

# The Ivory Tower at Ground Zero: Conflict and Convergence in Legal Education's Responses to Terrorism

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If timidity in the face of government overreaching is the academy's overarching historical narrative,<sup>1</sup> responses to September 11 broke the mold. In what I will call the first generation of Guantánamo issues, members of the legal academy mounted a vigorous campaign against the unilateralism of Bush Administration policies.<sup>2</sup> However, the landscape has changed in Guantánamo's second generation, which started with the Supreme Court's landmark decision in *Boumediene v. Bush*,<sup>3</sup> affirming detainees' access to habeas corpus, and continued with the election of Barack Obama. Second generation Guantánamo issues are murkier, without the clarion calls that marked first generation fights. This Article identifies points of substantive and methodological convergence<sup>4</sup> in the wake of *Boumediene* and President Obama's election. It then addresses the risks in the latter form of convergence.

Substantive points of convergence that have emerged include a consensus on the lawfulness of detention of suspected terrorists subject to judicial review<sup>5</sup> and a more fragile meeting of the minds on the salutary role of constraints generally and international law in particular. However, the promise of

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1. See Sarah H. Ludington, *The Dogs that Did Not Bark: The Silence of the Legal Academy During World War II*, 60 *J. Legal Educ.* 396 (2010) (discussing the relative quiescence of legal scholars during the Japanese-American internment and other threats to civil liberties).
2. For a discussion of those policies, see Peter Margulies, *Law's Detour: Justice Displaced in the Bush Administration* (NYU Press 2010). An important early example of opposition to those policies is Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 *Yale L.J.* 1259 (2002) (arguing that President Bush lacked authority to unilaterally establish military commissions).
3. 553 U.S. 723 (2008).
4. For a discussion of convergence in paradigms for the arrest, detention, and adjudication of suspected terrorists, see Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 *Stan. L. Rev.* 1079 (2008).
5. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

substantive consensus is marred by the peril of a methodological convergence that I call dominant doctrinalism. Too often, law school pedagogy and scholarship squint through the lens of doctrine, inattentive to the way that law works in practice.<sup>6</sup> Novel doctrinal developments, such as the president's power to detain United States citizens or persons apprehended in the United States, get disproportionate attention in casebooks and scholarship. In contrast, developments such as an expansion in criminal and immigration law enforcement that build on settled doctrine get short shrift, even though they have equal or greater real-world consequences. Consumers of pedagogy and scholarship are ill-equipped to make informed assessments or push for necessary changes. If legal academia is to respond adequately to second generation Guantánamo issues, as well as issues raised by any future attacks, it must transcend the fascination with doctrine displayed by both left and right, and bolster its commitment to understanding and changing how law works "on the ground."

To combat dominant doctrinalism and promote positive change, this Article asks for greater attention in three areas. First, law schools should do even more to promote clinical and other courses that give students first-hand experience in advocacy for vulnerable and sometimes unpopular clients, including the need for affirming their clients' humanity and expanding the venue of advocacy into the court of public opinion.<sup>7</sup> Clinical students also often discover with their clients that legal rights matter, although chastened veterans of rights battles like Joe Margulies and Hope Metcalf are correct that victories are provisional and sometimes pyrrhic.<sup>8</sup> Second, legal scholarship and education should encourage the study of social phenomena like path-dependence—the notion that past choices frame current advocacy strategies, so that lawyers recommending an option must consider the consequences of push-back from that choice. Aggressive Bush Administration lawyers unduly discounted risks flagged by more reflective colleagues on the consequences of push-back from the courts. Similarly, both the new Obama Administration and advocates trying to cope with Guantánamo's post-*Boumediene* second generation failed to gauge the probability of push-back from the administration's early announcement of plans to close the facility within a year. In each case,

6. This is, of course, not a new critique; on the interaction of socio-political and legal developments from a Critical Legal Studies perspective, see Robert W. Gordon, *Critical Legal Histories*, 36 *Stan. L. Rev.* 57, 103–14 (1984). Judges have weighed in as well; see Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 *Mich. L. Rev.* 34 (1992).
7. On the importance of affirming a client's humanity, see Stephen Ellmann, *Empathy and Approval*, 43 *Hastings L.J.* 991 (1992). For a discussion of mobilizing broader audiences in advocacy for corporate clients, see Michele DeStefano Beardslee, *Advocacy in the Court of Public Opinion, Installment One: Broadening the Role of Corporate Attorneys*, 22 *Geo. J. Legal Ethics* 1259 (2009).
8. See Joseph Margulies & Hope Metcalf, *Terrorizing Academia*, 60 *J. Legal Educ.* 433 (2010).

unexpected but reasonably foreseeable reactions skewed the implementation of legal and policy choices. Students should learn more about these dynamics before they enter the legal arena.

Third, teachers need to focus more on ways in which bureaucratic structures affect policy choices. For example, terrorism fears gave conservative politicians like John Ashcroft an opportunity to decimate asylum adjudication, harming many victims of persecution who have been unable to press meritorious claims for refugee status and other forms of relief. Similarly, creation of the Department of Homeland Security turned a vital governmental function like disaster relief into a bureaucratic orphan, thereby paving the way for the inadequate response to Hurricane Katrina. Students need more guidance on what to look for when structure shapes substance.

The Article is in three parts. Part I discusses substantive convergences on issues like detention and international law. Part II analyzes the problems posed by dominant doctrinalism, including the neglect of important criminal law issues in counterterrorism. Part III outlines suggestions that would temper doctrinalism's impact by encouraging engagement with the realities of legal practice.

### I. Substantive Convergence

While reports of an overarching consensus on counterterrorism law are premature, marked convergence has emerged, particularly as the Supreme Court declared off-limits the stark uses of presidential power that the Bush Administration deployed in the immediate aftermath of the September 11 attacks. Convergence is evident on the specific issue of detention (with appropriate judicial review). Hints of a more provisional consensus have also emerged on the desirability of legal constraints on the president and the nature of international law. I consider each in turn.

#### *A. Detention: Common Ground and a Residue of Disagreement*

The academy started out solidly arrayed against the Bush Administration's highhanded assertion of power to indefinitely detain suspected terrorists without judicial review.<sup>9</sup> Some academics argued that such detention was categorically inappropriate.<sup>10</sup> Others suggested that the administration's flaws

9. For a critique of the former administration's position, see Margulies, *Law's Detour*, *supra* note 2, at 16–17. Scholarly supporters of the administration's positions, some of whom worked for the administration at one time or another, included Eric A. Posner & Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* 275 (Oxford Univ. Press 2007) (arguing that legal constraints on national security decisionmaking are usually counterproductive and institutionally flawed); John Yoo, *War by Other Means: An Insider's Account of the War on Terror* (Atlantic Monthly Press 2006) (arguing for virtually unfettered presidential power).
10. See Margulies and Metcalf, *supra* note 8 (implicitly taking this position, although not defending it); see also Gabor Rona, *An Appraisal of U.S. Practice Relating to "Enemy Combatants,"* 10 *Y.B. Int'l Humanitarian L.* 232 (2009) (arguing that law of war prohibits most detention of individuals associated with Taliban or Al Qaeda).

concerned the absence of judicial review, and the failure to consult Congress.<sup>11</sup> In significant ways, the Supreme Court settled much of the debate, requiring judicial review<sup>12</sup> and congressional buy-in.<sup>13</sup> After the Supreme Court's decisions and the election of President Obama, a common-sense consensus has emerged.

