Terrorizing Academia

Joseph Margulies and Hope Metcalf

I. Introduction

In an observation more often repeated than defended, we are told that the attacks of September 11 "changed everything." Whatever merit there is in this notion, it is certainly true that 9/11—and in particular the legal response set in motion by the administration of President George W. Bush—left its mark on the academy.

Nine years after 9/11, it is time to step back and assess these developments and to offer thoughts on their meaning. In Part II of this essay, we analyze the post-9/11 scholarship produced by this "emergency" framing. We argue that legal scholars writing in the aftermath of 9/11 generally fell into one of three groups: unilateralists, interventionists, and proceduralists. Unilateralists argued in favor of tilting the allocation of government power toward the executive because the state's interest in survival is superior to any individual liberty interest, and because the executive is best able to understand and address threats to the state. Interventionists, by contrast, argued in favor of restraining the executive (principally through the judiciary) precisely to prevent the erosion of civil liberties. Proceduralists took a middle road,

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Guantánamo

John Moore/Getty Images News/Getty Images

informed by what they perceived as a central lesson of American history.[1] Because at least some overreaction by the state is an inevitable feature of a national crisis, the most one can reasonably hope for is to build in structural and procedural protections to preserve the essential U.S. constitutional framework, and, perhaps, to minimize the damage done to American legal and moral traditions.

Despite profound differences between and within these groups, legal scholars in all three camps (as well as litigants and clinicians, including the authors) shared a common perspective—*viz.*, that repressive legal policies adopted by wartime governments are temporary departures from hypothesized peacetime norms. In this narrative, metaphors of bewilderment, wandering, and confusion predominate. The country "loses its bearings" and "goes astray." Bad things happen until at last the nation "finds itself" or "comes to its senses," recovers its "values," and fixes the problem. Internment ends, habeas is restored, prisoners are pardoned, repression passes. In a show of regret, we change direction, "get back on course," and vow it will never happen again. Until the next time, when it does. This view, popularized in treatments like *All the Laws but One*, by the late Chief Justice Rehnquist,[2] or the more thoughtful

1. This scholarly production should come as no surprise; a generation ago, Abe Sofaer similarly observed that "[t]he war in Indochina led to an enormous outpouring of legal activity." Sofaer, War, Foreign Affairs, and Constitutional Power xiii (Ballinger Pub. Co. 1976). One difference between then and now, however, has been the rise of clinical programs and academic centers dedicated to the study and litigation of these issues. Some law schools have opened clinics, such as the National Security Clinic at the University of Texas, Austin, to litigate rights abuses arising out of "counter-terrorism efforts both domestic and abroad." One of the first clinics in this vein was the National Litigation Project of the Allard K. Lowenstein International Human Rights Clinic at Yale, founded in 2002, where Metcalf co-taught from 2005–2010; by the time this essay goes to print, Yale's "9/11 Clinic" will have transitioned to a broader human rights litigation portfolio focused on detention and human rights in the United States. The majority of institutions, however, are "research centers" that aspire, in the words of Georgetown's Center on National Security and the Law, "to change the dialogue from the current sloganeering debate into a mature conversation that can build long-term solutions to the problems posed by asymmetric warfare, rapid technological and transportation changes, and religious extremism." http://www.law.georgetown.edu/cnsl/. Similarly, the NYU Center on Law and Security describes itself as "a center of expertise committed to promoting an informed understanding of the legal and security issues defining the post-9/11 era," see http://www.lawandsecurity.org/, and William and Mary's Center for Human Security and the Law aims to "creat[e] citizen lawyers with an appreciation for national security issues through educating and exposing students to the interplay between national defense and the protection of civil rights." http://law.wm.edu/academics/intellectuallife/researchcenters/hrnsl/index.php. In fairness, the programs at several law schools long predated 9/11. The Center on Law, Ethics, and National Security at Duke, for instance, was founded in September, 1993 (http://www.law.duke.edu/lens/), and the Center for National Security Law at Virginia was established in April, 1981 (http://www.virginia.edu/cnsl/).

2. William H. Rehnquist, All the Laws But One: Civil Liberties in Wartime (Alfred A. Knopf 1998). Notably, Chief Justice Rehnquist's book was written in a time of relative peace and stability.

and thorough discussion in *Perilous Times* by Chicago's Geoffrey Stone,[3] quickly became the dominant narrative in American society and the legal academy. This narrative also figured heavily in the many challenges to Bush-era policies, including by the authors. The narrative permitted litigators and legal scholars to draw upon what elsewhere has been referred to as America's "civic religion"[4] and to cast the courts in the role of hero-judges[5] whom we hoped would restore legal order.[6]

But by framing the Bush Administration's response as the latest in a series of regrettable but temporary deviations from a hypothesized liberal norm, the legal academy ignored the more persistent, and decidedly illiberal, authoritarian tendency in American thought to demonize communal "others" during moments of perceived threat. Viewed in this light, what the dominant narrative identified as a brief departure caused by a military crisis is more accurately seen as part of a recurring process of intense stigmatization tied to periods of social upheaval, of which war and its accompanying repressions are simply representative (and particularly acute) illustrations. It is worth recalling, for instance, that the heyday of the Ku Klux Klan in this country, when the organization could claim upwards of 3 million members, was the early-1920s, and that the period of greatest Klan expansion began in the summer of 1920, almost immediately after the nation had "recovered" from the Red Scare of 1919–20.[7] Klan activity during this period, unlike its earlier and later iterations,

3. Geoffrey Stone, In Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism (1st ed., W.W. Norton & Co. 2004).

4. Joseph Margulies, Why the Hubbub About Habeas? A Post-Mortem on a Failed Policy, 35 Wm. Mitchell L. Rev. 5089, 5101 (2009).

5. *See* Anthony Amsterdam, Thurgood Marshall's Image of the Blue-Eyed Child in Brown, 68 N.Y.U. L. Rev. 226, 229 (1993) (noting that cases involving controversial issues "almost always call for telling an action story with the court as hero and the rectification of the wrong as the hero's duty").

6. Metcalf believes the people responsible for planning and implementing unlawful interrogation and detention regimes should not escape personal liability (in both a legal and moral sense). As a general matter, Margulies disagrees. But both believe that a strategy for post-9/11 justice that focuses exclusively on the law (and especially courts) misses the mark by failing to confront the political and societal conditions that foster the creation of abusive policies.

7. Consistent with the dominant narrative, legal scholars have largely ignored the economic, cultural and social links between the Red Scare and American nativism before, during, and after the Great War. Historians, however, have not. The classic study is John Higham, Strangers in the Land: Patterns of American Nativism, 1860–1925 (Rutgers 1992), who provides the information cited in the text at 286–299; *see also, e.g.*, David H. Bennett, The Party of Fear: the American Far Right from Nativism to the Militia Movement 183–237 (Vintage 1995). The best discussion of the scientific racism that emerged in the early 20th century, and which gave an intellectual patina to the nativism of the same period, is Thomas F. Gossett, Race: The History of an Idea in America (Oxford Univ. Press 1965). For some of the many accounts of the excesses of the Red Scare, *see, e.g.*, Stanley Cohen, A Study in Nativism: The American Red Scare of 1919–20, 79 Pol. Sci. Q. 52, 52 (1964); Robert K. Murray, Red Scare: A Study in National Hysteria, 1919–1920 (Univ. of Minnesota 1955); Stone, *supra* note 3.

focused mainly on the scourge of the immigrant Jew and Catholic, and flowed effortlessly from the anti-alien, anti-radical hysteria of the Red Scare. Yet this period is almost entirely unaccounted for in the dominant post-9/11 narrative of deviation and redemption, which in most versions glides seamlessly from the madness of the Red Scare to the internment of the Japanese during World War II.[8]

And because we were studying the elephant with the wrong end of the telescope, we came to a flawed understanding of the beast. In Part IV, we argue that the interventionists and unilateralists came to an incomplete understanding by focusing almost exclusively on what Stuart Scheingold called "the myth of rights"—the belief that if we can identify, elaborate, and secure judicial recognition of the legal "right," political structures and policies will adapt their behavior to the requirements of the law and change will follow more or less automatically.[9] Scholars struggled to define the relationship between law and security primarily through exploration of structural[10] and procedural questions, and, to a lesser extent, to substantive rights. And they examined the almost limitless number of subsidiary questions clustered within these issues. Questions about the right to habeas review, for instance, generated a great deal of scholarship about the handful of World War II-era cases that the Bush Administration relied upon, including most prominently *Johnson v. Eisentrager* and *Ex Parte Quirin*.[11]

Regardless of political viewpoint, a common notion among most unilateralist and interventionist scholars was that when law legitimized or delegitimized a particular policy, this would have a direct and observable effect on actual behavior. The premise of this scholarship, in other words, was that

8. Omissions like this can be readily multiplied. The dominant narrative, for instance, typically makes no mention of the long and virulent history of anti-Catholicism and anti-Semitism in this country, ignores slavery, Jim Crow, and the treatment of Native Americans altogether, and refers briefly if at all to the nativism and anti-immigrant sentiment that has flourished episodically in this country since before the Founding. For detailed explorations, see Higham, *supra* note 7; Dan Kanstroom, Deportation Nation: Outsiders in America (Harvard Univ. Press 2007); David Cole, Enemy Aliens (The New Press 2006). It also leaves essentially undisturbed any consideration of U.S. actions abroad, including the role of the CIA in training and popularizing torture methods. *See* Alfred McCoy, A Question of Torture: CIA Interrogation from the Cold War to the War on Terror (1st ed., Metropolitan Books 2006). Nor does it acknowledge the brutality that so characterizes the treatment of prisoners in the United States—especially prisoners of color or otherwise marginalized—through the present day. *See generally* John T. Parry, Understanding Torture: Law, Violence and Political Identity 135 (Univ. of Michigan Press 2010); Brian Jarvis, Cruel and Unusual: Punishment and U.S. Culture (Pluto Press 2004).

9. Stuart Scheingold, The Politics of Rights 5 (2d ed., Univ. of Michigan Press 2004).

10. For our purposes, separation-of-powers arguments present similar shortcomings to the extent they assume that the policy in question would change if confronted with a judicial decree to the contrary.

11. A simple search of core U.S. law journals in Hein OnLine produced 296 articles that cited Johnson v. Eisentrager from 2001–2010 but only 198 in the half century after the Supreme Court decided the case in 1950. A search regarding Ex Parte Quirin yielded similar results.

policies "struck down" by the courts, or credibly condemned as lawless by the academy, would inevitably be changed—and that this should be the focus of reform efforts. Even when disagreement existed about the substance of rights or even which branch should decide their parameters, it reflected shared acceptance of the primacy of law, often to the exclusion of underlying social or political dynamics. Eric Posner and Adrian Vermeule, for instance, may have thought, unlike the great majority of their colleagues, that the torture memo was "standard fare."[12] But their position nonetheless accepted the notion that if the prisoners had a legal right to be treated otherwise, then the torture memo authorized illegal behavior and must be given no effect.[13]

Recent developments, however, cast doubt on two grounding ideas of interventionist and unilateralist scholarship—*viz.*, that post-9/11 policies were best explained as responses to a national crisis (and therefore limited in time and scope), and that the problem was essentially legal (and therefore responsive to condemnation by the judiciary and legal academy). One might have reasonably predicted that in the wake of a string of Supreme Court decisions limiting executive power, apparently widespread and bipartisan support for the closure of Guantánamo during the 2008 presidential campaign, and the election of President Barack Obama, which itself heralded a series of executive orders that attempted to dismantle many Bush-era policies, the nation would be "returning" to a period of respect for individual rights and the rule of law. Yet the period following Obama's election has been marked by an increasingly

12. Eric Posner & Adrian Vermeule, A "Torture" Memo and Its Tortuous Critics, Wall St. J. July 6, 2004, at A22. Posner and Vermeule argued that the memo was a defensible interpretation of the anti-torture statute: "But the memorandum's arguments are standard lawyerly fare, routine stuff. The definition of torture is narrow simply because, the memorandum claims, the relevant statutory texts and their drafting histories themselves build in a series of narrowing limitations, including a requirement of 'specific intent.' The academic critics disagree, but there is no foul play here." *Id.* The necessary implication of this reasoning is that if the memo had not been a faithful exegesis of the statutory text, its advice would have been legally unsound, and therefore should not have been followed.

13. Throughout this piece, we use "post-9/11 policies" and similar formulations to denote the set of policies enacted by the Bush Administration in response to the attacks of September 11. We do so with some trepidation, since, as should be apparent from our argument, we find the term itself to be problematic because it suggests a strict delineation between the world as it existed on Sept. 10, 2001, and Sept. 11, 2001. Nonetheless, the term is a familiar shorthand at the very least for a set of interrelated counterterrorism policies, including: the detention, interrogation, and rendition of alleged "enemy combatants"; the specialized procedures legislated by the Detainee Treatment and Military Commissions Acts; the use of warrantless wiretaps and government surveillance; and the increasing use of the State Secrets evidentiary privilege to restrict judicial inquiry into the legality of these various practices. *See, e.g.*, Oren Gross, Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?, 112 Yale L.J. 1011, 1017–18 (2003) (describing "alternate system of justice" enacted after 9/11). But the term can also refer to a much broader set of legal, political, and social developments involving the mistreatment of primarily Muslim, South Asian, Arab, and Middle Eastern people within the United States, from the round-up of non-citizens directly after 9/11 to the rash of hate crimes perpetrated on "Muslim-looking" people since 9/11. *See, e.g.*, Muneer I. Ahmad, A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion, 92 Cal. L. Rev. 1259, 1278 (2004).

retributive and venomous narrative surrounding Islam and national security. Precisely when the dominant narrative would have predicted change and redemption, we have seen retreat and retrenchment.

