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Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible

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EXPORTING HARSHNESS: HOW THE WAR ON CRIME HELPED MAKE THE WAR ON TERROR POSSIBLE

JAMES FORMAN, JR.*

I. INTRODUCTION

During the Bush administration, opponents of the prosecution of the war on terror routinely denounced it as a betrayal of American values. The narrative went like this: the United States has a long-standing commitment to human rights and due process, reflected in its domestic criminal justice system's expansive protections, but after September 11, 2001, President Bush, Vice President Cheney, Defense Secretary Rumsfeld, and their allies dishonored this tradition.

Consider the argument of Neal Katyal, the lead civilian lawyer for Salim Hamdan, Osama bin Laden's driver. Katyal describes meeting his client for the first time, when Hamdan asked him, "Why are you doing this?" Katyal responded:

The reason that I am here is that my parents came to America with eight dollars in their pocket. . . . They came to America for a simple reason: they could land on its shores and they'd be treated fairly and their children would be treated fairly. And when the president issued this military order, which said, "If you're one of them, if you're a green card holder"—as my parents were—"or if you're a foreigner . . . you get the beat-up Chevy version of Justice. You get sent to Guantanamo. But if you're an American citizen, accused of the most heinous crime imaginable, the detonation of a weapon of mass destruction, you get the Gold Standard. You get the American Civilian Trial." I told him *that's* why I was so offended. Because we haven't ever had Us versus Them justice.¹

* Professor of Law, Georgetown University Law Center. I received valuable comments from Lama Abu-Odeh, Muneer Ahmad, Seema Ahmad, Bill Bratton, David Cole, Arthur Evenchik, Sara Feinberg, Emma Jordon, Laura Hankins, Aziz Huq, Neal Katyal, Jamie Mayerfeld, Mitt Regan, Joanna Saul, Mike Seidman, Giovanna Shay, Andrew Wise, and David Vladek. I acknowledge the work of my research assistants Kristina Joye, Jessica McCurdy, and Ryan Warren, as well as the efforts of Jennifer Locke Davitt, Leslie Street and the staff of the Edward Bennett Williams Law Library. Finally, I would like to thank Sara Conrath and the staff of the N.Y.U. Review of Law & Social Change for their excellent editorial assistance.

1. Neal Katyal, Paul & Patricia Saunders Professor of Nat'l Sec. Law, Georgetown Univ. Law Ctr., Investiture and Inaugural Lecture for the Center on National Security and

Katyal made the same point when testifying before Congress, contrasting the Bush administration's proposed military commissions for detainees held at Guantanamo with "the 'Cadillac' version of justice" reserved for U.S. citizens.²

Having represented indigent defendants for six years in the local courts of Washington, D.C., I was taken aback by Katyal's contention that Americans receive a 'Cadillac' system of justice.³ But Katyal is hardly alone. Consider the titles of three recent exposés of the Bush administration's policies in the war on terror. British human rights lawyer Philippe Sands's new book is called *Torture Team: Rumsfeld's Memo and the Betrayal of American Values*.⁴ *New York Times* reporter Eric Lichtblau's investigation of the NSA spying program is *Bush's Law: The Remaking of American Justice*.⁵ And the *New Yorker's* Jane Mayer has just released *The Dark Side: The Insider Story of how the War on Terror Turned into a War on American Ideals*.⁶ Each of these titles tells the same familiar tale: the war on terror represents a sharp break from the past, with American values and ideals "betrayed," American law "remade."

The truth is more complicated, and in this Article I seek to begin a more sustained comparison between the wars on terror and crime.⁷ While I share much of the criticism of how we have waged the war on terror, I suspect it is both too simple and ultimately too comforting to assert that the Bush administration alone remade our justice system and betrayed our values. In this Article, I seek to turn Katyal's argument on its head and to explore the ways in which our approach to the war on terror is an

the Law: The Principled War on Terror (Apr. 10, 2008), <http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=543>. See also Neal Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365, 1393 (2007).

2. *Military Commissions in Light of the Supreme Court Decision in Hamdan v. Rumsfeld: Hearings Before the Comm. on Armed Servs.*, 109th Cong. 243 (2006) (statement of Neal K. Katyal, Professor of Law, Georgetown University).

3. Of course, some people in America do get something approximating the Cadillac. See *infra* note 173.

4. PHILIPPE SANDS, *TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES* (2008).

5. ERIC LICHTBLAU, *BUSH'S LAW: THE REMAKING OF AMERICAN JUSTICE* (2008).

6. JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* (2008).

7. This topic is only starting to get the attention it deserves. Initial contributions that have influenced my thinking include Aziz Z. Huq & Christopher Muller, *The War on Crime as Precursor to the War on Terror*, 36 INT'L J. L., CRIME & JUST. 215 (2008), and Dorothy Roberts, *Torture and the Biopolitics of Race*, 62 U. MIAMI L. REV. 229 (2008). See also Atul Gawande, *Hellhole*, NEW YORKER, Mar. 30, 2009, at 36, 39, 44 (arguing solitary confinement in domestic prisons constitutes torture and that "[o]ur willingness to discard these standards for American prisoners made it easy to discard the Geneva Conventions prohibiting similar treatment of foreign prisoners of war, to the detriment of America's moral stature in the world").

extension—sometimes a grotesque one—of what we do in the name of the war on crime.⁸

By pursuing certain policies and using particular rhetoric domestically, I suggest, we have rendered thinkable what would otherwise have been unthinkable. Moreover, as the world's largest jailer, we are increasingly desensitized to the harsh treatment of criminals. We have come to accept such excesses as casualties of war—whether on crime, drugs, or terror. Indeed, more than that, we no longer see what we do as special, different, or harsh. Certain practices have become what David Garland calls “the taken-for-granted features of contemporary crime policy.”⁹ In part for this reason, despite the mounting evidence regarding secret memos, inhumane prison conditions, coercive interrogations, and interference with defense lawyers, the Bush administration's approach to the war on terror went largely unchecked and unchanged.

Many critics of the Bush administration's terror policies open with some version of the question—how did it come to this? My Article seeks to address the same question. Specifically, I will explore five areas in which our domestic criminal system has informed our approach to the war on terror: (1) the scope of our prison complex, (2) prison conditions and prisoner abuse, (3) our harsh treatment of juveniles, (4) attacks on judicial authority, and (5) undermining the role of defense counsel. In addition, I will discuss the innocence movement, which I argue has somewhat tempered the prosecution of both the wars on crime and terror.

Before turning to the details, I want to outline how some other critics have explained the forces that give rise to our current approach to the war on terror. Perhaps the most common explanation for why America has pursued such extreme measures is what might be called the *Wartime Overreaction Theory*. In this view, civil liberties always suffer in times of war. As Justice Brennan once put it:

There is considerably less to be proud about, and a good deal to be embarrassed about, when one reflects on the shabby treatment civil liberties have received in the United States during times of war and perceived threats to national security. . . . After each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But

8. John Parry makes a similar point about torture. Parry reviews America's historic and current uses of torture domestically and internationally and concludes that “torture may be compatible with American values in practice and with the legal system we have constructed to serve those values.” John T. Parry, *Torture Nation, Torture Law*, 97 *Geo. L. J.* 1001, 1003 (2009).

9. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 1 (2001).

it has proven unable to prevent itself from repeating the error when the next crisis came along.¹⁰

More recently, Eric Lichtblau frames the history of the American criminal justice system as exercising “restraint over aggression” except in times of war. In Lichtblau’s account, the American tradition is to place a “premium” on protecting “the rights of the innocent.” Exceptions are few and far between and concern times of national emergency, like World Wars I and II and the ensuing Cold War. According to Lichtblau,

For much of its history, the American justice system has placed a premium on ensuring that a society’s zeal to rid its streets of the guilty does not trample the rights of the innocent in its path and, just as important, that the justice system includes enough checks and balances, enough safeguards, to know the difference. There have been, of course, the notable and in some ways predictable exceptions, especially in times of national fear and crisis. The Palmer Raids targeting some ten thousand suspected radicals, socialists, and anarchists in 1919 were one; the internment of some 120,000 Japanese-Americans during World War II was another; Senator Joseph McCarthy’s Red Scare in the 1950s a third. More often, however, the justice system has tilted toward restraint over aggression.¹¹

The *Wartime Overreaction Theory* helps explain why Americans have accepted practices that have outraged much of the rest of the world. Foreigners might have the luxury to sympathize with the plight of those locked up in Guantanamo or Abu Ghraib or secret prisons. But American sympathies will naturally lie with the victims of the September 11 bombings and making sure it does not happen again. After all, America was attacked, and it is natural—even typical—for states to respond aggressively and with little regard for civil liberties in such circumstances.

Closely related is what might be called the *Blame Bush and Rove Theory*. The argument here is that while war always leads to some level of overreaction, the fear generated by September 11 has been stoked by the

10. William J. Brennan, Jr., *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises*, 18 *ISR. Y.B. HUM. RTS.* 11, 11 (1988). See also RICHARD POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* 9 (2006) (“In times of danger, the weight of concerns for public safety increases relative to that of liberty concerns, and civil liberties are narrowed. In safer times, the balance shifts the other way and civil liberties are broadened.”). For a useful debate on whether decision making in times of emergency poses risks for civil rights and liberties, compare ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 64–128 (2007) (rejecting *Wartime Overreaction Theory*) with David Cole, *No Reason to Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint*, 75 *U. CHI. L. REV.* 1329, 1342–54 (2008) (reviewing and disagreeing with POSNER & VERMEULE, *supra*).

11. LICHTBLAU, *supra* note 5, at 23–24.

Bush administration to bully opponents and win support for various harsh measures.¹² In the words of 9/11 Commission Director Phillip Zelikow, the problem was that “fear and anxiety were exploited by zealots and fools.”¹³ In this account, the Bush administration consistently and “successfully invoked the threat of ‘mushroom clouds’ to win support, or at least acquiescence, for the invasion of Iraq.”¹⁴ By the time it became clear Saddam Hussein had no weapons of mass destruction, the Bush administration began warning of the risks of losing to terrorists in Iraq—the new “central front” of the war on terror.¹⁵ The name bin Laden disappeared for awhile, only to reemerge once reports of “secret CIA prisons, torture, and domestic spying”¹⁶ surfaced.

David Cole’s *Enemy Aliens Theory* also deserves our attention. According to Cole, aliens have always been the first target during times of crisis. The government gets away with it precisely because the restrictions on liberty and privacy are directed at a group that is foreign, other, and politically weak.¹⁷ Because foreign nationals have borne the brunt of the war on terror’s harshness, American citizens have not internalized the costs.¹⁸ When citizens’ rights have been limited, says Cole, the political system has largely responded. In an effort to spur Americans out of their current complacency, Cole argues that past harms inflicted on aliens eventually expand to the rest of the population.¹⁹

I think there is some truth in each of the above explanations, and I offer my *Exporting Harshness Theory* as a modification, not a rejection, of the others. *Wartime Overreaction* has surely been part of the explanation for the past seven years, but it does not explain why the United States resorted to tactics that Europe resisted, despite the fact that hundreds were killed in terrorist attacks in Madrid, in 2004, and London, in 2005.²⁰ Nor does it explain why the United States government has sought to extend executive authority and limit access to counsel for detainees much

12. See, e.g., Eugene Robinson, Editorial, *Using Our Fear*, WASH. POST, Jan. 27, 2006, at A23.

13. Jane Mayer, *The Battle for a Country’s Soul*, N.Y. REV. BOOKS, Aug. 14, 2008, at 41, 43.

14. Robinson, *supra* note 12.

15. *Id.*

16. *Id.*

17. See DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* 13 (2003).

18. *Id.*

19. *Id.* at 229.

20. Jamie Mayerfeld, *The High Price of American Exceptionalism: Comparing Torture by the United States and Europe after 9/11*, at 9 (unpublished manuscript, on file with author). Mayerfeld traces the differences in American and European responses to terrorism to the fact that Europe has more fully embraced international human rights law. *Id.* at 1–2.

more aggressively than did Britain or Israel—two countries which also have experience responding to terrorism.²¹ Moreover, the reasonable claim that crisis can produce overreaction too often shades into the more doubtful one that, to quote Lichtblau, our peacetime criminal justice system typically “tilt[s] toward restraint over aggression.”