Progressive scholars, including Georgetown's David Cole, have acknowledged that the United States has authority to detain members of Al Qaeda and the Taliban, subject to judicial review.<sup>14</sup> Cole endorsed a narrower scope for the detention power than others suggest. However, the underlying basis for the power is accepted by a significant number of scholars across the spectrum. For progressives, this is in part a pragmatic calculation: Cole has argued that a categorical or absolutist argument against detention authority would "have the perverse effect of encouraging states to use lethal force, or to seek to act outside the law without even the safeguards that accompany wartime detention."<sup>15</sup> However, Cole has also endorsed detention as a necessary step for effective counterterrorism policy, acknowledging that barring detention

11. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 *Harv. L. Rev.* 941 (2008) (offering defense of heightened role for Congress and the courts); Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, in *The Constitution in Wartime: Beyond Alarmism and Complacency* 161 (Duke Univ. Press Books 2005).
12. *See Boumediene v. Bush*, 553 U.S. 723 (2008) (striking down restrictions on habeas corpus). For commentary on the case, see Baher Azmy, *Executive Detention, Boumediene, and the New Common Law of Habeas*, 95 *Iowa L. Rev.* 445 (2010) (analyzing the decision's role in safeguarding the separation of powers); David Cole, *Rights Over Borders: Transnational Constitutionalism and Guantánamo Bay*, 2008 *Cato Sup. Ct. Rev.* 47 (decision helps restore rule of law); Jared A. Goldstein, *Habeas Without Rights*, 2007 *Wis. L. Rev.* 1165 (viewing habeas as check on political branches); Joseph Landau, *Muscular Procedure: Conditional Deference in the Executive Detention Cases*, 84 *Wash. L. Rev.* 661 (2009) (procedural rulings in terrorism cases guide interaction between the branches); *but see* Eric A. Posner, *International Law and the War on Terror: Boumediene and the Uncertain March of Judicial Cosmopolitanism*, 2008 *Cato Sup. Ct. Rev.* 23, 39-46 (courts err in not extending greater deference to executive decisions about national security and foreign affairs).
13. *See Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (holding that president lacked authority to unilaterally establish military commissions that lacked safeguards required by Congress); *cf.* Stephen I. Vladeck, *Foreign Affairs Originalism in Youngstown's Shadow*, 53 *St. Louis U. L. J.* 29, 35-37 (2008) (discussing relationship between Hamdan and historical understanding of separation of powers).
14. *See* David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 *Cal. L. Rev.* 693, 732-40 (2009). President Obama has also endorsed the detention subject to judicial review as one of three approaches to incapacitation and adjudication of cases involving suspected terrorists. *See* Remarks by President Barack Obama, *Protecting Our Security and Our Values*, May 21, 2009, *available at* [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-On-National-Security-5-21-09/](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/) (discussing relationship between criminal prosecution, military commissions, and detention under laws of war).
15. *See* Cole, *supra* note 14, at 695-96.

and requiring the government to charge suspected terrorists in the criminal justice system would “inappropriately tie the United States’ hands.”<sup>16</sup>

As Cole suggests,<sup>17</sup> if charge or release were the only choices and officials could not opt for detention, the high burden of proof in criminal cases would allow an Al Qaeda fighter to game the system and return to the fight. A soldier for one of the Axis powers during World War II was entitled to release only at the war’s conclusion or the advent of peace. However, an individual whom the government could show by clear and convincing evidence was an Al Qaeda fighter would be entitled to release, since the government could not prove beyond a reasonable doubt that he had committed a crime. This asymmetry in results would give terrorists an incentive to recruit, while limiting counterterrorism strategies.

Empirical investigation supports Cole’s claim that wholesale release of detainees would pose security risks. Independent studies published in 2008 revealed that a significant number of detainees boasted of their prior involvement with the Taliban and Al Qaeda.<sup>18</sup> Court decisions since then have buttressed this point with specific facts about detainees’ ties.<sup>19</sup>

16. *Id.* at 727. For discussion of relevant legal standards, see *Hamlily v. Obama*, 616 F. Supp.2d 63, 74-77 (D.D.C. 2009); *cf.* Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 *Am. J. Int’l L.* 48, 70-71 (2009) (suggesting that in certain contexts detention of civilians linked with violent groups such as Al Qaeda and the Taliban complies with law of war, while specifying that compliance hinges on humane treatment).
17. *See* Cole, *supra* note 14, at 731-32.
18. *See* Benjamin Wittes, *Law and the Long War: The Future of Justice in the Age of Terror* 84-92 (Penguin 2009) (noting that many detainees acknowledged working on behalf of Al Qaeda and the Taliban, including Walid Bin ‘Attash, who told an administrative tribunal that he had “purchas[ed] explosives” for the 1998 Kenyan and Tanzanian embassy bombings and the attack on the U.S.S. Cole); *see also* William Glaberson & Margot Williams, *Next President Will Face Test on Detainees*, *N.Y. Times*, Nov. 3, 2008, at A1 (providing comprehensive survey of detainees).
19. *See* *Fahad v. U.S.*, 611 F.3d 8 (D.C. Cir. June 30, 2010) (denying habeas petition, citing evidence that detainee had trained at a Taliban camp, obtained an AK-47 rifle, and participated in an extended march with armed men); *Al-Adahi, et al. v. Obama*, 698 F.Supp.2d 48 (D.D.C. Mar. 10, 2010) (denying petition of Fami Salem Al-Assani, who trained at Al Qaeda’s main Afghanistan camp and accompanied Osama bin Laden at Tora Bora in December, 2001). For a balanced account of habeas litigation that criticizes the government for digging in its heels on some cases but also argues that decisions in higher courts will vindicate the government’s positions in many detainee matters, see Benjamin Wittes, *Why I Don’t Like the “Scorecard,” Lawfare: Hard Nat’l Security Choices*, Sept. 2010, *available at* <http://www.lawfareblog.com/2010/09/why-i-dont-like-the-scorecard/>. While the present administration has approached detention cases more reasonably than Justice Department officials from the prior administration, questions linger over the moratorium on release of Yemeni detainees whom the government’s own task force has cleared for release. *See* Charlie Savage, *Ruling Raises Doubts on Policy on Transfer Of Yemenis*, *N.Y. Times*, July 9, 2010, at A11.

Dismissing this convergence as backsliding or opacity does not do Cole justice. He has shown continued vigor in advocating for those wrongfully detained.<sup>20</sup> However, Cole has also recognized that detention in particular cases, accompanied by judicial review, may be the only way to plug “unprotected spot[s] in the Nation’s armor.”<sup>21</sup>

This convergence is far from complete. Substantial disagreement exists on whether courts should develop detention standards through habeas proceedings<sup>22</sup> or whether a statute is necessary to guide courts’ discretion.<sup>23</sup>

20. See David Cole, *What to Do About Guantánamo?*, N.Y. Rev. Books, May 28, 2010, *available at* <http://www.nybooks.com/articles/archives/2010/oct/14/what-do-about-Guantánamo/>. Cole has also served as counsel for Maher Arar, who sought damages for his alleged extraordinary rendition to Syria, see *Arar v. Ashcroft*, 585 F.3d 559, 580 (2d Cir. 2009) (en banc), cert. denied, 130 S.Ct. 3409 (2010) (holding that national security and foreign affairs concerns required precluding damages action), and for the Humanitarian Law Project, which argued in the Supreme Court that a federal statute violated its First Amendment rights. See *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2726 (2010) (upholding statute that bars providing material support such as funding or training to foreign terrorist organizations) [hereinafter *HLP v. Holder*]; see also *infra*, notes 39–48 and accompanying text (discussing material support laws). The author served as co-counsel on an amicus brief supporting the constitutionality of the statute challenged in *HLP v. Holder*, contingent on interpreting the statute to respect First Amendment rights. See Brief for Amicus Curiae Scholars, Attorneys, and Former Public Officials with Experience in Terrorism-Related Issues, *available at* <http://ccjjustice.org/holder-v-humanitarian-law-project> (arguing that court should read statute as including exceptions for lawyers providing advice on compliance with federal law, journalists, scholars, and human rights groups).
21. See *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (citation omitted).
22. See Human Rights First & The Constitution Project, *Habeas Works: Federal Courts’ Proven Capacity To Handle Guantánamo Cases* (June 2010), *available at* <http://www.humanrightsfirst.org/pdf/Habeas-Works-final-web.pdf> (arguing that courts are competent to develop workable standards); cf. Steve Vladeck, *The Case Against the Graham Bill*, *Prawfsblawg*, Sept. 2010, *available at* <http://prawfsblawg.blogs.com/prawfsblawg/2010/09/the-case-against-the-graham-bill.html> (arguing that statute would lead to undue rigidity and unfairness, and also encourage new detentions, including detention of United States persons on American soil).
23. See Benjamin Wittes, Robert Chesney & Rabea Benhalim, *The Emerging Law of Detention: The Guantánamo Cases as Lawmaking*, *Governance Studies at Brookings*, Jan. 22, 2010, *available at* <http://ssrn.com/abstract=1540601> (criticizing lack of uniformity in district court habeas decisions); Robert Chesney & Benjamin Wittes, *Resolving Ambiguities? Yes. Dramatically Expanding Existing Detention Authority? No.*, *Lawfare: Hard Nat’l Security Choices*, Sept. 2010, *available at* <http://www.lawfareblog.com/2010/09/resolving-ambiguities-yes-dramatically-expanding-existing-detention-authority-no/#more-406> (defending bill introduced by Sen. Lindsey Graham (R-SC) to codify habeas determinations); Walter E. Kuhn, *The Terrorist Detention Review Reform Act: Detention Policy and Political Reality*, *Seton Hall Leg. J.* (forthcoming 2010), draft *available at* <http://ssrn.com/abstract=1683636>; cf. Matthew C. Waxman, *Guantánamo, Habeas Corpus, and Standards of Proof: Viewing the Law Through Multiple Lenses*, 42 *Case W. Res. J. Int’l L.* 245, 258–63 (2009) (analyzing possible standards).