This conundrum is not adequately addressed by dominant strands of post-9/11 legal scholarship. In retrospect, it is surprising that much post-9/11 scholarship appears to have set aside critical lessons from previous decades as to the relationship among law, society and politics.[14] Many scholars have long argued in other contexts that rights—or at least the *experience* of rights—are subject to political and social constraints, particularly for groups subject to historic marginalization. Rather than self-executing, rights are better viewed as contingent political resources, capable of mobilizing public sentiment and generating social expectations.[15]

From that view, a victory in *Rasul* or *Boumediene* no more guaranteed that prisoners at Guantánamo would enjoy the right to habeas corpus than a victory in *Brown v. Board*[16] guaranteed that schools in the South would be desegregated.[17] *Rasul* and *Boumediene*, therefore, should be seen as part (and probably only a small part) of a varied and complex collection of events, including the fiasco in Iraq, the scandal at the Abu Ghraib prison, and the use of warrantless wiretaps, as well as seemingly unrelated episodes like the official response to Hurricane Katrina. These and other events during the Bush years merged to give rise to a powerful social narrative critiquing an administration committed to lawlessness, content with incompetence, and engaged in behavior that was contrary to perceived "American values."[18] Yet the very success of this narrative,

14. In some instances the evolution was explicit. Jack Balkin, in a thoughtful essay on the blog Balkinization, considered the salience of Critical Legal Studies in light of Bush Administration policies. He concluded that "[in] a world of executive arrogance, authoritarian posturing, and blatant disregard for rule of law values…[c]ritical scholars should go back and read what feminists and critical race theorists had to say about the limited but nevertheless important values implicit in the rule of law and rights discourse." Jack Balkin, The Other Side of Critical Legal Theory, May 3, 2007, *available at* http://balkin.blogspot.com/2007/05/other-side-of-critical-legal-theory.html.

15. Scheingold, *supra* note 9, at 131–48. We do not mean to endorse wholeheartedly the Critical Legal Studies viewpoint nor to revive old debates. Even so, as others have recognized, the recent history of post-9/11 policy brings those theories once again to bear on understanding the interplay between law and society. *See, e.g.*, Brian Tamanaha, The Bush Administration Vindicates Critical Legal Studies, May 3, 2007, *available at* http://balkin.blogspot.com/2007/05/bush-administration-vindicates-critical.html ("An apology is due from the conservatives and moderates who excoriated CLSers at the time for cynicism about law. On this score, the Crits pale in comparison to the Bush Administration.").

16. Brown v. Board of Ed. of Topeka, 347 U.S. 483 (1954).

17. *See, e.g.*, Derrick Bell, Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform (Oxford Univ. Press 2004). The cruel irony of that fact is made in Caprice L. Roberts, Rights, Remedies, and Habeas Corpus: The Uighurs, Legally Free While Actually Imprisoned, 24 Geo. Immigr. L.J. 1 (2009).

18. We use social narrative as "the discourse about good and bad states of society," combining "utopian and polemical elements [that attempt] to impose models of what society should be on others." S.C. Humphreys, Law as Discourse, 1 Hist. & Anthropology 241, 251 (1985).

culminating in the election of Barack Obama in 2008, produced quiescence on the Left, even as it stimulated massive opposition on the Right. The result has been the emergence of a counter-narrative about national security that has produced a vigorous social backlash such that most of the Bush-era policies will continue largely unchanged, at least for the foreseeable future.[19]

Just as we see a widening gap between judicial recognition of rights in the abstract and the observation of those rights as a matter of fact, there appears to be an emerging dominance of proceduralist approaches, which take as a given that rights dissolve under political pressure, and, thus, are best protected by basic procedural measures. But that stance falls short in its seeming readiness to trade away rights in the face of political tension. First, it accepts the tropes *du jour* surrounding radical Islam—namely, that it is a unique, and uniquely apocalyptic, threat to U.S. security. In this, proceduralists do not pay adequate heed to the lessons of American history and sociology. And second, it endorses too easily the idea that procedural and structural protections will protect against substantive injustice in the face of popular and/or political demands for an outcome-determinative system that cannot tolerate acquittals. Procedures only provide protection, however, if there is sufficient political support for the underlying right. Since the premise of the proceduralist scholarship is that such support *does not* exist, it is folly to expect the political branches to create meaningful and robust protections. In short, a witch hunt does not become less a mockery of justice when the accused is given the right to confront witnesses. And a separate system (especially when designed for demonized "others," such as Muslims) cannot, by definition, be equal.

In the end, we urge a fuller embrace of what Scheingold called "the politics of rights," which recognizes the contingent character of rights in American society. We agree with Mari Matsuda, who observed more than two decades ago that rights are a necessary but not sufficient resource for marginalized people with little political capital.[20] To be effective, therefore, we must look beyond the courts and grapple with the hard work of long-term change with, through and, perhaps, in spite of law. These are by no means new dilemmas, but the post-9/11 context raises difficult and perplexing questions that deserve study and careful thought as our nation settles into what appears to be a permanent emergency.

II. An Emergency Scholarship

A review of the post-9/11 legal literature reveals a scholarship obsessed with the exceptional. In the years following 9/11, scholars referred to that period

19. Scheingold, *supra* note 9, at xxxii–xxxvii (discussing recent scholarship on counter-mobilizations).

20. Mari J. Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 Harv. C.R.-C.L. L. Rev. 323, 393–94 (1987).

as "a violent crisis,"[21] "extraordinary times,"[22] a "national emergency,"[23] and a "catastrophe."[24] Whereas in the years prior to 2001 "[d]iscussion of emergency powers in general, and counterterrorism measures in particular, [had] been relegated to a mere few pages, at most, in the leading American constitutional law texts,"[25] the topic of national security produced a multitude of articles, books and other commentary.[26]

Despite the proliferation of post-9/11 legal scholarship, the discussion has taken place within a relatively narrow range. Starting with the proposition that 9/11 marked the beginning of a national military emergency, the vast majority of scholarship focused on the structural and procedural questions of how to manage that crisis. The debate was quickly framed as a battle among "unilateralists," who pressed for expanded executive powers to best meet the new crisis and "interventionists," who thought the crisis was best met by a rigid constitutional interpretation favoring individual rights and enforced by a muscular judiciary. As this debate took shape, a third group of scholars—the "proceduralists"—began to argue that some departure from peacetime norms was inevitable, but modest procedural interventions would properly ensure constitutional serenity.[27] To try to summarize all scholarship regarding U.S. counterterrorism in the years 2001–2010 as a "debate" is of course greatly oversimplified.[28] We do not mean to discount the creative and counter-intuitive inquiries undertaken by many scholars, often across obvious lines

21. Gross, *supra* note 13, at 1011.

22. Gary Lawson, Ordinary Powers in Extraordinary Times: Common Sense in Times of Crisis, 87 B.U. L. Rev. 289 (2007).

23. *See, e.g.*, Richard A. Posner, Not a Suicide Pact: The Constitution in a Time of National Emergency (Oxford Univ. Press 2006); Bruce Ackerman, The Emergency Constitution, 113 Yale L.J. 1029 (2004) (advocating for a "National Emergencies Act.").

24. Richard A. Posner, Catastrophe: Risk and Response (1st ed., Oxford Univ. Press 2004).

25. Gross, *supra* note 13, at 1012.

26. As of February 2010, a search for law review articles shows that more than 2,000 articles published since Sept. 11, 2001 contain the word "terror" or "terrorism" in the title, in contrast with 352 prior to that date.

27. These labels are borrowed, to some extent, from Oren Gross, who described the "Business as Usual" response to "acute national crises," marked by "notions of constitutional absolutism and perfection." Gross, *supra* note 13, at 1021. By contrast, "models of accommodation" attempt to preserve the regular system, but "exceptional adjustments are introduced to accommodate exigency." *Id.* at 1022.

28. Aziz Huq characterizes scholarship regarding the role of courts in national security cases as falling into two broad camps, which we term "interventionists" and "unilateralists," but further identifies five general schools of thought along that spectrum. Aziz Z. Huq, Against National Security Exceptionalism, 2010 Sup. Ct. Rev. (forthcoming 2010) ("Scholarly attention to the judicial role respecting national security has produced five accounts of the federal courts' function: (i) the "social learning" thesis, (ii) heroic countermajoritarianism, (iii) the executive accommodation account, (iv) national security minimalism, and (v) bilateral institutional endorsement.").

between "conservative" and "progressive." That said, certain common themes and—perhaps more important—omissions are apparent.

The Unilateralists

For scholars sympathetic to Bush-era policies, great American presidents stretching back to Abraham Lincoln had acted to protect the public during periods of national crisis, even if doing so demanded temporary departures from peacetime rights.[29] Such departures were not only justified, they were part of the very fabric of our constitutional system.[30] Cass Sunstein and Jack Goldsmith, for instance, posited that the military tribunals enacted by President Bush were on stronger ground than those used by Franklin Roosevelt.[31]

Generally speaking, these scholars argued for heightened deference to the executive as the branch best placed to make the necessary cost-benefit analysis in any presumed tradeoff between liberty and security.[32] Adrian Vermuele and Eric Posner flatly stated that "[o]ur central claim is that government is better than courts or legislators at striking the correct balance between security and liberty during emergencies."[33] Richard Posner similarly called upon judges to "decid[e] cases narrowly, preferably on statutory grounds, hesitating to trundle out the heavy artillery of constitutional invalidation."[34]

29. *See, e.g.*, John Yoo, Lincoln's Constitutionalism in Time of War: Lessons for the War on Terror?, 12 Chap. L. Rev. 505, 533 (2009) ("While some believe that the courts should still decide cases challenging government authority without taking account of wartime conditions, this approach ignores the costs of judicial intervention, not only to the war effort but also to the Court."); Lawson, *supra* note 22, at 299–303 (defending expansive view of emergency powers on originalist grounds); Michael Stokes Paulsen, The Constitution of Necessity, 79 Notre Dame L. Rev. 1257 (2005) (drawing upon Lincoln to argue for "meta-rule" of necessity in interpretation of separation of powers in times of crisis).

30. Lawson, *supra* note 22, at 299–303 (defending expansive view of emergency powers on originalist grounds); John C. Yoo, War and The Constitutional Text, 69 U. Chi. L. Rev. 1639, 1654 (2002) ("[T]he Framers would have understood the President's powers as commander-in-chief and chief executive as vesting him with the authority to initiate and conduct hostilities.... [T]he power to declare war would not have been understood by the Framers as a significant restriction on the President's powers in war.").

31. Jack Goldsmith & Cass Sunstein, Military Tribunals and Legal Culture: What a Difference Sixty Years Makes, 19 Const. Comm. 261 (2002).

32. Eric A. Posner & Adrian Vermeule, Accommodating Emergencies, 56 Stan. L. Rev. 605, 626 (2003) (criticizing "accounts of emergency that emphasize the Constitution's role in limiting the impact of fear on government policy" and concluding that "strict enforcement of the Constitution during emergencies will not improve policy choices by restricting the influence of fear."); John Yoo, War, Responsibility and the Age of Terrorism, 57 Stan. L. Rev. 793, 794 (2004).

33. Eric A. Posner & Adrian Vermeule, Terror in the Balance: Security, Liberty, and the Courts 6, 15–18 (Oxford Univ. Press 2007) (outlining "deferential view" of executive power in emergencies, under which judges defer to executive in part because of executive's informational advantage).

34. Posner, *supra* note 23, at 34; *see also* Cass R. Sunstein, Minimalism at War, 2004 Sup. Ct. Rev. 47, 50 (calling for "a minimalist approach to intrusions on freedom amidst war").

As Oren Gross observed, unilateralist proposals were founded upon "the belief in our ability to separate emergencies and crises from normalcy," which "facilitates our acceptance of expansive governmental emergency powers and counterterrorism measures, for it reassures us that once the emergency is removed and terrorism is no longer a threat, such powers and measures will also be terminated and full return to normalcy ensured."[35] More to the point, the unilateralist stance—founded on the notion of the exceptional and the limited—"assures us that counter-emergency measures will not be directed against us, but only against those who pose a threat to the community."[36] Those boundaries, however, proved difficult to specify. Starting with the fuzzy premise of a "war on terror," unilateralist scholars shied away from strict temporal or territorial bounds, instead turning to status-based distinctions. Vermuele and Posner emphasized citizenship as a hallmark between "us" and "them,"[37] whereas others borrowed (loosely) from laws-of-war definitions of "combatant" vs. "non-combatant."[38] Regardless of the nomenclature, in practice and in rhetoric, proposed policies applied to the newly racialized category of "Islamic extremist" in what Stephen Holmes has called the "re-tribalization of culpability."[39]

Interventionists

The unilateralist position sparked intense disagreement from libertarian scholars such as Lawrence Tribe and Patrick Gudridge, who stated that "[i]t was once an unspeakable thought that our Constitution should have lacunae—temporal discontinuities within which nation-saving steps would be taken by those in power, blessed not by the nation's founding document but by the brute necessities of survival."[40] Civil libertarians tried to reclaim U.S. history

35. Gross, *supra* note 13, at 1022.

36. *Id.*

37. Eric A. Posner & Adrian Vermeule, Emergencies and Democratic Failure, 92 VA. L. Rev. 1091, 1144 (2006) (arguing that Carolene Product's "discrete and insular minority" is not acute during "emergencies" and, if anything, applies with less force to non-citizens).

38. For defenders of post-9/11 policies, "[t]he differentiation of lawful and unlawful combatants is not an exercise of revenge or animus, but the preservation of civilization." Douglas W. Kmiec, Observing the Separation of Powers: The President's War Power Necessarily Remains "The Power to Wage War Successfully," 53 Drake L. Rev. 851, 891 (2005).

39. Stephen Holmes, In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror, 97 Cal. L. Rev. 301, 351 (2009). While defenders of post-9/11 policies generally avoid any discussion of race, the disproportionate effect of post-9/11 policies on groups deemed to be "Muslim-looking" is well-documented. *See, e.g.*, Gil Gott, The Devil We Know: Racial Subordination and National Security Law, 50 Vill. L. Rev. 1073 (2005); Deborah A. Ramirez, Jennifer Hoopes & Tara Lai Quinlan, Defining Racial Profiling in a Post-September 11 World, 40 Am. Crim. L. Rev. 1195 (2003).

40. Laurence H. Tribe & Patrick O. Gudridge, The Anti-Emergency Constitution, 113 Yale L.J. 1801 (2004). To a large degree, the pitched debate between Ackerman, Tribe and others

from conservatives, highlighting how Bush policies were inconsistent with past U.S. responses to internal threats and the long-standing judicial function in stemming executive excess.[41] From that view, the World War II internee case of *Endo* was at least as important as its contemporary *Korematsu*, and the decades of Cold War precedents demonstrated a canny judicial approach to "ultimately largely dismantle Cold War security efforts."[42] To interventionist scholars, "the [Bush] Administration's recent assertion of preclusive war powers is revealed as a radical attempt to remake the constitutional law of war powers."[43]

The interventionists criticized those who would restrict individual liberties and judicial review on an emergency basis for advocating "constitutional amnesia,"[44] and presented a sunnier view of the judicial role in wartime. They argued that federal courts presented the best (or perhaps the least worst) safeguard of individual rights.[45] Some posited that courts generally (though perhaps belatedly) fulfilled their role to hem in executive excesses and to protect individual rights,[46] while others thought that the courts' lackluster track record demonstrated a need for a greater judicial role, especially in moments

over the appropriate response rekindled past debates about constitutional process. *See, e.g.*, Laurence H. Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 59 Yale L.J. 1063 (1980).

