

# Citizen in Exception: Omar Khadr and the Performative Gap in the Law

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In May 2015, former Guantanamo Bay detainee Omar Khadr was released from the Bowden Institution in Alberta. Khadr's return to society followed 14 years of incarceration for an act that he may not have committed, which may not have been a crime, which took place while he was technically a child, and which was judged by a military tribunal that has questionable status in Canadian law.

This article argues that Khadr's long imprisonment was a political decision by US and Canadian authorities that required them to use performativity to suspend the law, depriving Khadr of his rights under American law, the Canadian Charter, and various protocols of international law. This use of performance to undermine law exposes a performative gap in the law: a space in the law that allows it to be moved and shaped by performative acts. Through these acts, Khadr became effectively stateless for a period in time: a citizen-in-exception. Building from Giorgio Agamben's theory of the state of exception, this paper draws out the role played by performativity in the suspension of law by law. Importantly, the process that led to Khadr's situation was racially charged from beginning to end. His situation is one manifestation of the way that Muslims have been "cast out" of Western law, as Sherene Razack puts it, since 9/11.

*En mai 2015, Omar Khadr, un ancien détenu de Guantanamo Bay, a obtenu son congé de l'établissement de Bowden, en Alberta. Ce retour à la société survenait après 14 ans d'incarcération pour un acte que Khadr n'avait peut-être pas commis, qui n'était peut-être pas un acte criminel, qui avait eu lieu alors qu'il était techniquement encore enfant, et pour lequel il avait été jugé par un tribunal militaire dont le statut, en droit canadien, était douteux.*

*Dans cet article, Matt Jones soutient que la longue incarcération de Khadr était une décision politique prise par des autorités américaines et canadiennes qui contraignait ces parties à recourir à la performativité pour suspendre la loi, privant ainsi Khadr de ses droits en vertu du droit américain, de la Charte canadienne et de divers protocoles relevant du droit international. Ce recours à la performance pour saper le droit, affirme Jones, met en évidence un vide performatif : un espace qui permettrait de façonner la loi au moyen d'actes performatifs. Et en raison de ces actes, Khadr s'est retrouvé apatride pendant un certain temps, un citoyen d'exception. En partant de la théorie d'état d'exception de Giorgio Agamben, Jones s'intéresse au rôle de la performativité dans la suspension de droits en vertu de la loi. Il rappelle aussi que le processus ayant mené à la situation de Khadr était entaché de racisme du début à la fin. Son issue illustre la façon dont les musulmans ont été, pour citer Sherene Razack, « évincés » du droit occidental depuis les attentats du 11 septembre.*



In May 2015, former Guantánamo Bay detainee and Canadian citizen Omar Khadr was released from the Bowden Institution, a medium security prison near Red Deer, Alberta. Khadr's return to society followed thirteen years of incarceration for an act that he may not have committed, which may not have been a crime, and which took place while he was technically a child. Moreover, his conviction came at the hands of a military tribunal that has questionable status in Canadian law. What, then, was Khadr doing in prison in the first place?

My contention is that Khadr fell into what I call a “performative gap” in the law that allowed him to be held for eleven years even though he had not broken US, Canadian, or international laws. Liberal systems of governance operate on the principle that everyone is treated equally under the law. However, closer inspection often reveals gaps in the exercise of the law that leave entire classes of people without the protection or due process that law affords. Such gaps have a long history in Canada, where at various times they have been wielded by the state to exercise legal violence against Indigenous peoples, women, people of colour, immigrants, queer folks, and many other groups. The Khadr case is exemplary not because it is unusual, then, but because it shows so explicitly how this gap operates. While the unevenness of the legal implementation of rights has been explored extensively elsewhere, my interest is in the way that gaps in the law are held open by performance and performativity.

For gaps to exist in law without undermining the system's overall claim to legitimacy, individual actors need to intervene to claim that such exceptions are justifiable and necessary for the overall functioning of the system. As Joshua Chambers-Letson and Yves Winter put it, law depends upon “continuous affirmation through rituals and theatricality in order to sustain its prescriptive force” (qtd. in Zien 4). The interventions of lawyers, judges, politicians, witnesses, activists, and reporters can be read as performances by figures of differing authority that can work to open or close the gaps in the system. Performances can only have this level of influence because the law is itself performatively constituted, in the sense described by J.L. Austin. As Chambers-Letson describes elsewhere, “law is performative. It is composed of linguistic utterances and acts (statutes, policies, executive memos, judicial opinions) that do more than describe the world, because they produce a doing in it through their very utterance or inscription” (14). The performativity of law means not only that its language shapes the material world but also that its ultimate authority comes from a process of citing, adapting, and modifying prior articulations of justice. The law's reliance on continual performance interventions means that gaps in the law may in fact become enshrined in law if a given authority, such as a judge, recognizes them as legitimate within the jurisprudential history of past performances.

Those who seek to shape the law sometimes move around the law, and move the law around, as they try to press it into the service of their interests. One way to manipulate the law is to act “as if” a certain condition is legal regardless of whether it will finally stand up in court. Such a strategy employs what Katherine Zien has called the “legal subjunctive” to describe a peculiar way that a legal entity, particularly a powerful one, may try to expand its authority into places beyond its conventionally understood jurisdiction by acting “as if” it had authority over that space (11). I use the term in a slightly different fashion to describe a situation in which an actor behaves “as if” their actions were legal even if they are aware that their interpretation will not ultimately be recognized as legal. Though a subjunctive claim of this kind may ultimately be struck down, it may nonetheless hold open a



**Marine Corps Gen. Joseph F. Dunford Jr., chairman of the Joint Chiefs of Staff, left, visits Joint Task Force Guantánamo, Cuba (2016). Photo by Navy Petty Officer 2nd Class Dominique A. Pineiro.**

temporary gap in the legal system in which an individual or group is, for a time, deprived of their rights. In such cases, performance has the power to suspend law, leaving an accused individual without their customary legal protections. Furthermore, if an actor performs their subjunctive claim well, they may succeed in convincing an authority to recognize their claim as the legitimate embodiment of the law. In that way, a gap in the law may end up enshrined as law, an exception may become the rule. If law is performative, though, that also means that contesting it is performative. The interactions of activists, lawyers, and the accused likewise mobilize performance to try to close the gap, to insist that courts do not hold the authority they claimed.