Similarly, *Blame Bush and Rove* is partially correct. For example, it is clear that in areas such as executive privilege and secrecy the administration used 9/11 as an opportunity to push an agenda that predated the crisis.²² Yet why did they succeed? Leaders who make bad decisions ought to be held accountable, but in a country that holds elections, voters cannot avoid all responsibility for the actions of elected officials. As for *Enemy Aliens*, I agree with Cole that some of our most punitive tactics have been tried first on non-citizens. But there is a risk in advancing *Enemy Aliens* as the complete explanation. Unless we accompany the *Enemy Aliens Theory* with some account of our domestic criminal justice system’s harshness, it becomes too easy to take the Cadillac metaphor seriously.

So what to make of Katyal’s Cadillac? I offer my criticism reluctantly because I am sympathetic to the agenda of ensuring fair process for those detained by the United States government. In characterizing the domestic criminal justice system as he does, Katyal knows the Cadillac only appears shiny and new in comparison with the awful condition of justice in Guantanamo Bay. Moreover, he and others making similar claims²³ are likely adopting a stance long familiar to human rights lawyers, civil rights advocates, and critical race theorists. The strategy requires first appealing to what Americans believe their nation and its Constitution stand for, and then highlighting the distance between the promise and the reality lived by the client.²⁴ Like Martin Luther King, Jr., the human rights lawyer is

21. See Stephen J. Schulhofer, *Checks and Balances in Wartime: American, British and Israeli Experiences*, 102 MICH. L. REV. 1906, 1908 (2004) (noting that while the American response to terrorism followed the same path as responses in Britain and Israel, there is a “dramatic difference in the *degree* to which the adjustments were made” in the U.S.).

22. See Stephen J. Schulhofer, *No Checks, No Balances: Discarding Bedrock Constitutional Principles*, in *THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM* 74, 91 (Richard C. Leone & Greg Anrig, Jr. eds., 2003).

23. See, e.g., JOSEPH MARGULIES, *GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER* 148 (2006) (explaining that the Bush administration’s approach to fighting terrorism “cast[s] doubt on this country’s well-deserved reputation ‘as the standard-bearer for democracy and human rights’” (citing Brief of Former American Prisoners of War as Amici Curiae in Support of Petitioners in *Rasul v. Bush*, Jan. 14, 2004, at 18-19)).

24. For a discussion of this strategy, see Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 63, 66 (Kimberlé Williams Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995) (“Nonwhite lawyers have passionately invoked legal doctrine, legal ideals, and liberal theory in the struggle against racism. Their success is attributable in part to the passionate response that conventional legalisms can at times

asking America to “be true to what you said on paper.”²⁵ Of course, the advocate may be doing this armed with the same doubts that King had about whether the nation meant it.²⁶

But the strategy—while a great one for Katyal’s client and others like him—is risky for the rest of us. America suffers no lack of enthusiasm for the greatness of its legal system.²⁷ Instead, our failure is to see our flaws. Convinced that our system is the most rights-protective in the world, we are insufficiently self-reflective. For the same reasons, we are often highly suspicious of comparative or international reform models.²⁸ These tendencies have stunted the development of our criminal justice system. Worse, they have left us in the unenviable position of having one of the most punitive systems in the world while believing we have one of the most liberal. Images like that of Katyal’s Cadillac both reflect and reinforce this state of affairs.

To put the point another way, consider the words of Muneer Ahmad, who, like Katyal, is both a professor and Guantanamo defense attorney.

elicit.”). Cf. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimization in Antidiscrimination Law*, in *CRITICAL RACE THEORY*, *supra*, at 103 (describing the choices of the Martin Luther King, Jr. Federal Holiday Commission to focus on a “celebration of progress toward racial equality while urging continued commitment to this ideal”).

25. Dr. Martin Luther King, Jr., Speech at the Memphis, Tennessee Mason Temple: I’ve Been to the Mountaintop (Apr. 3, 1968), *available at* <http://www.americanrhetoric.com/speeches/mlkivebeentothemountaintop.htm>.

26. For an extended discussion of how King balanced his belief in the promise of America with his disappointment in its failures, see MICHAEL ERIC DYSON, *I MAY NOT GET THERE WITH YOU: THE TRUE MARTIN LUTHER KING, JR.* 225–48 (2000).

27. See AM. BAR ASS’N, *PERCEPTIONS OF THE U.S. JUSTICE SYSTEM* 58–59 (1999), *available at* <http://www.abanet.org/media/perception/perceptions.pdf> (reporting results of survey of opinions of U.S. justice system). See also Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. SOC. SCI. 173, 174 (2008) (“We are not a modest nation. We frequently insist that the American criminal justice system . . . is ‘the best in the world.’”). One of the costs of our self-satisfaction is that when confronted with allegations of abuse in our own system, it is easy to argue that others are worse. As Philippe Sands reports, when Major General Michael Dunlavey was criticized for allegedly allowing prisoner abuse at Guantanamo Bay, one letter writer in his hometown paper defended the process at Guantanamo. Would it be better, the author of the letter asked, to have “the Arab sheikdom practices of amputation or decapitation, or perhaps Oriental jurisprudence administered from the muzzle of an AK-47?” SANDS, *supra* note 4, at 39 (quoting Donald F. Rutz, Letter to the Editor, *Erie Judge, U.S. Legal System Defended*, *ERIE TIMES-NEWS*, Aug. 25, 2004, at 2).

28. Rosemary Foot, *Exceptionalism Again: The Bush Administration, the “Global War on Terror” and Human Rights*, 26 L. & HIST. REV. 707, 708 (2008). See also Mayerfeld, *supra* note 20, at 5 (many Americans believe that “the U.S. has no need of international human rights law because its own rights protections are sufficient”). For a robust defense of American exceptionalism, see Steven G. Calabresi, “*A Shining City on a Hill*”: *American Exceptionalism and the Supreme Court’s Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335 (2006). For Calabresi, “The whole point of being Americans for many of us is that we are *not* Europeans; we are a special people, in a special land, with a special mission.” *Id.* at 1398.

Ahmad's account of the bizarre world of Guantanamo Bay leads him to conclude that "[t]he central cultural project of Guantanamo has been to normalize what is, on first inspection, extraordinarily aberrant, and to render intelligible the seemingly bizarre."²⁹ For those who believe Guantanamo Bay is an irredeemable human rights violation, it is essential to demonstrate how aberrant it truly is. That is what Katyal achieves with the comparison between Cadillacs and Chevrolets. My discomfort comes from the fact that in contrasting the aberrant (Guantanamo) with the normal (our domestic criminal justice system) we become blinded to the profound abnormality of our domestic criminal system. One of my goals in this Article is to counter this tendency by raising questions about our domestic criminal system by turning a mirror back on it.

There is one more reason to pay close attention to how the war on crime has helped make the war on terror possible. It is the only way to achieve change that sticks in how we fight the war on terror. In the months following the release of the Abu Ghraib abuse photos, the administration claimed the scandal was the work of a few "bad apples" and that neither the administration nor the chain of command bore any responsibility. Critics of this excuse questioned the notion that removing the bad apples would solve the problem. It was more systemic, more deeply-rooted, they argued.³⁰

I think the critics were right then. In the waning days of the Bush administration, as disapproval of the prosecution of the war on terror mounted and a new administration prepared to take office, the bad apples explanation reemerged. This time, however, the alleged bad apples are not low-level officers but Bush, Rumsfeld, and Cheney themselves.³¹ While placing blame on the leaders gets closer to the truth than accusing front-line officers, there is one sense in which the bad apples explanation is still unsatisfying. It lets some people—We the People—off the hook.

29. Muneer Ahmad, *Resisting Guantánamo: Rights at the Brink of Dehumanization*, 103 Nw. U. L. REV. (forthcoming) (manuscript at 16, on file with author).

30. W.J.T. Mitchell, *Sacred Gestures: Images from Our Holy War*, AFTERIMAGE, Nov./Dec. 2006, at 18 ("Much has been written about the political significance of the Abu Ghraib photographs, their scandalous and undeniable revelation that the American war on terror has involved a widespread use of torture. Commentators Mark Danner, Seymour Hersh, and Susan Sontag immediately argued that the images were only the tip of an iceberg, symptoms of a much larger and systematic problem than a 'few bad apples' among the United States soldiers at Abu Ghraib prison.").

31. Anthony Lewis lamented that the Bush administration's actions had "sapped the belief of many Americans in the righteousness of their country." Anthony Lewis, *Official American Sadism*, N.Y. REV. BOOKS, Sept. 25, 2008, at 49. "[T]he cure," said Lewis, will "come from leaders who reassert the primary place of law in the American character: from a president who does not seek unrestrained power, from an attorney general and other officials who respect the law. It is not too late to return to a government of laws, not men." *Id.*

After all, to suggest that we were led—against our essential character—to do terrible things conveniently avoids some important questions. What caused our leaders to imagine such harsh tactics? Why did they think we would tolerate it? Why were they right?³² These questions matter because although the Bush administration has left office, unless we confront why they succeeded, many of the tactics they adopted may survive their departure.³³

Before turning to the specifics of my argument, I want to offer two caveats. I will draw a number of analogies between tactics, practices, and rhetoric adopted in the war on crime and those employed in the war on terror. I am not arguing, however, that there is a jot-for-jot parallel between how we have prosecuted the two wars. To the contrary, some enormous differences exist. Some of the most notable distinctions of the war on terror include: secret prisons for terror suspects, indefinite detention without trial of the accused, and the systematic use of physical brutality as a method of interrogation. While physical brutality to obtain confessions was used extensively through the mid-twentieth century,³⁴ and still occurs occasionally, it is no longer widely practiced in domestic criminal cases.³⁵ Similarly, indefinite detention without trial and secret prisons are unknown to our criminal system.

Second, when I discuss conditions of confinement or right to counsel, for example, I am not asserting that our domestic prisons are as awful as Abu Ghraib or that we deny lawyers to suspects domestically in the same way that we have to those held at Guantanamo. My argument, I hope, is more nuanced. I am interested in exploring continuities in places where the prevailing wisdom has been to emphasize discontinuity. I want to understand why we as a nation have allowed certain things to go on in our

32. Consider that, in at least one poll, Americans' support for torture of alleged terrorists increased from thirty-six percent in 2006 to forty-four percent in 2008. *Id.*

33. For those who would suggest that the Bush administration were the bad apples spoiling the rest of us pure ones, it is worth noting that Congress consistently refused to rein in the executive branch. See LAURA K. DONOHUE, *THE COST OF COUNTERTERRORISM: POWER, POLITICS AND LIBERTY* 112 (2008). There are limits to this argument. Philippe Sands has powerfully demonstrated that at least some of the Bush administration's actions were done secretly. See, e.g., SANDS, *supra* note 4, at 92–93 (explaining how General Counsel of the Department of Defense Jim Haynes “short-circuited the usual process” by limiting internal circulation of a memo with proposed new interrogation techniques).

34. Jerome H. Skolnick, *American Interrogation: From Torture to Trickery*, in *TORTURE: A COLLECTION* 105, 112–13 (Sanford Levinson ed., 2004). Our nation's historic use of torture domestically and internationally should cause us to pause before asserting, as Anthony Lewis does, that “somehow this country has to reassert its historic repugnance at the use of torture.” Lewis, *supra* note 31, at 49. Indeed, a review of the evidence presented in Skolnick, *supra*, Parry, *supra* note 8, and this Article, *infra* Section III, might help begin to answer Lewis when he asks, “how did the United States government get into the business of torturing prisoners?” Lewis, *supra* note 31, at 45.

35. *But see* Roberts, *supra* note 7 (discussing role of race in America's history of torture and highlighting current interrogation abuses).

name, even, in some cases, after we learned the truth about abuses in the war on terror. To answer those questions we must pay careful attention to what we do at home, to our own citizens, in our domestic criminal system.