41. For example, Carlton Larson riffed on Scalia's dissent in the Yaser Hamdi habeas case and pointed to the many instances of treason being used against non-citizens, thereby calling into question the entire wartime paradigm. Carlton F.W. Larson, The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem, 154 U. Pa. L. Rev. 863, 926 (2006). History became a battleground in the courts as well. *See, e.g.*, Rasul v. Bush, No. 03-334, Al Odah v. United States, 03-343, Brief of Fred Korematsu as Amicus Curiae in Support of Petitioners, Jan. 14, 2004.

42. Tribe & Gudridge, *supra* note 40, at 1844-45, 1851.

43. David J. Barron & Martin S. Lederman, The Commander in Chief at the Lowest Ebb—A Constitutional History, 121 Harv. L. Rev. 689, 692 (2008). The concern with preserving the rule of law—and especially the separation of powers—from an overzealous executive was another common theme among interventionist scholars. *See, e.g.*, Peter Margulies, Law's Detour: Justice Displaced in the Bush Administration (NYU Press 2010).

44. Tribe & Gudridge, *supra* note 40, at 1804.

45. *See, e.g.*, Erwin Chemerinsky, Enemy Combatants and Separation of Powers, 1 J. Nat'l Security L. & Pol'y 73 (2005) (arguing that stronger separation of powers analysis would have led to different outcomes in Padilla and Hamdi); Sanford Levinson, Constitutional Norms in a State of Permanent Emergency, 40 Ga. L. Rev. 699, 706 (2006). Indeed, Steve Vladeck has recently argued that the separation of powers thesis for access to courts at base of Boumediene may provide a means to resuscitate individual rights in other contexts. Stephen I. Vladeck, Boumediene's Quiet Theory: Access to Courts and the Separation of Powers, 84 Notre Dame L. Rev. 2107 (2009).

46. Robert J. Pushaw, Jr., The "Enemy Combatant" Cases in Historical Context: The Inevitability of Pragmatic Judicial Review, 82 Notre Dame L. Rev. 1005, 1083 (2007); Patrick O. Gudridge, Remember Endo?, 116 Harv. L. Rev. 1933, 1968 n.160 (2003) ("But if it is the case, as I have argued, that constitutional law is ordinarily complex, a collection of emphases and therefore a range of variations, it becomes possible to recognize such complexity, and the attendant differences in focus and result, without proclaiming crisis.").

of crisis, to protect historically marginalized groups such as non-citizens.[47] In any event, the civil libertarian instinct was to turn first and foremost to the courts.

For many in this camp, the post-9/11 era posed an uncomfortable dilemma. The urge to portray Bush policies as legally deviant required the evocation of a better, pre-9/11 United States, which implicitly minimized decades of legal battles—against police brutality, the death penalty, religious intolerance, racial profiling, and even emergency powers,[48] to name but a few.[49] Put another way, were post-9/11 policies sui generis (and therefore outside U.S. norms), or did they represent an extreme but continuous path with the past? Most—including the authors—chose the former in what Jack Balkin termed "a world of executive arrogance, authoritarian posturing, and blatant disregard for rule of law values."[50] Under such circumstances, taking refuge in the language of rights and in the purview of courts seemed the best, and perhaps only, hope.

Proceduralists

Another set of scholars—whom we call "proceduralists"[51]—positioned themselves as centrist pragmatists concerned principally with the overall well-being of U.S. constitutional institutions. If unilateralists were too prone to disregard individual rights,[52] the civil libertarians were too "rigid[] in the face

47. Burt Neuborne, The Role of Courts in Time of War, 29 N.Y.U. Rev. L. & Soc. Change 555, 567–68 (2005); Christina E. Wells, Fear and Loathing in Constitutional Decision-Making, 2005 Wis. L. Rev. 115 (2005) (arguing that history of anti-communist prosecutions in 1940s and 1950s demonstrate need for greater judicial independence on matters of national security); Christina E. Wells, Questioning Deference, 69 Mo. L. Rev. 903, 909–21 (2004) (discussing public and government responses to perceived threats during World War I, World War II, and the Cold War); David Cole, Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis, 101 Mich. L. Rev. 2565, 2576–77 (2003) (arguing for expanded judicial review in times of emergency because of the risk that minorities will be scapegoated).

48. The question of appropriate modes of governance during periods of crisis, of course, long predates 2001. *See, e.g.*, Jules Lobel, Emergency Power and the Decline of Liberalism, 98 Yale L.J. 1385 (1989).

49. For example, John Parry describes how U.S. law had already accommodated brutal interrogation and dehumanizing incarceration practices before September 11. Parry, *supra* note 8, at 159.

50. Balkin, *supra* note 14.

51. Cass Sunstein has referred to his position as "Minimalist" caught between "National Security Maximalist" and "Liberty Maximalists." Cass Sunstein, Minimalism at War, 2004 Sup. Ct. Rev. 47,71 (2004).

52. Sunstein, *supra* note 51, at 73–74 (arguing that policies advocated by "National Security Maximalists" could result in undue infringements on liberty, especially because "when deprivations of liberty are limited to an identifiable few—as they frequently are—external checks on the executive provide an insufficient safeguard of civil liberties.").

of radical changes in the surrounding context."[53] The answer between those proposed extremes lay in constitutional process and modest judicial review.

Proceduralists viewed emergency overreactions as both regrettable and inevitable.[54] "Times of heightened risk to the physical safety of their citizens," wrote Samuel Issacharoff and Richard H. Pildes, "inevitably cause democracies to recalibrate their institutions and processes and to reinterpret existing legal norms, with greater emphasis on security, and less on individual liberty, than in "normal" times."[55] What mattered most was not the prevention of individual abuses, but the preservation of the larger constitutional order.[56] For scholars such as Pildes and Isaacharof, the courts were rightly concerned first and foremost with structural and procedural questions, rather than individual liberties. From that view, "[i]f the framework for judicial determinations is shifted from individual rights to processes of institutional decision making, the American experience offers some rather surprisingly stable observations about legal constraints in times of national emergency."[57] Although process-driven inquiries might be frustratingly incomplete for civil libertarians, courts properly emphasized "second-order issues of appropriate institutions and processes, through which [they] seek mainly to ensure that the right institutional process supports the tradeoff between liberty and security at issue."[58] Cass Sunstein agreed, proposing an even more modest judicial role. For him, the Supreme Court correctly adopted a minimalism that required only the barest of due process for individuals and Congressional authorization, confining itself to "decisions that are themselves shallow and narrow and that therefore impose modest constraints on the future."[59]

53. Gross, *supra* note 13, at 1021; Sunstein, *supra* note 51 (referring to a strict libertarian position as a "non-starter").

54. Sanford Levinson has long written about the apparent disregard for the rule of law by our most celebrated presidents, including George Washington, Lincoln, and Roosevelt. Sanford Levinson, Constitutional Faith 9–17 (Princeton Univ. Press 1988).

55. Samuel Issacharoff & Richard H. Pildes, Between Civil Libertarianism and Executive Unilateralism: An Institutional Process approach to Rights During Wartime, 5 Theoretical Inquiries L. 1, 2 (2004).

56. Ironically, many counterterrorism experts argue with considerable force that the "war on terror" is doomed to fail because terrorism is inevitable and predictable; the most one can reasonably hope for is containment. *See, e.g.*, Louise Richardson, What Terrorists Want: Understanding the Enemy, Containing the Threat 204 (Random House 2006) ("Rather than having the objective of the defeat of terrorism, today our goal should be to contain the threat from terrorists. Unlike the goal of eliminating terrorism, the goal of containing the terrorist threat is achievable.").

57. Issacharoff & Pildes, *supra* note 55, at 8; *see also* Lee Epstein, Daniel E. Ho, Gary King & Jeffrey A. Segal, The Supreme Court During Crisis: How War Affects Only Non-War Cases, 80 N.Y.U. L. Rev. 1, 74 (2005) (suggesting Court, in wartime, tends to engage "in a process-oriented mode of decisionmaking…ensuring authorization from the democratic branches of government" in order to "ensure[ ] the political legitimacy of a ruling").

58. *Id.* at 44.

59. Goldsmith & Sunstein, *supra* note 31, at 52.

For some scholars in this camp, the primary purpose of law was not to eliminate but to contain the inevitable abuses attendant to national crises. The great fear was that "[t]he temporary will be made permanent, threatening civil liberties well beyond the period of the emergency."[60] Thus, Bruce Ackerman advocated for "an emergency constitution" that would temporarily take hold until the risk of constitutional fracture had passed.[61] Under that framework, by using an "on/off" switch, any curtailment of individual rights was temporary, and the risk of contagion minimized. The rules would be set ahead of time, presumably when the nation was freer to favor civil liberties without the immediate crush of mass panic. For others, the best means to avoid long-term erosion of liberties was to operate outside the "law." Oren Gross argued "that there may be circumstances where the appropriate method of tackling grave dangers and threats entails going outside the constitutional order, at times even violating otherwise accepted constitutional principles, rules, and norms."[62] According to Gross, "extra-legal measures" may be normatively defensible (for example, in the ticking time-bomb scenario), but they are never legal. Thus, the legal order is protected from the infection of crisis-thinking and the adage that "hard cases make bad law."[63]

By that measure, the post-9/11 jurisprudence was reassuring. Joseph Landau's view of the courts' response was typical: "[W]hile courts have yielded to the political branches in order to accommodate new challenges and a perceived emergency, they…have reinforced their critical role in the broader tripartite framework [] by grounding decision-making within their own area of expertise."[64] Incremental and marginal change through judicial review is best-suited to protect the constitutional order. Richard Fallon concurred that "[t]he [e]xecutive may be, and may be perceived as, better positioned than the judiciary to strike an informed balance between claims of liberty and the demands of national security."[65] Although the Supreme Court had generally failed to protect individual rights, Fallon posited that an emphasis on process served as a placeholder, such that "the Court has [] guaranteed itself future

60. Mark Tushnet, Defending Korematsu?: Reflections on Civil Liberties in Wartime, 2003 Wis. L. Rev. 273, 304 (2003).

61. Bruce Ackerman, The Emergency Constitution, 113 Yale L.J. 1029 (2004).

62. Gross, *supra* note 13, at 1023; Oren Gross & Fionnuala Ní Aoláin, Law in Times of Crisis (1st ed., Cambridge Univ. Press 2006).

63. Mark Tushnet argues in a similar vein that to the extent emergency powers are necessary or inevitable; they should be viewed as "extra-constitutional." Tushnet, *supra* note 60, at 306–07.

64. Joseph Landau, Muscular Procedure: Conditional Deference in the Executive Detention Cases, 84 Wash. L. Rev. 661 (2009) ("Although the prevailing descriptive and normative frameworks advocate either blind deference to the collective expertise of the political branches or judicial resolution of large, complex and highly fractious substantive questions, courts have instead put procedure to muscular uses—focusing on the means of coordinate branch decision-making, while still allowing the political branches to define the content of the substantive law.").

65. Richard Fallon, The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science, 110 Colum. L. Rev. 352, 392 (2010).

opportunities to consider what rights executive detainees have in a climate different from that which existed in the months and years immediately after 9/11."[66]

A small but vocal chorus of interventionists disagreed. In response to *Hamdi*,[67] Owen Fiss "fault[ed]" the Supreme Court for having decided on purely procedural grounds,[68] and, despite *Hamdan's*[69] reputation as a landmark decision on "military tribunals,"[70] Mark Tushnet observed that "*Hamdan* changed the political dynamics associated with the law of emergency powers without changing the legal terrain (as conventionally understood) one whit."[71] Likewise, while many lauded the Supreme Court's extension of constitutional habeas to Guantánamo in *Boumediene*,[72] others criticized the decision for leaving open a rash of both procedural and substantive questions, most notably the bounds of who may be detained and for how long.[73] Jenny Martinez observed,

66. *Id.* ("[E]ven though the Court's jurisdictional rulings have not entailed the recognition of substantive rights, they have had the effect—which was almost surely intended—of unsettling the status quo ante by giving notice to the [e]xecutive [b]ranch that its detention policies are not immune from judicial scrutiny."). Others, like Joseph Landau go further, arguing even that "[i]t would not be a stretch [] to argue that many of the detainees—if they could choose—might be better off with a procedural resolution than a decision of substance." Landau, *supra* note 64, at 675.

67. Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (upholding military detention for U.S. citizen captured as "enemy combatant" in Afghanistan but imposing basic due process protections).

68. Owen Fiss, The War Against Terrorism and the Rule of Law, 26 Oxford J. Legal Stud. 235, 235 (2006).

69. Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (holding that military commissions exceeded executive authority).

70. Walter Dellinger, The Most Important Decision on Presidential Power. Ever., Slate, June 29, 2006, *available at* http://www.slate.com/ id/2144476/entry/2144825.

71. Mark Tushnet, The Political Constitution of Emergency Powers: Some Lessons from Hamdan, 91 Minn. L. Rev. 1451, 1451 (2007). Hence, Omar Khadr pled guilty in the military commission system, reportedly in exchange for a deal under which he would serve one additional year at Guantanamo and the remainder of his sentence in Canada. Paul Koring, Khadr pleads guilty in exchange for repatriation to Canada, Globe & Mail (Oct. 25, 2010), *available at* http://www.theglobeandmail.com/news/world/americas/omar-khadr-pleads-guilty-to-all-terrorism-charges/article1771325/.

72. Ronald Dworkin, Why It Was a Great Victory, N.Y. Rev. of Books, Aug. 14, 2008, at 18 (describing Boumediene "one of the most important Supreme Court decisions in recent years" and "a landmark change in our constitutional practice"); Gerald L. Neuman, The Extraterritorial Constitution After Boumediene v. Bush, 82 S. Cal. L. Rev. 259, 260–61 (2009) ("[F]or the first time in history the Court found it necessary to strike down a statute as violating the Suspension Clause, rather than construe it to avoid invalidity."); Baher Azmy, Executive Detention, Boumediene, and the New Common Law of Habeas, 95 Iowa L. Rev. 445, 446 (2010) (arguing that in Boumediene "the Court went significantly further than it had ever gone before.").