These performative aspects of the law were brought out when the Guantánamo military tribunal charged Khadr with violating the laws of war for allegedly throwing a grenade that killed a US medic. Military courts have limited recognition in the laws of most states. The judges who preside over them are military officers rather than civilian jurists, and initially the lawyers for the defence were also drawn from the military. Although Khadr's offence was not recognized as a war crime in international law at the time, lawyers, judges, politicians, and the media acted as if Khadr had committed such a crime, effectively working to make it become one. This behaviour tested whether the charge would stick. Moreover, the tribunal operated as if it held jurisdiction to try him, though that claim would be challenged by numerous US and international courts as well as the interventions of some of its own judges. In the end, the tribunal was successful in charging Khadr as a war criminal. No matter how disputed its legitimacy may be, the performative effect of this naming meant that the title of "convicted war criminal" became attached to his identity in other systems of law and in public life for years to come.

Khadr's case, and the public reaction to it, reveals how deeply racialized are the politics of this gap in the law. The rights of Khadr and the other Guantánamo detainees were not suppressed because of their innocence or guilt (which is, after all, what the courts were expected to determine). Rather, this gap in the law is one manifestation of the way that Muslims have been increasingly "cast out" of Western law, as Sherene Razack puts it, since 9/11. Khadr's Islamic identity was repeatedly invoked both in court and in the court of public opinion as evidence that he posed a threat to society. Lawyers and politicians took advantage of public suspicion of Muslims to justify the removal of legal protections from those who held (or appeared to hold) this identity. The performative gap in the law, then, is a space that is opened in the universality of the law that legitimizes differential treatment to Muslims as a minoritarian group. It is the performances of lawyers and judges who justify such discrepancies that make differential treatment possible in a liberal system of law in which everyone is in principle entitled to equal treatment. Moreover, the legal decisions rendered against Muslims casually attach and reify stigma to the whole group in a way that is itself performative: accusations of terrorism perpetuate the association of the Muslim body with terror in the public imaginary. As Sara Ahmed points out, the language of terror comes to "stick" to some bodies more than others. The materiality of "looking Muslim" thus becomes a sign of guilt and a reason to remove the protections of law (8).

In addition, the performative gap that ensnared Khadr affected the way that he was treated in the Canadian legal system. Although the gap was opened by the establishment of the prison camp at Guantánamo Bay, it was kept open—and strengthened—by the Canadian intervention. Canadian officials chose to follow US legal decisions with a dubious base in international law even though Canadian law could have achieved a different outcome, as Khadr's eventual exoneration shows. As I will argue below, Canadian officials not only bowed to US pressure, but were eager to work hand-in-hand with US officials regardless of whether their actions had a basis in Canadian legal principles.

## Legal Liminality

Omar Khadr was arrested in July 2002 by a US patrol outside of Khost, Afghanistan. He was found in an insurgent safehouse, where he had been left by his father, Ahmed Khadr, who ran a charity that was allegedly a front for al Qaeda. The troops were met with fire from the house and called for backup, which came in the form of a four-hour helicopter bombardment of the compound and the arrival of between fifty and one hundred soldiers.<sup>1</sup> When the dust from the battle settled, six soldiers entered the compound and a grenade exploded, killing Sergeant Christopher Speer. Though Speer was an army medic, his mission that day was to sweep the compound after it had been attacked. As such, he was armed and acting as a Delta Force soldier at the time. Inside the compound, the soldiers found the fifteen-year-old Omar Khadr, whom they shot twice through the back, almost killing him. There was another living adult, whom soldiers executed on the spot, but it was Khadr who would be accused of throwing the lethal grenade.<sup>2</sup> Khadr was taken to Bagram Air Base, where the US had established a prison. He received surgery for his wounds and was interrogated violently by soldiers. He was then flown to Guantánamo Bay, Cuba, where he would remain for almost eleven years,

becoming the last citizen of a Western country in the camp, and the only person, to date, to have been criminally charged with the death of a US soldier in Afghanistan or Iraq.

The camp was opened in 2002 by the administration of George W. Bush to house thousands of people taken prisoner when the United States invaded Afghanistan and, later, Iraq. Amy Kaplan describes it as a space “[h]aunted by the ghosts of empire” (854). Indeed, the camp is a product of the US occupation of Cuba following the Spanish-American War and a remnant of the Cold War in the Western Hemisphere. In the intervening years, it had been used to hold refugees from Haiti and Cuba, who were caught trying to escape to the US. But the base gained the attention of the Bush administration because of its peculiar legal status. The agreement between the United States and Cuba gives the US “jurisdiction” but not “sovereignty” over the territory, which the Bush administration interpreted to mean that the US had the right to use it for whatever purpose it chose, yet the rights afforded to prisoners under US domestic law could not be applied.<sup>3</sup> The agreement, which is disputed by the Cuban government, takes advantage of the subjunctive nature of US sovereignty over the military base to create a deliberately ambiguous legal status for those held there.