Scholars also disagree on the appropriate scope of the detention power.<sup>24</sup> However, these differences play out against a backdrop of consensus that some form of detention is both necessary and legitimate, as long as judicial review is available to uphold due process and sort out false positives.<sup>25</sup>

### B. Convergence, Constraint, and Rights

The emerging consensus on detention, which may seem at first blush like a nod to the right, partners with a consensus that originated with the left—the need for constraints. Scholars with a progressive bent have pointed out that constraints on the executive’s detention authority have a first-order purpose: They limit the ability of the executive branch to manipulate factors like geography, which officials in the Bush Administration invested with talismanic significance when they established Guantánamo.<sup>26</sup> However, constraints have a second-order purpose as well that often appeals to conservatives with a prudential bent. By signaling that government power is not unbounded, constraints encourage a wise executive to ration the ways in which she elects to push the envelope. Constrained in this manner, the executive’s pick of occasions for the exercise of power is more likely to trigger deference from other stakeholders, including the courts. In this vein, Jack Goldsmith has argued that the Bush Administration failed to obtain lasting approval for its policies because it viewed consultation as inconvenient or unnecessary.<sup>27</sup> For both liberals and nuanced conservatives, constraints are both necessary and desirable because they temper the pursuit of short-term goals with consideration of long-term values and interests.

24. Compare Cole, *supra* note 12 (arguing for limited scope focusing on Al Qaeda higher-ups and active fighters), with Wittes, Chesney & Benhalim, *supra* note 23 (arguing for wider scope of detention authority).
25. Some commentators have also urged creation of a national security court. Compare Glenn Sulmasy, *The National Security Court System: A Natural Evolution of Justice in an Age of Terror* (Oxford Univ. Press 2009) (recommending creation of national security court); Kevin E. Lunday & Harvey Rishikof, *Due Process is a Strategic Choice: Legitimacy and the Establishment of an Article III National Security Court*, 39 Cal. W. Int’l L.J. 87 (2008) (same); with Human Rights First & The Constitution Project, *Habeas Works*, *supra* note 22 (arguing that federal courts’ strong performance with habeas cases obviates need for other forums); Richard B. Zabel & James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts* (Human Rights First 2008), available at <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf> (concluding that federal courts can try suspected terrorists efficiently); Hearing of the Terrorism and Homeland Security Subcommittee of the Senate Judiciary Committee, *Prosecuting Terrorists: Civilian and Military Trials for Guantánamo and Beyond*, Fed. News Service, July 28, 2009 (hereinafter *Subcommittee Hearing*) (remarks of Sen. Whitehouse, D-R.I.) (same).
26. See Azmy, *supra* note 12, at 467 (warning against executive manipulation of bright-line rules); see also *Boumediene v. Bush*, 553 U.S. 723, 765 (2008) (protecting access to habeas corpus so that political branches could not “switch the Constitution on and off at will”).
27. Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration 206–07* (W.W. Norton & Co. 2007).

*C. Convergence and International Law*

One constraint that has attracted a nascent if still provisional consensus is the role of international law. Pitched intellectual battles occurred on this ground in the early years of the Bush Administration. However, the couple of years have seen softening in positions on the left and right.

Before the Obama Administration, debates on international law usually entailed two polar opposite stances. One perspective, associated with Bush Administration officials, viewed particular sources of international law, such as customary international law, as being an illegitimate and incoherent source of rules. Jack Goldsmith and his co-author, Eric Posner, developed this view in a series of articles, and refined it for a 2005 book.<sup>28</sup> Goldsmith also wrote disparagingly about the “human rights industry.”<sup>29</sup> In contrast, pro-international law scholars extolled customary international law and international law. When a succession of bipartisan American administrations declined to give international law the precise effect it had elsewhere, seeking to adapt it to American contexts, critics often denounced this effort as American “exceptionalism”—a failure to live by rules that the rest of the world accepts.<sup>30</sup>

In the Obama era, however, convergence has smoothed these jagged edges. Goldsmith still has severe doubts about CIL, but seems more open to the position that nations develop customary norms to further long-term interests in predictability and cooperation, even when those norms impair short-term interests.<sup>31</sup> If this is true, customary international norms may serve a purpose akin to domestic constitutional constraints, curbing what Hamilton described as the impulsive “humors” of the people and their representatives.<sup>32</sup> By the same token, Harold Koh, who now serves as the legal adviser to the

28. See Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law* (Oxford Univ. Press 2006); *but see* David M. Golove, *Leaving Customary International Law Where It Is: Goldsmith and Posner’s The Limits of International Law*, 34 *Ga. J. Int’l & Comp. L.* 333, 364–70 (2006) (criticizing Goldsmith and Posner’s views as reductive).
29. See Goldsmith, *The Terror Presidency*, *supra* note 27, at 59. Goldsmith’s view on this point clashed with his view in the same book, that constraints can be healthy, disciplining the executive to pick her shots. *Id.* at 206–07. For analysis of Goldsmith’s complex views, see Peter Margulies, *True Believers at Law: National Security Agendas, The Regulation of Lawyers, and the Separation of Powers*, 68 *Md. L. Rev.* 1 (2008); *cf.* Stephen Holmes, *The Spider’s Web: How Government Lawbreakers Routinely Elude the Law*, in *When Governments Break the Law: The Rule of Law and the Prosecution of the Bush Administration* 121, 133–35 (Austin Sarat & Nasser Hussain eds., NYU Press 2010) (citing Goldsmith’s skepticism about human rights advocacy, but not acknowledging countervailing praise of constraints in Goldsmith’s book).
30. *Cf.* Harold Hongju Koh, *On American Exceptionalism*, 55 *Stan. L. Rev.* 1479, 1480–95 (2003) (discussing positive and negative elements of American exceptionalism).
31. See Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 *Harv. L. Rev.* 1791, 1826–28, 1835 (2009) (discussing institutionalist version of international and constitutional law as coordinated games in which parties accept fewer short-term benefits to realize gains over time).
32. See *The Federalist* no. 78 (Alexander Hamilton), at 470 (Clinton Rossiter ed., New American Library 1961).



State Department, has articulated a more flexible view of international law, acknowledging that events such as 9/11 can lead to changes in norms such as the criteria for national self-defense. For example, they can justify actions such as drone attacks in Pakistan against Al Qaeda and the Taliban, as long as those strikes comport with basic guarantees such as avoiding disproportionate harm to civilians.<sup>33</sup> One rationale for the drone strikes may be the difficulty of new detentions since law has come to Guantánamo. In sum, for abstract and instrumental reasons, subtle convergence may be carrying the day on the international law front.<sup>34</sup>

## II. An Unwelcome Convergence: Dominant Doctrinalism

While the substantive convergence described above has been a welcome trend, the same cannot be said about the triumph of what I call dominant doctrinalism. Legal scholarship and pedagogy after September 11 focused on the doctrinal implications of the Bush Administration's unilateral acts, rather than on other measures which affected just as many if not more individuals. Doctrinalism—a focus on legal doctrine to the exclusion of other factors such as social, economic, and political factors—has been a bane of law since the hey-day of formalism.<sup>35</sup> To show its influence in the post-9/11 climate, I first

33. See Harold Hongju Koh, U.S. Dept. of State, The Obama Administration and International Law, Annual Meeting of the Am. Soc'y of Int'l L., March 25, 2010, *available at* <http://www.state.gov/s/1/releases/remarks/139119.htm>.
34. Debate has also narrowed on the question of accountability for Bush Administration policies, including coercive interrogation. The Justice Department decided not to seek professional discipline of lawyers who drafted opinions authorizing such tactics. See David Margolis, Assoc. Deputy Attorney General, Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists, Jan. 5, 2010, *available at* <http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf>. Some scholars disagree with the Justice Department's justification for declining to seek sanctions. See David Cole, *They Did Authorize Torture, But...*, N.Y. Rev. Bks, Mar. 10, 2009, *available at* <http://www.nybooks.com/blogs/nyrblog/2010/mar/10/they-did-authorize-torture-but/> (arguing that DOJ Final Report did not adequately address flaws in lawyers' opinions); David Luban, David Margolis is Wrong: The Justice Department's ethics investigation shouldn't leave John Yoo and Jay Bybee home free, *Slate*, Feb. 22, 2010, *available at* <http://www.slate.com/id/2245531/> (same). Others viewed the decision as appropriate, while agreeing that the lawyers' advice was myopic, at best. See Peter Margulies, *Changing of the Guard: The Obama Administration, National Security, and the Ethics of Legal Transitions* (unpublished manuscript), draft *available at* <http://ssrn.com/abstract=1673989>. However, few if any members of the legal academy argued for resumption of these coercive measures.
35. Decades ago, the legal realists discussed the normative and descriptive challenges with a formalist approach to legal doctrine. See Karl Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed, 3 *Vand. L. Rev.* 395 (1950) (arguing that equally respected canons of statutory interpretation often led to opposite results). For an argument that some supposedly formalist judges actually considered policy, see Brian Z. Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* 67-90 (Princeton Univ. Press 2009).

consider the post-9/11 neglect of criminal laws governing terrorism. I then briefly examine the quality of attention paid to issuance of National Security Letters (NSLs), compared to the scholarly attention devoted to the Bush Administration's Terrorist Surveillance Program (TSP).

