[196] Other illegal acts of human degradation, such as water boarding[197] and extraordinary rendition[198] remained under a fog of suspicion, whose instances have been established but never sufficiently explained.[199] Various other suspicious acts at the detention facility, such as excessive instances of cardiac arrest[200] and death in custody,[201] continue to be occluded from transparency in the name of security, territorial integrity, and the classified nature of the details.[202]

Thus, the paradox of Guantánamo lies in the realization that when we construct a dialogue surrounding the nature of legal rights of detainees, we cannot escape the fact that any abdication of such rights was done in a meticulously calibrated and cogently framed sophisticated framework. This has manifested itself in torture memos,[203] internal

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194. Torture photos of Guantánamo detainees are available at http://globalresearch.ca/articles/CRG211A.html. These images of U.S. military transports of prisoners were anonymously sent to media sources on November 8, 2002. Although the U.S. government was unaware of the identity of the person or persons who may have leaked the photos, it verified that the photos were authentic. *See Pentagon probes anonymous release of detainee photos: pictures show restrained men in military transport*, CNN.COM, Nov. 8, 2002, http://archives.cnn.com/2002/US/11/08/detainees.pictures.

195. *See* Ghoshray, *supra* note 36.

196. *See The Amistad*, 40 U.S. 518.

197. *See* Priest & Stevens, *supra* note 29 and accompanying text.

198. *See* Ignatius, *supra* note 30.

199. *Id.*

200. *See* Jennifer Rizzo, *Documents Raise Questions on Treatment of Detainees*, CNN.COM, Jan. 22, 2011, http://articles.cnn.com/2011-01-22/us/detainee.documents_1_detainee-deaths-iraqi-detainees-detainee-treatment?_s=PM:US.

201. *Id.*

202. *See* sources cited *supra* note 70.

203. *See* memorandum from John Yoo, Deputy Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, to William J. Haynes II, Gen. Counsel, Dep't of Def., Military Interrogation of Alien Unlawful Enemy Combatants Held Outside the United States, 80 Op. O.L.C. (Mar. 14, 2003). Collectively, these and other Office of Legal Counsel memoranda are referred to as the *Torture Memos*. Available at www.aclu/org/pdfs/safefree/too_army_torture_memo.pdf. *See* Jeffrey Rosen, *The Nation; The Struggle Over the Torture Memos*, N.Y. TIMES, Aug. 15, 2004,

White House communications,[204] a multitude of review panels and tribunals,[205] periodic farcical review boards,[206] and scholarly military law journal articles.[207] However, throughout the concoction of this legal "absurdism"[208] to establish legality within the multitude of illegal acts, we acquire the realization that legal rights were never envisioned for the detainees. Thus, not recognizing those rights was the primary objective and it was designed not as a-means-to-an-end, but rather an end to be achieved by any means.

C. Human Rights

In my examination of the rights narrative at Guantánamo, I seek to examine whether the detainees' human rights were ever recognized or even envisioned at Guantánamo. This inquiry centers on understanding under what framework the detainees' human rights are processed. Understanding the human rights construct of Guantánamo would perhaps allow us to envision a prospective end game, besides attempting to place the Guantánamo narrative within its intended ontological space. Earlier, I suggested that rights must be envisioned in order to be executed. Professor Muneer Ahmad examined the coercive dimension of rights by posing two questions: "Is there a right without a remedy?" and "Are rights self-executing?"[209] In my view, answers to these questions go back to the fundamental issue of whether rights can be recognized if the other parties to this mutual execution of rights were never part of the original discussion. If there is a unilateral play, however, the answer depends on

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http://www.nytimes.com/2004/08/15/weekinreview/the-nation-the-struggle-over-the-torture-memos.html.

204. *See* memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002). This Memo provided the legal framework for the authorization of interrogation techniques previously considered unlawful under U.S. legal norms.

205. *See* Ahmad, *supra* note 84, at 1711, 1726.

206. *See In re* Guantánamo Detainee Cases, 355 F. Supp. 2d 443, 470 (D.D.C. 2005) (citing Kurnaz Factual Return, Enclosure (1) at 2–3, Kurnaz v. Bush, 04-CV-1135 (ESH) (discussing how a CSRT found Murat Kurnaz to be an enemy combatant, merely because he befriended an alleged suicide bomber at a mosque in Germany)).

207. *See generally* James A. Schoettler Jr., *Detention of Combatants and the Global War on Terror*, *in* THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE 88 (Michael W. Lewis, ed. 2009).

208. *See* Ahmad, *supra* note 84, at 1716-26.

209. *See* Ahmad, *supra note* 84.

whether we recognize remedy without rights, part of what the Guantánamo-related Supreme Court jurisprudence centered on.[210]

The context here takes us to the next level of discussion vis-à-vis Guantánamo—can we locate a right, even without recognizing its emergence? Indeed, most discussions of Guantánamo begin with "rights" and end with "rights," in part due to the more popular representation framework. The difficulty of this restricted approach lies in the fact that this viewpoint does not allow for an in-depth understanding of Guantánamo's complexity or it's inter-relationship with other socio-cultural narratives that I introduce in this current discourse. "Lack of rights" or "suspension of rights," in this context, is only part of the story, a perspective that has also been supported by Professor Ahmad's work.[211] However, if Guantánamo is viewed from existing within an ontological space, the argument turns on whether an ontological space consists of any combination of living entity and physical space. This abstraction would suggest that we must be able to locate rights within Guantánamo—the ontological space. By default, every living entity, including the much maligned detainees, should have human rights while they are in Guantánamo.[212]

While pondering over the argument that rights are acquired over time, we must recognize that we cannot allow eternity to pass before rights of detainees become accepted within the applicable legal framework. Professor Ahmad reflected on this, by capturing the observations of Sarat and Kearns, "Rights, which are claimed to be natural and unalienable, do not spring fully formed at the conclusion of some philosophical argument or analysis: instead, they take a long time to be realized and instantiated."[213] I must ask: How long is a long time? When one's very existence is at stake, the basic fundamental human right to existence is being violated, could we rely on the ephemeral nature of rights and wait for eternity for them to be realized? Neither the slaves of *Amistad*, nor the hundreds of detainees in Guantánamo would think so. That would mean humans can be thrown into the deep vortex of the

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210. *Id.*

211. *Id.*

212. Any physical space, or entities under that space, existing in the modern world are expected to exist under a framework of law. An entity existing under law's framework and which evolves in contemplation of law is inherently endowed with a set of legal rights. Therefore, by virtue of occupying a physical space, while existing as human beings, the detainees in Guantánamo must be endowed with some natural rights.