Giorgio Agamben has described this situation of lawlessness within a system of law as a “state of exception.” The term describes the power of a governing body to suspend the law for certain groups of people or for the whole community during a period of emergency. During this time, the normal legal contract is suspended and acts that would normally violate the rights of those in the community attain the force of law (Agamben thus calls it the force of law; *State of Exception* 32). As Gerry Kearns explicates, in Agamben’s view, “political communities are formed by exclusion, not inclusion” (7). To hold sovereign power is to have the authority to decide who is included and who is excluded from the community, and thus to decide who is to be protected by law and who can become “*homo sacer*”: a person whose death is of no legal consequence. Agamben describes the latter group as “those who may be killed and yet not sacrificed” (*Homo Sacer* 8). In response to criticism that Agamben underestimates the role that race and colonialism play in this process, Yasmin Jiwani adds that the operation of deciding who will be protected by law is often racialized, as race becomes the demarcating line separating those whom the state allows to “let live” as opposed to those it chooses to “let die” (18). Likewise, A. Naomi Paik argues that those who lack rights are always envisioned as racial others. As she puts it, “people could not be rendered rightless, without ‘camp-thinking’—Paul Gilroy’s term for nationalist and racist invocations of difference” (8). Paik also notes that the peculiar nature of the offshore camp in Cuba is itself a result of the expansion of rights on the US mainland. Because prior performative contestations of gaps in the law undermined the legitimacy of stripping populations of rights within the national territory, the US state was compelled to move offshore to continue such treatment (7).

The legal arrangement at Guantánamo Bay was designed to open a gap in the law in which those who were captured in Afghanistan and Iraq would be placed in a liminal status that deprived them of the rights usually accorded to either criminals held in custody or those captured in combat. Holding them outside of US territory prevented them from claiming the protections accorded to criminals under US domestic law. This includes the historic principle of *habeas corpus*, a concept that dates to the fourteenth century, which grants prisoners the right to petition the courts for redress from unlawful detention. Without that principle, prisoners could be held indefinitely without being accused of committing a crime. And so



**Guantánamo military commission court room (2008).  
Photo by Petty Officer 2nd Class Patrick Thompson.**

they were: detainees were not charged with crimes until 2006 and many waited much longer. Shaker Amer, a former US Army translator, spent fourteen years imprisoned without charge before being released to the UK in 2015 (Barrett, n. pag.).

While in the camp, they were not to be referred to as prisoners of war but rather as “unlawful enemy detainees,” as it was argued by Secretary of State Donald Rumsfeld that they were participants in what the US deemed an illegal war. As such, the provisions of the Geneva Convention, which guarantees minimal rights for those captured in combat and bars the use of torture, would not be applied to them. Without these protections, nothing prevented guards from submitting detainees to what was called “enhanced interrogation,” a set of techniques that are conventionally understood to constitute torture.<sup>4</sup> On the contrary, Rumsfeld’s language operated as a performative speech act that effectively reclassified the detainees as those who would not be protected from torture. As such, he sent a signal to guards and officers that acts of brutality would be tacitly condoned. The mechanism used to convey that message was a document written by government lawyers Alberto Gonzales and Jay S. Bybee that became known as the “torture memos.” The memo declared that anyone engaging in torture would be punished, but it narrowed the accepted definition of the practice to include only activities that result in “death, organ failure or the permanent impairment of a significant body function” (qtd. in Shephard, *Guantánamo’s Child* 94). Joseph Pugliese describes it as a “do-what-you-want” card that swept away in one executive note extensive American and international jurisprudence and proscriptions against torture (13). Pugliese exaggerates slightly: the principle of “enhanced interrogation” would be challenged by numerous US courts and the government eventually backed away from it. But Rumsfeld nevertheless succeeded in opening a temporary gap in the law that allowed acts of brutality to become the “standard operating procedure” at Guantánamo for a significant period of time.<sup>5</sup>

Detainees would eventually be tried by the Military Commissions, a military tribunal established under Bush's orders in November 2001. These legal apparatuses set up a system that ensured that detainees were excluded as much as possible from the protections of law; meanwhile, guards and soldiers were legally protected and led to believe, quite accurately, that they could not be tried in any court were they to overstep their authority. Their immunity from sanction effectively guaranteed them impunity.<sup>6</sup> The prison's geographical isolation also made any kind of oversight by international monitors, journalists, or lawyers subject to great difficulty, ensuring that what standards did exist would be almost impossible to uphold. What went on in Guantánamo did so largely behind the scenes. Even when they were able to visit their clients, lawyers experienced arbitrary rules about visit times, limited access to evidence, and extreme censorship of documents moving in and out of the prison. In many cases, the evidence being used against their clients was classified, as often were the very crimes the detainees were accused of (see Pratt 211-12 and Wilson 189).

Many critics have seen this as evidence that the camp is a place of lawlessness. But though the Bush administration was happy to flout international treaties that stood in their way, the state of exception in Guantánamo was a condition carefully crafted by law, as Derek Gregory has emphasized (207). Paik, similarly, argues that the denial of rights in a camp is intimately connected to the expansion of rights for those outside it. She understands the condition of "rightlessness" not as an absence of universal inalienable rights but as a condition "that emerges when efforts to protect the rights of some depend on disregarding the rights of others" (4). Indeed, portraying the denial of rights as exceptional allows the United States to present itself as a global leader in protecting rights at the same time as it selectively withdraws rights. The legal enigma created at Guantánamo Bay has endured in a modified form to this day, outlasting efforts by the subsequent executive to do away with it. More importantly, although the initial juridical regime set up at Guantánamo may seem to have little to do with democratic systems of law, it required the complicity of more respectable legal regimes in order to function. In this way, the performative gap opened out to other systems of law, reeling them into the state of exception.