Even with these caveats, I confess some ambivalence about my argument. It, too, carries risks. Comparing tactics employed in the war on terror with those used in the war on crime invites defenders of our current anti-terror policy to say, “Stop complaining, we do this already.” This is not a hypothetical risk. As I was working on this part of the Article, I watched Neal Katyal debate former federal prosecutor Andrew McBride on *NewsHour with Jim Lehrer*. When Katyal objected to the fact that Hamdan’s lawyers were forced to wait until the eve of trial to interview a high-security witness with potentially exculpatory information, McBride responded with something along the lines of “when I was a federal prosecutor in similar cases, that is how we did it.”³⁶ While my own defense practice was in state court, and did not involve the sorts of cases that make it onto *NewsHour*, my experience is that while our rules on paper favor what Katyal argued for, our routine practice is as McBride portrays it.

Moreover, by placing our approach to the war on terror on a continuum with how we fight the war on crime, I worry I may help to normalize, or even justify, the egregious and inhumane. This is a tricky issue, similar to a divide that marks the debate over torture. To oversimplify, there are those who would treat torture as a categorically unique form of state violence, comparable only perhaps to genocide.³⁷ Others situate torture on a continuum with other forms of state violence and coercion.³⁸ Given what I have said so far, it is not surprising that my

36. See *The NewsHour with Jim Lehrer: Military Trial Yields Split Verdict for Bin Ladin’s Driver* (PBS television broadcast Aug. 6, 2008), available at http://www.pbs.org/newshour/bb/law/july-dec08/verdict_08-06.html. Guantanamo Commander Rear Admiral Mark Buzby employed a similar argument in defending prison conditions at Guantanamo. Buzby argued that Guantanamo prison cells were modeled on domestic American prisons and that Guantanamo detainees are treated as well. Teleconference: Department of Defense Bloggers Roundtable with Rear Admiral Mark Buzby, Commander, Joint Task Force Guantanamo 3–4 (Fed. News Serv., May 21, 2008) [hereinafter *Roundtable with Buzby*]. For example, he said, Guantanamo detainees “get a shower every single day, which is actually more than the [U.S.] Bureau of Prisons offers their high-security folks.” *Id.* at 3. In response to suggestions that Guantanamo detainees suffer from their isolation, Buzby pointed to data suggesting that Bureau of Prisons inmates are twice as likely to need mental health services. *Id.* at 4. In sum, Buzby argued, it was wrong to suggest that “[Guantanamo’s] conditions are especially arduous or different than [what] a normal prisoner might find in the Bureau of Prisons systems. . . .” *Id.*

37. John T. Parry, “*Just For Fun*”: *Understanding Torture and Understanding Abu Ghraib*, 1 J. NAT’L SECURITY L. & POL’Y 253, 257 (2005).

38. *Id.* Scott Shane puts the point this way:

When the Central Intelligence Agency obliterates a dozen suspected terrorists, along with assorted family members, with a missile drone, the news rarely stirs a strong reaction far beyond Pakistan. Yet the waterboarding of three operatives from Al Qaeda – one of them the admitted murderer of 3,000 people as organizer

sympathies lie with those who put torture on a continuum. I fear that viewing torture as categorically different can sustain a perverse result: we devote more attention to the (relatively) few individuals tortured in the war on terror than to the much larger number of Iraqi civilians killed during the same time period.³⁹ By analogy, I would argue that singling out our prosecution of the war on terror as categorically different runs a similar risk. It invites us to avoid more difficult conversations about our domestic war on crime.

II. THE SCOPE OF AMERICA'S PRISON COMPLEX

The first thing to understand about the American prison system is its scope. We have the largest prison system in the world, by a wide margin. As Figure 1 indicates, we also have the highest incarceration rates.⁴⁰

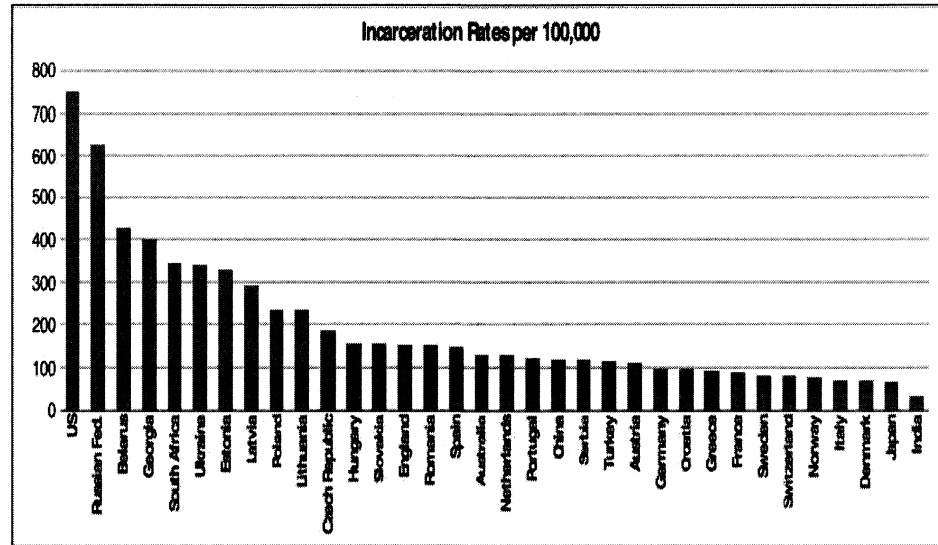
of the 9/11 attacks—has stirred years of recriminations, calls for prosecution and national soul-searching.

Scott Shane, *Torture Versus War*, N.Y. TIMES, Apr. 19, 2009, at WK1.

39. Cf. Parry, *supra* note 37, at 258 (“Creating a separate category for an intentionally narrow set of practices labeled and banned as ‘torture’ only functions to normalize and legitimate the remaining practices that are ‘not-torture.’”). There is another cost to the focus on torture. In the context of detention, government conduct can be quite atrocious while arguably not meeting the legal definition of torture. Focusing only on those few instances in which the standard is met can distract us from the larger number of cases that might fail the torture test, but should nonetheless be condemned. This issue becomes clear when Philippe Sands describes meeting Gita Gutierrez, an attorney representing Mohammed al-Qahtani. Sands and Gutierrez have a difficult discussion regarding whether the treatment of al-Qahtani at Guantanamo constituted torture. SANDS, *supra* note 4, at 161–62. Sands’ conclusion at that point was that he needed to consult with an independent expert because “I hadn’t yet formed a clear view: there were issues of law and of fact, the test was ‘severe pain or suffering, whether physical or mental.’” *Id.* at 162. As a lawyer, Sands is right. To make the case for torture, it would matter how long al-Qahtani was forced to stay awake, stand without relief, be denied food, or isolated in a cell flooded with light. But, as one of my students wrote to me after reading Sands’ account: “One could conceive of an entirely different consciousness—one in which seizing an individual, hooding him and putting him on a plane, sending him to some island thousands of miles away from anyone he knows and holding him there indefinitely without access to the outside world or to his family *without more* could be torture.” Seema Ahmad, Response to *Torture Team* by Philippe Sands 1–2 (Seminar Response Paper, Georgetown University Law Center) (Dec. 2, 2008) (on file with author).

40. For the incarceration rates for England, South Africa, Australia, China, Japan, and India, see Haeyoun Park, Vu Nguyen & Shan Carter, Interactive Graphic: Prison Population Around the Globe, NYTIMES.COM, Apr. 22, 2008, http://www.nytimes.com/interactive/2008/04/22/us/20080423_PRISON_GRAPHIC.html. For all other incarceration rates, see PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 35 (2008), http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison_08_FINAL_2-1-1_FORWEB.pdf.

Figure 1



Those numbers do not accurately reflect how much of an outlier the United States truly is. Figure 2 shows the same countries in the same order as Figure 1, reflecting from left to right those that incarcerate the most to the least. Figure 2, however, highlights the relative wealth of each nation, as measured by GDP per capita.⁴¹ The countries that, like the United States, incarcerate at relatively high rates are all relatively poor countries, such as Belarus and South Africa. Relatively wealthy countries such as France and Italy all have low incarceration rates and appear on the right hand side of the graph. This reflects the commonsense notion that wealthy countries are better equipped to make the human capital investments that allow for a reduced dependency on incarceration.⁴² This trend holds true

41. The data reflected in Figures 2 and 3 were derived by the author from the following sources: Int'l Monetary Fund, World Economic Outlook Database (Apr. 2008), <http://www.imf.org/external/pubs/ft/weo/2008/01/weodata/index.aspx>; World Bank, World Development Indicators Database: Gross Domestic Product 2007 (July 1, 2008), <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf>; Central Intelligence Agency, The World Factbook: Field Listing—GDP (Official Exchange Rate) (July 15, 2008), <https://www.cia.gov/library/publications/the-world-factbook/fields/2195.html>; U.S. Census Bureau, International Data Base—Country Summaries (July 12, 2008), <http://www.census.gov/ipc/www/idb/tables.html>.

42. Cf. MARC MAUER, THE SENTENCING PROJECT, COMPARATIVE INTERNATIONAL RATES OF INCARCERATION: AN EXAMINATION OF CAUSES AND TRENDS 13 (2003) (explaining that programs that aim to raise high school graduation rates, provide family therapy, and reduce drug addiction all cut crime more cost-effectively than does increasing incarceration rates).

across the board, except for one outlier. One of the world's wealthiest countries sits at the far left of the graph, reflecting high incarceration rates despite its relative wealth. That is the United States.

Figure 2

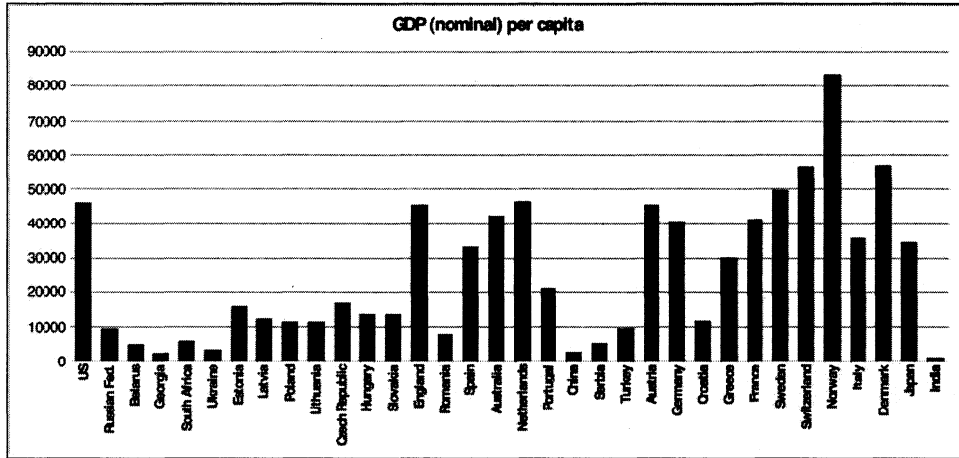
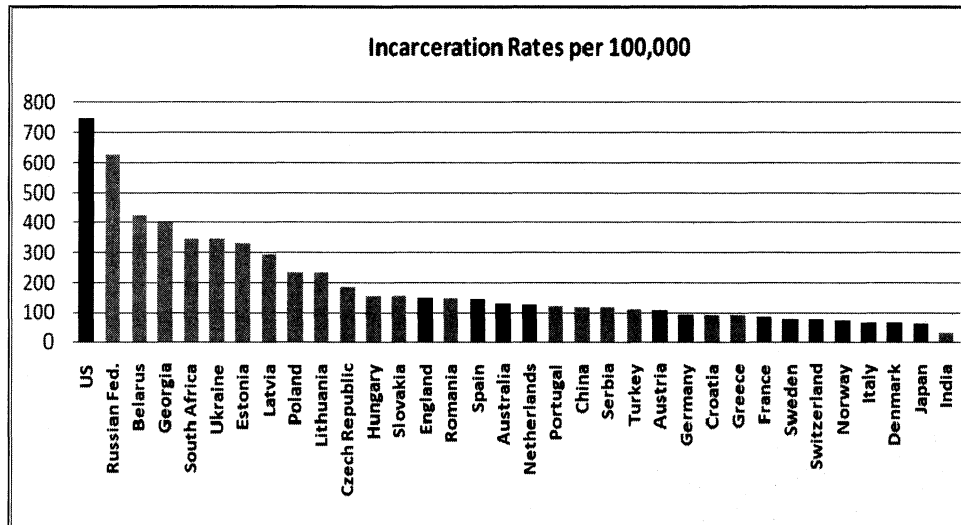


Figure 3 makes the same point in a slightly different way. The countries are again arranged in the same order as Figure 1, with the bars showing their relative incarceration rates. This time, however, the countries that have similar wealth levels as the U.S. are bolded dark. The others have lighter-colored bars.