213. *See* Ahmad, *supra* note 84, at 1692. AUSTIN SARAT & THOMAS R. KEARNS, *Editorial Introduction*, LEGAL RIGHTS: HISTORICAL AND PHILOSOPHICAL PERSPECTIVES 1, 6–7 (Austin Sarat & Thomas R. Kearns eds., 1996).

paradigmatic legal black hole never to be heard from again in this life—a logically anomalous proposition that we must reject outright.

The contemporary human rights jurisprudence guides us to deal with a set of doctrinal conditions along the lines of which each individual human, detainee or non-detainee, must be allowed to live within a physical space. By virtue of rights that emanate from being in a physical space,[214] the doctrinal developments would seem to be at odds with the various torture mechanisms, the indefinite detentions and lack of access to justice mechanisms. We are not necessarily focusing on the severity of the punishment that may be the logical outcome for some of the hardcore terrorists. However, not having the adequate procedure to get to that endpoint would defy logic according to contemporary human rights jurisprudence.[215] So, while we might locate rights in the ontological space, they still are not flowing from the current Administration of the ontological space—an act of illegality that Guantánamo should be viewed from.[216]

To understand the illegality, let us analyze the framework of detention in its various phases. First, there is the detention without recourse to legal process.[217] Second, there is detention with inhumane conditions, not resulting in torture.[218] Third, detention punctuated with periodic torture and frequent trips to non-Guantánamo destinations.[219] Does modern human rights jurisprudence support any of the above procedural treatments?[220] If it does not, why was this allowed to continue

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214. *See supra* note 212.

215. I draw attention to the fundamental promise and enduring principles of contemporary human rights jurisprudence, in observing that, under an adequate human rights paradigm, all instances of human rights violations should have remedy and consequences. In a similar vein, I believe the robustness in existing human rights jurisprudence compels us to see all instances of criminal or terrorist infractions through a deterministic mechanism decoupled from indefinite, rightless detention.

216. I bring the concept of ontological space to imply that there may be multiple social objects in addition to the physical object which serves as their ontological basis.

217. *See* Ghoshray, *supra* note 36 at 83-97.

218. *See supra* note 29.

219. *See supra* note 30.

220. I refer to the well known rendition programs where, at the behest of the U.S., various countries around the world specialized and participated in torture of detainees under U.S. or coalition custodies. In a sense, they are torturers for hire. This is supported by the words of U.S. Congressman Edmund Markey. He laments, "Sending prisoners overseas to extract information through water torture, removal of toenails and fingernails, beatings, and electrocution at the request of US officials is inhumane and must be stopped." *USA—Below the Radar: Secret Flights to Torture and 'Disappearance'*, AMNESTY INT'L USA REP. (Apr. 5, 2006), *available at* http://www.amnestyusa.org/en/library/asset/AMR51/051/2006/en/b543c574-fa09-11dd-b1b0-c961f7df9c35/amr510512006en.pdf. I question the civilized society's silence as

and most likely still continue?[221] This is a difficult scenario to accept. We are not talking about a smaller, less developed nation. Rather we are talking about a civilized society, a nation that not only is the moral leader of the civilized world, but is the self-proclaimed champion of human rights discourse.[222] This exuberance of inhumanity[223] has to be internalized from all coercive measures at play. Not only are there individual detainees existing within the physical space of Guantánamo, but also these detainees go in and out of the physical space of the Guantánamo detention facility from various external extraordinary rendition locations.[224] Based on evidence uncovered so far, not only did the U.S. engage in such activities,[225] but the deception, layering, and premeditation of such actions caused much debilitating harm to the broader world community.[226] Even if, for the sake of argument, we set aside the treatment of detainees as subject to judicial determination, the collateral consequences of such actions alone cause grave concerns from a human rights discourse.[227] This concern should be part of the narrative of rights to adequately understand the construct of Guantánamo.

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such tortures continued for years, despite not finding any support in contemporary jurisprudence.

221. *See* Rizzo, *supra* note 200.

222. Guantánamo has deeply eroded the United States' moral authority in the world. Given its former moral position as the beacon of progress, liberty, and justice in the free world, such action as was taken at Guantánamo can deprives the U.S. of the moral authority it once enjoyed in the community of nations.

223. When the detainees are neither treated as criminal suspects, nor as enemy combatants, they have in essence been subject to inhumane detention and interrogation techniques and insulated from all existing modalities of law which are standard in the civilized world. The question that naturally comes to the forefront is why the United States government is working outside of the allowable legal framework in expressing such illegitimate expression of inhumanity.

224. *See* Rizzo, *supra* note 200.

225. *See supra* notes 30 and 31.

226. Indefinite and illegitimate detention of individuals at Guantánamo and in U.S. detention centers all over the world, coupled with this post-9/11 hybrid model of detention and prosecution, paves the way for a dangerous trend towards the erosion of human rights all over the world. Because the U.S. is perceived as the beacon of progress, liberty and justice in the free world, any action by the U.S. could provide fodder for the naked export of such illegitimate acts elsewhere. We have already witnessed periodic assaults on customary norms of international law in various parts of the world. These U.S. renditions could continue the propagation of human rights violations in countries also currently holding detainees, such as Jordan, Egypt, Syria and Yemen. Therefore, if these U.S. practices become the norm, then more countries in the world will employ such tactics by using unlawful procedures to extract information. This would indeed be the saddest legacy of 9/11.

227. *See supra* note 225.

For example, when Moroccan security personnel, at the behest of the Americans, knife through the penis of a human,[228] or when Egyptian security personnel keep a detainee chained in the fetal position inside an ice-like closet for more than eighteen hours,[229] or when a Syrian security officer mercilessly whips a cable across the open palm of a weakened detainee,[230] what broader message gets sent to the rest of the world? The more serious inquiry centers on where these human actions of inhumanity find support, legally, morally and sociologically? This is the very essence of Guantánamo as an existential phenomenology—that which goes beyond legal realism in encapsulating humanity's mortal fear, deep-seated inhumane instincts, and violent virulence. Perhaps, in a paradoxical representation, these actions may not be happening in the physical space called Guantánamo, but are happening within that ontological construct of Guantánamo.[231] In this way, we must begin to think of Guantánamo as a phenomenon which extends far beyond its actual physical manifestation. Sadly, this manifestation also represents the devolution of humanity. Unfortunately, pursuit of an existential objective has annihilated the human rights construct of Guantánamo mostly due to the focus of our contemporary discourse on the end to be achieved, where not much critical analysis has been focused on the means to that goal.