## Stanislavskian Justice

The Bush administration's use of law at Guantánamo operates as an analogue to Stanislavski's theories of acting. A central principle that Stanislavski proposed was what he called the "magic if." Stanislavski instructed his acting students to behave "as if" a situation really were happening to them. As he explained through his character Tortsov, "For actors, 'if' is the lever which lifts us out of the world of reality into the only world where we can be creative" (48). In a similar way, the Bush administration's creative interpretation of the law allowed them to operate "as if" their behaviour were legal, knowing that by the time the law's reality caught up, the strategic tasks they wanted accomplished in Guantánamo would have long been completed. In this way, the "magic if" is a theatrical posture that creates material facts in the world. As Tortsov tells his students: "What we have here is a device, a creative idea which, through the operation of nature itself, produces an action that is apt, a real action, one which is essential if we are to achieve the goal we have set ourselves" (50). If the Military Commissions

succeeded in persuading other courts that they were legitimate, they would similarly create a “real action” with real consequences in the world: detainees would be sentenced by a court. Importantly, Stanislavski’s point is that the actor must perform a representation of an action that is plausible to an audience. Likewise, one of the Military Commissions’ purposes was to convince onlookers that their practice was legally acceptable. As a new order of law, the Guantánamo Military Commissions built their claims to legitimacy by mimicking other systems of US law. But whether they would be accepted as legitimate by mainstream US law depended on the efficacy of their representatives’ performances not only in Guantánamo but also in parallel legal systems.

One thing that is intriguing about the Military Commissions is the way they seem to have been designed to confront a hostile audience. The legitimacy they would eventually acquire in US law came out of struggles over their illegitimacy. One problem with Agamben’s theory of the state of exception is that it seems to presume the absolute authority of the sovereign. But in fact, the state of exception at Guantánamo was contested more or less continually. Significant differences of opinion were held by the CIA, the Department of Defence, and senior figures in the Republican Party. As Gregory puts it, “This matters because it means that law is a site of political struggle not only in its suspension but also in its formulation, interpretation, and application” (207). However, in this case, the conflicts over legal legitimacy also deferred decision-making and thus contributed to the military goal of keeping detainees incarcerated and without rights for as long as possible. And while there were many challenges to the legal regime set up at Guantánamo from courts in the United States and Canada, there was also cooperation by many courts, including the Supreme Courts of both countries, which made the regime possible.

In questions of incarceration, time is the way that justice is measured, and power is exercised as power over someone else’s time. The performative gap in the law thus played out as a relationship between law and time. The military goals of the camp emphasized the temporary expediency of the camp and the need to acquire intelligence through interrogation as quickly as possible. These goals clashed with the logic of legal justice, which conventionally operates slowly but at Guantánamo had slowed inordinately. Gregory describes the camp as a space of “law at a standstill” (213). At the same time, the camp projected itself into an eternal future, with its insistence on authorizing the indefinite detention of its prisoners.<sup>7</sup> These clashing timeframes meant that the legal campaign against the camp often had the paradoxical effect of prolonging the punishment of those detained inside it.

The Military Commissions took several years to begin operating. Their tenuous legality meant that the first judges appointed to serve in them disputed their own authority to do so, claiming that they did not hold jurisdiction (Wilson 196–98). The Commissions would find their legality challenged several times in the American federal and Supreme courts before they settled on their current arrangement. In the meantime, detainees continued to languish in the prison camp as the courts argued over who had jurisdiction and what form of law applied to the detainees. In 2005, the United States Congress passed the Detainee Treatment Act, a law that prohibited “cruel, inhuman, or degrading treatment” of detainees. Importantly, as Gregory describes, the Act did not include any mechanism by which detainees could challenge their treatment. He quotes the sardonic response of Human Rights Watch, which stated, “The law says you can’t torture detainees at Guantánamo, but it also says you can’t enforce

that law in the courts” (218). According to the letter of the law, then, the Act conferred rights on the detainees and absolved the judicial system for overlooking the gap that allowed their abuse. But as these rights would be technically unenforceable, the Act allowed for the continued suspension of those rights in practice. Rather than closing the performative gap in the law, the Act extended it.

During the time they were being contested in higher courts, the Military Commissions performed as if they were authorized sites of legal adjudication. They were declared illegal by the US Supreme Court in 2006, and the Bush administration responded by revising the way they were conceived and passing a new Military Commissions Act. When that Act was declared unconstitutional by the same court in 2008, for its suspension of *habeas corpus* rights, the administration quietly restored those rights but kept the Commissions otherwise intact. Thus, through a process of legal contestation, the Commissions were re-organized and ultimately strengthened as increasingly recognized and established legal entities. Contestation within the parameters of law, then, does not necessarily withdraw legitimacy from illegitimate forms of power but may offer them an opportunity to develop a stronger basis in law.<sup>8</sup> Moreover, the gradual legalization of the camp and the tribunal did not necessarily lead towards justice but away from it. As Audrey Macklin notes, “the proliferation of rules had the effect of codifying the evisceration of the rule of law” (225). The emergent legalized regime presented the legal teams representing the detainees with a dilemma that Macklin terms a “paradox of legitimization” (226). How might their participation help the Commissions perform their own legitimacy? If they abandoned the process, they risked letting their clients slip into a legal abyss, but the more they participated in it, the more legitimacy the courts would attain.

