

KAFKA'S COURT: SEEKING LAW AND JUSTICE AT GUANTANAMO BAY

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“Why do you wear a hijab?” asks a prominent journalist.

“Why do you wear a hijab?” asks the mother of an FDNY firefighter who selflessly ran in to save lives before the second tower fell.

“Why do you wear a hijab?” asks a second-year law student, holding a “Feminist” coffee mug.

“Practicing law at Guantanamo Bay” often seems oxymoronic. The detainee camps there were created in 2002 for the specific purpose of being outside the law. Nearly eighteen years later, the judges at the slow-moving military commissions still can't decide whether or which parts of the Constitution might apply to the forty men who remain there. Human rights are for all humans, I lecture my students, but if the jailers don't recognize the humanity of their charges and no outsider can make them, is it true?

The detainees at Guantanamo are presented as a monolith—hardened terrorists who want to kill Americans. The first impression, shaped by people like Donald Rumsfeld and Dick Cheney who also controlled all information about the men, has become truth in the minds of the public. I have represented over a dozen men at Guantanamo. Unlike Rumsfeld or Cheney, I have sat in rooms with them, shared meals with them, been given pregnancy and parenting advice from them, and tightened my jaw as some of them cried over their mothers, brothers, or children dying in faraway homes while they remained locked up at Guantanamo. No one gets family visits at Guantanamo. One client had a son he had never met. Another lost a young son to shelling in Syria while he was at Gitmo. One wrote frantic letters with a right hand that cramped constantly from his early torture, trying to

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participate somehow in the preparations for his daughter's pending marriage. His letters all arrived after the wedding, words of advice inexplicably covered in censor ink.

One of my favorite clients, a gentle man who would apologize for taking me away from my family to visit him at Guantanamo, wrote love letters to his wife every day. He would quietly tear out pictures of flowers and animals from Department of Defense-approved magazines and enclose them with his letters to her. He begged her to wait for him and against my advice, agreed to a release deal that would put him in great danger when he left Guantanamo—in the hopes of reuniting with her faster. Upon release, he was illegally disappeared for nearly six months. It was the last straw for his long-suffering wife, who refused to rejoin him afterwards.

It has been reported that all of these men took up arms against the United States, that they all pose a threat to Americans and that is why we are forced to hold them forever, outside of the United States, in the equivalent of a gulag. That statement is unequivocally false. Here are some truths: We have held nearly eight hundred men at Guantanamo; the majority should not have been detained at all. If they had been white and from France or Norway or Germany, the extraterritorial prison at Guantanamo would never have been allowed to exist. And it certainly would not have lasted for eighteen years with no end in sight.

The only truth that all of the detainees have in common is that they were tortured by Americans. We lied about that, too, and still do. These weren't "enhanced interrogation techniques." They were brutal, medieval acts, some of them the same as those committed at the Tower of London and at Salem—and yes, at Bergen-Belsen. Men were killed in our torture program. Those who survived were physically and psychologically maimed for life.

I. BACKGROUND

When I decided at the ripe old age of sixteen that I was going to practice human rights and humanitarian law, I would have never guessed that I would be litigating against my own government. I was newly returned from a high school summer program at Oxford University, where one of the speakers was Patricia Viseur Sellers, then a prosecutor specializing in gender-based war crimes at the ICTY.¹ She was an American lawyer, like I wanted to be, helping to shape the then-brand-new field of international criminal law. And she was a woman, and her skin looked like mine.

I grew up primarily in a comfortable, homogeneous suburb in Ohio, the type of place captured well by TV shows like *One Tree Hill* or *My So-Called*

¹ International Criminal Tribunal for the former Yugoslavia.

Life. What those shows lack, however, are the female Indian-American characters whose self-deprecating comments and loud laughs are meant to preempt the jokes about their clothes (“not Abercrombie”), faces (“too dark to see in photos”), religions (“my parents don’t want me coming over if you have an elephant god on your wall”), countries of origin (“shithole,” long before the President said so), and home-packed lunches (“stinks of curry”).

I wouldn’t let myself feel bullied. I made the jokes before they opened their mouths, embraced the punch lines, left them feeling awkward. I did it for the newer immigrant kids too, the ones who didn’t understand the joke. “The joke is how we look to them.” Twenty years later, I find myself nodding along when my client, Ammar, talks about his feeling of being an outsider as a teen refugee in Iran. I was infinitely more privileged than Ammar, but minority teen angst is a bonding agent.

My grandfather worked for the United Nations, and I spent many long summers in Geneva around family friends who were all international civil servants. I read about the Balkan Wars, the Rwandan genocide, the India–Pakistan nuclear arms race, debated the merits of sovereignty versus humanitarian intervention in my high school American Politics and Government class. When I saw Ms. Sellers speak, it felt like I’d found my place. As she explained, no one invented human rights—they exist inherent in every human being. But without people to defend those rights with sword and shield, there is no way to temper the chaos of politics and war. I wanted to do that.