III. GUANTÁNAMO AS A HYBRID NARRATIVE OF DEHUMANIZATION AND ERASURE

A. Narrative of Dehumanization Deconstructed

The rights framework of the previous Section established the rights narrative at Guantánamo. As revealed in this narrative, withholding rights from detainees tells only part of the story. The saga of detention involves coercive interrogation, barbaric torture and degrading

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228. *See* Stephen Grey & Dan Cobain, *British Detainees' Tale of US "Torture by Proxy,"* THE GUARDIAN (Aug. 2, 2005), *available at* http://www.guardian.co.uk/uk/2005/aug/02/terrorism.humanrights. *See also* Dennis Loo, *Penis Cutting: Torture or State Sponsored Body Modification?* OPEN SALON, April 23, 2009, http://open.salon.com/blog/dennis_loo/2009/04/23/harman_the_nation_and_the_world.

229. *See supra* note 1 and accompanying text.

230. *See* Rizzo, *supra* note 200.

231. I refer to the expanded conception of Guantánamo, in which Guantánamo has ascended beyond the basic legal representation, and as such, acts of organized violence by the State have taken on a special significance, both in terms of imagery and social construction of epistemological manifestation of events, space, and phenomena.

humiliation, which often times results in physical injury and even death. Legal arguments aside, I seek to explore the conditions that degrade civilized humans to such an extent that they feel no remorse in de-recognizing basic rights of other human beings in pursuit of their own existential agenda. This will allow us to examine an additional dimension of the narrative of Guantánamo through the lens of dehumanization.

Historically, dehumanization of other humans has been used as a tool to advance various agendas, from colonial objectives, to imperialistic designs, to empire building.[232] Most of these uncivilized acts of dehumanization have been perpetrated by the civilized colonial powers against colonized countries or people from third-world countries.[233] In the case of Guantánamo, however, dehumanization reared its ugly head as a direct response to existential threats—this we must embrace as the central thesis behind the Guantánamo narrative. Dehumanization is a phenomenological process by which an individual human being is stripped of his natural constructs[234]—his existential ontology,[235] in which humans are born and allowed to be nurtured. During the process of dehumanization, the oppressor systematically dismantles the building blocks that form the human construct, thereby taking out the necessary elements for the survival of the human. Dehumanization, or the destruction of the original construct of a human, is done both to seek a desired end and, at times, to seek intermediate relief—mostly as a response to existential threats in the current context.[236]

The threshold question is why do humans seek to dehumanize other humans?[237] To me, it goes back to evolutionary fundamentals.[238] If a person is dehumanized, it becomes easier to force his or her existence within a rights vacuum. A rights vacuum is an artificially constructed

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232. Historically, oppressors, states, and demagogues alike have resorted to dehumanization to advance specific agendas. From colonial aspirations to expansion of empires, dehumanization evolved through the basic design of subjugating some humans by denying them the fundamental right of personhood.

233. *See* Ghoshray, *supra* note 70.

234. *See supra* note 99.

235. *See supra* note 97.

236. *See infra* Part IV.

237. *See infra* Part I.

238. By evolutionary fundamentals I draw attention to existentialist design of humans from an evolutionary paradigm. In this framework, primal human tendencies evolve in the temporal space to assume a predatory metamorphosis such that the primal-instinct driven human wants to dominate and conquer the other. Due to the primal instincts, the conqueror does not refrain from adopting violent means, even if that means dehumanizing the conquered humans.

ontology[239] where rights the human inherits for being human[240] are suspended or de-recognized both in time and space. Dehumanization thus can travel through the space-time construction across the ontological space,[241] whereby it imposes an altered sensation to the human construct.[242] Dehumanization can be understood from a necessary condition framework[243] because the necessary condition to exist as a human is to have one's recognized.[244] The process of dehumanization eliminates this necessity and it allows the oppressor to suspend or de-recognize rights connected to that human. Dehumanization is perpetuated by systematically eliminating the physical elements that the human construct is connected with. By increasing the threshold of suffering the human is able to withstand, it is thus possible to eliminate the reaction stimulus a human is expected to exhibit.[245] Once this reaction stimulus is eliminated, the process of dismantling of the human construct begins, eventually leading to the dehumanization of the person. Because of the complexity and depth of perception involved, dehumanization is carried out via a systemic[246] and carefully constructed framework whereby all the enablers of dehumanization act in coordination and cohesion.[247]

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239. By artificially constructed ontology, I refer to the construction which may not exist in reality, or whose existence may be in conflict with the natural representation of human rights. However, this construction can be envisioned by extrapolating or interpolating ontological variables along the fundamental ontological construct.

240. *See generally supra* note 17.

241. I discuss ontological space throughout this article to delineate between the real world that manifests itself through our sensory illuminations and the perceived world that appears before us through socially mediated construction. *See supra* notes 126 and 216.

242. Altered sensation emerges according to one's belief in a world that has an existence, not via actual manifestation, but through perceived manifestations via mediated social interpretation.

243. By this, I refer to the basic ingredient that an individual human must possess to manifest his or her inherent human characteristics. These basic ingredients are the rights of existence with all human qualities, which can be suspended under the paradigm of "rights vacuum" discussed earlier. *See supra* note 119.

244. I refer in general to the manifestation of rights as precondition for existence as human.

245. It is believed that physical suffering of a human being has a threshold beyond which an individual human can no longer withstand such suffering. Once this threshold is breached, the human individual can begin to perceive a destruction of sensitivities—a breakdown of constructs surrounding his or her being. This threshold limit must vary from individual human to human such that the precise limit at which point the actual break down of a human construct will begin cannot be determined a priori.

246. Systemic acts of dehumanization can be seen in the unfolding saga of Guantánamo, in which a carefully orchestrated and calibrated framework of dehumanization of detainees has been carried out for years.

247. *Id.*

Unfortunately, dehumanization at Guantánamo has brought unintended consequences—some of which I discuss below.

Dehumanization at Guantánamo has been accomplished by systematically dismantling the constructs of detainees. As seen from evidence, this was carried out by decoupling the physical elements that detainees had grown accustomed to before being transported to Guantánamo. Torture,[248] subjection to stress positions,[249] and cutting through the torso to make deep cut marks,[250] are all inhumane acts that consolidate in eliminating intimate physical elements from detainees' construct. Exposure to relentless western music,[251] sleep deprivation for months,[252] subjugation to extreme stress positions[253]—these intimate sensory stimuli taken as a whole go towards limiting the detainees' pain threshold. On the other hand, being forced to watch other people having sex in close proximity,[254] desecrating their own holy book[255]—these indirectly associated physical elements continue this deconstruction process by dismantling secondary physical elements in the detainees' physical world. By systematically eliminating all the physical elements, a detainee's entire construct can be made to disappear from his ontology.