73. Jenny S. Martinez, Process and Substance in the "War on Terror," 108 Colum. L. Rev. 1013 (2008); *see also* Neal Devins, Talk Loudly and Carry a Small Stick: The Supreme Court and Enemy Combatants, 12 U. Pa. J. Const. L. 491, 492 (2010) ("One year later, the landmark billing of these rulings seems suspect. Next-to-no detainees had been released

"whatever its systemic virtues, the focus on process rather than substance comes at a human cost."[74] Moreover, Martinez was concerned that procedural decisions intended to serve only as placeholders nonetheless tilt the Court in a particular direction: "Having invited Congress to fix things, for example, the Court has put itself in an institutionally weaker position to later strike down Congress's fix on rights-based grounds.... And the Court has done so without the benefit of fully considering the substantive or rights-based arguments."[75]

For some scholars, no options were satisfactory. Mark Tushnet commented that neither Congress nor the judiciary has proven to be a champion of individual rights in the face of national security: "the difference between the residual role given individual rights in the separation-of-powers mechanism and its seemingly prominent role in the judicial-review mechanism nearly disappears."[76] Because of the president's "prime mover" status in wartime decision-making, Tushnet dismissed "deference to the political branches" as "executive unilateralism in a new guise."[77] Throwing up his hands at the inadequate institutions to promote rigorous national defense while preserving individual liberties, Tushnet concluded "[p]erhaps we should consider the possibility that the existing Constitution is one of the dogmas of the quiet past."[78]

* * *

Despite genuine and deep disagreements, the leading narrative in post-9/11 legal scholarship was that a crisis had been thrust upon the United States, and, thus, the pressing question of the day was not whether the government should change, but how much.[79] As Stephen Holmes recently observed, the dominant

from Guantánamo."). *Cf.* Boumediene v. Bush, 128 S. Ct. 2229, 2293 (2008) (Roberts, C.J., dissenting) ("So who has won? Not the detainees. The Court's analysis leaves them with only the prospect of further litigation to determine the content of their new habeas right, followed by further litigation to resolve their particular cases, followed by further litigation before the D.C. Circuit...."). Eve Brensike Primus points to similar criticisms in the case of habeas review of state criminal convictions. Eve Brensike Primus, A Structural Vision of Habeas Corpus, 98 Cal. L. Rev. 1 (2010).

74. Martinez, *supra* note 73.

75. *Id.* at 1030. This critique echoes similar themes raised in the context of welfare rights. Charles A. Reich, Beyond the New Property: An Ecological View of Due Process, 56 Brook. L. Rev. 731, 732–33 (1990) ("Judged by the experience of twenty years, the moderate, due process, cost-benefit approach to individual security [taken in Goldberg v. Kelly] must surely be deemed a failure. We have given it a fair trial, and it does not work.... If individual protection is our goal, nothing less than a full constitutional guarantee will do.").

76. Mark Tushnet, Controlling Executive Power in the War on Terrorism, 118 Harv. L. Rev. 2673, 2679–80 (2005).

77. *Id.* at 2679-80.

78. *Id.* at 2682.

79. Others have criticized the "exceptionalist" framework that characterizes much post-9/11 scholarship. For example, Aziz Huq argues that "there is nothing sui generis about the behavior of courts in instances of national security exigency, or at least that the thesis of exceptionalism is overstated." Aziz Z. Huq, Against National Security Exceptionalism,

framings presupposed that 9/11 heralded a radical departure from the norm, for which some reorganization of the national government and some re-calibration of the balance between liberty and security was both necessary and justified.[80] As with the Supreme Court, the academy's largely procedural approach has arguably had a channeling effect.[81] An emerging trend of scholarship, which takes the question of the tradeoff between rights and security seriously, urges a perhaps limited, but permanent, recalibration. We find ourselves, as Sanford Levinson predicted, in a "permanent emergency."[82]

More fundamentally, an unstated but shared presumption among unilateralists and interventionists was the idea that courts were on the front line of the struggle to define the contours of post-9/11 policies, and that as a result, courts were the proper focus for scrutiny. The preponderance of post-9/11 scholarship addressed whether unilateral executive action was permissible[83] and whether and to what extent judicial review was appropriate. As we show in the next section, that focus left many—but especially interventionists—

2009 Sup. Ct. Rev. 225 (2009). *See also* Judith Resnik, Detention, the War on Terror, and the Federal Courts, 110 Colum. L. Rev. 579 (2010).

80. Stephen Holmes, In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror, 97 Calif. L. Rev. 301, 316 (2009) ("Civil libertarians seem insufficiently aware of how much, when they casually embrace the tradeoff metaphor, they are implicitly conceding to their conservative adversaries."). Holmes has described the effect of the emergency framework, which he calls the "security vs. freedom" metaphor. "So powerful is the imaginative grip of this metaphor…that even civil libertarians adamantly opposed to extralegal executive discretion during emergencies implicitly accept it." *Id.* at 313.

81. Parry, *supra* note 8, at 203–04.

82. Sanford Levinson, Constitutional Norms in a State of Permanent Emergency, 40 Ga. L. Rev. 699 (2006). Robert J. Pushaw, Jr. has suggested that Boumediene may well prove to be a high water mark. Robert J. Pushaw, Jr., Creating Legal Rights for Suspected Terrorists: Is the Court Being Courageous or Politically Pragmatic?, 84 Notre Dame L. Rev. 1975, 1979–80 (2009) (arguing that Boumediene was partially due to the Bush Administration's political unpopularity; predicting that the Court's review of similar future acts by another administration will be more deferential).

83. Some authors gestured toward fundamental rights that would withstand Congressional action, but largely left the boundaries undelineated. Neal K. Katyal & Laurence H. Tribe, Waging War, Deciding Guilt: Trying the Military Tribunals, 111 Yale L.J. 1259, 1309 (2002) (arguing that "[w]hether or not Congress enacts such legislation, by extending to all "persons" within the Constitution's reach such guarantees as equal protection and due process of law, the Constitution constrains how our government may conduct itself in bringing terrorists to justice."). There are, of course, notable exceptions, including Kim Lane Scheppele, Law in a Time of Emergency: States of Exception and the Temptations of 9/11, 6 U. Pa. J. Const. L. 1001 (2004); John T. Parry, Constitutional Interpretation, Coercive Interrogation and Civil Rights Litigation After Chavez v. Martinez, 39 Ga. L. Rev. 733 (2005); Seth F. Kreimer, Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror, 6 U. Pa. J. Const. L. 278, 325 (2003). An especially rich literature has arisen regarding the rights of terrorism suspects under international law. *See, e.g.*, Meg Satterthwaite, Rendered Meaningless: Extraordinary Rendition and the Rule of Law, 75 Geo. Wash. L. Rev. 1333 (2007).

unprepared for the new politics of the Obama era, when there appears to be a widening gap between "rights" as expressed by the Supreme Court and as experienced by individuals.

III. The Paradox of the Obama Era

If there were ever a moment when it appeared the dominant legal narrative had succeeded, and that the myth of rights was not a myth after all, it was Jan. 22, 2009. Democrats had won the largest electoral landslide since LBJ's victory over Barry Goldwater in 1964, leaving them in control of the House, Senate, and White House, and once again prompting pundits to predict the imminent demise of the GOP.[84] Obama had run on a promise to end the abuses of the Bush Administration's "war on terror," vowing to end torture, reform rendition, restrict the use of the State Secrets privilege, and restore the dominant role of Article III courts as the preferred venue for terrorism prosecutions. And of course, he promised to close the detention facility at Guantánamo.[85] Unlike in the 2004 election, Republican attempts to capitalize on the politics of fear proved unsuccessful.

For several years leading up to the election, Obama's proposed reforms appeared to be supported by a broad consensus. Journalists and media personalities had denounced nearly every aspect of the "war on terror," including detention without legal process, the suspension of habeas corpus, the use of coercive or "enhanced" interrogation techniques, warrantless wiretapping,

84. Michael Grunwald, One Year Ago: The Republicans in Distress, Time, May 9, 2009, *available at* http://www.time.com/time/politics/article/0,8599,1896588,00.html ("These days, Republicans have the desperate aura of an endangered species."). These predictions started even before the election. *See, e.g.*, Joe Rothstein, Can The Republican Party Survive The 2008 Elections?, U.S. Politics Today, Oct. 8, 2008, *available at* http://uspolitics.einnews.com/article/557738-can-the-republican-party-survive-the-2008-elections- (predicting possible GOP "decline into permanent minority status"). More sensibly, David Brooks predicted the Republican Party would "veer right in the years ahead, and suffer more defeats," before reforming itself along more moderate lines. David Brooks, Darkness at Dusk, N.Y. Times, Nov. 20, 2008, at A29.

85. *See, e.g.*, Barack Obama: The War We Need to Win, Obama '08, *available at* http://www.barackobama.com/pdf/CounterterrorismFactSheet.pdf ("Guantánamo has become a recruiting tool for our enemies. The legal framework behind Guantánamo has failed completely, resulting in only one conviction. President Bush's own Secretary of Defense, Robert Gates, wants to close it. Former Secretary of State Colin Powell, wants to close it. The first step to reclaiming America's standing in the world has to be closing this facility. As president, Barack Obama will close the detention facility at Guantánamo. He will reject the Military Commissions Act, which allowed the U.S. to circumvent Geneva Conventions in the handling of detainees. He will develop a fair and thorough process based on the Uniform Code of Military Justice to distinguish between those prisoners who should be prosecuted for their crimes, those who can't be prosecuted but who can be held in a manner consistent with the laws of war, and those who should be released or transferred to their home countries."); Obama: We Are Going To Close Gitmo, CBS News, Jan. 11, 2009, http://www.cbsnews.com/stories/2009/01/11/national/main4713038.shtml ("But I don't want to be ambiguous about this. We are going to close Guantánamo and we are going to make sure that the procedures we set up are ones that abide by our Constitution.").

and the excessive use of presidential signing statements.[86] Bookshelves groaned under the weight of titles that criticized nearly every aspect of the post-9/11 policy, and Jane Mayer's book on the detention policy, *The Dark Side*, a New York Times bestseller, had been shortlisted for the National Book Award.[87] Non-governmental organizations rained down a relentless criticism. Libertarian and conservative think tanks like CATO and the Rutherford Institute, bi-partisan organizations like the Constitution Project, a veritable army of liberal policy centers, and a broad coalition of religious and military groups consistently inveighed against the Bush Administration's post-9/11 policies.[88] Professional associations like the American Bar Association and the American Psychological Association took official positions against one or more aspects of the post-9/11 world. And, of course, condemnation abroad was nearly universal.[89]

86. Much of this coverage was presented in Joseph Margulies, Guantánamo and the Abuse of Presidential Power (Simon and Schuster 2006). *See also, e.g.*, Neil A. Lewis, Red Cross Criticizes Indefinite Detention in Guantánamo Bay, N.Y. Times, Oct. 10, 2003, at A1; Edward T. Pound, A House of Horrors, Revealed, U.S. News & World Report, Sept. 6, 2004, at 45; Gabor Rona, "War" Doesn't Justify Guantánamo, Fin. Times, Mar. 1, 2004, *available at* http://search.ft.com/ftArticle?queryText=gabor+rona&y=15&x=33&id=040229002897&ct=0&nclick_check=1; Jeffrey Toobin, Killing Habeas Corpus, The New Yorker, Dec. 4, 2006, at 46; Evan Thomas, The Debate Over Torture: Right after 9/11, Cheney said, "we have to work…the dark side if you will," Newsweek, Nov. 21, 2005, at 30; Marty Lederman, The Anti-Torture Memos: Balkinization Posts on Torture, Interrogation, Detention, War Powers, Executive Authority, DOJ and OLC, July 8, 2007, *available at* http://balkin.blogspot.com/2005/09/anti-torture-memos-balkinization-posts.html.

87. Deborah P. Jacobs, Down a Dark Road, The Boston Globe, Dec. 9, 2008, at G3.

88. *See, e.g.*, James Bovard, Breaking Bush's Resistance: A pending court case could expose the administration's torture regime, The American Conservative, July 30, 2007, *available at* http://www.amconmag.com/article/2007/jul/30/00025; Tim Wheeler, Growing movement assails Bush torture policy, People's Weekly World Newspaper, May 18, 2006, *available at* http://www.pww.org/article/articleview/9149/; American Civil Liberties Union, Coalition Letter Supporting End to Torture and Changes in Interrogation and Detention Policy, Jan. 14, 2009, *available at* http://www.aclu.org/images/torture/asset_upload_file718_38484.pdf; Amnesty International, Framework: End Illegal US Detentions (2007), *available at* http://www.amnesty.org/en/library/asset/AMR51/167/2007/en/69dcf709-aa4b-11dc-a783-95b6ae9ecbe6/amr511672007eng.pdf; Gene Healy & Timothy Lynch, CATO Institute, Power Surge: The Constitutional Record of George W. Bush (2006), *available at* http://www.cato.org/pubs/wtpapers/powersurge_healy_lynch.pdf; Robert E. Hunter & William H. Taft, IV, U.S. Should Restore Rights to Detainees, The Constitution Project, July 10, 2007, *available at* http://www.constitutionproject.org/pdf/Hunter_Taft_Commentary_Restore_Rights_For_Detainees1.pdf; Unitarian Universalist Association of Congregations, Civil Liberties: 2004 Statement of Conscience, *available at* http://www.uua.org/socialjustice/socialjustice/statements/13422.shtml; John W. Whitehead, The Constitution is the Issue, The Rutherford Institute, Sept. 12, 2008, *available at* http://www.rutherford.org/articles_db/commentary.asp?record_id=552.