*A. Pedagogy Neglected: The Strange Case of the Material Support Statutes*

The legal academy has largely failed to address the scope and operation of criminal statutes regarding terrorism, including a matched pair of federal statutes that bar "material support" of terrorist activity<sup>36</sup> and designated foreign terrorist organizations.<sup>37</sup> The government has prosecuted scores of defendants—the vast majority of them Muslim and/or Arab—under these statutes, while seeking to detain only three United States persons.<sup>38</sup> However, this development has received only modest scholarly attention.

The government has used § 2339B, which prohibits material support specifically intended to facilitate terrorist activity, in many of these cases. Prosecutions often rely on informants who act as entrepreneurs serving a personal agenda. In exchange for substantial cash rewards or consideration regarding their own legal difficulties, informants promise prosecutors that they will deliver a package of defendants.<sup>39</sup> In a number of cases, informants have had to coax and cajole their targets, who seemed distracted by ordinary matters like exercise and jobs.<sup>40</sup> Some of these cases had to be brought despite doubts

36. See 18 U.S.C. § 2339A (2010).

37. See 18 U.S.C. § 2339B (2010).

38. This group includes Ali Saleh al-Marri, a foreign national arrested in the United States, with whom the Obama Administration's Justice Department, under Attorney General Eric Holder, concluded a plea agreement in 2009. See John Schwartz, Path to Justice, but Bumpy, for Terrorists, N.Y. Times, May 2, 2009, at A9. It also includes United States citizen Jose Padilla, who was arrested in Chicago, and eventually convicted of violating 18 U.S.C. § 2339B after being held as an enemy combatant for over three-and-a-half years. See Margulies, Law's Detour, *supra* note 2, at 112-13. The third detainee was Yaser Esam Hamdi, a presumptive United States citizen who had lived most of his life abroad. Hamdi was captured in Afghanistan, and released in 2004 after the Supreme Court held that that the government needed to comply with due process for his continued detention. See Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Joel Brinkley & Eric Lichtblau, U.S. Releases Saudi-American It Had Captured in Afghanistan, N.Y. Times, Oct. 11, 2004, at A15.

39. Cf. U.S. v. Hayat, 2007 U.S. Dist. Lexis 40157 (E.D. Ca. May 17, 2007) (denying motion for a new trial; quoting juror who was convinced after long deliberations that defendant had provided material support to terrorism and lied to federal agents, but who acknowledged that "future cases" brought under the counterterrorism statutes could result in sending people to prison "who never committed the crime"). The case involved an informant who made persistent approaches to Hayat to travel to Afghanistan, and a confession obtained after fifteen hours of interrogation. See Robert M. Chesney, Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism, 80 S. Cal. L. Rev. 425, 488-89 (2007).

40. See Margulies, Law's Detour, *supra* note 2, at 106 (discussing the case of Bronx bassist Tarik Shah, who eventually pleaded guilty to a violation of § 2339B); see also *id.* at 117 (discussing Miami "Seas of David" case, in which an informant working with the government and promising free merchandise persuaded a religious sect of Haitian Americans to turn away

about their provenance, particularly where targets had special knowledge of a particular area, as in the JFK bombing plot, or had previously engaged in illegal conduct, such as the Fort Dix conspiracy defendants.<sup>41</sup> However, in other cases, the time-honored fuzziness of conspiracy law allowed prosecutors to charge defendants catalyzed by an informant with crimes based on proof of an agreement to engage in illegal activity, and little more.

While there is a rich literature on prosecutorial decisionmaking<sup>42</sup> and on informants,<sup>43</sup> few writers have focused on the decisions made by prosecutors in terrorism cases.<sup>44</sup> Most other scholarship, and, I fear, teaching has been sketchy. Few articles discuss in depth the interaction of detention of alleged terrorists and criminal liability.<sup>45</sup> The disjuncture stems in part from the awkward fit between this aspect of criminal law and established doctrinal fields

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from internecine squabbling just long enough to collect data on South Florida and Chicago landmarks, including the Sears Tower). I do not suggest that prosecutors should stop using such statutes, which often provide the only way to ferret out certain types of dangerous conduct. However, scholars should engage further with the difficult trade-offs such cases present. For example, in a recent case involving a conspiracy to place bombs at Bronx synagogues, a government informant strongly suggested that the defendants would receive substantial amounts of cash if they followed through on the plot, and that the informant's life would be in danger if the defendants refused. *See* Kareem Fahim, *Informant in Synagogue Plot Is Accused of Bullying Suspect*, N.Y. Times, Sept. 22, 2010, at A20. While the judge expressed doubts about portions of the informant's testimony incriminating the defendants, the defendants did not dispute that they were arrested after planting devices outside the temples which they believed to be explosives (the devices, supplied by the informant, were actually fake). *Id.* The defendants' entrapment defense ultimately failed to persuade the jury. *See* Kareem Fahim, *4 Convicted of Attempting to Blow Up 2 Synagogues*, N.Y. Times, Oct. 19, 2010, at A21.

41. *See* Margulies, *Law's Detour*, *supra* note 2, at 122.
42. *See, e.g.*, Fred Z. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. Rev. 1 (2010) (discussing content and implementation of rules to encourage prosecutors to prevent wrongful convictions).
43. *See* Ellen Yaroshesky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 Fordham L. Rev. 917 (1999) (noting incentives for dishonesty among cooperators); *but see* Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 Vand. L. Rev. 1, 33-42 (2003) (arguing that cooperation can spur atonement, instead of merely reflecting utilitarian calculus); *cf.* Daniel C. Richman, *Cooperating Clients*, 56 Ohio St. L.J. 69 (1995) (discussing cooperation and legal ethics).
44. For an insightful exception that discusses the discretion the statute gives to prosecutors, see Chesney, *Beyond Conspiracy*, *supra* note 39. Ironically, since Chesney supports statutory codification of habeas standards, see Wittes, *Chesney & Benhalim*, *supra* note 23, Margulies and Metcalf would view him as a conservative. This litmus test illustrates doctrinalism's creeping influence, even among those who purport to reject it.
45. In addition to Chesney, *Beyond Conspiracy*, *supra* note 39, see Norman Abrams, *Anti-Terrorism and Criminal Enforcement* (2d ed., West 2005); Stephen Dycus, et al., *National Security Law 817-38* (4th ed., Aspen Pub. 2007); Benjamin J. Priester, *Who is a "Terrorist"?* Drawing the Line Between Criminal Defendants and Military Enemies, 2008 Utah L. Rev. 1255 (2008); Tung Yin, *Coercion and Terrorism Prosecutions in the Shadow of Military Detention*, 2006 B.Y.U. L. Rev. 1255.

within legal education. Criminal counterterrorism statutes are important to national security law, but less central than issues of separation of powers, the use of force, and detention.<sup>46</sup> They have less salience in constitutional law than executive power, federalism, due process, and equal protection.<sup>47</sup> Similarly, they are less foundational to criminal law than bedrock issues of criminal responsibility.<sup>48</sup> This is not a knock on casebook authors, who face difficult choices on what to cover. Nevertheless, legal education's focus on doctrine shapes those choices in particular ways, which do not always match law's real-world consequences.<sup>49</sup>

*B. Disproportionate Doctrinalism and the Case of the Missing National Security Letters*

Another measure of disproportionate doctrinalism has been the vast attention paid to the Bush Administration's program of warrantless surveillance,<sup>50</sup> as