When we grow up in America, though—and especially when we study law in America—we are taught that we are the good guys. Sometimes that is true. We helped to shape much of the world after World War II and we led the charge on the international law that now chafes on our Department of Defense at Guantanamo Bay. Our Constitution is magnificent and deeply flawed, and magnificent again for how it creates the institutions—Congress, Presidency, Courts—to help resolve those flaws.

But the Constitution, written in a time of state power, didn’t know what to do with the 9/11 attacks, and neither did the institutions. Caught paying too little attention to intelligence about a non-state actor (Al Qaeda), Congress and the Executive overcorrected. Sweeping powers were employed, the normal rules of intelligence gathering in secret and war-fighting in public were suspended. The United States didn’t want to follow the laws it had helped to write.

We now know some of the mistakes that we made. We didn’t understand the nature or diversity of the parties on the ground in Afghanistan. The rendition and torture program didn’t generate useable intelligence and may have wasted years in the search for Bin Laden. But we

have still never reckoned with the effects of those mistakes. We still do not discuss the impact on our national security of our allies withdrawing from joint operations because of our detainee torture. The government still strenuously argues that Guantanamo detainees should have no constitutional protections at all in territory controlled by the United States and in courtrooms over which the flag flies. We don't seem to see how those mistakes—torturing people of color, creating separate courts for Muslim men outside of the Constitution—have undermined the security we sought so desperately to ensure.

II. IN THE COURTROOM

For much of the four years that I have represented Ammar in the purpose-built courtroom at “Camp Justice” (the legal compound at Guantanamo Bay), I have been the only female attorney of color. One of only a handful of females in the courtroom at all, in fact. During my first oral argument, I paused on the word “Abbottabad.” Abbottabad is a town in Pakistan where Osama bin Laden was eventually found and killed by U.S. forces in 2011. It is constantly mispronounced in the press, including by President Obama. Nearly two decades after the war began in Afghanistan, is it truly too much to ask that we learn to pronounce “Afghanistan,” “Taliban,” “Iraq,” “Abu Ghraib,”—and yes, “Abbottabad,” correctly? Disrespecting a culture and a people because five of them are accused of committing crimes (even heinous ones) is antithetical to rights-based justice. So I paused, and explained to the judge in two sentences the history of Abbottabad and that I was going to pronounce it the way Pakistanis pronounce it. To me, it seemed like a perfectly rational thing to do. The judge, to his credit, accepted the explanation gracefully. To my right, however, there was a chorus of snorts from the prosecution through the rest of my argument.

Many courtrooms are still male-dominated, and I hear the same commentary at the purpose-built courtroom at Guantanamo as my female colleagues do around the world. I've been called “hysterical” for talking about Ammar's traumatic brain injury at the hands of the CIA. The prosecutors have retorted that I “don't understand” litigation. One male prosecutor commented that I “needed to get back to my children” after a particularly contentious week of hearings. These are standard unimaginative lines that can be dismissed.

Where it gets weird is the “terrorist sympathizer” label. My skin is brown, and I am the only woman of color who stands up at the podium and argues in the purpose-built courtroom at Guantanamo. I wear a hijab when Ammar and the other four defendants are in the courtroom, so observers sometime conclude that I am Muslim. The sister of a 9/11 victim, her

unimaginable pain resurfacing after a day of arguments about the flaws that are holding up the trial, told me, “You’re on *their side*. You’re not American.” Another family member said baldly that the prosecution-appointed minders informed them that I was there to promote “the terrorists.” An observer once asked me, oblivious to both the absurdity and the offense, whether I enjoyed projecting a “Mata Hari” vibe. (When I asked if he knew that Mata Hari’s prosecutor cited her gender as evidence against her, he made a hasty exit. Also, I assure everyone that I am fully clothed in the courtroom.) All of my defense colleagues take fire for representing our clients. But with me, the “joke” is, once again, how I look.

This time, I don’t preempt the comments. The reason is the “purpose-built” courtroom. The courtroom sits surrounded by barbed wire and signs saying “Expeditionary Legal Complex.” It was built deliberately outside of our legal system, with an obscure clause in its statute allowing for evidence derived from Ammar’s black site torture. The purpose for which it was built is to execute Ammar as quickly as possible. The purpose of the taunts and the roadblocks by the government—spying on our meetings, withholding funding, refusing discovery—is to stop us from defending him. In real terms, if we get distracted by preempting the punchlines about us, Ammar will be killed without anyone to fight the corrupt system that is prosecuting him. We’re not in Ohio anymore, Toto.

It is possible to be a great defense lawyer without being very close to your client, but not at Guantanamo. Because these men were so dehumanized, they trust almost no one. They live isolated, away from press and observers and family, in a secret camp in Cuba. The first thing we do, if they’ll let us, is get to know them. Learn what their childhoods were like, how many siblings they have. If they like dates from Kuwait or from Dubai better, if there is a special dish their mother makes during Ramadan. Whether they ever played cricket or soccer or watched Bollywood films, which are ubiquitous in the Middle East. How they modify the prison meals with yogurt, mint, garlic, or hot sauce to make them palatable. Only after we reconstruct their personhoods can we defend them in a court designed to reduce them to one-dimensional monsters.