Detainees likewise worried about legitimating the Commissions, and in 2006 they began a boycott of the proceedings. The boycott attempted to mobilize theatrical politics instead of legal argument as a way to demonstrate the illegitimacy of the Commissions to the outside world. The boycott began with the trial of Ali al Bahlul, who stood accused of thirty-five acts of terrorism, including acting as Osama bin Laden’s chief media secretary. Al Bahlul sat silently at his first hearing holding a hand-drawn sign that said “boycott” in English and Arabic. He likewise boycotted the appeal his attorneys had mounted in his defence. The Commissions rewarded him with a life sentence at Guantánamo (Percival n.p.).<sup>9</sup> Khadr, for his part, briefly boycotted the Commissions but changed his mind as a way of showing his willingness to “play by the rules,” as his lawyers put it, if he was released (Melia n.p.). That made him, at one point, the only detainee not boycotting the tribunal (Melia n.p.). Deciding whether or not to participate was a tactical question about how best to mobilize performance to affect the course of the trial. While a boycott might be a successful meta-performance to a global audience, it would have detrimental effects on the more immediate performance to the court. This meta-performance mattered to the courts as well, as they were struggling to prove their legitimacy in American law and global opinion. Nevertheless, the material power of the court over the detainees’ time drew many of them into the process, forcing them to acknowledge its authority.

Alan Read points out that law “has to be *seen* to be done” (8). In this way, law is “*showing doing*, one of the prerequisites [...] for something to be called performance” (9). Law, then, is always performing, and the kind of audience it performs for affects the type of law it becomes. To judge by the reactions of those who interacted with the Commissions—defence lawyers,

journalists, NGO observers, civilian courts, and the detainees themselves—the Commissions’ performance of legitimacy was a spectacular failure. In her detailed and angry record of her time in Guantánamo as a human rights witness, Macklin describes the Military Commission courtroom as an elaborate simulacrum of a regular court. While its judges were meticulous about demonstrating their commitment to procedural transparency and to carefully upholding their version of the law, it was also a system that “breached the most basic precepts of the rule of law” and was designed to ensure conviction:

The invention of crimes, and their retroactive application to detainees, the routine use of torture, solitary confinement, and cruel, inhuman and degrading treatment, the lack of access to legal counsel, the indefinite detention without charge or trial, each and all extravagantly flouted international human rights law, international humanitarian law, the US Constitution, and US military law. (224)

The failure of the Military Commissions to prove their authority to impartial observers is one likely reason that they have been largely abandoned today, as most cases have been moved to the US federal courts (which have not resolved a case since 2013). Though they may have failed to be perceived as legitimate, they nevertheless succeeded in their short-term goal of temporarily propping up the state of exception. More disturbingly, this failure did not prevent the Commissions from extending the performative gap into other systems of law, including the Canadian one.

As the first case before the Guantánamo military tribunals, the Khadr trial exerted extraordinary pressure on the macro-narrative of whether justice could be done at Guantánamo. Khadr spent much of his time at Guantánamo in solitary confinement before he was finally charged with “murder in violation of the law of war” as well as four lesser charges. However, his trial would be delayed by several years as the Commissions were organized and



The sign waved by Ali al Bahlul declaring a boycott at his 2006 hearing. Photo by the Department of Defence Records. Sketch by Ali Hamza Ahmed Suleiman Al Bahlul.

re-organized on the basis of the legal challenges to their legitimacy.<sup>10</sup> Khadr's case finally came before the Commission in 2010, and he pleaded guilty to murder in violation of the law of war, attempted murder in violation of the law of war, conspiracy, providing material support for terrorism, and spying. Though he had always insisted on his innocence, he agreed to plead guilty in exchange for a limit on his sentence to eight years in addition to time served and an arrangement to complete his sentence in Canada.

Conventionally, a settlement of this kind would cancel the court proceedings before a sentence was handed down. But in this case, for reasons that remain unclear, the jury of seven military officers proceeded to name a sentence of forty years imprisonment, even though it would not be enforced because of the settlement. Richard J. Wilson, who represented more than 500 detainees, calls it a purely theatrical stunt, "a form of kabuki theatre, performed exclusively for the broad publicity" (206). But Wilson's anti-theatrical use of the metaphor of theatre underestimates the more fundamental role of performativity in the case. Had Khadr not pleaded guilty, he could have faced another four decades behind bars. The price of switching his plea, though, was the reification of his identity as a "war criminal" in the eyes of the court. His name would be forever associated with the crimes he was accused of, regardless of his actual guilt, and he would carry this guilt into the mainstream judicial realm in Canada. In this way, the performative gap would extend into Canadian law and society. This reminds us of the normative power of law to define identities through a process of interpellation. Once defined as a convicted war criminal, Khadr would be marked as abject within Canadian society, as was repeatedly heard in the theatre of public opinion, where the facts of his case would blend with the dog-whistles, racism, and Islamophobia that circulate in North American media.

## Exporting the Gap Across the Border

The performative gap in the law uses performance to create exceptions to liberal principles of equality that have been enshrined in law. Official discourse about Guantánamo Bay describes the camp using a language of counter-insurgency warfare and policing that omits mention of race as a determining factor. Yet, as a space that confines brown and black Muslim bodies who are overseen by a multicultural cast of American soldiers and officers, the camp is also, as Eric N. Olund has pointedly described it, a "space of racial violence" (56-57). This gap between official colour-blindness and the highly visible reality of racialized incarceration echoes patterns that exist throughout the American prison system, but it is exacerbated by the peculiar way that Islamophobia plays out in a society that considers itself post-racist. Jiwani describes the way that suspicion has been cast on Muslim bodies by means of what she calls "colour-blind racism," a discourse that simultaneously disavows overt racism but re-frames discrimination around racialized categories such as "culture" and "civilization" (19). The Military Commissions often relied on experts who held anti-Muslim bias. Perhaps most preposterous was psychologist Michael Welner, who interviewed Khadr for eight hours before giving testimony on his mental health. As Tara Atluri reports, "Welner relied on the work of Nicolai Sennels, author of *Among Criminal Muslims* (2008) in which Sennels claimed that, 'massive in-breeding within the Muslim culture during the last 1,400 years may have done