46. Even in a national security law casebook, other topics receive substantially more attention. See Dycus, et al., *supra* note 45, at 703-58 (detention); 876-906 (military commissions).
47. See Paul Brest, et. al., *Processes of Constitutional Decisionmaking: Cases and Materials* 841-81 (5th ed., Aspen Pub. 2006) (discussing executive power and detention). Issues relating to the material support statutes receive little coverage in this otherwise excellent casebook.
48. See Sanford Kadish, Stephen J. Schulhofer & Carol Steiker, *Criminal Law and Its Processes: Cases and Materials* 602-03 (8th ed., Aspen Pub. 2007) (discussing material support statutes).
49. The issue of interrogation techniques has filtered through the law school curriculum. A casebook on professional responsibility has included useful materials regarding legal advice authorizing coercive interrogation of terror suspects. See Lisa G. Lerman & Philip G. Schrag, *Ethical Problems in the Practice of Law* 302-04 (2d ed., Aspen Pub. 2008) (discussing problem developed by Professor Kathleen Clark of Washington University); cf. Kadish, Schulhofer & Steiker, *supra* note 48, at 814-21 (discussing defense of necessity in cases involving coercive questioning). Legal ethics scholars have analyzed these issues in depth. See David Luban, *The Torture Lawyers of Washington*, in *Legal Ethics and Human Dignity, Cambridge Studies in Philosophy and Law* 162, 176-80, 200-02 (Cambridge Univ. Press 2007); Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 *J. Nat'l Sec. L. & Pol'y* 455 (2005); Stephen Gillers, *Legal Ethics: A Debate*, in *The Torture Debate in America* 236, 237-38 (Karen J. Greenberg ed., Cambridge Univ. Press 2005); Margulies, *True Believers at Law*, *supra* note 29; W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 *Cornell L. Rev.* 67, 80-85 (2005); cf. Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 *Stan. L. Rev.* 1931, 1975-76 (2008) (arguing that flaws in legal advice emerged from ideology, not from kowtowing to client's wishes). Casebooks in constitutional law may devote more space to §2339B after the Supreme Court's decision in *Holder v. Humanitarian Law Project*, 130 *S. Ct.* 2705 (2010), holding that Congress could impose what the majority termed content-based restrictions on speech, such as training in non-violence, performed under the direction and control of a foreign terrorist organization such as Hamas. However, this increased attention only confirms the sway of dominant doctrinalism, since the plaintiffs in this case mounted an as-applied challenge based on their alleged fear that prosecutors would target them if they engaged in this activity. No actual prosecution had ever taken place.
50. See Margulies, *Law's Detour*, *supra* note 2, at 17-19; Eric Lichtblau, *Bush's Law: The Remaking of American Justice* 154-55 (Pantheon Books 2008); Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy* 115-18 (Little, Brown and Co. 2007).

compared with the use of National Security Letters (NSLs) and other forms of statutorily authorized administrative requests for information.<sup>51</sup> The Terrorist Surveillance Program (TSP) was more significant doctrinally, because the Bush Administration acted without statutory authorization.<sup>52</sup> However, there is a strong argument that NSLs led to the retention of more private data by federal authorities.<sup>53</sup> The use of NSLs also led to bad habits in law enforcement which will be difficult to break. For example, officials sometimes used “blanket” NSLs that covered a wide spectrum of information requests not tied to a specific investigation.<sup>54</sup> The Justice Department’s own inspector general rightly condemned this practice.<sup>55</sup> In addition, the FBI failed to document its use of NSLs both internally and in reports to Congress.<sup>56</sup> Moreover, until recently, the law required a recipient of an NSL to keep the contents of the letter confidential, even from the recipient’s lawyer.<sup>57</sup> Recently, the Second Circuit Court of Appeals, after holding the statute unconstitutional because it placed the burden on the recipient of the letter to contest the confidentiality provisions, fashioned a novel remedy that facilitated such challenges.<sup>58</sup> However, few commentators have addressed the use of NSLs, despite their intrusiveness, perhaps because Congress provided for them, and discovering abuses requires a more careful look at law “on the ground,” not just legal doctrine.<sup>59</sup>

51. See 18 U.S.C. § 2709(b)(1), (2) (2010). In the USA PATRIOT Act, Congress broadened the statutory authorization for National Security Letters (NSLs) to allow the FBI to seek information “relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities.” *Id.* Prior to September 11, the statute had required “specific and articulable facts giving reasons to believe that the person or entity to whom the information sought pertains is a foreign power or an agent of a foreign power.” See United States Dep’t of Justice, Office of the Inspector General, A Review of the Federal Bureau of Investigation’s Use of National Security Letters, March 2007, at 23 (hereinafter *OIG NSL Report*), available at <http://www.usdoj.gov/oig/special/so703b/final.pdf>.
52. The TSP evaded the constraints Congress had enacted as part of the Foreign Intelligence Surveillance Act (FISA). See 50 U.S.C. § 1801-45 (2010). See Edward T. Swaine, *The Political Economy of Youngstown*, 83 S. Cal. L. Rev. 263, 316-24 (2010).
53. See Margulies, *Law’s Detour*, *supra* note 2, at 20.
54. *Id.* at 21.
55. See *OIG NSL Report*, *supra* note 51, at 72-90.
56. See Margulies, *Law’s Detour*, *supra* note 2, at 170 n.87.
57. See Samuel J. Rascoff, *Domesticating Intelligence*, 83 S. Cal. L. Rev. 575, 643-44 (2010).
58. See *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008).
59. For selected exceptions, see Dycus, et al., *supra* note 45, at 557-81; see also Orin Kerr, *Updating the Foreign Intelligence Surveillance Act*, 75 U. Chi. L. Rev. 225, 232 (2008) (mentioning Congress’ enactment of authority for NSLs); Paul M. Schwartz, *Reviving Telecommunications Surveillance Law*, 75 U. Chi. L. Rev. 287, 301-02 (2008) (comparing NSLs with FISA regime).

### III. Challenging Doctrinalism's Empire

Legal educators should strive to break doctrinalism's grip. The task will not be easy, because so much of legal education still turns on coverage of doctrinal issues. Indeed, discarding doctrine would be as ill-advised as it is unavailing. The task is to supplement and inform doctrinal teaching on law and terrorism, which I suggest with three steps: 1) enhance clinical education opportunities for representing the despised and unpopular, 2) promote understanding of social phenomena, such as path-dependence, that affect lawyering, and, 3) teach how the structure of legal institutions affects outcomes.

#### *A. Clinical Education and the Virtues of Vigorous Advocacy for Pariahs*

To combat doctrinalism, law schools should enhance experiential learning on the interaction of law and terrorism. Clinics, simulations, and skills courses that focus on issues of law and terrorism can deepen the learning that doctrinalism often obscures. Students in clinics that represented detainees learned about the challenges of lawyering for the unpopular and despised, the affective as well as instrumental needs of clients,<sup>60</sup> and the eclectic advocacy strategies necessary for competently representing this group.<sup>61</sup> Clinics also taught students the power of rights, although as Margulies and Metcalf note, that power is always provisional and frequently fleeting. At their best, clinics taught students to be resourceful, reaching out to new forums and audiences, and to tolerate and embrace the ambiguity of legal representation in cross-cultural settings.<sup>62</sup> In some cases, as I'll discuss in the next subsection, clinicians and other lawyers became over-invested in their own narratives, and failed to anticipate that narratives that worked in one context, such as Guantánamo's first generation, would be less useful down the road. However, because of their focus on the concrete dynamics of cases, clinics are an ideal site for brainstorming about these dilemmas of legal practice.

60. See Robert Dinerstein, Stephen Ellman, Isabelle Gunning & Ann Shalleck, Connection, Capacity and Morality in Lawyer-Client Relationships: Dialogues and Commentary, 10 *Clinical L. Rev.* 755, 758-66 (2004).

61. See Muneer I. Ahmad, Resisting Guantánamo: Rights at the Brink of Dehumanization, 103 *Nw. U.L. Rev.* 1683 (2009); Mark Denbeaux & Christina Boyd-Nafstad, The Attorney-Client Relationship in Guantánamo Bay, 30 *Fordham Int'l L.J.* 491 (2007); Jonathan Hafetz, Habeas Corpus, Judicial Review, and Limits on Secrecy in Detentions at Guantánamo, 5 *Cardozo Pub. L. Pol'y & Ethics J.* 127 (2006); Martha Rayner, Roadblocks to Effective Representation of Uncharged, Indefinitely Imprisoned Clients at Guantánamo Bay Military Base, 30 *Fordham Int'l L.J.* 485 (2007); cf. Scott L. Cummings, The Internationalization of Public Interest Law, 57 *Duke L.J.* 891 (2008) (discussing innovations in practice by public interest lawyers across the globe).

62. See Muneer I. Ahmad, Interpreting Communities: Lawyering Across Language Difference, 54 *UCLA L. Rev.* 999 (2007) (discussing lawyering issues arising because of differences of language and culture with clients); Susan Bryant, The Five Habits: Building Cross-Cultural Competence in Lawyers, 8 *Clinical L. Rev.* 33, 33 (2001).