89. *See, e.g.*, Thomas Friedman, Just Shut it Down, N.Y. Times, May 27, 2005, at A23; Luke Harding, CIA's secret jails open up new transatlantic rift: Hundreds of flights landed in Germany over two years: Seizure of innocent people likely to embarrass Rice, The Guardian, Dec. 5, 2005, at 14; Close Guantánamo Camp, Hain Says, BBC News, Feb. 17, 2006, *available at* http://news.bbc.co.uk/2/hi/uk_news/politics/4722408.stm; (Euro MPs Urge

Nor was this reaction confined to popular culture. At a gathering at the University of Georgia in March, 2008, five former Secretaries of State—Henry Kissinger, James Baker, Warren Christopher, Madeleine Albright, and Colin Powell—agreed the next president should move quickly to close the prison. Baker, who served under the first President Bush, said Guantánamo "gives us a very, very bad name, not just internationally." "I have a great deal of difficulty," he added, "understanding how we can hold someone, pick someone up,… and hold them without ever giving them an opportunity to appear before a magistrate." Powell hoped the new president would close Guantánamo "immediately."[90] In the months before the 2008 election, several of the most senior members of the Bush White House announced that Guantánamo should be closed, including Secretary of State Condoleeza Rice and Secretary of Defense Robert Gates. Even President Bush said he wanted to shutter the island prison. Congress, though it joined the fracas late, was eventually unsparing in its criticism.[91] Promises by Senators McCain and Obama to close the camp provoked no particular public outcry.[92]

On Jan. 22, 2009, President Obama began to act on this apparent cultural consensus. To begin with, he ordered Guantánamo shut within a year. Noting the "significant concerns" raised by the facility, "both within the United States and internationally," Obama determined it "would further the national security and foreign policy interests of the United States and the interests of justice" to close the base. He also directed the CIA to close and not reopen its black sites, and ordered CIA interrogators to confine themselves to the techniques authorized in the Army Field Manual, rather than the "enhanced interrogation techniques" authorized by the Bush Administration.[93] In addition, he quickly brought into his administration a number of the academics, policy experts, and practitioners who had attacked various aspects of the war on terror.[94] Polls

Guantánamo Closure, BBC News, June 13, 2006, *available at* http://news.bbc.co.uk/2/hi/americas/5074216.stm; Merkel: Guantánamo Mustn't Exist in Long Term, Spiegel Online, Jan. 9, 2006, *available at* http://www.spiegel.de/international/0,1518,394180,00.html.

90. David E. Sanger, Restoring a Constitutional Balance, N.Y. Times, July 14, 2006, at A15.

91. *See, e.g.*, 152 Cong. Rec. S6047 (2006) (statement of Sen. Jeff Bingaman); 152 Cong. Rec. S7290-04 (2006) (statement of Sen. Richard Durbin); 153 Cong. Rec. E979-05 (2007) (speech of Rep. Jane Harman); 153 Cong. Rec. H7080-05 (2007) (statement of Rep. Moran); 155 Cong. Rec. S779 (2009) (statement of Sen. Christopher Dodd); Renee Schoof, Congress Letter to Bush: Close Guantánamo, McClatchy Newspapers, June 29, 2007, *available at* http://mcclatchydc.com/100/story/17486.html.

92. The views of Sens. John McCain and Obama were hardly unique; with the exception of former Massachusetts Gov. Mitt Romney, every major candidate during the primaries had endorsed closing Guantánamo.

93. Exec. Order No. 13,492, 74 C.F.R 4897 (Jan. 22, 2009); Exec. Order No. 13,491, 74 C.F.R 4893 (Jan. 22, 2009); *see also* Australia Says It May Accept Guantánamo Bay Detainees, N.Y. Times, Dec. 27, 2008, at A7; James Risen, The Executive Power Awaiting the Next President, N.Y. Times, June 22, 2008, at A4.

94. Some of the more prominent include Harold Koh and Sarah Cleveland, respectively the Legal Advisor and Counselor on International Law at the Department of State; Marty

suggest these steps were broadly accepted. When they voted in November, only 12 percent of Americans identified the threat of terrorism as their number one concern, and by the end of 2008, a majority of Americans favored closing Guantánamo, ending torture, and either putting terror suspects on trial in federal court or returning them for prosecution in their home countries.[95] At least in January, 2009, it appeared as though the dominant narrative of deviation and redemption was true, and that the clamor for "rights" had been heard.

Yet by early 2010, even Obama's supporters viewed many of his actions as stunning political missteps. What appeared to have been a broad cultural consensus had disappeared, and a new one had supposedly emerged in its place. As though the former consensus never existed, politicians and pollsters confidently claimed to know what Americans really wanted, which is that Guantánamo remain open, "enhanced interrogation" remain on the table, preventive detention be added to the arsenal of U.S. counter-terror weapons, and that prosecutions, if they must occur, take place in military commissions rather than federal court. And politicians who previously supported reform scrambled to conjure creative explanations for their former positions. On January 22, 2009, for instance, John McCain, praised President Obama and pledged "to support [his] decision to close the prison at Guantánamo…."[96] Within months, however, when the political winds had changed, he was arguing that Guantánamo should stay open until a "comprehensive plan" has been passed by Congress.[97] McCain and Connecticut Democrat-turned-

Lederman, Deputy Assistant Attorney General in Office of Legal Counsel, Department of Justice; Neal Katyal, Deputy Solicitor General; and Tony West, Assistant Attorney General, Department of Justice. There was, of course, the idiocy over the role played by some of these lawyers within the Department of Justice. *See, e.g.*, Ari Shapiro, "Al-Qaeda 7" Controversy: Detainees and Politics, National Public Radio, March 11, 2010, *available at* http://www.npr.org/templates/story/story.php?storyId=124546087; Andrew McCarthy, Why the Al Qaeda 7 Matter, National Review Online, Mar. 9, 2010, *available at* http://article.nationalreview.com/427318/why-the-al-qaeda-seven-matter/andrew-c-mccarthy.

95. As Paul Gronke and Darius Rejali have recently shown, a majority of Americans have consistently opposed the use of torture, including in 2008. *See* Paul Gronke, et al., U.S. Public Opinion on Torture, 2001–2009, 43 Pol. Sci. & Pol. 3, 437–444 (2010). On public support for closing Guantánamo and use of trials in the civilian system, *see, e.g.*, Jon Cohen & Jennifer Agiesta, Public Supports Closing Guantánamo; In Poll, Most Agree with President's Plan to Shutter the Facility within a Year, Washington Post, Jan. 22, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/01/21/AR2009012103652.html; Jon Cohen, WaPo-ABC poll on Gitmo, Washington Post (Jan. 21, 2009), *available at* http://www.washingtonpost.com/wp-srv/politics/documents/postpoll011709.html.

96. *See* Joint Statement by Sen. McCain and Sen. Bob Graham on Guantánamo Executive Order, Jan. 22, 2009, *available at* http://mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord_id=03BF6495-9452-AE33-F5EC-73E0E412F857.

97. *See* Floor Statement by Sen. McCain on the Closure of the Guantánamo Bay Prison, May 19, 2009, *available at* http://mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.FloorStatements&ContentRecord_id=5B05F68A-FCB8-

Independent Joseph Lieberman have proposed legislation that would permit detention without trial of citizens and non-citizens alike, including those arrested in this country, "for the duration of hostilities against the United States or its coalition partners" or for as long as authorized by either the law of war or by "any authorization for the use of military force provided by Congress pertaining to such hostilities."[98]

Apparently dramatic reversals like this cry out for an explanation. The obvious candidate—some intervening event that reset the emergency clock—can be quickly set aside; no such event took place. In fact, the official consensus of the intelligence community is that Al Qaeda has been substantially weakened. In the national security assessment of 2009, Dennis Blair, the former Director of National Intelligence for the Obama Administration, reported that the threat of terrorism is no longer the greatest risk facing the United States, a position he repeated in 2010.[99] If anything, the reality of events would suggest that support for emergency measures should continue to decline. The most significant incident of 2009—the failed attempt Christmas Day by Abdul Farouk Abdulmutallab to bring down a commercial jet by detonating explosives sewn into his clothing—cannot account for the reversal. By that time, the apparent consensus of 2008 had already evaporated, as demonstrated conclusively by the reaction to Abdulmutallab's actions. When the Obama Administration arrested and charged him in federal court in Detroit, the partisan outcry was immediate and vitriolic. Even though Abdulmutallab confessed, pundits and politicians demanded to know why he had been brought into the criminal justice system, read his Miranda warnings, and prosecuted like a common criminal; polls quickly suggested substantial support for the use of "enhanced interrogation techniques," including water-boarding, as well as trial by

0CC5-F0E3-38840F8439E2; Press Release, Statement by Senator John McCain, Dec. 15, 2009, *available at* http://mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord_id=9461EB86-018E-E04C-D381-C90463777A8D.

98. S. 3081, 111th Cong. § 2d (2010). Enemy Belligerent Interrogation, Detention, and Prosecution Act of 2010. Preventive detention is provided for in Section 5, "Detention Without Trial of Unprivileged Enemy Belligerents."

99. In the 2009 National Threat Assessment, Blair described the global economic freefall as the greatest threat to national security, and that "[b]ecause of the pressure we and our allies have put on al-Qa'ida's core leadership in Pakistan and the continued decline of al-Qa'ida's most prominent regional affiliate in Iraq, al-Qa'ida today is less capable and effective than it was a year ago." *See* Intelligence Community Annual Threat Assessment, Given to the Senate Select Committee on Intelligence, February, 2009 *available at* http://www.dni.gov/testimonies/20090212_testimony.pdf ("The primary near-term security concern of the United States is the global economic crisis and its geopolitical implications."). The assessment in 2010, given shortly after the failed Christmas attack, was considerably less sanguine. Still, Blair ranked cyber attacks as the number one threat to national security, followed by continued instability in the global economy, and did not retreat from his 2009 position that the United States was "turning a corner on violent extremism." *See* Intelligence Community Annual Threat Assessment, given to the Senate Select Committee on Intelligence, February, 2010, *available at* http://www.dni.gov/testimonies/20100202_testimony.pdf.

military commission.[100] Yet barely 100 days after 9/11, the Bush Administration reacted precisely the same way to shoe-bomber Richard Reid, who was duly convicted and sentenced to life in prison. At the time, not even conservative commentators had argued for a different result.[101]

IV. A Politics of Crisis and Quiescence

Recent events expose a flaw in the predictive power of the dominant narrative in post-9/11 legal scholarship; that narrative envisions a country that veers off course at the onset of a military emergency but gradually steers back to a peacetime norm once the threat recedes, via primarily legal interventions. That model cannot explain a sudden return to the repressive wilderness just at the moment when it seemed the country had recovered its moral bearings. The problem, we suggest, has been a narrow focus on the structure and production of American legal institutions rather than on the actual operation of those institutions in society. We believe a more complete, and more accurate, perspective is to see courts, Congress, and the executive as players in a political theater. Their lines acquire meaning principally through their conversion into symbols of a particular social narrative. In this view, the Aug. 1, 2002 memos from the Office of Legal Counsel do not merely authorize particular interrogation methods; they are a symbol that can be used to mobilize support for a narrative about government overreaching, or, conversely, their repudiation can be used to paint a portrait of a dangerously naïve executive.

100. On support for waterboarding and "enhanced" techniques, *see, e.g.*, Waterboarding Terror Suspects Unacceptable to Half of Americans, Angus Reid Public Opinion, Feb. 24, 2010, *available at* http://www.visioncritical.com/wp-content/uploads/2010/02/2010.02.24_Waterboard.pdf (39 percent of Americans, and 58 percent of Republicans, support water-boarding; 57 percent of Americans, and 77 percent of Republicans, support "enhanced interrogation techniques."). On military commissions, *see, e.g.*, Economist/YouGov Poll, Mar. 13-16, 2010, *available at* http://media.economist.com/images/pdf/Toplines20100318.pdf (58 percent of Americans favor military commissions.). For a summary of the polling data on torture from October, 2001, through the beginning of 2009, including the wording used, see Gronke, *supra* note 95, at 437-444. We do not exclude the possibility that there were other significant terrorist threats in 2009 of which the public is unaware. But for that very reason, they cannot have influenced the course of public opinion. The public only reacts to what it learns.

101. Writing in the Weekly Standard, for instance, Stephen Schwartz believed Reid's indictment would "make it possible to trace, identify, and shut down Islamic extremist recruiting networks with which [Reid] had contact in the United States and Britain." Stephen Schwartz, Recruiters for Jihad; Meet the Tablighi Jamaat—Right Here in the U.S.A., The Weekly Standard, Jan. 28, 2002 (copy on file with the authors). Other articles presented no inkling that Reid was anything other than a criminal who should be prosecuted to the full extent of the law. *See, e.g.*, Deroy Murdock, Right Country, Wrong Camp, National Review, Jan. 25, 2002, http://www.nationalreview.com/articles/205127/right-country-wrong-camp/deroy-murdock; Robert A. Levy, Not on Our Soil, National Review, Jan. 25, 2002, http://www.cato.org/pub_display.php?pub_id=3380 ("Plain and simple, military tribunals have no business on U.S. soil. So far, President Bush seems to agree. He should say so, unequivocally and soon."); Theodore Dalrymple, Just Your Average Shoe-Bomber: "Not a Bad Lad," and How Not To Be Had, National Review, Jan. 28, 2002.

As the discussion in the second part of this essay makes clear, this orientation has not figured prominently in post-9/11 scholarship and is entirely absent from the dominant legal narrative of deviation and redemption. We do not purport to have definitive answers to the complex relationship between law and politics in the fraught area of national security, but one place to enter the discussion is to return to the related insights of Murray Edelman and Stuart Scheingold.[102] Taken together, Edelman's and Scheingold's observations about the essential malleability of American popular opinion and the political nature of rights seems to account for the conundrum described in Part III and point to new directions in national security scholarship.

Beginning in 1964 with *The Symbolic Uses of Politics*, and continuing throughout a long and productive career, the late political scientist Murray Edelman struggled to understand poverty in America. For him, the conundrum was not simply that the condition existed and persisted, but that the poor were largely quiescent, apparently content with little more than symbolic participation in the democratic process, even though that process consistently failed to produce change and sometimes brought about policies that made the condition demonstrably worse. But unlike his contemporary Louis Hartz, who seized on America's unswerving devotion to its liberal tradition as an explanation for its vitriolic hostility to socialism and class-based policies (a devotion Hartz derided as "irrational Lockeanism"), Edelman focused on the structure of American government and in particular on the distance between policy-makers and those they govern.