Why is understanding dehumanization in the context of Guantánamo important?[256] History is punctuated with instances of dehumanization thrust upon humans by their fellow humans.[257] It comes in a cycle, as if history is repeating itself. Through an understanding of the associated constraints and constructs of this dehumanization, we acquire a better understanding of ourselves. Thus, until we recognize and accept that dehumanization continues to be an integral part of Guantánamo,[258] no meaningful remedy can be devised. We must internalize that dehumanization was sanctioned not in a rights-free zone, but rather it

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248. *Id.*

249. JAMEEL JAFFER & AMRIT SINGH, ADMINISTRATION OF TORTURE: A DOCUMENTARY RECORD FROM WASHINGTON TO ABU GHRAIB AND BEYOND 2 (2007).

250. *Id.*

251. *See generally id. See also* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB, (Karen J. Greenberg and Joshua L. Dratel eds. 2005).

252. JAFFER & SINGH, *supra* note 248.

253. *Id.*

254. *See* Gina Pace, *U.S. Releases Gitmo Detainee Names*, CBS NEWS/ASSOCIATED PRESS, Mar. 4, 2006, http://www.cbsnews.com/stories/2006/03/02/terror/main1364552.shtml.

255. *See supra* note 200.

256. This is the central point of this article, as a more complete narrative of Guantánamo will allow the present generation to comprehend some of humanity's existentialist difficulties in the overall process of its evolution.

257. *See supra* note 17.

258. *See supra* note 99 and accompanying text.

was sanctified by various illegally constructed means,[259] and it was implemented under various legal paradigms.[260] Clearly, there remains a huge gap in implementation of substantive and procedural law surrounding Guantánamo, which fails to address this process of dehumanization, its genesis, and its various manifestations. As a result, the narrative of Guantánamo is incomplete and a closure within the existing jurisprudential mechanism is not achievable.

B. Does Dehumanization Need Erasure of Human Construct?

Professor Muneer Ahmad has connected dehumanization at Guantánamo with various forms of erasure.[261] Although he creates a compelling case for viewing Guantánamo through a paradigm of erasure, the story remains somewhat incongruent. This is because erasure is as much a permanent state of being as it is a process that might take generations to develop and arrive in the social dimensions.[262] This is mostly due to the inviolable, inherent human dignity that sustains all humans. It is inconceivable for me to construe that the phenomenological construct surrounding humanity is so fragile that an event can originate, evolve and unfold, all within the span of a decade—in which erasure wipes out the human construct permanently. Perhaps there is a missing connector somewhere,[263] lost in the ontological space narrative of Guantánamo. Finding this connector might account for an adequate explanation of the scope and nature of causality, if there is any, between erasure and dehumanization. Therefore, I want to step back and connect

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259. *See* Ghoshray, *supra* note 36.

260. *See* Ghoshray, *supra* note 106 and accompanying text.

261. *See* Ahmad, *supra* note 84 and accompanying text.

262. By erasure in this context, I refer to the elimination or complete destruction of all human constructs that allow an individual human to exert his or her personhood. Therefore, erasure is a mechanism that might take several generations of step by step deconstruction to eventually arrive at a point where an individual human can no longer exist. I see a disconnect in asserting erasure as a necessary ingredient for the dehumanization process. The connection between erasure and dehumanization may be tenuous at best as we should subscribe more to the idea of a temporary suspension rather than a permanent state of being that erasure construes. Because erasure gives the meaning of permanency, I would suggest Guantánamo can never erase any human construct.

263. The missing connector could be a yet undefined ontological dimension that exists in that ontological space which connects erasure and dehumanization. I have argued in this article that the subjective perspective takes us to an ontological space in a construction such that reality and knowledge are derived from mediated social interpretation. Therefore, if we find both erasure and dehumanization belong in that ontological space, by virtue of my previous assertion that we cannot connect the two, we must find the missing connector that might evolve in the ontological space.

some of the missing dots to reconstitute the connection between dehumanization and erasure.

When we talk about erasure, it is intrinsically linked to the temporal aspect of the phenomenological evolution of time and space[264] in that erasure is a process that attains its meaning through permanency.[265] While I appreciate Professor Ahmad's invocation of human erasure in the context of Guantánamo for providing a much needed interpretive gloss, I remain unsure whether "erasure" necessarily can be associated with dehumanization at Guantánamo.[266] While the very process of dehumanization continued unabated for the intensity of state violence on subjugated prisoners' unquestioned and attempted destruction of individuals' physical constructs perhaps unparalleled in post-modernity, the damage might only be described in temporary terms.[267] Despite the harshest of conditions imposed on the detainees, human resilience surely has won against dehumanization attempts to eventually overcome extra-ordinary odds to retain their old constructs. For the construct might get erased temporarily, but if the temporal length of the dehumanization process is short, it must retain its pristine construct[268] when the prior conditions are restored. In this context, the process of restoration comes in various forms, such as eventual release or relaxation of the harshest of conditions. Therefore, I look at this dehumanization as a temporary erasure as I construe the process as a suspension. I do this with conviction borne out of hope, because I want to end with hope—hope for humanity. Erasure is giving up.[269] Erasure is painting a dark picture for humanity. But temporary erasure brings in the harbinger of aspiration that wrongs will be righted, that this very phenomenon of Guantánamo will be rehabilitated.

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264. Here I draw attention to the anti-ephemeral nature of erasure. Because erasure is permanent, its temporal aspect in its evolution in time has a much longer duration than our existing construct will allow us to construe. Therefore, attaching erasure with any outgrowth or implication of Guantánamo may not be logical.

265. *See supra* note 262 and accompanying text.

266. *See supra* note 262 and accompanying text.

267. Here once again, I draw attention to the non-permanence aspect of Guantánamo in arguing against attaching any characteristics of erasure.

268. The retention of pristine construct can be witnessed in various detainee accounts. *See supra* note 1 (detailing the account of Mohammed Madni). Despite human torture and exhibiting all the signs of dehumanization, Madni was eventually able to resume his life as a civilian. He may have lost some physical faculties, but his humanity in the full bloom of its inviolable nature has remained intact. Therefore, I discount the argument that goes in favor of Guantánamo's erasure of the human construct.

269. I refer to the surrender of an individual by means of which the individual discontinues its existence. This is not possible in reality, which goes to disprove in a sense the connection between erasure and Guantánamo's fall out.