Clinics tell students that rights matter. As critical feminist and race theorists have observed,<sup>63</sup> rights can be a part of a discourse that empowers. They are not a panacea, as critics of the legal profession's performance over the past nine years have noted.<sup>64</sup> However, just as legal advocacy during the civil rights movement chipped out a foothold for further mobilization efforts, rights since 9/11 raise consciousness and redefine the contours of what is possible.<sup>65</sup> For example, when lawyers began seeing scores of Guantánamo detainees in 2004, after the Supreme Court's decision in *Rasul v. Bush*, independent accounts reflect that the treatment of the detainees improved. This improvement did not resolve all problems, by any means; non-dangerous detainees still lacked a clear pathway to release, and confinement was still rigorous. However, the government stopped using the harshest interrogation techniques.<sup>66</sup> The causes were complex, including pushback from more scrupulous lawyers within the administration,<sup>67</sup> but the presence of lawyers at Guantánamo was clearly one factor. The government knew that detainee lawyers would report ongoing abuses, and it took steps to give the lawyers less to talk about.

63. See Patricia J. Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (Harvard Univ. Press 1992); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. Rev. 589 (1986); cf. Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 Harv. C.R.-C.L.L. Rev. 301 (1987) (analyzing flaws and benefits of critical legal studies agenda which discounted value of rights).
64. See Margulies & Metcalf, *supra* note 8; compare Jenny S. Martinez, *Process and Substance in the "War on Terror"*, 108 Colum. L. Rev. 1013 (2008) (asserting that emphasis on procedural rights of detainees has frequently neglected substantive questions), with Neal Kumar Katyal, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 Harv. L. Rev. 65 (2006) (arguing for virtues of advocacy approach that cast government as challenging established procedures).
65. For an insightful account that avoids reifying rights but nonetheless recognizes their power in certain situations, see Ahmad, *Resisting Guantánamo*, *supra* note 61, at 1712-13.
66. See Committee on Armed Services, United States Senate, *Executive Summary, Inquiry into the Treatment of Detainees in U.S. Custody*, 110th Cong., 2d Sess., Nov. 2008, at xxv. Reporters have documented the use of waterboarding in 2003. See Scott Shane, *Interrogations' Effectiveness May Prove Elusive*, N.Y. Times, April 23, 2009, at A14 (discussing March, 2003 waterboarding of Khalid Shaikh Mohammed, the alleged mastermind of the 9/11 attacks, documented in Justice Department memoranda). However, reporters have been unable to document use of waterboarding in 2004 or subsequent years, after officials from the Justice Department and the CIA Inspector General's office began to raise questions. *Id.*
67. See Goldsmith, *Terror Presidency*, *supra* note 27, at 142-54 (discussing successful effort to withdraw two legal opinions that provided legal support for "enhanced" interrogation techniques); Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned Into a War on American Ideals* 316-18 (Doubleday 2008) (describing efforts during President Bush's second term of officials serving under Secretary of State Condoleezza Rice such as Legal Adviser John Bellinger, Matthew Waxman, and Philip Zelikow); Testimony of Philip Zelikow, *Hearing of the Administrative Oversight and the Courts Subcommittee of the Senate Judiciary Committee Chaired by Sen. Sheldon Whitehouse (D-RI)*, Fed. News Service, May 13, 2009 (same).

Similarly, rights move the baselines of possible outcomes. Before *Rasul* and *Boumediene*, the big question for detainees who did not pose a danger was if they would be released. After these cases, the question for detainees held not to be part of Al Qaeda<sup>68</sup> was *when* release would come. There is a big difference between these two questions. The latter makes it far easier to obtain leverage against the government. Moreover, lawyers have “voted with their feet” on these issues—lawyers seek to bring habeas petitions for detainees at other sites, such as Bagram Air Base in Afghanistan,<sup>69</sup> precisely because those lawyers know that rights do bring increased leverage for their clients. The government seems to believe this too—that is why the Bush Administration fought tooth and nail against rights for detainees, and why the Obama Administration is now contesting the habeas rights of detainees at Bagram. Indeed, although Joe Margulies now criticizes a focus on rights in his co-authored article for this symposium, a few years ago he confessed that “few moments in [his] legal career have been as gratifying” as the reunion he witnessed between a just-released Guantánamo client and the client’s wife.<sup>70</sup>

As this moving moment reveals, clinics can also teach lawyers that competent representation includes what I’ve called “affective solidarity.”<sup>71</sup> Lawyers do not merely promote the legal interests of their clients; they also help provide the emotional support that clients in difficult situations need. Clients who are isolated and despised like the Guantánamo detainees need this human support more than most.<sup>72</sup> Sometimes this support shows itself through simple human acts that a lawyer is uniquely situated to perform for the client in detention: For example, lawyers representing Guantánamo detainees in habeas or military commission proceedings were permitted to bring their clients food. Baher Azmy, a Seton Hall law professor and attorney for a wrongly accused client, Murat Kurnaz, recounted that he bonded with his client after bringing him McDonald’s coffee with six packets of sugar, which Azmy later supplemented with “baklava, cheese, pita bread, Turkish

68. Courts applying the law of war have held that being part of Al Qaeda entails giving or receiving “orders or directions” within the group. *See Barhoumi v. Obama*, 609 F.3d 416, 424 (D.C. Cir. 2010).

69. *See Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010) (holding that habeas jurisdiction did not extend to Bagram).

70. *See Joseph Margulies, Guantánamo and the Abuse of Presidential Power 2* (Simon & Schuster 2006).

71. *See Peter Margulies, The Virtues and Vices of Solidarity: Regulating the Roles of Lawyers for Clients Accused of Terrorist Activity*, 62 Md. L. Rev. 173, 179–81 (2003).

72. With a client such as Khalid Shaikh Mohammed, attending to this human element is more challenging. *See William H. Simon, Homo Psychologicus: Notes on a New Legal Formalism*, 32 Stan. L. Rev. 487 (1980) (discussing limits on teaching of empathy as virtue in legal representation). Yet, we praise lawyers who can marshal empathy, even—or perhaps especially—when their clients’ conduct seemingly makes this impossible. *See Jessica Silbey, Truth Tales and Trial Films*, 40 Loy. L.A. L. Rev. 551, 578 n.102 (2007) (discussing film account of Clarence Darrow’s plea for the lives of his clients, the convicted murderers Leopold and Loeb).

figs, fresh garlic...subs, pizza, Filet-O-Fish,” and a veritable smorgasbord of other culinary items.<sup>73</sup> Sharing food with a detainee client was an affirmation of the precious rhythms of life’s routine, which a facility like Guantánamo disrupted.<sup>74</sup> This form of affective solidarity had an instrumental component as well; it helped build rapport and facilitate discussion of facts relevant to the representation.<sup>75</sup>

In helping students explore the intangible realm of affective interactions, clinical courses add a dimension that doctrine neglects. Doctrinal courses will help a lawyer understand legal arguments, but getting to the legal arguments is impossible unless the client is willing to actually speak with the lawyer. A client who lacks trust in the lawyer will not pursue a legal challenge, and therefore cannot keep the government honest in the way that the Constitution envisions. Clinical courses bring home this reality, and give the lawyer a repertoire of techniques for gaining client trust.

Clinicians know that rights also galvanize mobilization in other spheres, which I have called crossover advocacy.<sup>76</sup> For example, when Maher Arar filed a lawsuit challenging his extraordinary rendition to Syria, where he was tortured for the better part of a year, he was also able to obtain a congressional hearing looking into his case. Secretary of State Condoleezza Rice, not one given to casual displays of regret, acknowledged that the government had handled Arar’s case poorly.<sup>77</sup> This reckoning, however partial, documented the practice of extraordinary renditions,<sup>78</sup> and helped persuade the Obama Administration to stop the practice.

By instilling this affective component and commitment to crossover advocacy, clinical education nurtures lawyers who can challenge future patterns of government overreaching. Consider a law student like Sarah H. Lorr, who

73. See Jonathan Hafetz & Mark P. Denbeaux, *The Guantánamo Lawyers* 58 (NYU Press 2009).

74. See Ahmad, *Resisting Guantánamo*, *supra* note 61.

75. *Guantánamo Lawyers*, *supra* note 73, at 63–64 (recollection of habeas lawyer Joshua Colangelo-Bryan).

76. See Peter Margulies, *The Detainees’ Dilemma: The Virtues and Vices of Advocacy Strategies in the War on Terror*, 57 *Buff. L. Rev.* 347, 423–29 (2009); *The Guantánamo Lawyers*, *supra* note 73, at 308–09 (discussing advocacy efforts at Inter-American Commission on Human Rights by American University law professor Rick Wilson); cf. Anthony V. Alfieri, *Post-Racialism in the Inner City: Structure and Culture in Lawyering*, 98 *Geo. L.J.* 921, 957–66 (2010) (discussing use of rights as element in community organizing, education, and advocacy); Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 *Calif. L. Rev.* 1879, 1905–06 (2007) (discussing role of lawyers in organizing subordinated communities).