Edelman's great contribution was a series of related observations into the operation of American government. Foremost, he recognized that for the overwhelming majority of Americans, politics is necessarily remote, especially at the national level. Most Americans cannot intelligently assess whether a particular national policy is a good or bad idea—whether, for instance, we should have a national health care policy, and whether it should include a public option, or even what a "public option" is—and therefore cannot be said in any meaningful way to demand one choice over another.[103] And if it is true the public cannot intelligently evaluate most domestic policy initiatives,

102. Edelman developed his ideas in a series of books and articles. See in particular Murray Edelman, Symbolic Uses of Politics (2d ed., Univ. of Illinois Press 1985); Edelman, Politics as Symbolic Action: Mass Arousal and Quiescence (Markham Pub. Co. 1971); Edelman, Constructing the Political Spectacle (1st ed., Univ. of Chicago Press 1988); Edelman, The Politics of Misinformation (1st ed., Cambridge Univ. Press 2001). For a discussion of Edelman's legacy within the field of Law and Society, see Patricia Ewick & Austin Sarat, Hidden in Plain View: Murray Edelman in the Law and Society Tradition, 29 Law & Soc. Inquiry 439 (2006).

103. *See, e.g.*, Edelman, Symbolic Uses, *supra* note 102, at 5–6 ("For most men most of the time, politics is a series of pictures in the mind, placed there by television news, newspapers, magazines, and discussions…. It is central to its potency as a symbol that it is remote, set apart, omnipresent as the ultimate threat or means of succor, yet not susceptible to effective influence through any act we as individuals can perform.") (emphasis added). We do not mean to suggest that this idea originated with Edelman. The notion can be traced at least to 1922, when Walter Lippman published Public Opinion (Free Press 1997) (1922).

which could have an immediate impact on their lives, Edelman's insight is all the more compelling in matters related to national security and foreign affairs, where the particulars of the debate are deliberately shrouded in secrecy and beyond the ken of all but a tiny number of esoteric specialists.[104] This led Edelman to conclude that contrary to what was then the conventional wisdom among politicians, pundits, and journalists, American policy-makers do not respond to demands that bubble up from the American people. Instead, the American people form judgments about what they "want" with respect to remote issues, and whether those "wants" are being met, based on symbolic gestures and cues provided to them by trusted insiders and policy-makers who share their values, and who are believed to have access to the information that most Americans lack.[105]

Though Edelman grounded his writing in the social science research that was available to him, much of that research was in its infancy. As a result, Edelman's early writing is largely impressionistic. But his theories have since been confirmed by decades of scholarship, particularly the rich literature on rational ignorance and democratic theory. For many years, countless studies and surveys have consistently shown that the majority of Americans are abysmally ignorant about even the most basic characteristics of the American political system, and even more so about the details of particular policy positions.[106] A great deal of this literature explores how and to what

104. In Symbolic Uses, Edelman speculated that his theories would explain public behavior vis-à-vis foreign affairs, but he did not undertake a demonstration to that effect until Politics as Symbolic Action. More recent research has confirmed the theory. *See, e.g.*, William Howell & Douglas Kriner, Political Elites and Public Support for War (2007) (unpublished manuscript, on file with author) *available at* http://www.law.northwestern.edu/colloquium/international/Howell.pdf ("Whereas most citizens have immediate experiences on which to draw when formulating their domestic policy preferences, on questions of foreign policy these citizens lack direct experience or knowledge; and consequently…, citizens rely on elites both to acquire and process information about foreign affairs."). For a discussion of survey data demonstrating voter ignorance about foreign affairs over many decades, *see, e.g.*, Herbert H. Hyman & Paul B. Sheatsley, Some Reasons Why Information Campaigns Fail, 11 Pub. Opinion Q. 412 (1947); Stephen E. Bennett, "Know-Nothings" Revisited: The Meaning of Political Ignorance Today, 69 Soc. Sci. Q. 476 (1988) [hereinafter "Know-Nothings" Revisited]; Stephen E. Bennett, "Know-Nothings" Revisited Again, 18 Pol. Behav. 219–31 (1996) [hereinafter "Know-Nothings" Revisited Again]. For an insightful discussion penned during the McCarthy era of the perils of secrecy in national security, see Edward Shils, The Torment of Secrecy: The Background & Consequences of American Security Policies (Free Press 1956).

105. *E.g.*, Edelman, Symbolic Uses, *supra* note 102, at 172–73 ("The mass public does not study and analyze detailed data about secondary boycotts, provisions for stock ownership and control in a proposed space communications corporation, or missile installations in Cuba. It ignores these things until political actions and speeches make them symbolically threatening or reassuring, and it then responds to the cues furnished by the actions and the speeches, not to direct knowledge of the facts. It is therefore political actions that chiefly shape men's political wants and 'knowledge,' not the other way round. The common assumption that what democratic government does is somehow always a response to the moral codes, desires, and knowledge embedded inside people is as inverted as it is reassuring.").

106. *See, e.g.*, Michael X. Delli Carpini & Scott Keeter, What Americans Know About Politics and

extent American voters use "information shortcuts" to inform themselves about candidates and issues and thereby become intelligent participants in the electoral process.[107] Most of these shortcuts amount to heuristics that allow voters to substitute the judgment of others for their own investigation. Our concern is not whether these shortcuts work, though some scholars have expressed skepticism.[108] Rather, our point is that scholars agree these shortcuts are widely employed, and that Americans get their information about remote issues from others, including most prominently the cues and messages of those people and institutions perceived to be in the know or allied with their view of the world. As Dan Kahan and Donald Braman recently put the matter:

> [C]itizens aren't in a position to figure out through personal investigation whether the death penalty deters, gun control undermines public safety, commerce threatens the environment, et cetera. They have to take the word of those whom they trust on issues of what sorts of empirical claims and what sorts of data supporting such claims, are credible. The people they trust, naturally, are the ones who share their values—and who…are predisposed to a particular view.[109]

At the same time, and drawing on emerging research in social psychology, Edelman theorized that remote attachments to contentious national issues are paradoxical: On the one hand, they are apt to be intensely expressed and to generate fierce political passions. Yet on the other hand, for most Americans, the attachments are ephemeral and quickly forgotten, depending on how they are packaged and presented to the American public.

One example illustrates the malleability of contemporary political debates, particularly regarding national security or foreign affairs. In an address to a joint session of Congress in April, 1983, Ronald Reagan famously warned that the communist Sandinistas of Nicaragua were "just as close to Miami, San Antonio, San Diego, and Tucson as those cities are to Washington." After recounting the alleged perfidies of the Nicaraguan communists, as well as

Why It matters (Yale Univ. Press 1996); Bennett, "Know-Nothings" Revisited, *supra* note 104: Bennett, "Know-Nothings" Revisited Again, *supra* note 104.

107. *See, e.g.*, John Gastil, Donald Braman, Dan M. Kahan & Paul Slovic, The "Wildavsky Heuristic": The Cultural Orientation of Mass Political Opinion, preliminary draft *available at* http://ssrn.com/abstract=834264 (discussing literature).

108. *See, e.g.* Ilya Somin, Voter Ignorance and the Democratic Ideal, 12 Critical Review 413 (1998).

109. Dan M. Kahan & Donald Braman, Cultural Cognition and Public Policy, 24 Yale L. & Pol. Rev. 149 (2006). This research has important implications for efforts to trace the arc of American thought on a given issue, since it implies that the range of messages heard on a remote issue will strongly influence the course of American thought. If, for instance, the range shifts to the right or left, or narrows around a particular consensus, American thought on the issue will follow suit. *See, e.g.*, John R. Zaller, The Nature and Origins of Mass Opinion 11–15 (Cambridge Univ. Press 1992); Benjamin Page, Robert Shapiro, & Glenn R. Dempsey, What Moves Public Opinion, 81 Am. Pol. Sci. R. 23 (1987); Adam J. Berinsky, Assuming the Costs of War: Events, Elites, and American Public Support for Military Conflict, 69 J. of Pol. 975 (2007) (documenting shifts in public opinion when elites "come to a common interpretation of a political reality."). These, however, are matters for another day.

their supposedly enthusiastic embrace of Moscow, Reagan asked rhetorically—in language worth recalling today—whether democracies must "remain passive while threats to their security and prosperity accumulate?"

> Must we just accept the destabilization of *an entire region from the Panama Canal to Mexico* on our southern border? Must we sit by while independent nations of this hemisphere are integrated into the most aggressive empire the modern world has seen? Must we wait while Central Americans are driven from their homes like the more than a million who've sought refuge out of Afghanistan?"[110]

With this, Reagan roused Americans to support a policy initiative that had only the most remote connection to their lives, but which signaled their support for the equally remote, but symbolically powerful struggle against communism. Yet the majority of Americans had no idea what the American position was with respect to the Sandinistas, just as they later had no idea who the mujahideen in Afghanistan were, or why there would be "more than a million" refugees from the Afghan war.[111] So when it came time to view the mujahideen as terrorists, the American public could make the transition with Orwellian ease.[112]

Sadly, history presents a ready supply of these bewildering transformations in America's foreign policy preferences. The classic example is the post-war re-imagining of Germany and the Germans from demonic incarnation of evil to democracy-loving, anti-communist stalwarts and allies—the metamorphosis that figured among Orwell's inspirations for 1984.[113] But an even more striking illustration, if perhaps less commented upon, was the juxtaposition in the perception of the Japanese and our former allies, the Russians and Chinese. As the historian John Dower has artfully shown, within weeks of the war's end, the iconic wartime image of the Japanese—the rapacious, blood-soaked, and savage ape—was softened and replaced with the inquisitive, imitative, and child-like chimp, resting on the broad shoulders of his American protectors

110. Presidential Address Before a Joint Session of the Congress on Central America (April 27, 1983), *available at* http://www.reagan.utexas.edu/archives/speeches/1983/42783d.htm (emphasis added).

111. Zaller, *supra* note 109, at 25.

112. Almost immediately after the collapse of the Soviet Union, pundits began to express fear about the threat of Islamic fundamentalism, quickly dubbed "the Green Peril." *See, e.g.*, Amos Perlmutter, Wishful Thinking about Islamic Fundamentalism, Washington Post, Jan. 19, 1992 ("Islamic fundamentalism is an aggressive revolutionary movement as militant and violent as the Bolshevik, Fascist, and Nazi movements of the past," and cannot be reconciled with the "Christian-secular universe"); Judith Miller, The Islamic Wave, The New York Times, May 31, 1992, *available at* http://www.nytimes.com/1992/05/31/magazine/the-islamic-wave.html. Some foresaw the danger in the new demonization. *See, e.g.*, Leon Hadar, The "Green Peril": Creating the Islamic Fundamentalist Threat, CATO Pol. Anal. No. 177 (Aug. 27, 1992).

113. This was also the example Edelman used. Edelman, Symbolic Uses, *supra* note 102, at 173-76.

who would educate him in the ways of democracy.[114] Gen. Douglas MacArthur later made this explicit, explaining to the Senate that his philosophy during the occupation had been to treat the Japanese as twelve-year-olds. "Measured by the standards of modern civilization," he said, "they would be like a boy of [twelve]…. Like any tuitionary period, they were susceptible to following new models. You can implant basic concepts there. There were still close enough to origin to be elastic and acceptable to new concepts…."[115]

Meanwhile, as the Japanese were quickly recast as eager and harmless students of the American Way, first the Russians and then the Chinese were cast with the old wartime stereotypes. "Traits which the Americans and English had associated with the Japanese, with great empirical sobriety, were suddenly perceived to be really more relevant to the communists (deviousness and cunning, bestial and atrocious behavior, homogeneity and monolithic control, fanaticism divorced from any legitimate goals…)." And when China joined the communist camp, the favorable traits attributed to the Chinese during the war—their individualism and love of democracy—suddenly disappeared, replaced by "the old, monolithic, inherently totalitarian raiments the Japanese were shedding. They became the unthinking horde; the fanatics…; the new Yellow Peril." Experts quickly emerged to explain their "true" character. Edmund Chubb, a diplomat and leading China specialist, assured Americans that the Chinese "do not think like other men." Instead, they acted out of a "madness born of xenophobia."[116]

If Edelman's first insight was that most Americans have only a remote attachment to national controversies, and that public engagement with these controversies is apt to be particularly susceptible to symbolic manipulation, his second was to explain how such an attachment could come under siege and collapse. Edelman observed what today is commonplace—that crisis is a much more potent political resource than calm. Every politician, as well as every journalist, community organizer, fundraiser, and advertising executive, understands that a loss can produce a sense of threat and mobilize people to act, while success invariably encourages complacency and quiescence.[117]

In 1974, Edelman's insights received an important elaboration when his colleague at the University of Wisconsin, Stuart Scheingold, published *The Politics of Rights*. Where Edelman focused his attention on the political

114. John W. Dower, War Without Mercy: Race and Power in the Pacific War 302 (Pantheon 1986).

115. U.S. Senate, Committee on Armed Services and Committee on Foreign Relations, 82d Cong., 1: 312–313 (1951) (Hearings To Conduct an Inquiry into the Military Situation in the Far East and the Facts Surrounding the Relief of General of the Army Douglas MacArthur from His Assignments in that Area).

116. Dower, *supra* note 114, at 309. Another example of this phenomenon was the rapid re-imagining of the Germans at the end of World War I. *See* Gary Gerstle, The Immigrant as Threat to American Security: A Historical Perspective, *in* The Maze of Fear: Security and Migration after 9/11 96–97 (John Tirman, ed., New Press 2004).

117. *See* Edelman, *supra* note 102.

branches, Scheingold tried to understand why judicial decisions conferring "rights" upon marginalized groups so infrequently led to meaningful change in the condition that prompted the litigation, a riddle Scheingold thought particularly anomalous given the widespread tendency in American society to equate law with moral legitimacy.[118] Why, in other words, were courts universally respected but their pronouncements generally ignored, and what did this paradox tell us about the nature of rights in American society?

His answer to these questions, much simplified here, was that rights are best understood as contingent political resources, rather than entitlements that could be cashed in like coupons in a grocery store. Scheingold theorized that rights awarded by courts acquired broader symbolic significance as soon as they entered the cultural and political bloodstream. Depending on how those symbols were received and manipulated, they were capable of commanding financial resources, conferring legitimacy, and generating expectations, as well as encouraging resistance and stimulating opposition—a phenomenon Scheingold called, "the politics of rights."[119] Building on Edelman's ideas of remoteness, quiescence, and threat, Scheingold theorized that a judicial declaration of rights could, and probably would, calm some even as it alarmed others. In that way, the decree itself could generate opposition that previously did not exist, providing political resources that could be marshaled in a campaign to limit or marginalize the decree. The result could be the emergence of a vigorous backlash against a decision that, at least at the time, seemed supported by a broad social consensus.[120]

A potent illustration of the politics of rights is the political and social reaction to the Supreme Court's 1972 decision in *Furman v. Georgia*, which struck down then-existing death penalty statutes. In the years prior to *Furman*, the death penalty had come under increasing attack from leading intellectuals, prominent politicians, editorialists, and religious organizations.[121] Juries had been sentencing fewer and fewer people to die, and protracted appeals prevented executions. After 105 executions in 1951, there were fifty-six in 1960.