Figure 3



To this point my premise has been that our position atop the world's incarceration leader board is evidence of punitiveness. But perhaps our high incarceration rates simply reflect that we have a lot of crime. There is some truth to this. America's relatively high rate of violent crime partially explains our large prison population. Although our overall crime rate is not especially high (most people are surprised to learn, for example, that Sydney, Australia, and London, England, both have higher burglary rates than New York City), homicide rates in the United States are three to five times higher than in most industrialized countries.⁴³

But the crime rate does not explain all, or even most, of America's prison expansion. To understand why it expanded, one must compare domestic trends in crime and incarceration over the past forty years. Incarceration rates were largely steady for most of American history; between 1940 and 1970, for example, the nation averaged about 110 inmates per 100,000 people.⁴⁴ The increase began in the mid-1970s and has continued an upward trajectory since.⁴⁵ The initial prison growth coincided with a rise in crime, but even as crime declined for nearly fifteen years we continued to send more and more people to prison every year.⁴⁶ Indeed, by 2002, the nation's violent crime rate had declined to 1970 levels,⁴⁷ yet the incarceration rate was almost seven times what it had been in that year.⁴⁸

The fact that prisons have grown regardless of whether crime goes up or down suggests that our prison growth stems primarily from our response to crime, rather than from crime levels themselves. In particular, in the last forty years we have made three policy choices that have driven prison growth. First, we arrest greater numbers of drug offenders than we once did.⁴⁹ Second, we choose prison for a higher percentage of those arrested for all crimes.⁵⁰ Third, those who go to prison now serve longer terms.⁵¹

43. MARC MAUER, *RACE TO INCARCERATE* 25–26 (2006).

44. *Id.* at 18.

45. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 495 [hereinafter SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS] (2002), available at <http://www.albany.edu/sourcebook/pdf/sb2002/sb2002-section6.pdf> [hereinafter SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS].

46. MAUER, *supra* note 43, at 94–95.

47. *Id.* at 95.

48. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 45, at 495.

49. BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* 46 (2006) (reporting a “fourfold growth in drug arrest rates from the late 1960s to 2001”). Because self-reporting studies show drug use *declining* between 1979 and 2000, there is little evidence to suggest that the increase in arrests was due to increased drug use, rather than stepped-up law enforcement. *Id.* at 47–48.

50. Violent crimes decreased throughout the 1990s, but the chance that an arrest would result in prison time more than doubled. *Id.* at 43.

51. Between 1980 and 2001, the length of the average prison sentence increased about sixty percent. This increase, plus the increase in the likelihood of imprisonment, meant that

International comparisons also show that America's sentencing policy is punitive in comparison with much of the rest of the world.⁵² Burglars, for example, receive an average sentence in the U.S. that is more than three times as long as the average equivalent Canadian sentence and more than twice as long as the average sentence in Britain.⁵³ The story is the same for drug offenses. In the United States, twenty-six percent of drug offenders are serving terms of greater than ten years, while only eight percent are serving similar sentences in Britain.⁵⁴

Whether American laws accurately reflect the attitudes of the public is a complicated question. Every year in my criminal procedure class I show *Snitch*, a film about our nation's drug laws and the role of informant testimony.⁵⁵ The documentary ends with the story of Clarence Aaron, a twenty-three-year-old man from Mobile, Alabama, who is tried for driving some friends and drugs between Louisiana and Alabama. Because of federal conspiracy laws, Aaron can be punished for the full amount of drugs involved in the conspiracy (even though he did not know the precise amount). Because of informant testimony, he can be convicted based solely on the word of one of the other people in the car, even though no drugs were ever recovered. Aaron, who had no prior run-ins with the law, was found guilty, and the movie ends with the filmmakers asking one of the jurors how much time he thought Aaron should have received. With the camera focused on Aaron sitting in his cell, the viewer hears the juror say, "Well, I wouldn't have thought a large number of years. . . . I don't know—three to five years, maybe something like that." When the filmmaker tells the juror that Aaron had received three life sentences, the juror is visibly dismayed. We are left with the scene of Aaron sitting in the cell he will occupy for the rest of his life, as the juror says, with sorrow, "I'm surprised at that, I really am, that harsh a sentence. He seemed to be a pretty promising boy."⁵⁶

the incarceration rate for violent crime has nearly tripled despite the decline in violence. *Id.* at 44.

52. See JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN EUROPE AND AMERICA* 4 (2003) ("The Western European media regularly runs pieces expressing shock at the extreme severity of American punishment.").

53. Mauer, *supra* note 43, at 35. I do not mean to overstate the evidence here. See, e.g., James B. Jacobs, *Facts, Values and Prison Policies: A Commentary on Zimring and Tonry*, in *MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES* 165, 168 (David Garland ed., 2001) ("Comparative time served data, holding criminal conduct and prior criminal record constant is very hard to come by. . . . I do not believe that criminologists have the data to back up the constantly repeated assertion that American offenders serve hugely greater sentences than similarly situated offenders in other countries.").

54. James Lynch, *Crime in International Perspective*, in *CRIME* 11, 36 (James Q. Wilson & Joan Petersilia eds., 1995).

55. *SNITCH* (PBS Video 1999).

56. *Id.*

While *Snitch* presents a compelling example of a case where many observers will share the juror's shock upon learning the penalty for violating the law, there is also evidence to suggest that Americans have more punitive views on punishment than citizens of other countries to which we normally compare ourselves. For example, in one international survey respondents were asked to identify the appropriate penalty in a case involving a twenty-one-year-old second-time burglar who had stolen a television set. Fifty-six percent of Americans questioned chose prison, compared with an international average of thirty-two percent.⁵⁷

Together this suggests that the size of America's prison system cannot be explained solely by pointing out that America is a violent nation. *We are* violent, but our prisons are large because of how we have chosen to respond to both violent and nonviolent crime, particularly over the past forty years.

As a nation, when faced with new or pressing social challenges, we increasingly turn to criminal prosecution and incarceration. This is not only true of law-and-order conservatives or Republicans trying to create a wedge issue for Democrats.⁵⁸ Our incarceration inclination has become ingrained even among unlikely advocates. This becomes clear from Marie Gottschalk's careful examination of international differences in the domestic violence movement.⁵⁹ In both Britain and the United States, the fight against domestic violence grew out of the feminist movement in the 1970s. In the United States, advocates for battered women ended up turning to the criminal system for solutions and became leading voices for longer prison sentences and mandatory prosecution policies. By contrast, their allies in Britain and throughout Europe were much more likely to focus on social policy rather than penal policy, arguing for housing, health services, and welfare benefits that would allow women to escape violence through economic independence.⁶⁰

Civil rights advocates in the United States, like their domestic violence counterparts, have shown a similar inclination to seek solutions in criminal

57. PAT MAYHEW & PHILIP WHITE, HOME OFFICE (U.K.) RESEARCH & STATISTICS DIRECTORATE, THE 1996 INTERNATIONAL CRIME VICTIMIZATION SURVEY 5-6 (1996).

58. For the best accounts of the political forces that have supported the nation's punitive turn, see GARLAND, *supra* note 9, at 131-35 (arguing "the finer points of penological realism become secondary considerations, easily subordinated to political ends"); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510 (2001) (describing expansion of criminal law as "a story of tacit cooperation between prosecutors and legislators"). See also KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 5 (1997) (arguing that "crime-related issues . . . are socially and politically constructed"). See generally David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995) (detailing social fears in late 1980s that led Congress to pass unequal crack and cocaine sentencing guidelines).

59. MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA 139-64 (2006).

60. *Id.*

prosecution—despite the toll that our nation’s high incarceration rate has taken on the black community. Consider the debate that erupted in response to the aggressive criminal prosecution of black teens in Jena, Louisiana, for fighting with white schoolmates.⁶¹ Even as protestors demanded that prosecutors drop or reduce the charges against the black teens, they simultaneously called for the Department of Justice to bring more criminal prosecutions against whites for hate crimes.⁶² Minister-activist Al Sharpton suggested that federal criminal law should be expanded to cover juveniles who commit hate crimes.⁶³ Representative Artur Davis, from Alabama, complained that the Department of Justice had charged only twenty-two people with hate crimes in 2006, compared with seventy-six people ten years earlier.⁶⁴ And when a prosecutor testified before a congressional panel that federal law did not allow for the prosecution of juveniles for the crime of hanging a noose over a tree, he was roundly booed by a room of mostly African-American observers.⁶⁵

I am not arguing that criminal prosecutions are inappropriate in the case of domestic violence or hate crimes. Instead, I use these examples to show how our high incarceration rates have been produced by, and in turn have led to, a deeply-rooted tendency to pursue penal responses to social problems. This is the backdrop against which we must understand America’s punitive approach to fighting the war on terror.

61. For a detailed account of the Jena controversy and the legal/ethical considerations of the prosecution, see Anthony V. Alfieri, *Prosecuting the Jena Six*, 93 CORNELL L. REV. 1285 (2008). In brief, the turmoil in Jena, Louisiana began in the beginning of the 2006 school year when a group of black students sought to eat lunch under a tree in the center of campus, a place typically frequented by white students in this highly segregated town. Two nooses were found hanging from the same tree the next day. During the fall, racial tensions rose and fights erupted between black and white students. In December, a group of black students attacked a white male, badly beating him. Those students were prosecuted, and one was convicted by an all-white jury. Civil rights advocates protested the disparate outcome in which black students were criminally prosecuted while the previous racial incidents—including the noose-hanging—were ignored. *Id.* at 1288–91.

62. *Al Sharpton Pleads for Tougher Hate Crimes Law in Wake of Jena 6 Arrests*, ASSOCIATED PRESS, Oct. 16, 2007. See also Plan to Strengthen Civil Rights, http://www.barackobama.com/issues/civil_rights/#hate-crimes (last visited July 7, 2009) (calling for stronger hate crime legislation).

63. *Jena 6 and the Role of Federal Intervention in Hate Crimes and Race-Related Violence in Public Schools: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Al Sharpton, President, National Action Network) (“I’ve seen where people that have been involved in drug trafficking has gotten around those laws by using kids. Are we now going to have a society where if you want to hang up a noose or paint a swastika, you use somebody underage to do it?”).

64. *Rally Urges Hate Crimes Prosecutions, New AG Responds*, CNN.COM, Nov. 16, 2007, <http://www.cnn.com/2007/POLITICS/11/16/justice.rally/index.html>.

65. Interview with Seema Ahmad, Candidate for J.D., Georgetown Univ. L. Ctr., in Wash., D.C. (Oct. 18, 2007).

III. PRISON CONDITIONS AND PRISONER ABUSE

Prison conditions matter. This might seem so obvious as to be banal, but I don't think so. American lawyers have overwhelmingly focused their attention on the time from initial suspicion to final judgment and have developed an extensive jurisprudence governing these stages of the process. Indeed, this period is what most are thinking of when they laud the protections built into the American criminal system—this is the Cadillac of which Katyal speaks. But how we treat both incarcerated suspects while they await trial and convicts after judgment has received much less notice.⁶⁶ While it is the subject of substantial academic debate, it is ignored in the criminal and constitutional curricula of our law schools⁶⁷ and is unfamiliar even to many American criminal lawyers.

Those awaiting trial or serving sentences see the world quite differently. The disjuncture between what the lawyer and the client think matter is often made manifest at the lawyer's first meeting with an incarcerated client whose case is pending appeal. I will never forget my first such visit, arriving at Lorton Prison in Virginia, armed with the trial transcript, preparing to discuss what claims might be pressed upon the appellate court. My client interrupted me a few minutes into the discussion to say, "Mr. Forman, I hear that, but I need to be moved to a different unit. I'm in here with all these young dudes, and they are too wild." He went on to describe the violence of the place, the stabbings, shankings, and general mayhem caused by inmates and guards alike. He was serving a long sentence, and his main goal was to get to a part of the facility with older, and to his mind calmer, fellow lifers. My thoughts about his legal claims could wait.