77. See Scott Shane, *On Torture, 2 Messages and a High Political Cost*, *N.Y. Times*, Oct. 30, 2007, at A18.

78. See Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 *Geo. Wash. L. Rev.* 1333 (2007); cf. Peter Margulies, *Judging Myopia in Hindsight: Bivens Actions, National Security Decisions, and the Rule of Law*, *Iowa L. Rev.* (forthcoming 2010) [hereinafter *Judging Myopia*], draft available at <http://ssrn.com/abstract=1564411> (analyzing actions for damages involving extraordinary renditions).

visited Guantánamo while in Fordham's International Justice Clinic. Lorr, who had to cross to the other side of a barbed-wire fence to interview a client spending his fifth year in confinement without judicial review, will likely view the government's future claims with a robust skepticism born of experience.<sup>79</sup> Like the perspectives that veteran death penalty lawyers such as Joe Margulies and Clive Stafford-Smith brought to their Guantánamo representation, clinical experience prods lawyers to question authority even in extraordinary times, when conventional wisdom initially counsels deference.<sup>80</sup>

Although some have attacked the patriotism of lawyers for detainees,<sup>81</sup> those critics fundamentally misunderstand the role that lawyers play in a constitutional republic. From de Toqueville's time, American lawyers have been intermediaries who temper the excesses of both the private sector and government.<sup>82</sup> As we shall see in the next subsection, unchecked excesses promote volatility in governance, leading to the "pendular swings" that Justice Kennedy cautioned against in his opinion for the Court in *Boumediene v. Bush*,<sup>83</sup> which struck down the Military Commission Act of 2006's limits on habeas. Lawyers who challenge the government promote *greater* stability in the polity, by deterring the myopia that could otherwise afflict powerful decisionmakers. In this fashion, lawyers safeguard the deliberative virtues necessary for democracy. Teachers who have advocated for detainees model this democratic understanding of the lawyer's role.

#### *B. The Advocate's Peril: Path-Dependence as Social Phenomenon*

While the Guantánamo lawyers served constitutional values by bringing judicial review to Guantánamo, their efforts floundered through a failure to understand social phenomena that influence law's implementation, including path-dependence.<sup>84</sup> Ironically, Bush Administration officials who had authored the unilateral policies the Guantánamo lawyers challenged made the same mistake. Neither appreciated that since where we were influences where we are

79. See Guantánamo Lawyers, *supra* note 73, at 68–70 (discussing trip to Guantánamo with Professor Martha Rayner).
80. *Id.* at 25–26 (observations by Hofstra Law School habeas expert Eric M. Freedman regarding death penalty lawyers' early, formative role in Guantánamo representation).
81. See John Schwartz, Attacks on Detainee Lawyers Split Conservatives, *N.Y. Times*, Mar. 10, 2010, at A1 (noting attacks by Liz Cheney, daughter of the former vice president, on Obama Administration officials who had earlier represented Guantánamo detainees, as well as defense of those officials by noted conservatives like Kenneth Starr, who had served as independent counsel investigating President Clinton).
82. See Rakesh K. Anand, The Role of the Lawyer in American Democracy, 77 *Fordham L. Rev.* 1611, 1620–21 (2009).
83. 533 U.S. at 742.
84. Cf. Adrian Vermeule, Law and the Limits of Reason 108–110 (Oxford Univ. Press 2008) (discussing path-dependence in common law adjudication); Oona A. Hathaway, Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System, 86 *Iowa L. Rev.* 601, 606–22 (2001) (same).

going, the consequences of an earlier choice may permanently alter subsequent options. For legal education to break decisively from doctrinalism, a thorough understanding of theoretical constructs like path-dependence should inform pedagogical practice.

To understand path-dependence, consider the following hypothetical. Suppose an official can consult with stakeholders at Time 1, or delay consultation until Time 2. Consultation at Time 1 could solidify stakeholders' allegiance. Conversely, a failure to consult could solidify mistrust. Moreover, the failure to consult yields opportunity costs. The level of consultation that could have engendered agreement at Time 1 will not satisfy stakeholders at Time 2. Securing consent becomes that much more expensive, requiring even greater official concessions.

The Bush Administration learned this lesson the hard way. Its early intransigence alienated the courts, convincing them that more accountability was necessary. More timely concessions by the administration might have triggered greater judicial deference.<sup>85</sup>

Unfortunately, advocates for Guantánamo detainees who celebrated the election of President Obama did not appreciate that consultation is important not only for ramping up aggressive policies, but also for winding down those measures. Advocates pushed for President Obama's early announcement that he would close Guantánamo by January 20, 2010.<sup>86</sup> Troubled by the administration's failure to consult, Congress enacted legislation that impeded closure efforts.<sup>87</sup> While within a few months President Obama articulated a

85. See Goldsmith, *Terror Presidency*, *supra* note 27, at 139 (arguing that if Bush Administration had complied with rudimentary Geneva Convention requirements in the twenty months after September 11, it would have "avoided the more burdensome procedural...requirements that became practically necessary under the pressure of subsequent judicial review").
86. See § 2(b), Executive Order, Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities, Jan. 22, 2009 [hereinafter Executive Order], available at [http://www.whitehouse.gov/the\\_press\\_office/closureofGuantanamoDetentionFacilities/](http://www.whitehouse.gov/the_press_office/closureofGuantanamoDetentionFacilities/); cf. Peter Margulies, Putting Guantánamo in the Rear-View Mirror: The Political Economy of Detention Policy, 32 *W. New Eng. L. Rev.* 339, 354 (2010); Ken Gude, Getting Back on Track to Close Guantánamo 3 (Center for American Progress Nov. 2009), available at [http://www.americanprogress.org/issues/2009/11/gitmo\\_on\\_track.html](http://www.americanprogress.org/issues/2009/11/gitmo_on_track.html) (discussing presidential announcement and aftermath); Sarah Mendelson, The Guantánamo Countdown, *Foreign Pol'y*, Oct. 1, 2009, available at [http://www.foreignpolicy.com/articles/2009/10/01/the\\_Guantanamo\\_countdown?page=0,1&%24Version=0&%24Path=/&%24Domain=.foreignpolicy.com,%20%24Version%3Do](http://www.foreignpolicy.com/articles/2009/10/01/the_Guantanamo_countdown?page=0,1&%24Version=0&%24Path=/&%24Domain=.foreignpolicy.com,%20%24Version%3Do) (same).
87. Supplemental Appropriations Act, 2009, Pub. L. No. 111-32, H.R. 2346, § 14104(a) (2009) ("None of the funds made available in this or any prior Act may be used to release an individual who is detained as of the date of enactment of this Act, at Naval Station, Guantánamo Bay, Cuba, into the continental United States, Alaska, Hawaii, or the District of Columbia").

fuller strategy that may yet produce agreement,<sup>88</sup> the haste of the original closure announcement spawned mistrust. As of December, 2010, Guantánamo is still here, with no augurs of its demise any time soon.<sup>89</sup>

Path-dependence also reveals that detainee advocates were victims of their own success. The story of Guantánamo currently stretches over two generations: pre- and post-*Boumediene*. Before the Supreme Court's decision in *Boumediene*, which upheld detainees' access to habeas corpus, establishing a definitive right to judicial review was central to the advocates' task. In the second, post-*Boumediene* generation, attention shifted to securing the release of advocates' individual clients. To make the case for judicial review, detainee advocates deployed what I have elsewhere called the "misadventure thesis"—the claim that all detainees were in the wrong place at the wrong time.<sup>90</sup> This narrative helped prompt the courts to establish a framework for judicial review.<sup>91</sup> However, this overarching narrative has not ensured that those rights would result in release in particular cases.

The first-generation narrative has undermined detainee advocates' second-generation agenda because some (although not all) of the remaining 170 detainees have ties to the Taliban or Al Qaeda that make the misadventure thesis inappropriate.<sup>92</sup> Advocates have discovered that rights facilitate consideration of the merits of cases, but do not guarantee favorable results. Indeed, the discontinuity between the misadventure thesis and the messier facts of individual cases may have actually produced greater judicial skepticism than would otherwise have been the case.<sup>93</sup> Appreciating the effects of path-dependence would have encouraged habeas lawyers to frame a more nuanced thesis in first-generation Guantánamo efforts, to reduce the skepticism they have sometimes encountered in second-generation litigation.<sup>94</sup>

88. See Obama, Protecting Our Security, *supra* note 14.

89. See Charlie Savage, Closing Guantánamo Fades as a Priority, *N.Y. Times*, June 26, 2010, at A13.

90. See Margulies, Advocacy Strategies, *supra* note 76, at 403-05.

91. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004) (requiring due process safeguards for detention of presumptive American citizens in part to reduce incidence of false positives, such as detention of an "errant tourist, embedded journalist, or local aid worker").