catastrophic damage to their gene pool” (38). Not all anti-Islamic racism at the camp was so blatant, though. Indeed, Islamophobia is often presented as non-racist because it is based ostensibly on a collective suspicion of people united by a religion rather than an ethnicity. But that distinction becomes moot, as it does with anti-Semitism, when it produces acts of violence and discrimination targeting a specific community for its beliefs. In Khadr’s case, the racism of the camp combined with anxiety about, as Sunera Thobani puts it, “Muslim strangers within [who] even if claiming the legal status of citizens, come to be construed as [...] the threat to the nation” (238-39). What Jiwani calls “the carceral net” has tightened since 9/11 to “render Muslim bodies unworthy on the grounds of their putative criminality, and as undeserving victims, unbefitting state intervention and societal sympathy” (13). If the law in liberal society has no official place for such forms of racial discrimination, they re-emerge through acts of performance that deny processes of racialization and characterize differential treatment as neutral. The performative gap in the law is one mechanism through which race is re-inserted into law.

Kaplan concludes that the Bush administration sought to redraw the borders of law in order “to create a world in which Guantánamo is everywhere” (854). Indeed, it is in the exportation of the state of exception that we see the effect of the performance of exceptionality on other polities. The Canadian state, one of the closest allies of the US, was reticent—despite its sense of itself as an upholder of rights—to acknowledge that the US was violating rights. The Canadian political and legal interventions around the Khadr case almost always began with an explicit statement that acknowledged the US as a great defender of rights. Such statements were not only rhetorical; they were acts of recognition that allowed the speaker to frame the denial of rights as unusual or exceptional. The Canadian Supreme Court decision ultimately closed the state of exception in Canadian law, but it did so in a way that presented the violation of Khadr’s rights as an unfortunate exception to an otherwise healthy legal regime. But the exception needs to be understood as a part of how the state operates, taking advantage of the space in time before the gap would be shut. Khadr’s case shows the complex ways that a relationship was negotiated between the state of exception and firmly established legal systems in Canada, the US, and internationally, each of which opened itself up to the state of exception and allowed their rules to be altered by it.

Canadian politicians were faced with the problem of what to do about Omar Khadr’s situation as early as his arrival at Bagram Air Base in 2002. But if they had a strategy for dealing with the state of exception that Khadr found himself in, it was largely that of ignoring the gap as much as possible. In doing so, a performative gap was opened in Canadian law. For both Liberal and Conservative politicians, the idea that the US was mistreating prisoners was almost unthinkable (or at least unsayable). Liberal MP Bill Graham, then Minister of Foreign Affairs, told the House of Commons, “He’s in American custody, he’s being properly treated in accordance with Red Cross rules” (qtd. in Côté and Henriquez 144). Graham’s logic is naively syllogistic: Khadr was tried by the United States; the United States is a democratic country; therefore, Khadr had a fair trial. Similarly, when agents from the Canadian Security Intelligence Service (CSIS) visited Khadr at Guantánamo, they did not act on Khadr’s disclosure to them that he had been tortured by the Americans. In the Security and Intelligence Review Committee’s (SIRC) investigation into CSIS’s role in the Khadr case, CSIS agents claimed they were “not aware of any specific allegations of torture on Khadr’s behalf prior



Omar Khadr and his legal team listen to testimony by Arlette Zinck during his trial by the Guantánamo Bay Military Commission (2010). Photo by Rick Scavetta. Sketch by Janet Hamlin.

to arriving at Guantánamo Bay” (16). However, SIRC’s report reprimands the officers for not considering that this could be the case, especially in the context of “widespread media reporting on allegations of mistreatment and abuse of detainees in US custody in Afghanistan and Guantánamo Bay” at the time (29). This display of wilful ignorance by both Graham and CSIS allowed Canadian authorities to continue their mission of gathering intelligence on Khadr without allowing his rights to stand as an obstacle. Whether or not they suspected that they would some day need to account for their behaviour, they performed as if nothing were out of the ordinary.

The display of ignorance was also a form of international diplomacy, a message to US allies that Canadian authorities would not object to the situation created at Guantánamo Bay. The case is revealing of the politics of Canada-US relations. Many Canadian critics saw the abandonment of Khadr as an example of the submission of Canadian institutions to US mandates. But this analysis ignores not only Canadian complicity but Canadian enthusiasm for participating in the state of exception. As lawyer David Rangaviz points out, Khadr was the last citizen of a Western country in Guantánamo “precisely because every other Western country with citizens imprisoned there [had] already sought their repatriation” and none of those countries reported any “deleterious effect on foreign relations” (266). In the end, it was the Obama administration that insisted that Canada take him back. Rangaviz sees Khadr’s plea deal as evidence that “the United States did not want to prosecute a juvenile for war crimes violations in a military commission” (268). These comments are speculative, but they suggest that Canadian authorities may have played a larger role in creating and perpetuating the state of exception than is usually admitted. Because Khadr was being given the simulacrum of a fair trial, the Canadian government was able to claim that it was not required to intervene on his behalf.