118. Scheingold acknowledged his heavy debt to the earlier work of Judith Shklar. Shklar defined legalism as "the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules." Shklar, Legalism 1 (Harvard Univ. Press 1964). More recently, Mary Ann Glendon made the same point: "This legalization of popular culture is both cause and consequence of our increasing tendency to look to law as an expression of the few values that are widely shared in our society: liberty, equality, and the ideal of justice under law…. *Legality, to a great extent, has become a touchstone for legitimacy*." Glendon, Rights Talk: The Impoverishment of Political Discourse 3 (Free Press 1991) (emphasis added). For a discussion of Scheingold's debt to, and development of, Edelman's theories, see Ewick & Sarat, Hidden in Plain View, *supra* note 102, at 444.

119. Scheingold, *supra* note 9, at 83–148.

120. In the first edition, Scheingold paid scant attention to counter-mobilizations and backlash. He remedied the deficiency in the second edition. *Id.* at xxxii–xxxvii.

121. Stuart Banner, The Death Penalty: An American History 240–41 (Harvard Univ. Press 2003).

Five years later, there were only seven, and in June, 1967, Colorado carried out what would be the last execution in the United States for a decade.[122] State legislatures responded to these developments with a flurry of activity. By 1969, fourteen states had abolished the death penalty and several others came close. In 1957, the California Assembly and the Illinois legislature passed six-year moratoria on executions, which Illinois renewed in 1967. Meanwhile, public opinion polls showed decreasing support—and more importantly, no apparent enthusiasm—for the ultimate sanction.[123] By 1972, there seemed to be a cultural consensus against capital punishment.

Yet the day after the Supreme Court decision in *Furman*, legislators in five states announced their intention to introduce bills that would restore the death penalty. President Nixon charged the FBI with providing him with the names of convicted killers who had committed a second murder after being released from prison. In November, 1972, a few months after *Furman*, voters in California overwhelmingly supported an amendment to the state constitution to allow for capital punishment. By 1976, thirty-five states plus the federal government had enacted new death penalty statutes.[124] The shift in public opinion was equally dramatic. A few months before *Furman*, supporters of capital punishment outnumbered opponents by only eight percentage points; a few months after, the number grew to twenty-five points. By the time the Court revisited the issue in 1976, supporters outnumbered opponents 65 percent to 28 percent, the widest gap since the early 1950s.[125] As the legal historian Stuart Banner observed, "*Furman* suddenly made capital punishment a more salient issue than it had been in decades, perhaps ever. People who previously had had little occasion to think about the death penalty now saw it on the front page of the newspaper. *Furman*, like other landmark cases, had the effect of calling its opponents to action."[126]

Taken together, the insights from Edelman and Scheingold about the operation of law in society allow us to see post-9/11 events in an entirely different light. What practitioners, clinicians, and the legal academy conceived as an argument about "rights" and the optimal structure of American government is better understood as a battle over political resources and how they have been, and continue to be, mobilized to create narratives about national identity—an identity that is alternately threatened or calmed depending on the symbolic manipulation of unfolding events.[127] In this view, for instance, the suspension

122. *Id.* at 244–46.

123. *Id.* at 240–44.

124. *Id.* at 267–68.

125. *Id.* at 268.

126. *Id.* at 268–69.

127. Leti Volpp has made a similar point about the role of the "other" (or the non-citizen, or the terrorist) in the construction of national identity. Leti Volpp, The Culture of Citizenship, 8 Theoretical Inquiries L. 571 (2007) (considering headscarf ban in France and contrasting treatment of Jose Padilla and John Walker Lindh).

of habeas corpus should not be understood as simply a counter-terror policy that expands or contracts the rights of some interested group, or even as a policy that is or is not illegal. Instead, it should be understood in the way it was actually used—*viz.*, as a political resource that was marshaled to contribute to competing narratives, one of official indifference to that magically potent symbol of American identity, "the Rule of Law," and another of official commitment to a different but similarly potent symbol, "National Security."

The nexus to "law" is, therefore, largely instrumental.[128] The ability to fashion the superior legal argument is most useful insofar as it increases the value of the political resource for one narrative or another.[129] Litigation battles join academic condemnation and white papers from NGOs condemning torture, rendition or indefinite detention, all of which are accompanied by a press release and eminently quotable executive summaries. These cultural products combine with press coverage of the Abu Ghraib prison scandal, or news of prisoner deaths in secret CIA black sites, which appears alongside news that yet another aspect of the Bush Administration policy has been struck down by the Supreme Court, which is handed down the day before the release of yet another book criticizing the lawlessness of the Bush Administration's policy, followed the next day by release of the torture memos and a new poll showing that a majority of Americans now think the Bush Administration is indifferent to civil liberties, which leads to another round of editorializing, white papers,

128. *See, e.g.*, Howell & Kriner, *supra* note 104, at 4. This discussion obviously links to the vigorous debate over whether social reform litigation "works." Gerald N. Rosenberg, in The Hollow Hope: Can Courts Bring About Social Change?, expresses considerable doubt about whether the courts can be successful, either directly or indirectly, in bringing about social change. Our position is more modulated. All litigation produces an outcome. As we have described, in socially contentious litigation, that outcome is a political resource which can be used to contribute to a social narrative. At least vis-à-vis social reform, the litigation "works" only to the extent that narrative prevails in society in an enduring way, such that the outcome achieved in the litigation is secure from political rollback. Viewed in this light, it is very difficult to pronounce the post-9/11 detention litigation as a success, despite the many victories in the Supreme Court. This understanding, however, should not be taken to imply that litigation is powerless for an individual client in an individual case. Obviously that is not true, as any successful civil rights plaintiff can attest. Nor does it mean that the Guantánamo habeas litigation did not in the end contribute to some prisoners securing their freedom. Clearly it did, and for them, the litigation "worked" in the evident sense that they are free today and may not have been but for the litigation. But if the measure of success is either meaningful judicial supervision of executive detentions in the war on terror, or the creation of an enduring social narrative against unfettered executive detention, then it is hard to consider the litigation to have been a success.

129. This is precisely what happened when U.S. District Judge Anna Diggs Taylor held that the warrantless wiretapping program was unconstitutional. Media outlets identified the most quotable sections of her opinion, which figured prominently in their coverage. *See, e.g.*, MSNBC, Feds Appeal Ruling Against Wiretap Program, Aug. 18, 2006, http://www.msnbc.msn.com/id/14393611/ ("'There are no hereditary Kings in America and no powers not created by the Constitution. So all 'inherent powers' must derive from that Constitution," Taylor wrote in her 43-page opinion. "The public interest is clear, in this matter. It is the upholding of our Constitution," she wrote) (last visited Oct. 18, 2010). By the time the Sixth Circuit overturned the decision, the narrative had already absorbed the value of her (perhaps unwitting) contribution and moved on.

law review articles…. In this way, a narrative is born, and along with it, the appearance of a broad cultural consensus.

But this apparent consensus, like the "consensus" against capital punishment in 1972, is likely to be a mile wide but an inch deep. For the vast majority of Americans, counter-terror policy is distant and opaque, operating in a world set apart from their daily existence and beyond their power to control. They have no direct access to the relevant information and cannot assess which of the many contested claims are true. Are the prisoners at Guantánamo innocent men, wrongly detained and horribly mistreated? Or coddled terrorists committed to destruction and mayhem? Can they be put on trial in federal court or paroled into the United States? Or would they overwhelm our courts and disappear into the shadows? The great majority of Americans cannot answer these questions for themselves, so they look to cues and messages from trusted insiders who they believe have access to the facts they lack. And because the debate touches on the essential symbols of American national identity, they listen in particular to those who affirm their vision of America.

President Obama's speech on national security May 21, 2009 at the National Archives is a case study in symbolic reassurance. As a number of observers have noted, despite Obama's campaign promises, his post-9/11 counter-terror policies are most striking for their similarity to Bush's, rather than their differences, which are mostly modest and incremental.[130] Yet in his only major speech on national security, Obama—invoking the mythical power of the Constitution, the Declaration of Independence, and the Bill of Rights—said the Bush Administration "went off course" when it made a series of "hasty decisions" that "established an ad hoc legal approach for fighting terrorism… that failed to rely on our legal traditions and time-tested institutions, and that failed to use our values as a compass." To correct these mistakes, Obama said he had made "dramatic changes" that represented "a new direction from the last eight years," and that his approach to terrorism, unlike that of his predecessor, was faithful to "our most fundamental values…[to] liberty and justice in this country, and a light that shines for all who seek freedom, fairness, equality,

130. *See, e.g.*, American Civil Liberties Union, Establishing a New Normal: National Security, Civil Liberties and Human Rights Under the Obama Administration, July 2010, *available at* http://www.aclu.org/files/assets/EstablishingNewNormal.pdf; Massimo Calabresi & Michael Weisskopf, The Fall of Greg Craig, Time, Nov. 19, 2009, *available at* http://www.time.com/time/politics/article/0,8599,1940537,00.html; Owen Fiss, Obama's Betrayal: His Guantánamo Policy Violates the Principle of Freedom, Slate, Dec. 4, 2009, *available at* http://www.slate.com/id/2237389/ ("[T]he sad fact is that Obama has not carried through on [his] promise and now presides over the very horror he himself had the courage to denounce."); Amy Davidson, Close Read: What's Going on at Bagram, New Yorker, Sept. 14, 2009, *available at* http://www.newyorker.com/online/blogs/closeread/2009/09/close-read-whats-going-on-at-bagram.html; Jack Goldsmith, The Cheney Fallacy: Why Barack Obama is waging a more effective war on terror than George W. Bush, The New Republic, May 18, 2009, *available at* http://www.tnr.com/article/politics/the-cheney-fallacy. The authors agree with these assessments.

and dignity around the world." These changes, he vowed, would allow us to resume our timeless "American journey…toward a more perfect union."[131]

This rhetoric built on both the anti-Bush narrative of indifference to the rule of law and Obama's campaign promise of change. The speech left a powerful impression that the Obama Administration had reclaimed America's moral standing, ending the abuses of a shameful past, and returning to our foundational principles. At least for those who are inclined to look to Obama as a trusted voice, his speech provided all the reassurance they could possibly want that change had finally come, and that the democratic process worked. Obama had reaffirmed their vision of American identity as a law-abiding and honorable nation, committed to a set of ideals that had been cast aside in the madness after 9/11. Lost in the comforting rhetoric, however, were the policy details, which included—for the first time in U.S. history—support for a preventive detention regime, something even the Bush Administration had not proposed.[132]

Among opponents to Bush-era policies, Obama's remarks produced quiescence and calm, a sense that the nation had finally "recovered" and that attention could safely be devoted to more pressing matters like the economy. But immediately after Obama's speech, the cameras shifted to former Vice President Cheney, who offered a vigorous defense of Bush-era counter-terror policies, including in particular Guantánamo and the use of "enhanced interrogation techniques." Relying on his position as an insider with presumed access to secrets unknown to most Americans, Cheney hinted darkly of the dangers that would befall Americans now that President Obama was carving holes in

131. *See* Remarks by the President on National Security at the National Archives, May 21, 2009, *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/.

132. *Id.* ("Now, finally, there remains the question of detainees at Guantánamo who cannot be prosecuted yet who pose a clear danger to the American people. And I have to be honest here—this is the toughest single issue that we will face. We're going to exhaust every avenue that we have to prosecute those at Guantánamo who pose a danger to our country. But even when this process is complete, there may be a number of people who cannot be prosecuted for past crimes, in some cases because evidence may be tainted, but who nonetheless pose a threat to the security of the United States…. Let me repeat: I am not going to release individuals who endanger the American people."). We should note here a disagreement between the authors. Margulies accepts that the United States may detain prisoners for the duration of hostilities in Afghanistan, at least so long as Congress continues to authorize military force and combat operations there remain ongoing, and provided the detention is subject to adequate habeas review. He maintains, however, that if a prisoner prevails in habeas he must be released, and understands the Obama Administration to take the position that a prisoner may be held indefinitely, without criminal charges and even if the United States loses in habeas, based solely on a prediction of future dangerousness. That is the essence of preventive detention and is illegal. Metcalf, by contrast, contends that because the United States is no longer engaged in an ongoing international armed conflict recognizable under international humanitarian law, prisoners captured in the so-called "war on terror" must either be criminally charged (either under U.S., Afghan, or other domestic law), detained pursuant to Afghan law in a manner that meets international human rights standards, or released.

the security net carefully woven by the Bush Administration.[133] Republicans have hammered on this theme throughout Obama's Administration (just as, it must be acknowledged, Democrats hammered on the theme of lawlessness and incompetence throughout the Bush Administration).[134]

Both speeches presented powerful narratives that appealed to particular audiences. But where Obama's speech produced quiescence, Cheney's produced the far more potent sense of threat. Once again, the nation was dangerously at risk and no more pressing matter faced the country than to thwart Obama's recklessness.[135] In reflecting on the relative impact of these two speeches, it is worth recalling the nature of counter-terror policy in the American imagination. It exists only as a collection of evocative images and ideas—black sites, torture, Guantánamo, terrorists—all of which are entwined with the most powerful political symbols in American life: race, national security, and the most elusive of all, "American values." This intimate connection not only to our perceived safety but to our most potent national symbols means that Americans can be roused to attach inordinate significance to the debates, creating the appearance of a cultural consensus. But at the same time, their attachments will be superficial and easily changed, perhaps with bewildering rapidity.[136]

133. Cheney's speech was delivered at the American Enterprise Institute. *See* Richard B. Cheney, Remarks at the American Enterprise Institute, May 21, 2009, *available at* http://www.aei.org/speech/100050.

134. For some of the many examples, *see, e.g.*, J.D. Gordon, 5 Reasons We're Not as Safe with Obama in the White House, Fox News, April 13, 2010, *available at* http://www.foxnews.com/opinion/2010/04/13/jd-gordon-obama-terror-al-qaeda-safe-america-nuclear-disarmament/; Rep. Mac Thornberry, Terrorism Policy Risks Disaster, Politico, May 6, 2010, *available at* http://www.politico.com/news/stories/0510/36834.html; Marc Theissen, U.S. may be passing up chances to stop terrorist plots, Washington Post, May 11, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/05/10/AR2010051002174.html.