92. See Wittes, The Long War, *supra* note 18, at 74-90; Glaberson & Williams, *supra* note 18.

93. This is hard to measure. However, the court in at least one detainee case expressed skepticism when advocates advanced a position that clashed with earlier arguments. See *Hamdan v. Gates*, 565 F. Supp. 2d 130, 137 (D.D.C. 2008) (declining to enjoin pending military commission proceeding authorized by Congress, in case where advocates had argued that earlier military commission was flawed because it lacked statutory authorization).

94. The overselling of narratives is a persistent risk in many advocacy arenas. Some have pivoted to protect against this danger. For example, informed opponents of capital punishment concede that lists of "the exonerated" include defendants who were not wholly blameless." See Carol S. Steiker & Jordan M. Steiker, The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy, 95 *J. Crim. L. & Criminology* 587, 597-98 (2005). With a better understanding of path-dependence, lawyers can reduce backlash and other unintended consequences, and more



*C. The Significance of Structure in Government Responses to Terror*

The academy also needs to pay closer attention to the role of government structure in counterterrorism measures. Structure can dictate substance, or at least exert a powerful influence. However, those outcomes remain invisible or unexplained if the student does not know where to look.

Consider here the assertion by Margulies and Metcalf that the government's poor response to Hurricane Katrina was unrelated to counterterrorism policy.<sup>95</sup> A more probing look at bureaucratic structures suggests a significant, albeit oblique, link between the government's response to Katrina and the war on terror.<sup>96</sup> The politics of the war on terror underwrote creation of the Department of Homeland Security (DHS) from a patchwork quilt of agencies with radically disparate missions, including the former Immigration and Naturalization Service, the Coast Guard, and the Federal Emergency Management Administration (FEMA). Predictably, activities related to national security received a healthy helping of the budgetary pie, while officials siphoned off resources from other vital missions, such as emergency response to natural disasters.<sup>97</sup> Senior bureaucracy at DHS focused on terror, and lacked background in emergency response. Without an appreciation for the importance of this mission, critical jobs went to unqualified patronage hires, like Michael Brown, who assumed leadership of FEMA even though his most useful experience with natural disasters had been heading the Arabian Horses Association.<sup>98</sup> These structural features foretold the cascade of errors in the government's Katrina response.

Structural concerns have also contributed to other policy glitches. For example, the war on terror provided an opening for former Attorney General John Ashcroft's evisceration of immigration adjudication.<sup>99</sup> Today, a structural mismatch between adjudication and enforcement resources continues to plague immigration law. Enforcement resources have grown, as the apprehension, detention, and removal of undocumented aliens and other non-citizens became a growth industry. However, adjudication, like emergency

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effectively ensure the flourishing of innovation. See Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 *Harv. L. Rev.* 1015 (2004) (describing public law remedies that promote innovation); *but see* Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 *UCLA L. Rev.* 1235, 1317-27 (2010) (arguing that backlash has not been significant consequence of same-sex equality litigation).

95. See Margulies & Metcalf, *supra* note 8, at 439.

96. See Margulies, *Law's Detour*, *supra* note 2, at 21-23.

97. See Dara Kay Cohen, Mariano-Florentino Cuellar & Barry R. Weingast, *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 *Stan. L. Rev.* 673, 725-26 (2006).

98. See Juliette Kayyem, *Appointments that Disappoint*, *L.A. Times*, Sept. 12, 2005, at B11.

99. See Margulies, *Law's Detour*, *supra* note 2, at 30-33; Linda Kelly Hill, *Holding the Due Process Line for Asylum*, 36 *Hofstra L. Rev.* 85 (2007); Shruti Rana, "Streamlining" the Rule of Law: How the Department of Justice is Undermining Judicial Review of Agency Action, 2009 *U. Ill. L. Rev.* 829 (2009).

management, remained a bureaucratic orphan in the Justice Department, chronically starved of resources and capacity. The result was a burgeoning immigration backlog<sup>100</sup> that thwarted accurate adjudication.<sup>101</sup>

Similarly, opportunity costs have burgeoned through the takeover of criminal prosecution by immigration imperatives.<sup>102</sup> Prosecutions of non-citizens for illegal re-entry into the country and other minor offenses, like individual cases of immigration fraud, now account for a substantial percentage of all federal prosecutions.<sup>103</sup> Federal prosecutors who must pursue these cases, the bulk of which involve nonviolent offenders, lose the opportunity to pursue other forms of illegal conduct, including organized crime, drug trafficking, and fraud.<sup>104</sup> That might be a sensible strategy, or a bad bargain. Students can make a judgment only if teachers and scholars flag the issue.

Structural factors also help explain the spike in criminal cases involving terrorism. Prosecutors have had to compete for resources and bureaucratic standing with agencies such as the Pentagon and the CIA that use different measures to counter terror. Material support prosecutions help prosecutors demonstrate their continued relevance.<sup>105</sup> However, prosecutors' focus on informant-driven prosecutions may have opportunity costs. While informants are good at enticing big talkers into incriminating statements, they may be ineffective at targeting more disciplined types who can do more damage. Indeed, some of these more dangerous individuals may use informant status to cloak their own activities.<sup>106</sup> Who informs on the informants is a worthy

100. See Julia Preston, *Immigration Agency Ends Some Deportations*, N.Y. Times, Aug. 27, 2010, at A14 (citing study indicating record backlog of 247,922 cases, with an average waiting time for a hearing of 459 days).

101. On the effects of backlogs in asylum cases, see Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295 (2007).

102. See Margulies, *Law's Detour*, *supra* note 2, at 88-89.

103. See TRAC Immigration, *Immigration Enforcement Under Obama Returns to Highs of Bush Era*, available at <http://trac.syr.edu/immigration/reports/233/> (noting that in April 2010, the Border Patrol referred 7,822 new cases to federal prosecutors, most involving charges that noncitizens had illegally attempted to reenter the United States after their removal).

104. See Margulies, *Law's Detour*, *supra* note 2, at 89.

105. Cf. Chesney, *Beyond Conspiracy*, *supra* note 39, at 430-33 (discussing bureaucratic crosscurrents within counterterrorism agencies).

106. See Jane Perlez, Eric Schmitt & Ginger Thompson, *U.S. Had Warnings on Plotter of Mumbai Attack*, N.Y. Times, Oct. 17, 2010, at A1 (reporting that David Headley, who has pleaded guilty to conspiracy regarding the deadly 2008 Mumbai terrorist attacks, had developed contacts with militants in 2002, possibly while he was still working as an informant for the Drug Enforcement Agency, and that U.S. officials had failed to act on warnings of Headley's terrorist ties).

question, but structural competition gives prosecutors little incentive to answer it. Here, too, students can better gauge whether incentives are adequate once teachers highlight the issue.<sup>107</sup>

### Conclusion

The legal academy's response to September 11 has been far more robust than its responses to most earlier occasions for government overreaching. On some fronts such as detention with judicial review, Guantánamo's second generation has seen a welcome substantive convergence favoring measures that balance security with the rule of law. Other areas have seen a less salutary methodological convergence on the familiar confines of doctrinalism. Teaching and scholarship on doctrinally salient matters like detention of suspected terrorists apprehended within the United States has overwhelmed teaching and analysis of issues that affect more people, such as criminal prosecutions under the federal material support statutes. Doctrinalism's influence has given both scholars and law students a skewed vision of counterterrorism measures.

To correct this distorted lens, law schools should curb doctrinalism's reach. They can do so with three measures. First, they can stress clinics as resources teaching advocacy for the unpopular. Second, they can pay greater attention to social phenomena like path-dependence. Third, they can study and teach about the links between governmental structure and legal policy. Taking these steps will help lawyers of the future deal more effectively with terrorism and its legal consequences.

107. Scholars who discuss the political economy of legislation and law enforcement have made vital contributions to this understanding. See Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford Univ. Press 2007) (noting influence of both official rhetoric and patronage concerns); cf. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *Mich. L. Rev.* 505 (2001) (describing dynamics of enacting federal criminal statutes); Daniel Richman, *Decisions About Coercion: The Corporate Attorney-Client Privilege Waiver Problem*, 57 *DePaul L. Rev.* 295, 317 (2008) (arguing that legislature can counter court-ordered procedural protections for defendants with more sweeping criminal prohibitions that facilitate convictions).