Some terror suspects see the world the same way. When Salim Hamdan finally had his day before a Guantanamo tribunal, after years of being held without trial, what did he want to discuss with the judge first? His housing situation.⁶⁸ He took the stand and described the details of his

66. See Anthony Kennedy, Assoc. Justice, Supreme Court of the U.S., Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), http://www.supremecourtus.gov/publicinfo/speeches/sp_08-9-03.html [hereinafter Kennedy, A.B.A. Speech] ("When someone has been judged guilty and the appellate and collateral review process has ended, the legal profession seems to lose all interest."). It was not always so. See, e.g., JAMES B. JACOBS, *NEW PERSPECTIVES ON PRISONS AND IMPRISONMENT* 39 (1983) (arguing that in the 1970s, "[a] platoon, eventually a phalanx, of prisoners' rights lawyers, supported by federal and foundation funding, soon appeared . . . They initiated, and won, prisoners' rights cases that implicated every aspect of prison governance.").

67. Cases such as *Wilson v. Seiter*, 501 U.S. 294 (1991) (setting standard for Eighth Amendment challenges to prison conditions) and *Hudson v. McMillan*, 503 U.S. 1 (1992) (setting standard for when use of force by prison guards violates Eighth Amendment), for example, are hugely important to prison inmates but get little attention in law school.

68. William Glaberson, *Detainee Challenges Guantanamo by Describing Life There*, N.Y. TIMES, July 16, 2008, at A13.

life to the military commissioners. “Camp Echo is like a graveyard where you place a dead person in a tomb,” he said. At Camp 6 “you can only see the soldiers. And, of course, I was never able to see the sun.” He complained that the cells were small and that his few permitted possessions—toothbrush, blanket, and towel—were sometimes seized. His most serious objection was that he had been placed in Camp 5, which, revealingly, is among the Guantanamo units that most resemble an American supermax prison. He had previously been housed in Camp 4, which he preferred because there detainees could eat and pray together. According to Hamdan’s lawyers, their client could “barely discuss any subject other than his wish to get back to Camp 4.” If they could not get him out of Camp 5, he told them, “I don’t need you. Why are you my lawyer?”⁶⁹

Hamdan’s plea to get out of the American-style supermax unit highlights a key feature of the international debate over the war on terror since September 11, 2001. While human rights lawyers and Europeans have reacted negatively to severe conditions of confinement (Guantanamo) and prisoner abuse (Abu Ghraib), Americans have seen it differently. The conditions of Guantanamo have been largely ignored domestically. Indeed, when confronted with evidence of harsh conditions at Guantanamo, the response of some American officials has been to argue that conditions there are no different from normal American prisons.⁷⁰ Rather than shrink from our domestic harshness, we have come to embrace it. Even the prisoner abuse scandal at Abu Ghraib followed a traditional pattern—a burst of outrage and eventual punishment of low-level officials, followed by a return to normalcy. These responses, I suggest, were predictable, given the harsh criminal justice complex we have constructed to fight the war on crime. Highly restrictive supermax facilities and episodic prisoner abuse have become some of the “taken-for-granted features” of crime policy,⁷¹ and no longer scandalize the American public.

In the section that follows, I separate the discussion of prison conditions into three categories. First, I discuss supermax facilities domestically and on Guantanamo Bay, pointing out similarities. Second, I

69. *Id.*

70. *See Roundtable with Buzby, supra* note 36.

71. GARLAND, *supra* note 9, at 1. In focusing on prisoner abuse, I do not mean to minimize the severe constraints under which prison professionals labor. Running a safe, humane prison is a difficult task that requires, among other things, sufficient resources. Our nation does not always adequately fund the endeavor, which leads to overcrowding and makes it difficult to recruit high-quality staff. In this area as in others, we get what we pay for. For a discussion of these concerns, see James B. Jacobs, *Prison Reform Amid the Ruins of Prisoners’ Rights*, in *THE FUTURE OF IMPRISONMENT* 179, 179–82 (Michael Tonry ed., 2004).

discuss what I call degradation policy—policies or practices in American prisons that are designed to undermine the dignity of the prisoner. This category, which focuses on officially sanctioned policy, makes clear that prison officials have wide berth to develop policies that dehumanize prisoners. But even with such latitude, some restrictions exist. When guards cross these lines, we get the third category, which I am calling episodic abuse by rogue guards.

Amnesty International recently sought to highlight abusive living conditions at Guantanamo Bay by constructing a mock Guantanamo jail cell on the National Mall in Washington, D.C.⁷² Tourists reacted with shrugs.⁷³ After all, America already has similar cells for 20,000 domestic prisoners.⁷⁴ In an American supermax prison, cells range from seventy-seven to eighty-seven square feet. Isolation is the norm. Inmates are locked in these cells for twenty-two and a half hours a day and are allowed to exercise in an area about the size of two small cars for the remaining hour and a half. The walls surrounding this small exercise area are twenty feet high and the top is covered by a metal grate. No exercise equipment is allowed. Each inmate is issued a jumpsuit, a t-shirt, boxers, and shorts. They are typically allowed to have papers and books, and in some prisons they have TVs on which they may watch prison-approved educational and religious programs.⁷⁵ As with all their possessions, these may be taken away by guards. Prisoners who break any rules are punished and humiliated in a variety of ways. Those that refuse to eat, for example, may be fed “food bricks” made up of a nearly inedible combination of all the day’s food.⁷⁶ Dogs, originally used for drug detection, are now employed to control inmates. In a training video developed by the Arizona

72. Paul Schwartzman, *Activists Offer a Taste of Guantanamo Prison*, WASH. POST, June 26, 2008, at B2.

73. *Id.*

74. Joseph Petrocelli, *All the Bad Apples in One Barrel: Are Supermax Prisons a Good Idea?*, OFFICER.COM, July 8, 2008, [http://www.officer.com/web/online/Editorial-and-Features/All-the-Bad-Apples-in-One-Barrel/19\\$33048](http://www.officer.com/web/online/Editorial-and-Features/All-the-Bad-Apples-in-One-Barrel/19$33048). See also Gawande, *supra* note 7, at 39 (“If prolonged isolation is—as research and experience have confirmed for decades—so objectively horrifying, so intrinsically cruel, how did we end up with a prison system that may subject more of our own citizens to it than any other country in history has?”). One response to Gawande’s “how did we end up with supermax prisons” question is offered by James Jacobs, who suggests that “prison reform litigation of the late twentieth century may have contributed to the emergence of a new form of super-maximum-security incarceration that scrupulously respects the letter of the law, while constituting a prison regime remarkable for a new form of inhumanity, marked by massive control and minimal interpersonal human contact.” Jacobs, *supra* note 71, at 187.

75. See *All Things Considered: At Pelican Bay Prison, A Life in Solitary*, (NPR, radio broadcast July 26, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5584254> (detailing conditions inside the prison’s solitary confinement unit).

76. SASHA ABRAMSKY, *HARD TIME BLUES 227* (2002) [hereinafter ABRAMSKY, *HARD TIME BLUES*].

Department of Corrections, officers are taught how to use dogs to drag inmates out of their cells in a manner that evokes some of the infamous dog photos from Abu Ghraib.⁷⁷

Some of the units at Guantanamo Bay are almost identical in structure to domestic supermax units, with similar rules consigning prisoners to their cells for at least twenty-two hours a day.⁷⁸ The similarity is intentional, as the military used the precise blueprints from domestic prisons in constructing the Guantanamo cells.⁷⁹ Some restrictions at Guantanamo are even more severe, such as prohibitions on phone calls and visits.⁸⁰ As with inmates in supermax facilities domestically, the few items that prisoners are allowed to have can be taken away for the slightest infraction.⁸¹ These extreme conditions of isolation can cause several psychological problems for the inmates⁸² and have been condemned internationally.⁸³

This humiliation is not limited to prisoners in supermax facilities: many American prisoners in other facilities also face degradation on a regular basis. A few examples: Sheriff Joe Arpaio of Maricopa County, Arizona, prides himself on housing some of his inmates in tents—outside, in 120-degree heat.⁸⁴ He has also publicized the return of the chain gang, which he employs for drunk drivers, whom he dresses in pink.⁸⁵ Sheriff

77. HUMAN RIGHTS WATCH, *CRUEL AND DEGRADING: THE USE OF DOGS FOR CELL EXTRACTIONS IN U.S. PRISONS 6* (2006), available at <http://www.hrw.org/sites/default/files/reports/us1006webwcover.pdf>.

78. HUMAN RIGHTS WATCH, *LOCKED UP ALONE: DETENTION CONDITIONS AND MENTAL HEALTH AT GUANTANAMO 8–9* (2008), available at http://www.hrw.org/sites/default/files/reports/us0608_1.pdf.

79. *Id.* at 9, 11.

80. *Id.* at 14–16.

81. *Id.* at 17.

82. *See id.* at 3–4 (detailing mental health problems of several Guantanamo detainees).

83. *Mustafa v. United States*, 2008 E.W.H.C. 1375, ¶ 70 (Admin.) (“[W]e too are troubled about what we have read about the conditions in some of the Supermax prisons in the United States. . . . [C]onfinement for years and years in what effectively amounts to isolation may well be held to be, if not torture, then ill treatment which contravenes Article 3 [of the European Convention on Human Rights].”). Atul Gawande argues that European countries have chosen a different approach to dealing with violent and difficult-to-control prisoners:

The results have been impressive. The use of long-term isolation in England is now negligible. In all of England, there are now fewer prisoners in “extreme custody” than there are in the state of Maine. And the other countries of Europe have, with a similar focus on small units and violence prevention, achieved a similar outcome.

Gawande, *supra* note 7, at 44.

84. JOE ARPAIO & LEN SHERMAN, *AMERICA’S TOUGHEST SHERIFF: HOW TO WIN THE WAR AGAINST CRIME 31* (1996).

85. *Arizona Sheriff Forms DUI Chain Gang Dressed in Pink*, *DUI.COM*, Dec. 12, 2007, <http://www.dui.com/dui-library/arizona/news/arizona-sheriff-forms-dui-chain-gang-dressed-in-pink>.

Gerald Hege of Lexington, North Carolina, painted the inside of his jail bright pink and made a practice of referring to prisoners in his jail—many of whom had not been convicted of anything—as “scumbags,” both to their faces and when meeting with constituents.⁸⁶

Some officers go further. In Dooly State Prison in Georgia, a guard required an inmate to tap dance naked before giving him a body cavity search.⁸⁷ Other prisoners were forced to strip naked in front of guards and inmates, given unnecessary body cavity searches, and forced to display their genitalia to other inmates.⁸⁸ At Pelican Bay State Prison in California, inmates were subjected to the use of fetal restraints, locked in outdoor cages naked, and chained to toilets. Still others had their skin peeled off after being bathed in boiling water.⁸⁹

America has so many jails and prisons, and each one is so large that it is easy to lose sight of the scope of the abuse. Consider that as recently as July 2008, a federal investigation concluded that the conditions in Chicago’s Cook County Jail violated the constitutional rights of its inmates.⁹⁰ The report detailed numerous instances of physical abuse, inadequate health care, and unsanitary living conditions.⁹¹ Inmates were beaten by guards for no reason or as punishment for breaking rules.⁹² One inmate, after being accused of planting contraband, was beaten by multiple officers while lying handcuffed on the floor. The guards fractured his jaw, forcing him to undergo multiple surgeries and eat through a straw.⁹³

The Department of Justice investigation into the Cook County Jail rated barely one day’s story in the press. But to understand the relative scale of this scandal, consider that the daily population of the jail is approximately 9800 inmates, with nearly 100,000 people passing through yearly.⁹⁴ This means the equivalent of the *entire prison population* of Germany (78,707), England (72,669), Italy (55,136), Spain (50,656), or France (50,714) has been subjected to these inhumane conditions each year.⁹⁵

The temptation is to dismiss instances of prisoner abuse as aberrations. Though most prisons are run by competent professionals, it would be a

86. ALAN ELSNER, *GATES OF INJUSTICE: THE CRISIS IN AMERICA’S PRISONS* 2–3 (2004).

87. Bob Herbert, Op-Ed., *America’s Abu Ghraibs*, N.Y. TIMES, May 31, 2004, at A17.

88. *Id.*

89. James D. Maynard, *One Case for an Independent Federal Judiciary: Prison Reform Litigation Spurs Structural Change in California*, 37 MCGEORGE L. REV. 419, 419–20 (2006).

90. CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, *COOK COUNTY JAIL 3* (2008).

91. *Id.*

92. *Id.* at 10.

93. *Id.* at 14.

94. *Id.* at 3.

95. ROY WALMSLEY, HOME OFFICE (U.K.), *WORLD PRISON POPULATION LIST 5* (4th ed. 2003), available at <http://www.homeoffice.gov.uk/rds/pdfs2/r188.pdf>.

mistake to minimize the scope of abuse. Similarly, the law plays a role in allowing the abuse to continue. After all, the trend in our legal system has been to make it yet more difficult for prisoners to challenge their conditions of confinement. Solitary confinement in supermax facilities, for example, has been validated by courts.⁹⁶ In addition, individual prisoner suits face additional hurdles since the passage of the Prison Litigation Reform Act (PLRA).⁹⁷ The PLRA states that prisoners may not recover compensatory damages for “mental or emotional injury suffered while in custody without a prior showing of physical injury.”⁹⁸ Courts have said that “physical injury” was not present in cases alleging, among other things, sexual assault, facial burns, “pain, numbness in extremities, loss of mobility, lack of sleep,” and “severe stomach aches, severe headaches, severe dehydration . . . and blurred vision.”⁹⁹

In addition to assaults by guards, we place prisoners at constant risk of assault from other prisoners. Sexual assault is a particular problem.¹⁰⁰ While efforts to quantify the scope of the prison rape problem face severe methodological challenges,¹⁰¹ even conservative estimates suggest it is a significant problem in American prisons. For example, Congressional findings in connection with the Prison Rape Elimination Act of 2003 indicate that approximately thirteen percent of inmates have been sexually assaulted in prison.¹⁰² By this estimate, in the last twenty years over one million prisoners have been raped in United States facilities.¹⁰³ Some populations are especially vulnerable, including first-time offenders, the young, and the mentally ill.¹⁰⁴ Although the prison rape problem has received increased attention in the last decade, it still remains a source of

96. For a discussion of judicial reactions to solitary confinement, see Gawande, *supra* note 7, at 41–42 and COLIN DAYAN, *THE STORY OF CRUEL AND UNUSUAL* 43–46, 54–57 (2007). For additional discussions of the harms imposed by solitary confinement, see generally LORNA AMARASINGHAM RHODES, *TOTAL CONFINEMENT: MADNESS AND REASON IN THE MAXIMUM SECURITY PRISON* (2004); Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477 (1997).

97. Pub. L. No. 104-134, §§ 801–10, 110 Stat. 1321, 1321-66–77 (1996) (codified as amended at 11 U.S.C. § 523 (2006), 18 U.S.C. §§ 3624, 3626 (2006), 28 U.S.C. §§ 1346, 1915, 1915A (2006), 42 U.S.C. §§ 1997–1997h (2006)).

98. 42 U.S.C. § 1997e(e) (2006).

99. For a summary and analysis of cases, see Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 J. CON. L. 1, 4–8 (2008).

100. STOP PRISONER RAPE, IN *THE SHADOWS: SEXUAL VIOLENCE IN U.S. DETENTION FACILITIES*, A SHADOW REPORT TO THE U.N. COMMITTEE AGAINST TORTURE 3 (2006), available at http://www.justdetention.org/pdf/in_the_shadows.pdf.

101. Mary Sigler, *By the Light of Virtue: Prison Rape and the Corruption of Character*, 91 IOWA L. REV. 561, 569–70 (2006).

102. 42 U.S.C. § 15601(2) (2004).

103. *Id.*

104. § 15601(3)–(4).

humor for some. For example, speaking about former Enron Chairman Kenneth Lay, California Attorney General Bill Lockyer joked in 2001 that he would “love to personally escort Lay to an eight-by-ten cell that he could share with a tattooed dude who says, ‘Hi, my name is Spike, honey.’”¹⁰⁵

Our domestic prison guards are trained and socialized in these harsh environments, and they sometimes export brutal tactics to the world via the war on terror. The harshness also circles back to the United States domestic system, as prison officials increasingly recruit former military veterans to serve as prison guards.¹⁰⁶ The story of Charles Graner highlights this dynamic. Graner achieved infamy as the ringleader of the abuse at Abu Ghraib and was sentenced to ten years in prison for his role.¹⁰⁷ But before Graner got to Abu Ghraib, he was a domestic prison guard and a Marine. Graner served in the Marine Forces Reserve in the 1980s and early 1990s; upon returning home from a tour in Saudi Arabia, he sought employment in southwestern Pennsylvania.¹⁰⁸ He was ultimately hired as a prison guard at the maximum-security State Correctional Institute-Greene (SCI Greene), where he benefited from a program that gave preference to former military officers seeking prison guard positions.¹⁰⁹ In 1998, SCI Greene was rocked by a massive prisoner abuse scandal that led to changes in the prison administration and the firing of some guards.¹¹⁰ Graner was not fired,

105. Editorial, *Investigating Enron*, WALL ST. J., Nov. 30, 2001, at A14. Prison rape jokes also feature prominently in popular culture. I remember my disgust some years ago when watching a 7UP ad making light of sexual assault. Mary Sigler describes the ad:

Meanwhile, a recent advertising campaign for a popular soft drink featured the company’s pitch man, the comedian Godfrey, distributing cans of soda in a prison. When he drops a can, he starts to bend over to pick it up, but quickly stops himself, saying, “*I’m not picking that up.*” The commercial ends with Godfrey seated in a cell next to a large, tattooed inmate whose arm is draped around him. When Godfrey delivers the company’s tag line—“When you drink 7UP, everyone is your friend”—the inmate tightens his hold, to Godfrey’s obvious discomfort.

Sigler, *supra* note 101, at 563. As Sigler points out, the ad is especially disconcerting, “for it is based on the market-tested assumption that prison rape is an appropriate subject of humor and that the joke will not be lost on viewers.” *Id.*

106. Matthew Pavelek, *Corrections Industry Offers Steady Growth and Stable Employment Opportunities*, GIJOBS.NET, Sept. 2008, <http://www.gijobs.net/magazine.cfm?id=1085&issueId=85>. In the Federal Bureau of Prisons, for example, nearly a quarter of the corrections officers are veterans. *Id.* Nashville-based Corrections Corporation of America—the nation’s largest for-profit prison operator—was recently rated one of the “Top 50 Military-Friendly Employers,” by *G.I. Jobs* magazine. *Id.*

107. Kate Zernike, *Reservist Gets 10 Years for Abuses at Abu Ghraib*, INT’L HERALD TRIB., Jan. 17, 2005, at 6.

108. David Finkel & Christian Davenport, *Records Paint Dark Portrait of Guard*, WASH. POST, June 5, 2004, at A1.

109. SASHA ABRAMSKY, AMERICAN FURIES: CRIME, PUNISHMENT AND VENGEANCE IN THE AGE OF MASS IMPRISONMENT 4 (2007) [hereinafter ABRAMSKY, AMERICAN FURIES].

110. Mike Bucsko & Bob Dvorchak, *Firings, Charges Shake Up SCI Greene*, PITTSBURGH POST-GAZETTE, Aug. 9, 1998, at A1. The allegations at Greene included

however, and when the wars in Iraq and Afghanistan began, he joined the Army Reserves and was called up.¹¹¹ He was eventually put in charge of guarding prisoners at Abu Ghraib as well, and his abuse of that power led ultimately to his downfall and eventual conviction.

Reports of prisoner abuse during the prosecution of the war on terror must be understood against the backdrop of this constant drumbeat of domestic prisoner abuse stories. We have allowed this sort of degradation and humiliation to become normal, acceptable, even inevitable. It has become the cost of doing business, a necessary incident to running such a large prison system full of incorrigibles. As investigative journalist Sasha Abramsky found when he talked to the residents of the Pennsylvania town that is home to SCI Greene, even an enormous prison scandal involving allegations of ritual abuse by guards had little impact on the area's free population.¹¹² "I do not remember people talking about it, no," county commissioner Pamela Synder told Abramsky. "The concerns here are the concerns that truly affect people's daily lives: it's jobs, it's health care, it's quality of life."¹¹³

Not only is prison abuse familiar to Americans, so is the rhetoric justifying it. In the war on terror, as in the war on crime, a common tactic is to label the victims as deserving of abuse. When the first individuals arrived at Guantanamo, before one person had been tried, former President Bush defended our treatment of them on the grounds that they were "killers," and later proclaimed, "[t]he only thing I know for certain is that these are bad people . . ."¹¹⁴ Former Vice President Cheney said they were "the worst of a very bad lot" who were "devoted to killing millions of Americans."¹¹⁵ After the Abu Ghraib photos were released, Oklahoma Republican James Inhofe said he was "more outraged by the outrage than . . . by the treatment" of the detainees.¹¹⁶ Despite reports that up to ninety percent of those detained in Iraq were there by mistake,¹¹⁷ Inhofe argued that the Abu Ghraib prisoners were "not there for traffic

charges that guards were told to "work over" inmates who needed "attitude adjustments" by, among other things, beating their heads against the wall. *Id.*

111. Finkel & Davenport, *supra* note 108.

112. *Id.* at 3 (reporting that Waynesburg "greeted the allegations with stony silence").

113. *Id.* at 4.

114. David Luban, *Lawfare and Legal Ethics in Guantanamo*, 60 STAN. L. REV. 1981, 2015 (2008) [hereinafter Luban, *Lawfare*]; *Bush-Blair News Conference* (CNN television broadcast July 17, 2003).

115. *Fox News Sunday: Cheney on Guantanamo Detainees* (Fox News television broadcast Jan. 27, 2002).

116. *GOP Senator Labels Abused Prisoners 'Terrorists,'* CNN.COM, May 12, 2004, <http://www.cnn.com/2004/ALLPOLITICS/05/11/inhofe.abuse/>.

117. INT'L COMM. OF THE RED CROSS, REPORT ON THE TREATMENT BY THE COALITION FORCES OF PRISONERS OF WAR AND OTHER PROTECTED PERSONS BY THE GENEVA CONVENTIONS IN IRAQ DURING ARREST, INTERNMENT AND INTERROGATION 8 (2004), available at http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.pdf.

violations. . . . If they're in Cell Block 1-A or 1-B, these prisoners—they're murderers, they're terrorists, they're insurgents. Many of them probably have American blood on their hands. And here we're so concerned about the treatment of those individuals."¹¹⁸

This tactic has roots in our domestic war on crime, where popular law enforcement officers defend harsh prison conditions on the grounds that the inmates are "killers" and "the worst of the worst."¹¹⁹ As Sheriff Arpaio writes in *America's Toughest Sheriff: How to Win the War Against Crime*, "The reality is stark—either the good guys will prevail and restore some sense of decency and honor and respect to our society, or the bad guys will come out on top and destroy everything we hold dear. . . . Win or lose. Right or wrong. Good guys versus bad guys. Sometimes life is that straightforward."¹²⁰

Arpaio uses language mirroring that of Bush, Cheney, and Rumsfeld. But Arpaio's play is even more audacious. He is running a jail, which means it houses two categories of prisoners: those who are awaiting trial and therefore should be presumed innocent, and those serving less than one-year sentences. Prisoners serving longer than one-year sentences are held in state-run prisons, rather than county jails. So those left in Arpaio's jail are serving time for fraud, forgery, drug possession, theft and assault—not the hardened killers and rapists he invokes to justify this sort of degradation.¹²¹ That said, if an American sheriff can sell voters on the value of degrading domestic criminals by disposing of the presumption of innocence, there is every reason to think the Bush administration could and would succeed with a similar tactic in the fearful months after September 11.