IV. EXPANDING THE NARRATIVE OF GUANTÁNAMO THROUGH THE LENS OF EXCEPTIONALISM

A. The Relentless Saga Continues

Despite campaign promises that the Guantánamo facilities will be closed,[270] the Obama Administration has made abundantly clear its intention to deny civilian trials to detainees, either by sending some to military commissions[271] or by continuing to imprison them indefinitely without bringing charges. Despite prior promises to try the 9/11 masterminds in a criminal court,[272] thereby guaranteeing them due process, it seems unlikely this promise will see the light of day. The officials now are signaling their real intention to reverse course,[273] thereby placing these defendants either in continued detention or putting them before military commissions. Despite the Supreme Court jurisprudence illuminated through *Hamdan*[274] and *Boumediene*[275] ensuring detainees' enforceable rights under U.S. law, the current Administration continues to bow down under pressure from domestic political constituents and business interests.[276]

This continued refusal to accord basic due process to the accused is not only antithetical to the legal landscape prevailing in other parts of the world,[277] but also is a sharp departure from countries where justice

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270. *See supra* note 129 and accompanying text.

271. *See supra* note 24 and accompanying text.

272. *See supra* note 129 and accompanying text.

273. *See supra* note 24 and accompanying text.

274. Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

275. Boumediene v. Bush, 553 U.S. 723 (2008).

276. Here I refer to the domestic sentiments and business interests that are shaping the post-*Boumediene* legal landscape on Guantánamo. Despite explicit observation by the Supreme Court on habeas rights of the detainees, and promises from the Obama Administration, the promised civilian trial continued to be elusive for the Guantánamo detainees as reported in the media. New York's Mayor, Michael Bloomberg, recently distanced himself from his earlier support of the civilian trial in his city. He cited rationale related to businesses' inconvenience and potentially huge costs. *See* Jane Mayer, *The Trial: Eric Holder and the Battle over Khalid Sheikh Mohammed*, THE NEW YORKER (Feb. 15, 2010), *available at* http://www.newyorker.com/reporting/2010/02/15/100215fa_fact_mayer#ixzz1BumFyFqH.

277. For example, in India, a civilian trial was given to terrorists that attacked domestic installations. The notorious attacks in Mumbai, India on November 26, 2008, were the largest attack on an Indian city by terrorists to date. The attacks lasted several days and killed nearly 165 people and wounded many more. The only surviving attacker, Ajmal Kasab, confessed to being a member of the terrorist group Lashkar-e-Taiba (LeT), a Pakistan-based militant organization. This group has been labeled a terrorist organization by many nations including the United States, the United Kingdom, and the United

mechanisms are at best subpar compared to the U.S. For example, in a still-developing terrorist case unfolding in Pakistan,[278] prosecutors indicted five Americans on terror-related offenses, laying out serious charges including waging war against Pakistan and plotting to attack the country.[279] Even there, the detainees were granted defense lawyers[280] and procedural due process rights under controlling domestic law and in conformity with applicable international law.[281] The moral of this story is that despite its own legitimate existential threat to both its system of government and its way of life, a country like Pakistan, which is never considered to be a beacon of Western justice, a country with a long record of torturing detainees,[282] adheres to the rule of law when it comes to dealing with detainees. Why can't the U.S. follow suit? Even Pakistan can charge and try suspected terrorists in a civilian court system. Many Western nations other than the U.S. have shown in the recent past that they have the courage to go through the same open, court-based justice system.[283] Therefore, the U.S. is becoming more isolated in its insistence

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Nations. *See Foreign Terrorist Organization (FTOs)*, U.S. Department of State, Office of the Coordinator for Counterterrorism, May 19, 2011, *available at* http://www.state.gov/s/ct/rls/other/des/123085.htm (noting that the FTO details the name of current designated foreign terrorist organizations, and Lashkar-e-Taba is listed as #23.) *See also Security Council Committee Pursuant to Resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities* (QE.L.118.05. LASHKAR-E-TAYYIBA), *available at* http://www.un.org/sc/committees/1267/NSQE11805E.shtml (noting the narrative and summary for listing this group on the terrorism list). *See also Proscribed Terrorist Groups or Organizations*, HOME OFFICE, *available at* http://www.homeoffice.gov.uk/publications/counter-terrorism/proscribed-terror-groups (noting the many organizations and individuals that have been classified as terrorist groups. This lists includes LT group, which is another alias for Lashkar-e Tayyiba.). This is important because, although labeled a terrorist that wreaked severe havoc on the nation of India, he still received a civilian trial on May 6, 2010. He was sentenced to death on five counts. He appealed but the verdict was upheld. *See* The State of Maharashtra v. Mohammed Ajmal Mohammad (Amir Kasab), No. 738 of 2010, (Case No. 175 of 2009).

278. *See* Shaiq Hussain & Brigid Schulte, *5 N. VA. Men Convicted On Terrorism Charges in Pakistan, Given 10 Years in Prison*, WASH. POST FOREIGN SERV. (June 25, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/06/24/AR2010062400843.html.

279. *Id.*

280. *Id.*

281. *Id.*

282. Evidence is widespread against countries like Pakistan that have a known history of torture of prisoners. *See generally Pakistan: Prison Officials Remain Unpunished despite Torturing Inmates by Taping their Male Organs*, ASIAN HUMAN RIGHTS COMM'N (Oct. 21, 2010), *available at* http://www.humanrights.asia/news/urgent-appeals/AHRC-UAC-166-2010.

283. Various terrorists' trials have taken place in countries like the Netherlands, the United Kingdom and Germany, where the justice mechanism and the legal framework

on applying uniquely designed tribunals to ensure conviction for terrorist detainees.[284] While the Obama Administration views itself as the self-anointed international arbiter of justice[285] and continues to lecture the rest of the world about their respective violations of human rights,[286] why isn't America's justice system robust enough to handle justice mechanisms for terrorism suspects? I seek to explore the answers to establish the final dimension of the narrative of Guantánamo as it must be understood through the dual threads of stark capitalism[287] and domesticated exceptionalism.[288]

When it was announced that the September 11 masterminds would be tried in a civilian court system in New York, human rights activists and progressive liberals viewed this as an effort to recognize America's faults and attempt to rectify them.[289] In some parlance, this was greeted with apprehension.[290] However, as time passed and more detailed analysis was presented, the capitalism concerns superseded any notion of justice or egalitarian sensitivities.[291] Based on reports by the business community, holding such trials in New York would not only cost a significant amount of money,[292] but would also infringe on the flow of business and traffic to the detriment of burgeoning capitalistic interests.[293] Clearly the prevailing thread of capitalism once again rears its head[294] and reshapes the jurisprudential contours of one of the most

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existing in these countries provided civilian trials with applicable due process rights to the alleged terrorists. *See* Radio Netherlands Worldwide, *Terrorism trial start in Brussels* (Mar. 8, 2010), *available at* http://www.rnw.nl/english/article/terrorism-trial-starts-brussels. *See also* Alexandra Hudson, *The Trial of Six Dutch Muslim Terrorists Begins*, REUTERS (Oct. 16, 2006), *available at* http://sweetness-light.com/archive/dutch-begin-trial-of-six-muslims-accused-of-terrorism. *See also* Tristana Moore, *Four on Trial in German Terror Case*, TIMEWORLD: BERLIN (Apr. 21, 2009), *available at* http://www.time.com/time/world/article/0,8599,1892840,00.html#ixzz1SaQJmorN. This begs the question as to why the U.S., long since recognized as the champion of liberty and justice, is dragging its feet in embarking on a justice mechanism for terrorist suspects.