During every interaction, we have to try to avoid retriggering their trauma. Certain music played at the black sites rewired Ammar’s brain such that he feels he is going to be killed when he hears it. Another prisoner is reduced to panic whenever he is transported in a blacked-out van—which is every time he goes to a legal meeting or medical appointment. One of the tortures visited on these men was sexual humiliation by female interrogators and guards. Sexual humiliation is cruel, inhuman, and degrading treatment for any person, but takes on another dimension with Muslim men because of

the specific tenets of their religion. To eliminate the trigger for that humiliation, I wear a hijab in the courtroom.

I am not naturally comfortable in a hijab. I don't really like putting anything on my head (wearing even a fascinator for Ascot was a pain). I have to pin it securely in place to make sure it doesn't fall off when I speak at the podium, because I tend to use my hands a lot in describing the government's failures to abide by any sort of fair trial standards. It gets warm under that hijab in the 100-degree Guantanamo heat, on top of wearing the required pantsuit. Some of the other women in the courtroom choose to wear full abayas, which would feel too physically restrictive for me. I am not Muslim and sometimes feel self-conscious about adopting, for practical purposes, a custom that holds religious and cultural meaning for many women around the world. But if a hijab can (and does) allow that trauma trigger to relax enough to let me do my job in that courtroom, then it is fully worth it. And ironically, just that little bit of "otherizing" visited upon me and my colleagues by American observers of our hijabs or abayas, allows me to better understand our country's use of Guantanamo as a massive experiment in dehumanization.

Even more ironically, I receive more respect and consideration from Ammar and my previous clients, as their American female attorney, than from my prosecution colleagues. No detainee has ever refused to meet with me because I am a woman. When I talk about Ammar's diagnosed traumatic brain injury, they call it "honest," not "hysterical." When I was in the depths of a fight with the State Department to negotiate conditions of repatriation for a client, he called me his "tiger lawyer" after the character in *Kung Fu Panda* (one of the Department of Defense-approved movies at Camp 6²). During my pregnancy through half of 2018 while attending hearings at Guantanamo, I received well-wishes from Camp 7,³ combined with questions about when I'd be back after the baby's birth. Drinking ginger tea made for me by Ammar to combat my nausea so that I'd be recovered in time for oral arguments, I promised that I'd be back, and I was. It turns out that if you offer respect and humanity to people, it comes back tenfold.

² Camp 6 is the facility for detainees considered to be "low value." Detainees in Camp 6 were almost all captured in Afghanistan post-9/11, and most were cleared for release by the Bush and Obama administrations. Camp 6 detainees have traditionally had slightly more access to communal recreation and entertainment items (movies and books) than detainees in any other facilities at Guantanamo.

³ Camp 7 is the facility for detainees deemed to be "high value." The detainees in Camp 7 were all held by the CIA in black sites around the world for three or four years before being brought to Department of Defense custody in September 2006. Until 2017, the detainees at Camp 7 were held in near-solitary confinement. All of the defendants in the 9/11 case are held at Camp 7.

CONCLUSION

My path has diverged greatly from that of my inspiration, Patricia Sellers. Instead of international courts, I cite the Convention Against Torture, the International Covenant on Civil and Political Rights, and the Geneva Conventions in an illegal military commission in Cuba. I chose defense rather than prosecution, but I tried to follow her example as a human rights defender, whatever the job title. I don't question the patriotism of my work; as Judge Tatel said recently in a D.C. Circuit decision excoriating the government for its handling of the *Nashiri* case at Guantanamo: "[C]riminal justice is a shared responsibility," among prosecution, defense, and judiciary.⁴ Without a strong defense bar, justice crumbles, and particularly at Guantanamo.

Ms. Sellers was once asked in an interview how important the *Akayesu* case was in international legal history, and she could not emphasize enough how progressive the decision had been. I feel the same way about the 9/11 case,⁵ for the opposite reason: international legal history will record lessons of the injustices we perpetrated. The Guantanamo Bay military commissions have allowed the charging of *ex post facto* "war crimes," insisted on the existence of a "war" extending back to 1996 to cover jurisdiction over all of the detainees, hidden the most important evidence of the defendants' torture, and then enforced a governing statute that allows the use of torture-acquired evidence. I play a small part in spotlighting these gross legal violations through litigation and press and Twitter. And someday, the public will understand why we fought our own government so hard in the 9/11 case, why we spent months and years of our lives in a forgotten corner of Cuba—and why we wear the hijabs.

⁴ *In re Abd Al-Rahim Hussein Muhammed Al-Nashiri*, 921 F.3d 224, 239 (D.C. Cir. 2019).

⁵ *United States v. Khalid Sheikh Mohammad, Walid Muhammad Salih Mubarak Bin Attash, Ramzi bin al Shibh, Ali Abdul-Aziz Ali, and Mustafa Ahmed Adam al Hawsawi*. "Ammar al Baluchi" is Ali Abdul-Aziz Ali's family name.