This interpretation would not stand up in law in the long run. When in 2008, a parliamentary committee recommended that the government demand Khadr’s repatriation, the

government of Stephen Harper refused to act. That recommendation was then ordered by the Federal Court, and Harper appealed to the Supreme Court of Canada to determine whether the government had an obligation to demand repatriation. In a paradoxical decision, the Court condemned the government's inaction, saying that it violated Khadr's Charter rights, but also reversed the Federal Court's order to demand repatriation. This removed the pressure on the Harper government to act and, as a result, extended the period of Khadr's detention in Guantánamo beyond the minimum time required in his sentence by almost one year. For Andrew Stobo Sniderman, this decision stands for "the melancholy proposition that Canadian courts will recognize a rights violation without demanding an effective remedy" (173). The decision upheld the liberal principles in the letter of the law, scolding CSIS and the government for abandoning Khadr, but left open a space that not only allowed the state of exception to continue but in fact extended it. Though the decision condemns the illegality of Khadr's detention, it tacitly accepts it by failing to offer a tool that could end it.

For Valentina Capurri, Canada's response to Khadr's case shows the extent to which representations of race shape media and public opinion in Canada (147). Khadr was of course not the only Muslim Canadian to lose his Charter rights in the aftermath of 9/11. Many others have found that their consular rights were not respected when they ran into legal problems overseas, several of whom—such as Maher Arar, Abdullah Almalki, Ahmad El Maati, Muayyed Nureddin, and Abousfian Abdelrazik—ended up facing torture as a result (Capurri 152). In contrast to their treatment, Robert Diab and Alnoor Gova have compared these cases to those of non-Muslims, some of them seasoned criminals, who received impeccable consular assistance when they were detained abroad, including visits by prominent politicians and diplomatic phone calls to negotiate their release. Likewise, in Canadian media, the Khadr case would be used to advance the idea that Muslims were to be treated with suspicion. As Elke Winter and Ivana Previsic argue, Canadian newspapers advocated "for equal citizenship in principle, [but] in their writing and reporting practice, [they] constructed Canadian Muslims as suspicious and less Canadian" (55).

Khadr's settlement with the Canadian government in 2017 included a payment of \$10.5 million (half of the amount he was suing the government for) and an apology from the federal government for its complicity in the violation of his Charter rights. The settlement technically closed the performative gap in the law and reinstated his position as a citizen with rights under the law. For Khadr, though, the damage had already been done, and it had taken the law fifteen years to restore his status. In one view, the Government's settlement does not correct the mistake; it rather marks the cost of maintaining the legitimacy of Canadian law despite the Government's willingness to temporarily abandon it when it was convenient. The case raises questions about the ability of law to protect citizens at all and introduces the ominous possibility that the performative gap may be opened again.

Indeed, Canadian officials responded eagerly to the state of exception opened up by the Bush administration in order to conduct their own War on Terror. CSIS enthusiastically took advantage of the situation to conduct their own interrogations of Khadr in Guantánamo and the Supreme Court of Canada allowed that state of exception to be granted legitimacy in Canadian law. The fact that these exceptions violated Charter rights gave Khadr a basis on which to sue the government. By settling the lawsuit, the government was able to close the temporal gap and perform a resolution to the case. But if this legal approach was successful in

eventually returning Khadr his rights, it was ineffective in protecting those rights from being violated in the first place. As a citizen-in-exception, Khadr was not protected by Canadian law until long after the crimes had been committed against him.

## Beyond Subjunctive Justice

Ultimately, legal challenges to Khadr's detention attacked the letter of the law without considering the performativity of the law. Opponents of the state of exception could win decisions on principle only to have courts fail to come through to enforce them. Both the US Federal Court and the Supreme Court of Canada handed down rulings of that sort. For some critics, these cases are evidence that a rights-based approach is insufficient to protect people from abusive systems of law. Capurri points out that just as the Canadian state was unable to protect Khadr, neither was the international community able to defend his human rights. She notes that, "[d]espite the public advocacy of several human rights organizations, such as Amnesty International, Human Rights Watch, UNICEF, Coalition to Stop the Use of Child Soldiers, and Lawyers Against War, little changed in Omar Khadr's life behind bars" (151). This leads her to conclude that "human rights remain ineffective due to the international community's refusal to enforce restrictions and hold accountable violators of those rights" (151). The problem, as Gregory points out, is that international law "is decentered, without a unitary sovereign to ground or guarantee its powers; its provisions are distributed through a congeries of conventions, treaties, and organizations" (209). Capurri draws on Hannah Arendt's criticism of human rights law to point out that rights can only be defended if they are backed up by a nation-state. But in global politics, international law intersects with the power of nation states in an unequal manner. As Capurri reminds us, "states are positioned on an unequal playing field [...]. Powerful states are guaranteed impunity for their human rights violations, while weaker states are prosecuted and eventually punished" (155).

In some ways, Khadr was a strange choice for the Military Commissions' debut decision. In addition to the controversy surrounding his age, the case against him was not strong, and journalists were able to find gaping holes in the evidence against him. Rangaviz cites the argument of Morris Davis, former chief prosecutor for the military commissions, that "the choice of forum depends upon the strength of the evidence against an accused detainee, with trial by military commission reserved for those against whom the government's case is weakest" (259). To use a performance metaphor, perhaps the Khadr case was merely a rehearsal that would allow the military tribunals to test their authority before the more significant trials of detainees such as Khalid Sheikh Mohammed, who stands accused of being an architect of 9/11. But the fact that over a decade and a half into their existence, the Commissions have only charged six people, two of whom ended with plea deals and two of whom were acquitted, stands as a testament to both the massive number of innocent people who have passed through Guantánamo Bay and the limited value of the state of exception for the pursuit of justice.