284. *See supra* note 24.

285. *See* Greenwald, *supra* note 24.

286. *Id.*

287. I draw attention to some of the non-legal factors that contributed significantly in the current Administrations, resulting in a reversed course, despite earlier promises of holding civilian trials of Guantánamo detainees in New York. *See supra* note 276, and accompanying text.

288. *See infra* Part V (B).

289. *See* Mayer, *supra* note 276.

290. *Id.*

291. *Id.*

292. *See id.*

293. *Id.*

294. *Id.*

significant legal events of our time. Guantánamo must be seen through this evolving dimension to appreciate its sweeping impact, not only on the lives of the detainees, not only in its shaping effect on the international jurisprudence, but also with regard to how its trajectory can be adjusted based on domestic needs.

This brings out perhaps the most controversial, yet most ignored, aspect of Guantánamo, which is one of the most significant driving forces behind the final manifestation of Guantánamo. In the final thread of this article, I argue that Guantánamo must be seen as a domesticated response to an existential threat to American Exceptionalism,[295] a narrative that completes the existential phenomenological description of Guantánamo.

B. Guantánamo as a Response to American Exceptionalism

American Exceptionalism broadly refers to the opinion that the U.S. is structurally, fundamentally, and qualitatively different from other nations,[296] as it emerged out of a revolution[297] and forged a unique ideology.[298] On the surface, American Exceptionalism manifested itself on the promise of liberty, egalitarianism, and individualism—a narrative solidified by the writings of Alexis De Tocqueville[299] to emphasize American's unique and heightened status among the comity of nations.[300] Unfortunately, however, the majority of Americans misinterpreted the true meaning of exceptionalism,[301] as they failed to see its iniquities,[302]

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295. *See infra* note Part V (B).

296. *See* SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD 17-23 (1996). *See also* HAROLD KOH, AMERICA'S JEKYLL-AND-HYDE EXCEPTIONALISM, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 110-115 (Michael Ignatieff, ed. 2005).

297. *See* LIPSET, *supra* note 296 at 17.

298. *See* KOH, *supra* note 296.

299. One of Alexis De Toqueville's best known works was DEMOCRACY IN AMERICA, 4 vol. (1835-40), which included an analysis of the American political and social system. His writings placed emphasis on the excesses, longevity and future of democracy for America compared with France.

300. *See* DE TOQUEVILLE, *supra* note 298.

301. Here I refer to the false sense that percolates the mindset of common citizens, which has manifested in both virulent anti-immigrant sentiment and also a misconstrued meaning of exceptionalism in the minds of common America. This can be seen through the mass hysteria and debilitating fear that has gripped citizens since 9/11. In my view, this psychosis is borne out of America's perpetual quest for invulnerability and its faulty conception of freedom, which become synonymous with the threat of insecurity. American citizens are living in cultural isolationism, accentuated by the successive Administration's policy of imbibing an exaggerated version of patriotic fervor that gives rise to bellicose nationalism, mistaken as American Exceptionalism. In a framework

imperialism,[303] and war-mongering,[304] remnants of which still reverberate through the continued evolution of Guantánamo.

Already revealed through the foregoing analysis, Guantánamo must be seen in conjunction with 9/11—its identity to be identified not in the splendid isolation of its legal representation, but through its irreversible duality with the 9/11 events. Intuitively, the narrative of Guantánamo can be constructed, at least in part, through an understanding of what 9/11 means to Americans. The events of 9/11 represent an overpowering national shame, a defeat of massive proportion, something the country has not seen since Pearl Harbor.[305] However, the enormity of 9/11 surpasses Pearl Harbor in the magnitude of the existential threat that it presented. Enmeshed in the post-9/11 fear psychosis,[306] the new manifestation of Guantánamo traveled from the masses to the military establishment, from the administrative parlance to the security establishment. Every citizen wanted to embrace an entity that would insulate them from this existential threat. The broader narrative of Guantánamo provided just the opportunity. It is against this deeper context that Guantánamo must be seen.

The existential threat presented by 9/11 not only brought forth paralytic psychosis,[307] but it also temporarily decoupled the populace from that entrenched feeling of exceptionalism.[308] The feeling of defeat was so deep in the minds of the populace[309] that the human construct

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where voices of dissent and individuality get submerged by a manufactured sense of insecurity, the U.S. allows the proliferation of a faulty sense of differentiation from citizens of the world. In this construct, the inability of the American people to take the blinders from their eyes disables them from seeing the abrogation of civil liberties both domestically and dealing with the overall detention mechanism.

302. It has become commonplace to consider the U.S. a war mongering nation with a substantial amount of the nation's budget spent on military machinery. *See generally* BERNARD SEMMEL, IMPERIALISM AND SOCIAL REFORM, ENGLISH SOCIAL-IMPERIAL THOUGHT 1895-1914 (1968), *available at* http://arno.daastol.com/books/SEMMEL,%20IMPERIALISM%20AND%20SOCIAL%20REFORM%20(1960).pdf.

303. *Id.*

304. *Id.*

305. *See generally The Pearl Harbor Papers: Inside The Japanese Plans* (Donald M. Goldstein & Katherine Dillion eds., 1993).

306. *See supra* text accompanying note 301.