IV. HARSH TREATMENT OF JUVENILES

Much of the world was shocked to learn juveniles were being held in Guantanamo Bay.¹²² The United States recently reported to the U.N. Committee on the Rights of the Child that it has detained approximately 2500 juveniles in Guantanamo Bay, Iraq, and Afghanistan since 2002.¹²³ In

118. *GOP Senator Labels Abused Prisoners 'Terrorists,' supra* note 116.

119. ABRAMSKY, *AMERICAN FURIES, supra* note 109, at 82.

120. ARPAIO & SHERMAN, *supra* note 84, at xxi-xxii.

121. ABRAMSKY, *AMERICAN FURIES, supra* note 109, at 82.

122. *See, e.g.,* Oliver Burkeman, *Children Held at Guantanamo Bay*, *GUARDIAN*, Apr. 24, 2003, at 1, *available at* <http://www.guardian.co.uk/world/2003/apr/24/usa.afghanistan>; Maggie Farley, *Guantanamo Inmate Stirs Debate in Canada*, *L.A. TIMES*, Jun. 24, 2007, at A3 (telling the story of Omar Khadr, a Canadian citizen accused of terrorism, who was fifteen years old when he was first sent to Guantanamo).

123. U.N. Comm. on the Rights of the Child (CRC), *Written Replies by the Government of the United States of America Concerning the List of Issues (CRC/C/OPAC/USA/Q/1) to be Taken up in Connection with the Consideration of the Initial Report of the United States of*

the United States, this revelation caused barely a stir. Indeed, the government argued that age was not relevant. According to Lt. Col. Matthew P. Beevers, chief spokesman for the United States military in Afghanistan, “[a]ge is not a determining factor in detention.”¹²⁴ This reaction should not surprise us; after all, Americans have become accustomed to exposing juveniles to the full harshness of our adult penal system. One example of how much of an outlier we are in this regard: worldwide there are 2237 people serving life sentences without parole for crimes they committed as juveniles. All but twelve of them are in the U.S.¹²⁵

Similarly, until the Supreme Court declared it unconstitutional,¹²⁶ the United States was one of only six nations in the world to authorize the death penalty for juveniles (the others are Iran, Nigeria, Saudi Arabia, Pakistan, and Yemen).¹²⁷ Before this ruling legislators in some states had proposed the death penalty for offenders as young as eleven,¹²⁸ and children as young as thirteen are among those serving the life without parole sentences described above.¹²⁹

Even juveniles who remain in juvenile facilities rather than prisons often do not escape the brutal treatment described in the previous section. The juvenile justice system’s original mandates of care and rehabilitation have frequently been replaced, in policy or practice, by a punitive emphasis.¹³⁰ In Florida, for example, a fourteen-year-old boy was admitted into a state-run boot camp after stealing his grandmother’s car. Shortly

America under Article 8, Paragraph 1 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (CRC/C/OPAC/USA/1), ¶ 28, U.N. Doc. CRC/C/OPAC/USA/Q/1/Add.1/Rev.1 (June 2, 2008), available at <http://www.unhcr.org/refworld/docid/4885cfb20.html>.

124. Carlotta Gall, *3 Afghan Youths Question U.S. Captivity*, N.Y. TIMES, Mar. 12, 2005, at A10.

125. John Hubner, *Discarded Lives: Children Sentenced to Life Without Parole*, AMNESTY INT’L. MAG., Spring 2006, at 16, 17, available at http://www.amnestyusa.org/Spring_2006/Discarded_Lives_Children_Sentenced_to_Life_Without_Parole/page.do?id=1105357&n1=2&n2=19&n3=392. By another account, all juveniles serving life without parole sentences worldwide are in the United States. Connie de la Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. REV. 983, 990 (2008). For a detailed look at the practice in one state, see HUMAN RIGHTS WATCH, “WHEN I DIE, THEY’LL SEND ME HOME:” YOUTH SENTENCED TO LIFE WITHOUT PAROLE IN CALIFORNIA (2008), available at <http://www.hrw.org/en/node/75357/section/1>.

126. *Roper v. Simmons*, 543 U.S. 551 (2004).

127. P. ELIKANN, *SUPERPREDATORS: THE DEMONIZATION OF OUR CHILDREN BY THE LAW* 151 (1999).

128. *Id.* at 152.

129. EQUAL JUSTICE INITIATIVE, *CRUEL AND UNUSUAL: SENTENCING 13- AND 14-YEAR-OLD CHILDREN TO DIE IN PRISON 3* (2008), available at <http://www.eji.org/eji/files/20071017cruelandunusual.pdf>.

130. For an exhaustive account of conditions of confinement in juvenile facilities, see Douglas E. Abrams, *Reforming Juvenile Delinquency to Enhance Rehabilitation, Personal Accountability, and Public Safety*, 84 OR. L. REV. 1001 (2005).

after his arrival, he fell down complaining of shortness of breath during a forced run around the boot camp's track. In response, more than seven guards descended upon him and roughed him up as he lay helpless on the ground. Eventually the boy was taken to the hospital, where he died the next day.¹³¹ In Texas, in the past few years, youths in state custody were sexually molested by state employees, while officials kept the reports secret.¹³² In Louisiana, guards created a game they called "Friday Night Fights"—placing some of the more aggressive youths into rooms with known rivals—entertaining themselves by watching the kids pummel each other.¹³³

We justify such harshness toward juvenile offenders with the oft-heard slogan, "Do adult crime, do adult time."¹³⁴ When we hear this phrase, we typically think of things such as long prison sentences. But politicians sometimes invoke the violent conditions that mark our adult corrections system and argue that youthful offenders should be subjected to them as well. This is what California Governor Pete Wilson had in mind when he said that teenagers convicted of serious crimes should "experience the terror that can only come from being locked in a real prison environment."¹³⁵

Echoing the arguments made in the context of the war on crime, defenders of holding juveniles in the war on terror argue that the teens have committed adult-like crimes and should be treated accordingly. As the Chairman of the Joint Chiefs of Staff said when asked about juveniles in Guantanamo, "They may be juveniles but they're not on a Little League team anywhere. They're on a Major League team, and it's a terrorist team."¹³⁶ This same reasoning seems to have been the dominant response to Omar Khadr's interrogation video released recently by his lawyers. Khadr was sixteen when he was interrogated at Guantanamo, and his lawyers have made clear their hope that the circumstances of his interrogation (which include his age, intense questioning, pleading and crying by Khadr, and references to previous physical abuse) will gain

131. Carol Marbin Miller, *Boot Camp Death: Guards Detail Youth's Final Minutes*, MIAMI HERALD, Mar. 10, 2006, at A1. The guards were acquitted of manslaughter charges by a jury. Melissa Nelson, *Guards Acquitted in Boot Camp Case*, USA TODAY, Oct. 12, 2007, http://www.usatoday.com/news/nation/2007-10-11-3868327840_x.htm.

132. Sylvia Moreno, *In Texas, Scandal Rocks Juvenile Justice System*, WASH. POST, Apr. 5, 2007, at A3; R.G. Ratcliffe, *Crisis Was Years in Making*, HOUSTON CHRON., Mar. 11, 2007, at A1.

133. Mark Gladstone & James Rainey, *Abuse Reports Cloud Youth Authority*, L.A. TIMES, Dec. 24, 1999, at A1.

134. E.g., Linda J. Collier, *Adult Crime, Adult Time: Outdated Juvenile Laws Thwart Justice*, WASH. POST, Mar. 29, 1998, at C1.

135. ABRAMSKY, *HARD TIME BLUES*, *supra* note 76, at 220.

136. Ted Conover, *In the Land of Guantanamo*, N.Y. TIMES, June 29, 2003 (Magazine), at 40.

public sympathy. One of Khadr's lawyers, Nathan Whitling, said he was "pleading in the court of public opinion."¹³⁷

Perhaps the video will have an impact in Canada, where Khadr is a citizen, and the Canadian government might in turn pressure the U.S. government.¹³⁸ But in America, where intense interrogations of juveniles are the norm, teenage status has long failed to move a public accustomed to treating teenage suspects as adults. In place of sympathy, our likely national impulse is summed up by the retired Special Forces soldier who told the *Washington Post*, "That's not just a sixteen-year-old boy snapped up off the streets. This is a demonstrated, hardened killer who is not happy with his new perspective on life, which is that he's going to be spending a long, long time in U.S. custody."¹³⁹

V. THE DECLINE OF JUDICIAL AUTHORITY

Since the war on crime's launch in the early 1970s, judges have come under sustained attack as insufficiently committed to the contest.¹⁴⁰ The critiques have taken a variety of forms. Judges have been criticized as arbitrary, irrational, idiosyncratic, elitist, and susceptible to being duped by clever defense lawyers or sympathetic defendants.¹⁴¹ They have been charged with spinning a "procedural web" designed "to prevent criminals from falling into the maw of the prison system."¹⁴² At the heart of this web is the exclusionary rule, which allows criminals to go free when judges find that police have violated the Constitution in gathering evidence.¹⁴³ Even when defendants are found guilty, critics say, judges too often impose light sentences that fail to protect the community.¹⁴⁴ Florida Senator Paula Hawkins put the point plainly during debates over drug crime legislation in

137. Ian Austen, *Blurry Peek at Questioning of a Guantanamo Inmate*, N.Y. TIMES, July 16, 2008, at A10.

138. Cf. WHITMAN, *supra* note 52, at 45 (describing how movement in American criminal justice to treat juveniles as adults "contrasts strongly with both German and French practice, and the European press has seized on the shift in American criminal justice with a mix of horror and journalistic fascination").

139. Jerry Markon & Josh White, *Detainee Describes Treatment*, WASH. POST, July 16, 2008, at A6.

140. JONATHON SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 127 (2007).

141. *E.g., id.* at 128.

142. MAX BOOT, *OUT OF ORDER: ARROGANCE, CORRUPTION, AND INCOMPETENCE ON THE BENCH* 65 (1998).

143. *Id.*

144. *See id.* at 50–52 (arguing that judges often fail to "take [the] simple step" of keeping repeat criminals off the streets). *See also* Phil Gramm, *Drugs, Crime & Punishment, Don't Let Judges Set Crooks Free*, N.Y. TIMES, July 8, 1993, at A19 ("Given this extremely low rate of expected punishment, is it any wonder that our nation is deluged by a tidal wave of crime?").

the 1980s: “[A]ll too many of our judges still avail themselves of the wide sentencing discretion allowed them under these watered down laws to let major drug dealers off with a tap on the wrist even after conviction.”¹⁴⁵ The appeals process is even worse, say the critics, as the court system allows litigious defendants to delay the inevitable, wasting precious resources and denying finality to victims.¹⁴⁶

Attacking judges as unduly sympathetic to criminals started on the right side of the political spectrum but became more wide-spread over time. Bill Clinton’s tough-on-crime strategy included appointing an overwhelming number of former federal prosecutors as judges, avoiding controversial appointments, and, in one instance, criticizing his own appointee for excluding evidence in a drug case.¹⁴⁷ More recently, Barack Obama, as a presidential candidate, criticized the Supreme Court for ruling that the death penalty could not apply to child rape cases.¹⁴⁸ The drumbeat of criticism has one consistent theme: judges cannot be counted on to protect us from society’s thugs. Judges are “behind each of the most perverse failures of today’s justice system,” argues political scientist John DiIulio, and innocent, law-abiding citizens pay the price.¹⁴⁹

Consistent with this criticism, over the past forty years legislatures have steadily reduced judges’ authority in criminal cases. Congress has cut back on habeas corpus review by limiting prisoners’ ability to challenge their convictions and conditions of confinement.¹⁵⁰ Judges have also lost sentencing authority. In 1980, there were only two states with sentencing guidelines; by 2000, there were seventeen.¹⁵¹ In 1980, there were no state-level three-strikes laws, requiring life sentences for certain categories of repeat offenders; by 2000, twenty-four states and the federal government

145. 132 CONG. REC. 17918 (July 29, 1986) (statement of Sen. Hawkins).

146. “Comprehensive reform of the habeas corpus rules prevent convicted criminals from exploiting the system, with more frivolous appeals, more unnecessary delays, and yes, more grief for the victims of crime and their families.” 141 CONG. REC. S2678 (daily ed. Feb. 15, 1995) (statement of Sen. Dole).