The case against Khadr may have been weak, but, from the perspective of spectacle, prosecuting a weak case projects power more terrifyingly than a strong one. And though it is thought of as a place shrouded in secrecy, this reminds us that unlike the countless CIA black sites around the world we know nothing about, Guantánamo Bay is asking to be looked at,

to be legitimized. The spectacular performative power of the camp is designed to instill fear in its enemies but also to find an authoritative audience nodding with approval. Rather than hiding its exceptionalism from the law or being shy about its use of torture, the camp has tried to build a community that condones such practices. The camp, then, is better thought of not as a place of secrecy but more as a political intervention in the global public sphere. The message that Guantánamo sends to the world is that anyone, guilty or innocent, who is perceived to cross the United States could find themselves in the depths of the state of exception.

The weak case against Khadr makes him an easy object of sympathy. But the state of exception is a problem because it entraps not only those who are innocent but also those who are guilty. For Atluri, Khadr's probable innocence allows us to award him "conditional empathy" while we ignore what happens to the "true *homo-sacers*," who remain held in Guantánamo (34). If justice is to be more than a performance, then law must be applied fairly to the guilty as well as the innocent. Moreover, focusing on the blatant violations of law in Khadr's case might cause us to miss the context of much wider lawlessness on which the War on Terror is based. It suffices to recall that the war in Afghanistan itself was the product of a performative gap in the law. Though retroactively sanctioned by a UN resolution, the invasion of Afghanistan by US and NATO forces in 2002 occurred without regard for international laws of engagement. The war saw the proliferation of new laws in many Western states that institutionalized racial profiling and removed traditional rights to a fair trial for those accused of terrorism. More recently, extra-judicial execution without any semblance of a trial found a place inside the law as the Obama administration promoted it as an alternative for the failed project of invasion and nation-building. If Guantánamo has become a synecdoche of the War on Terror, it is because that war has been waged as a creeping global state of exception.

The performative gap allows for the suspension of the law, a time when rights that have been long established may be taken away and forms of discrimination may be allowed to return. The performative element is not in the law but works around the law. Legal arguments and decisions that suspend law often cling to the liberal principles that exist in the letter of the law, even as they work to find a way around those principles. Because of that, the performative gap cannot always be seen in legal writing though it nevertheless haunts those texts. The decisions I have examined serve as archives of the performances that sought, in a variety of ways, to open a gap in the law that Omar Khadr and others would fall through. The case reveals that rights-based frameworks are inadequate to defend those who find themselves caught in the state of exception. While their rights may be restored legally, the price may be a lengthy time in prison and a miasma of public suspicion surrounding their name. New ways of conceiving of justice that move beyond rights-based frameworks and consider the performative ways that the law can be manipulated will be needed if we are to find meaningful justice.

## Notes

- 1 For a detailed description of the attack, see Shephard, *Guantánamo's Child* 1-17.
- 2 The detail of the second person in the safe house (which is crucial for determining Khadr's role in the Speer's death) was left out of official accounts of the incident until a document was mistakenly released to reporters during Khadr's trial (Shephard, "Khadr Secret").
- 3 This legal use of the word sovereignty is different from Agamben's notion of sovereign power. Ironically, Guantánamo Bay reveals that sovereign power may not require holding sovereignty. The agreement between the two nations reads: "While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [...] areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas" (qtd. in Gregory 212).
- 4 Description of what takes place at Guantánamo Bay is shrouded in euphemism, a strategy that stages the activities in an alternate light. Euphemistic language re-signifies acts as something other than acts that are against the law. It is a performative strategy that allows for a linguistic circumvention of the letter of the law, even as it enables the forthright breaking of it. It is a way of saying that the law has not been broken because the precise name of the law has been altered.
- 5 The afterlife of these principles can be seen in action in the work of current CIA Director Gina Haspel, who has also been active in re-classifying definitions of torture. Files declassified in 2018 reveal that she was directly involved in ordering "enhanced interrogation techniques" at a CIA black site in Thailand in 2002. Her rehabilitation by the Trump administration is a worrying sign of the enshrinement of these principles into the political and legal fabric of the USA today (see Barnes and Shane).
- 6 As the Center for Victims of Torture points out, immunity was explicitly granted to those who engaged in torture prior to December 2005.
- 7 More recently, President Trump's order to keep the camp open has revived talk about "forever prisoners" (see "Donald Trump vs. Guantánamo's Forever Prisoners"). Equally disturbing is the detention of migrants at the US-Mexico border for indefinite periods of time.
- 8 A similar process was at work in President Donald Trump's so-called "Muslim ban," a piece of legislation that at first seemed as if it would not be compatible with various anti-discriminatory provisions of American constitutional law. Legal challenges to the order succeeded in winning two temporary restraining orders and an injunction but the legislation was eventually strengthened and made enforceable. In fact, the contribution of the US Supreme Court was to reinstate portions of the order that had been struck down by lower courts.
- 9 Al Bahlul's conviction was appealed, overruled, and reinstated several times by various courts and he remains at Guantánamo.
- 10 As Christopher Dore summarizes, when the Supreme Court halted the military tribunals, the military was forced to drop the charges against Khadr until the new Military Commissions Act (MCA) was passed in October 2006. New charges were filed in

February 2007 and Omar was brought up for arraignment, only to have his case dismissed of jurisdiction under the MCA. That decision was reversed three months later, when the Military Commission Review overruled the dismissal (1288-89). Khadr's lawyers appealed their case to the US Court of Appeals for the District of Columbia, but the court claimed not to hold jurisdiction and the appeal was dismissed. They likewise petitioned the US Supreme Court, but the request was denied in April 2007 ("US Supreme Court").

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