307. *Id.*

308. *Id.*

309. This can be understood from the framework of American Exceptionalism. A misconstrued notion of "exceptionalism" manifested itself in developing a distorted sense of vulnerability post-9/11, which provoked a mad quest for "invulnerability" within the social construct. While literature is replete with references, media has carefully crafted the image of "America is a world unto itself," such that the physical attack of 9/11

needed an earth-shattering mechanism to deal with the decoupling to feel normal again.[310] Against this backdrop, the Administration and the security apparatus of the state resorted to organized violence against the source of the threat, which was manifested in the events of human violations at Guantánamo and evolved within a broader dehumanization mechanism. Thus, Guantánamo provided both the populace and the Administration impetus for dehumanization,[311] which the security apparatus embarked on with impunity. As the history of Guantánamo, the events surrounding the detainees, and their detention process unfolds, the legal affairs and events associated with this detention have come to light in drips and drabs. Despite a paucity of admissions, it is clear that, in many cases, indefinite detentions have been sustained via manufactured evidence.[312] It is also clear that a vast number of these terrorism charges will not prevail in a transparent system of justice.[313]

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magnified multi-fold in its psychological impact domestically. *See* Paul Dibb, *America—a World unto Itself*, ON LINE OPINION (Jan. 29, 2007), http://www.onlineopinion.com.au/view.asp?article=5428. Despite advancement of technology narrowing the physical gap between the United States and the rest of the world, America has become both a very *involved, yet a surprisingly aloof nation* as it relates to international affairs. This isolationist viewpoint, therefore, not only accentuates America's sense of vulnerability, but also provides a snapshot of how the national collective consciousness may have been manipulated into developing an existential vulnerability, while developing an intensely defeatist attitude that requires earth-shattering response.

310. *Id.*

311. I discuss this view throughout this article. *See generally supra* note 99.

312. It has been established that terrorist review proceedings at Guantánamo were so rigged, both in their penchant for manufacturing evidence against detainees and in their conducting proceedings under continuous inconsistencies that, practically, they have no legal value. This sentiment was echoed in Prof. Muneer Ahmad's observation:

> Despite the protests of defense lawyers, the commissions operated with virtually no rules of evidence, no discovery rules, no rules of decision, and no rules regarding precedent. Thus, not only was positive law in short supply, so, too, was any sense as to what interpretive practices would be followed by the commissions or what precedential value a decision in one commission would have in the same trial, in another trial before the same presiding officer, or in a trial before a different presiding officer. While any newly created legal system is bound to encounter initial problems, the failure of the commission system to contemplate or address these fundamental issues of adjudication suggests how poorly designed it was.

Ahmad, *supra* note 84, at 1722. In addition, evidence obtained through torture has been a predominant theme, which has been documented quite extensively. *See generally* U.S. DEP'T OF STATE, EQUATORIAL GUINEA, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (Mar. 8, 2006), *available at* http://www.state.gov/g/drl/rls/hrrpt/2005/61567.htm (documenting the questionable use in military trials of evidence obtained through torture); U.S. DEP'T OF STATE, PERU, HUMAN RIGHTS PRACTICES, 1994 (Feb. 1995),

But every victim wants redemption. Every injured person wants retribution and desires that some living entity be held accountable for their pain. Herein lays the paradox of Guantánamo. If the whole saga of Guantánamo is stripped out of the broader U.S. detention policy, we might be able to align American detention policy along the general contours of international humanitarian law (IHL).[314] At the fundamental level, human rights law is premised on its ontological independence from the state sovereign.[315] Fundamental *jus cogens* norms apply everywhere as they are premised on shared humanity. In addition, the law of fundamental rights has an omnipotent permanent nature, except in Guantánamo, which is characterized by absolute disjunction from most provisions of IHL. This systemic illegality did not creep in by chance, nor did it develop in a vacuum. This exuberance of the monopoly of state violence did not cross into lawlessness by happenstance. This was done by design, with a predicated outcome in mind. This is because the American domestic agenda requires a set of human detainees perpetually responsible and permanently incarcerated for the wound of 9/11 to be soothed and for the existential threat to disappear. That is why any effort to bring transparency to the justice process has been confronted with a multitude of obstacles.

The fundamental building block for a criminal justice mechanism is due process[316] and the rights of the accused to be accorded with that due process of law.[317] This is premised on irrefutable and confrontational evidence that can be challenged within adequate legal protection. Because the evidence gathering mechanism[318] and the quality of evidence[319] against most terrorism suspects is suspect and flimsy at best, the real prospect of bringing civilian trial proceedings is becoming increasingly remote or non-existent. Imagine if this quality of evidence finds its way into traditional civilian proceedings. The outcome in such prospective terrorist trial proceedings would cause a suspect to be found not guilty. What will happen to the domestic population?[320] The subjects

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available at http://www.freelori.org/gov/statedept/94_perureport.html (describing proceedings in military courts not satisfying internationally accepted due process norms, both due to their secrecy and practice of being closed to the public nature). *See* Ghoshray, *supra* note 36.

313. *Id.*

314. *See* Nabulsi, *supra* note 41, at 386.

315. *Id.*

316. *See* Ghoshray, *supra* note 36.

317. *Id.*

318. *See supra* note 312.

319. *Id.*

320. *See supra* note 309.

of existential threats need their dignity and the feeling of invulnerability restored. They require the outcome of such trials to be predictable in finding maximum punishment of the suspects.[321] This then leads us to see the Guantánamo proceedings as a vehicle to establish a universally accepted domesticated response. We begin to see why the framework for closure of Guantánamo has not been constructed, because any framework of closure for Guantánamo must first embrace the domesticated exceptionalism of Americans and this domesticated exceptionalism is completely disjunctive with the transparent notion of justice.[322] I submit that closure of Guantánamo will remain mired in uncertainty and confusion.

Finally, as I begin to summarize the narrative of Guantánamo and its relationship to the broader American jurisprudence, I have three fundamental observations. First, the existing construct of Guantánamo as a lawless region, or a region beyond law, must be evaluated on the arguments put forth in this article.[323] As I have shown from the beginning, from the first day that the detainee was brought to Camp Delta, through the countless combatants' reviews, and the myriad of court proceedings to the vehement denial of torture and extraordinary rendition, Guantánamo evolved not outside the law, but rather through an extremely intricate and complex web of laws. All of these laws were designed for mass deception,[324] the legal maneuvers crafted to develop

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321. I argue here that "exceptionalism" and "isolationism" have created such a post 9/11 mindset that domestic constituents will not be satisfied without maximum punishment given to any terrorist detainees. This makes it especially difficult for the administration to embark on a civilian trial with due process rights, an area I have discussed in detail in this article.

322. *See supra*, note 193.

323. Contemporary discourse generally holds the view that events in Guantanamo have been unfolding against the rule of law. However, looking at the elaborate legal procedures accompanying the status review of detainees, it can be argued that, in some distorted sense, rule of law pervades Guantanamo, albeit more in contemplation of "flouting" the rule rather than upholding it. Professor Muneer Ahmad observed, "[i]n this rights-free environment, we elected to pursue a primarily rights-based strategy, not merely in federal habeas proceedings, but in the commission at Guantánamo as well." Ahmad, *supra* note 84, at 1739.