135. This helps explain one of the many oddities of contemporary American public opinion. Though Obama's policies are generally indistinguishable from those in place at the end of the Bush years, public opinion polls consistently show that Republicans, by a substantial margin, believe Obama's policies have made the nation less safe than when Bush was in office, while Democrats, by similar majorities, believe the opposite. *See, e.g.*, Quinnipiac Polling Institute, Obama's Approval Splits Evenly for First Time, Quinnipiac University National Poll Finds; Voters Split on Whether First Year Is Success or Failure, Jan. 13, 2010, *available at* http://www.quinnipiac.edu/x1284.xml?ReleaseID=1411&What=obama&strArea=;&strTime=9. Polling throughout 2010, though less detailed, has consistently shown that Republicans strongly disapprove of Obama's terror policies and Democrats just as strongly approve. *See, e.g.*, Quinnipiac University National Poll, U.S. Voters Say Gays In Military Should Come Out, Quinnipiac University National Poll Finds; Voters Want Military Trials for Terror Suspects, Feb 10, 2010, *available at* http://www.quinnipiac.edu/x1284.xml?ReleaseID=1422&What=obama&strArea=;&strTime=9; Quinnipiac University National Poll, Senate Should Ratify Nuclear Disarmament Treaty, U.S. Voters Tell Quinnipiac University National Poll; Obama Not Strong Enough On Israel, Voters Say, April 10, 2010, *available at* http://www.quinnipiac.edu/x1284.xml?What=obama&strArea=;&strTime=9&ReleaseID=1448#Question003.

136. There is evidence that at least some members of the Obama Administration were caught off guard by the speed with which an apparent consensus can shift. White House Counsel

For the moment, it seems that the success of Obama's narrative produced quiescence on the Left and alarm on the Right. Conservatives were invigorated and mobilized just as the Left was abandoning the public square. The result has been a counter-mobilization against Obama and his national security policies that was much more vitriolic and effective than anything during the campaign.[137]

* * *

The foregoing is simply one attempt at a scholarship that goes beyond the "myth of rights" and takes account of the broader historical, social and political context for U.S. reactions to terrorism. But we note that other disciplines are ahead of the legal academy in this regard. Many scholars–notably in socio-legal studies, history and political science–have probed the causes and consequences of U.S. counterterrorism policies.[138] Sociologists have explored various explanations for post-9/11 policies, from consumerism[139]

Greg Craig had initial responsibility for implementing the administration's Guantánamo policy. According to published reports, Craig was surprised and taken aback at the resistance generated by Obama's decision to close the base. *See* Anne E. Kornblut & Dafna Linzer, White House Regroups on Guantánamo, Counsel Craig Replaced as Point Man on Issue as Deadline for Closing Looms, Washington Post, Sept. 25, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/09/24/AR2009092404893.html (quoting Craig: "I thought there was, in fact, and I may have been wrong, a broad consensus about the importance to our national security objectives to close Guantánamo and how keeping Guantánamo open actually did damage to our national security objectives.").

137. We note that the anti-Bush narrative was substantially advanced by other developments that bore little relation to his counter-terror policies but which could be taken as evidence that the narrative was true. The fiasco in Iraq and the disastrous response to Hurricane Katrina, for instance, contributed to the view that the Bush team did not adequately plan for contingencies and was so blinded by its ideology that it was unprepared for the reality of events. Likewise, the anti-Obama narrative has been powerfully fueled by resentment over his health care and economic policies, all of which merge into a narrative of big government run amok, with the traditional Democratic attachment to exorbitant social programs at the expense of national security. This illustrates the familiar psychological principle of biased assimilation, by which observers make sense of new events by fitting them into pre-existing understandings. *See* Charles G. Lord, Lee Ross & Mark R. Lepper, Biased Assimilation and Attitude Polarization: The Effect of Prior Theories on Subsequently Considered Evidence, 37 J. Personality and Soc. Psychol. 2098 (1979); Kahan & Braman, *supra* note 109.

138. Other scholars applied lessons from other disciplines, such as political science, to the Supreme Court's decisions regarding detainees' rights. Fallon, *supra* note 65, at 396 ("Lawyers who want to understand constitutional law must attend to the role of actors besides the Supreme Court in shaping the domain of politically tolerable assertions of judicial power.").

139. Timothy Recuber, The Terrorist as Folk Devil and Mass Commodity: Moral Panics, Risk and Consumer Culture, 9 J. Inst. Just. Int'l Stud. 158 (2009) (describing reaction to terrorism as "moral panic" fueled by mass media and consumerism); Dana Heller, Introduction: Consuming 9/11, *in* The Selling of 9/11: How a National Tragedy Became a Commodity (Dana Heller ed., Palgrave MacMillan 2005).

to media portrayals of crime[140] to the politics of fear generally.[141] As Jonathan Simon observed, from a socio-legal perspective, post-9/11 policies were not the exception but "only the latest effort to redefine the scope of the U.S. federal government's power (and especially the executive branch) by invoking the metaphor of war."[142] Legal historians also noted continuities, especially with respect to the historic U.S. antipathy to prisoners' dignity and humanity[143] as well as the long-standing presence of terrorism on U.S. soil.[144] Mary Dudziak has probed the foundations of the dominant emergency framing, arguing that "[i]deas about the temporality of war are embedded in American legal thought [which are] in tension with the experience of war in the twentieth century. The problem of time, in essence, clouds an understanding of the problem

140. David L. Altheide, The Mass Media, Crime and Terrorism, 4 J. Int'l Crim. Just. 982, 997 (2006) (arguing that experience of terrorism suspect Abdullah Al-Kidd was "similar to millions of current and former prison inmates, whose identity has been reconstructed by state officials acting with the blessing of frightened citizens, who in turn are seeking protection from real and imagined criminals, terrorists and any 'other' that is part of the script being played out in a mass mediated production of the politics of fear.").

141. David L. Altheide, Terrorism and the Politics of Fear (AltaMira Press 2006); Michael Tonry, Thinking About Crime: Sense and Sensibility in American Penal Culture (Oxford Univ. Press 2004); Barry Glassner, The Culture of Fear: Why Americans Are Afraid of the Wrong Things (Basic Books 2000).

142. Jonathan Simon, Choosing Our Wars, Transforming Governance *in* Risk and the War on Terror 79 (Amoore & de Goode, eds., Routledge 2008); *see also* John T. Parry, The Shape of Modern Torture: Extraordinary Rendition and Ghost Detainees, 6 Melbourne J. Int'l L. 516 (2005) (arguing that modern states may create unique conditions conducive to dehumanization and torture); Ryan Goodman & Derek Jinks, Toward an Institutional Theory of Sovereignty, 55 Stan. L. Rev. 1749 (2003) (using socio-legal framework to explain American exceptionalism). *See generally* Jonathan Simon, Risk and Reflexivity: What Socio-Legal Studies Add to the Study of Risk and the Law, 57 Ala. L. Rev. 119 (2005) (providing general framework for "socio-legal approach" to study of risk and law).

143. Comparative studies in this regard are illuminating. *See* James Q. Whitman, Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe (Oxford Univ. Press 2003) (comparative study of criminal punishment practices in the United States, France, and Germany, concluding that U.S. practices are far harsher and more degrading than their European counterparts due in part to U.S. history of greater egalitarianism); Peter Scharff Smith, Prisons and Human Rights: The Case of Solitary Confinement in Denmark and the US from the 1820s until Today *in* Human Rights in Turmoil: Facing Threat, Consolidating Achievements 221–248 (Stephanie Lagoutte, et al., eds., Martinus Nijhoff 2007) (noting the relative increase in harshness of U.S. penal policies).

144. Brenda J. Lutz & James M. Lutz, Terrorism in America 140 (Palgrave Macmillan 2007) (surveying history of violence by non-state actors in United States and concluding that terrorism "has in fact been a common thread running through much of the country's history…."); Brent L. Smith, Terrorism in America: Pipe Bombs and Pipe Dreams (SUNY Press 1994) (describing terrorist activity within United States from 1950s through 1980s along wide variety of fronts, from the Weathermen to the KKK); Carol K. Winkler, In the Name of Terrorism: Presidents on Political Violence in the Post-World War II Era Ch. 1 (SUNY Press 2005) (arguing that "terrorist" is "ideograph" that reinforces American identity through negating others and that examination of its use by U.S. presidents exposes boundaries of U.S. political culture).

of war."[145] And cultural critics have provided much needed context for U.S. torture policies[146] and reactions to "Islamic extremism."[147]

An emerging group of legal scholars—whom we might term "integrationists"—have examined the continuities between post-9/11 policies and American practices and attitudes toward crime, risk, security, and socially constructed "others."[148] As argued by John Parry,[149] Judith Resnik,[150] and James Foreman,[151] post-9/11 policies are neither sui generis nor likely to disappear at the end of this "war," whenever that might be. The struggle against abusive treatment and confinement of terrorism suspects will undoubtedly persist over the long-term, and we are best served by broadening our lens to consider how post-9/11 policies repeat, reflect, and inform broader U.S. policies towards marginalized people such as prisoners and non-citizens. Muneer Ahmad has begun the difficult task of questioning whether a rights-based strategy can possibly be effective in the political context of Guantánamo,[152] and most fundamentally, we must heed the admonition of Richard Fallon, who recently and quite properly observed that "the Constitution is 'politically constructed' by the tolerances of Congress and the president, as supported by public opinion."[153]

V. Conclusions and Implications

From the vantage of 2010, it appears the interventionist position—our position—has failed. As we see it, it failed because it was premised upon a

145. Mary L. Dudziak, Law, War, and the History of Time, Cal. L. Rev. (forthcoming 2010).

146. Robert Crawford, Torture and the Ideology of National Security, 12 Global Dialogue 1 (2010).

147. *See, e.g.*, Ahdaf Soueif, The Function of Narrative in the "War on Terror" *in* War on Terror 35–36 (Chris Miller ed., Machester Univ. Press 2009) (describing essentialist construction of "terrorist" as "Arab" and "Muslim," standing outside history or politics and essentially irrational and opposed to "civilization"); Khaled Abou El Fadi, 9/11 and the Muslim Transformation, *in* September 11: A Watershed Moment in History? 70 (Mary Dudziak ed., Duke Univ. Press Books 2003) (arguing that—far from evidence of a "clash of civilizations"—Al Qaeda represents extreme and reductive reaction to colonialism).

148. Ahmad, *supra* note 13, at 1278; Leti Volpp, The Citizen and the Terrorist, 49 UCLA L. Rev. 1575 (2002).

149. John T. Parry, Torture Nation, Torture Law, 97 Geo. L.J. 1001 (2008) (noting limited effect of Miranda on protecting most criminal suspects from coercive interrogation).

150. Judith Resnik, Detention, The War on Terror, and the Federal Courts, 110 Colum. L. Rev. 579 (2010). Resnik compares the federal courts' role in the current fight for the rights of terrorism suspects and the historical struggle to secure the rights of criminal suspects, prisoners, and non-citizens.

151. James Forman Jr., Exporting Harshness: How the War on Crime Has Made the War on Terror Possible, 33 N.Y.U. Rev. of L. & Soc. Change 331 (2009).

152. Muneer I. Ahmad, Resisting Guantánamo: Rights at the Brink of Dehumanization, 103 Nw. U. L. Rev. 1683 (2009).

153. The Supreme Court, Habeas Corpus and the War on Terror: An Essay on Law and Political Science, 110 Colum. L. Rev. 352, 357–58 (2010).

legalistic view of rights that simply cannot be squared with the reality of the American political experience. Yet the interventionist stance holds an undeniable attraction. Of all the positions advanced since 9/11, it holds out the best promise of preserving the pluralist ideals of a liberal democracy. The challenge going forward, therefore, is to re-imagine the interventionist intellectual endeavor. To retain relevance, we must translate the lessons of the social sciences into the language of the law, which likely requires that we knock law from its lofty perch. As a beginning, scholarship should be more attuned to the limitations of the judiciary, and mindful of the complicated tendency of narratives to generate backlash and counter-narratives.

But there is another tendency we must resist, and that is the impulse to nihilism—to throw up our hands in despair, with the lament that nothing works and repression is inevitable. Just how to integrate the political and the ideal is, of course, a problem that is at least as old as legal realism itself and one we do not purport to solve in this essay.[154] Still, we are heartened by the creative work undertaken in other arenas, ranging from poverty law to gay rights, that explores how, done properly, lawyering (and even litigation) can make real differences in the lives of marginalized people.[155] We hope that the next decade of reflections on the policies undertaken in the name of national security will follow their lead in probing not just what the law should be, but how it functions and whom it serves.

We close this essay on a personal note. Margulies was counsel of record in *Rasul v. Bush*. He and his colleagues at the Center for Constitutional Rights began work on that litigation in November, 2001, not long after Alan Dershowitz first started to press his proposal for "torture warrants." By the time this essay appears, Margulies' uninterrupted involvement in these issues will have lasted more than nine years, with no sign of ending anytime soon. He vividly recalls the state of play when *Rasul* was filed in February, 2002, and when one of his co-counsel received a death threat at his home in New Orleans. With considerable regret, Margulies now looks back on *Rasul* as a failure. But in 2002, there was no other choice. The Bush Administration had created a prison beyond the law, Congress was a stony monolith, and the parents and family of lost prisoners pleaded that their loved ones not be abandoned. At that moment, there was no choice but to litigate. He would do it again tomorrow, were the circumstances the same. His mistake, for which he takes sole responsibility, was to believe that law, in an intensely legalistic society, was enough.

154. For an engaging description of the various strands of legal realism, see Victoria Nourse & Gregory Shaffer, Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?, 95 Cornell L. Rev. 61 (2009). On the New Legal Realism Project, see www.newlegalrealism.org.

155. *See, e.g.*, Scott Cummings, Lawyering for Marriage Equality, 57 UCLA L. Rev. 1235 (2010); Sameer Ashar, Law Clinics and Collective Mobilization, 14 Clinical L. Rev. 355 (2008); Scott L. Cummings & Deborah L. Rhode, Public Interest Litigation: Insights from Theory and Practice, 36 Fordham Urb. L.J. 603 (2009).