324. I would argue here that, the overpowering forces of the post-9/11 Administration had systematically shut down all avenues of individual dissent. Society was interjected with the false need to fight a global terror war. The Bush Administration's scorched-earth policy of naked aggression against countries under false pretexts was imposed upon its citizenry via the systemic reshaping of individual thinking into a distorted, bounded rationality. Philosopher Jean Jacques Rousseau observed that, in its endless march towards materialistic *moksha* (*liberation*), humanity forgets its innate sympathy for the sufferings of others, as natural humanity becomes subsumed in the all-engulfing acquired characteristics of social life. *See generally* JEAN JACQUES ROSSEAU, THE SOCIAL

zones of exception within the law. These exceptions must be understood within the broader context as a response to propagate and continue American Exceptionalism.[325]

Second, Guantánamo has been called a legal black hole, but for the wrong reason. It was called a legal black hole to reveal its characteristic of opaqueness[326]—as if to bring the connotation that the nature of Guantánamo is so uncertain, so nebulous, that law is opaque to its implementation. I again humbly suggest that this construct must be reinterpreted. Indeed, Guantánamo is a black hole, but because of the enormous, gigantic vortex of energy it exudes. It is a black hole because it has an enormous shaping effect on the broader American detainee jurisprudence. It deconstructs the contours and obliterates any progressive forward movement of transparent jurisprudence.

Third, Guantánamo should be seen as neither a legal representation nor a legal exception. It must be viewed through a broader narrative—a narrative that is constructed out of multiple dimensions of divergent and dichotomist elements which are rights, dehumanization, erasure, and exceptionalism. In this exploration of Guantánamo, the "rights" dimension unfolded through the expression of panoply of rights—some of which were manifested, and some of which were annihilated for the detainees of Guantánamo. A single set or dimension of rights can describe a phenomenon, but Guantánamo cannot be seen simply as a rights-based narrative. Rather, it should be seen as the manifestation of a socially mediated construct. Rights only illuminate the ontological dimension of this whole, in much the same way *Amistad* and Guantánamo illuminate different spectrums of the broader continuum in which the whole ontology of dehumanization resides.

CONTRACT OR PRINCIPLES OF POLITICAL RIGHT (G. D. H. Cole, trans. 1762), *available at* http://www.constitution.org/jjr/socon.htm.

325. In this context, "American exceptionalism" can be seen also as "American isolationism." Here I use the term "isolationism" synonymously with "insularity." In this discourse, I use the term "isolationism" to reflect the perceived gap between Americans and the world, as we endeavor to search for the roots of this gap. Hence, I want to focus on exceptionalism in an isolationist frame of mind, rather than a policy. The isolationism that I refer to is, therefore, more cultural than political. In a way, it could be seen as cultural attitude of Americans shaping their political expression of how to interact with the world outside. In a distorted version, American Exceptionalism has transformed into American isolationism.

326. Opaqueness is the opposite of transparency. While the objective of any legal system is to bring transparency to the process, proceedings at Guantánamo were designed such that achieving that transparency would never be possible. *See supra* note 312. Therefore, like the way a "black-hole" can never reflect light due to its opaqueness, Guantánamo can never reflect the light of justice. Thus, the analogy is rightfully constructed.

Thus, dehumanization must be seen not as an isolated event. Rather, it is the vehicle that takes Guantánamo from a rights-based narrative[327] to its phenomenological representation, where dehumanization simply acts as a conduit from a means to the end. Furthermore, exceptionalism completes the final dimension of Guantánamo. It is this very dimension that gives Guantánamo the permanency[328] that is enabling it to continue today. Without this enabling factor, we might see the framework towards a closure construct begin to evolve. But until and unless that very factor of exceptionalism is decoupled, Guantánamo will continue to exist, and exist in permanence in a much broader framework than is currently being imagined in our dialogues.

V. CONCLUSION

This article proposed a narrative of Guantánamo based on an existential phenomenological representation that seeks to carve out a new ontological space for the infamous detention facility. This attempt to recast is not an attempt to rehabilitate Guantánamo, but to understand the inertia surrounding its closure paradigm. My inquiry has been prompted in part by the inconsistent quagmire in which the broader U.S. detention framework finds itself, and in part driven by the desire to understand the post-9/11 social construct behind state sanctioned organized violence. In this narrative, Guantánamo transcended from a mere physical detention facility to a Guantánamo which has evolved in space and time, to forge a construct made of interplay between existential threat and dehumanization.

The primary objective of this article has been to establish the connection between the closure of Guantánamo and the rehabilitation of U.S. detention framework—an objective satisfied by illuminating the threshold question of Guantánamo's true representation. Because Guantánamo is neither a legal narrative in splendid isolation, nor a mere

327. In this article, I have attempted to transform Guantánamo from a legal representation to a broader narrative, in which the subjective perspective has been illuminated via a set of ontological dimensions, and in the process elevated this narrative into an epistemological position by a carefully constructed and mediated social interpretation. What began as a discussion of rights of entities and persons has become a much broader narrative of social construction of Guantánamo from a description in legal historical terms to an ontological space.

328. The broader dimension I allude to comes from its evolution in an existential space where ontological and epistemological assumptions, in accordance with a belief system about a manifested world, allows it to assume a broader interpretative meaning that goes beyond the detainees' rights, but informs us about phenomena of existential threat and duality.

ephemeral socio-legal event, the closure of its physical manifestation is both difficult and representative of only a starting point. Understanding Guantánamo's narrative, through a combination of social experiences, and a general existential construct, required three separate dimensions to reveal it. First, the duality between 9/11 and Guantánamo allowed us to understand the cognitive construct of state violence where state action becomes the aspiration of its citizens. Second, it prompted the exploration to understand Guantánamo's ontological space through the interplay between dehumanization and existential fear. Third, the pursuit of a phenomenological construct shaped our inquiry to view Guantánamo from its narrative dimension of American Exceptionalism, by both tracing the genesis and the threat to that exceptionalism.

Admittedly, my construction of this narrative of Guantánamo may suffer from imperfection, and might even be incomplete. I do, however, seek to develop a broader narrative through the evolution of events in time and space via an understanding of the relationships amongst the social constructs and events, so that the narrative as a whole acquires meaning—both from legal and sociological perspectives. After all, developing a consistent and coherent detention framework is part legal, but mostly historical and socio-political. And it is in this attempt to show fidelity to historiography that I venture to illuminate the mere physical space of an infamous detention facility with our recorded history and with the gravitas of a deeper phenomenological representation. This will allow posterity to make the right judgment call on its significance, much the same way we have judged the slaves of *Amistad* and its legal framework.