147. Linda Greenhouse, *Judges as Political Issues*, N.Y. TIMES, Mar. 23, 1996, at A1.

148. James Oliphant, *Death Penalty for Child Rape Banned*, L.A. TIMES, June 26, 2008, at A19.

149. John J. DiIulio Jr., *Rule of Law: A Philadelphia Crime Story*, WALL ST. J., Oct. 26, 1994, at A21.

150. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214 (codified as amended in scattered sections of 28 U.S.C.). For an excellent discussion of the AEDPA, see James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2043–45 (2000). Liebman questions the necessity of the legislation pointing out that “by all objective accounts—e.g., that of Chief Judge Richard Posner—noncapital habeas and section 2255 procedures were working well by the early 1990s, with per capital filings down by two-thirds since 1970.” *Id.* at 2044.

151. WESTERN, *supra* note 49, at 65. See also GARLAND, *supra* note 9, at 58–61 (discussing broad array of intellectual and political forces supporting rise of determinate sentencing); Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 741–46 (2005) (tracing movement supporting growth of sentencing commissions).

had such laws.¹⁵² During the same time period mandatory minimum sentences for many categories of crime proliferated around the country, and the majority of states moved to abolish or limit parole.¹⁵³

The George W. Bush administration was particularly suspicious of judges. The administration pushed for the “Feeney Amendment,” which further limited judges’ already constrained ability to reduce sentences below the Federal Guidelines’ range.¹⁵⁴ This amendment required Attorney General John Ashcroft to report any judicial departures below the range set by the Guidelines to the Judiciary Committees of both Houses of Congress. This amendment was widely criticized, including by former Chief Justice William Rehnquist.¹⁵⁵

As these examples make clear, in the war on crime the legislative and executive branches moved jointly to expand their own authority at the expense of the judiciary. Sometimes the seizure was direct. By enacting mandatory minimums, for example, the other branches determined what the minimum sentence would be for particular crimes, taking away a judge’s ability to decide based on the specifics of the case. Other times the power shifted indirectly. Prosecutors have gained tremendous additional power from sentencing guidelines and mandatory minimums because they can use these guidelines to set the terms of the entire case based on what charges to file and whether and how to plea bargain.¹⁵⁶

Judges from across the political spectrum have spoken out against these changes,¹⁵⁷ but to little avail. For critics, these judges’ own excessive leniency explains why they lost authority. As Max Boot argues, “[t]he

152. WESTERN, *supra* note 49, at 64–65 (discussing states’ three-strikes laws); R. Daniel O’Connor, *Defining the Strike Zone—An Analysis of the Classification of Prior Convictions under the Federal “Three-Strikes and You’re Out” Scheme*, 36 B.C. L. REV. 847, 847 (1995) (discussing the federal three-strikes law).

153. *Id.*

154. MAUER, *supra* note 43, at 89. The Feeney Amendment required appeals courts to review downward departures by trial judges. It also established a system for reporting to Congress the sentencing practices of individual federal judges. Dan Christensen, *The Short Life of the Feeney Amendment*, LAW.COM DAILY BUS. REV., Jan. 24, 2005, <http://www.law.com/jsp/article.jsp?id=1105968948840>. Two years after passing Congress, the Amendment was struck down when the Supreme Court held that the Federal Sentencing Guidelines were advisory. *United States v. Booker*, 543 U.S. 220, 261 (2005) (“In light of today’s holding [that the Guidelines are advisory], the reasoning for these revisions—to make the Guidelines even more mandatory than it had been—have ceased to be relevant.”).

155. Linda Greenhouse, *Chief Justice Attacks a Law as Infringing on Judges*, N.Y. TIMES, Jan. 1, 2004, at A14.

156. David Margolick, *Justice by the Numbers: Full Spectrum of Judicial Critics Assail Prison Sentencing Guides*, N.Y. TIMES, Apr. 12, 1992, at A1. As a former prosecutor explained, “[t]he Guidelines make the U.S. attorney the most powerful person in the courthouse.” DORIS MARIE PROVINE, *UNEQUAL UNDER LAW: RACE IN THE WAR ON DRUGS* 124 (2007).

157. Margolick, *supra* note 156.

common complaint is that the guidelines, especially mandatory minimums, take away judges' discretion and turn them into sentencing cyborgs. Precisely. That's the point. And it's worked."¹⁵⁸

This is the backdrop for the Bush administration's decisions about how to handle those captured in the war on terror. The first moves to limit judicial authority came from the executive branch, in the form of President Bush's November 13, 2001, order establishing that military commissions, not civilian courts, would handle the trials of alleged terrorists and that the defendants would not have access to the writ of habeas corpus.¹⁵⁹ After the Supreme Court held that the executive could not do this on its own, the administration was forced to seek legislative approval. This proved easy.¹⁶⁰ Congress validated the limitation on judicial power by passing the Military Commissions Act of 2006, which set rules for the military commissions system and prevented domestic courts from reviewing the commission rulings.¹⁶¹

Some of the arguments for restricting access to federal courts for alleged terrorists were specific to that context, including concerns that domestic courts were not equipped to handle national security secrets.¹⁶² Others built directly off of the critiques advanced in the war on crime. If judges cannot be trusted to limit grandstanding defense attorneys and a sensationalist media in high-profile domestic criminal cases, said critics, "the excesses of the modern U.S. criminal justice system" will ensure that a major terrorist trial will inevitably turn into a "circus."¹⁶³ Opponents of federal court involvement in terrorism trials made a similar point about the procedural safeguards of our criminal justice system. Allowing judicial application of such evidentiary and procedural safeguards in terrorism trials, they said, would mean that "the killer who goes free will later detonate a 'suitcase' nuclear weapon in mid-Manhattan or L.A."¹⁶⁴ As for habeas corpus, to authorize it for terrorists would subject the federal courts to the same parade of horrors invoked to justify limiting access in

158. BOOT, *supra* note 142, at 53.

159. Detention, Treatment, and Trial of Certain Non-citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

160. As Laura Donohue points out, Congress was complicit in the Bush administration's claims for expanded authority at the expense of the other two branches. DONOHUE, *supra* note 33, at 112. Congress "did not pass a single law between 2001 and 2005 that limited or even regulated the executive branch in the exercise of the detention and interrogation program." *Id.*

161. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006). In 2008, the Supreme Court held that the Military Commissions Act was an unconstitutional suspension of the detainees' right to habeas corpus. *Boumediene v. Bush*, 128 S.Ct. 2229, 2277 (2008).

162. *Terrorists on Trial*, WALL ST. J., Nov. 16, 2001, at A12.

163. *Id.*

164. Spencer J. Crona & Neal A. Richardson, Commentary, *Civilian Courts Give Terrorists Far Too Many Loopholes*, L.A. TIMES, Mar. 31, 2002, at M5.

the domestic context. Prisoners, they argued, would abuse the system by filing frivolous claims. Using language similar to that employed when Congress restricted domestic prisoner's access to the courts,¹⁶⁵ South Carolina Senator Lindsey Graham argued that Guantanamo detainees have used the habeas writ to "sue[] our own military for everything imaginable: the quality of the food, DVD access, not enough exercise, judge-supervised interrogation."¹⁶⁶

In sum, the groundwork for limiting judicial authority in the war on terror was laid by forty years of criticizing judges' role in the war on crime. As Jonathan Simon writes, today "the judge remains a figure of suspicion, a person with a propensity to violate public safety."¹⁶⁷ This suspicion of judges as unwilling or unable to protect Americans from harm found its fullest expression in the context of the war on terror, where the stakes are so high.

VI. UNDERMINING DEFENSE COUNSEL

Guantanamo defense attorney Clive Stafford Smith has described the obstacles the government placed in the way of defense lawyers in terrorism cases. Initially the administration outright denied counsel to terror suspects;¹⁶⁸ more recently, the military has employed a range of tactics to prevent defense lawyers from doing their jobs, from the mundane (limiting a lawyer's ability to meet with her client) to the more inventive (telling Guantanamo prisoners that their lawyers are Jewish, defenders of Israel, or homosexual, or even sending in interrogators who pretend to be lawyers).¹⁶⁹ Lawyers representing those locked up in the war on terror have been accused of waging "lawfare": "the growing use of international law claims, *usually factually or legally meritless*, as a tool of war. . . . to gain a moral advantage over your enemy in the court of world opinion."¹⁷⁰

As I reflect on such blatant attacks on the right to counsel, I am reminded of the first criminal case I ever worked on. The summer after graduating law school, I assisted an experienced death penalty lawyer on a habeas case. Our client had been charged, more than a decade earlier, with murder in the

165. Senator Orrin Hatch argued that domestic habeas legislation was needed to "stop the frivolous appeals that have been driving people nuts throughout this country and subjecting victims and families of victims to unnecessary pain for year after year after year." 141 CONG. REC. S7479 (daily ed. May 25, 1995) (statement of Sen. Orrin Hatch).

166. 153 CONG. REC. S2767 (daily ed. Mar. 7, 2007) (statement of Sen. Lindsey Graham).

167. SIMON, *supra* note 140, at 129.

168. Luban, *Lawfare*, *supra* note 114, at 1988.

169. CLIVE STAFFORD SMITH, EIGHT O'CLOCK FERRY TO THE WINDWARD SIDE: SEEKING JUSTICE IN GUANTANAMO BAY 11–12 (2007); Luban, *Lawfare*, *supra* note 114, at 1989–92, 1994–95.

170. David B. Rivkin, Jr. & Lee A. Casey, *Lawfare*, WALL ST. J., Feb. 23, 2007, at A11 (emphasis added).

course of a robbery of a Utah electronics store. The local judge decided to appoint as the defense attorney a young man who had just graduated from law school and had never tried a criminal case. Perhaps our client would have been convicted and sentenced to death anyway, but his fate was surely sealed when, in one of the most complicated types of cases known to our criminal law, he was given a lawyer who had never filed a single criminal motion.

Our client's situation was more typical than I knew at the time.¹⁷¹ Since about three-quarters of felony defendants are poor enough to receive a state-funded lawyer,¹⁷² criminal defense for the poor is, for practical purposes, American criminal defense.¹⁷³ And while it is rare to see the type of government interference that Smith and others describe at Guantanamo, the state has devised other methods to ensure criminal defendants receive a lawyer in name only. The principal one is to limit funding available to contract attorneys and public defender offices.¹⁷⁴ On the whole, England spends three times as much per capita as does the United States on its indigent defense system.¹⁷⁵ In individual states the situation is often far worse. In Illinois, for example, lawyers can bill only \$150 for a misdemeanor case and \$1250 for a felony, and that statute has not changed for a quarter of a century.¹⁷⁶ Most of the people on Alabama's death row were represented

171. Liebman, *supra* note 150, at 2102–06 (describing in detail cases in which death penalty defendants are represented by lawyers who are “young and inexperienced, patently unqualified and incompetent, unethical, or bar-disciplined; sometimes drug-impaired, drunken, comatose, psychotic, or senile, very often grossly negligent; and nearly always out-gunned. . . .”); David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1754 (1993) [hereinafter Luban, *Criminal Defenders*] (“[T]he vast majority of criminal defendants receive no individualized scrutiny of their cases but instead are processed like carcasses at the meat-packing plant.”).

172. DEBORAH L. RHODE, ACCESS TO JUSTICE 11 (2004).

173. Of course, this is not the entire picture. Defendants who can afford robust representation are able to mitigate at least some of the harshness of the American criminal system. See Luban, *Criminal Defenders*, *supra* note 171, at 1763 (“[F]or there are in reality two criminal justice systems, two criminal populations, and two criminal defense bars.”). For this class of the accused, the robust procedural protections built into our system are real. This may in part explain the continued perception—despite substantial evidence to the contrary—that our justice system “tilt[s] toward restraint over aggression.” LICHTBLAU, *supra* note 5, at 24.

174. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 32–35 (1997) (arguing that underfunding means public defense lawyers “fail[] to contest cases as aggressively as they should”). See also Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 93–95 (1993) (arguing that low fees available to public defense lawyers “provide inducements for sufficient but not excessive effort”); Luban, *Criminal Defenders*, *supra* note 171, at 1757 (“Along with this low pay scale goes the natural human tendency to cut corners, especially when doing unpleasant things on behalf of unappetizing strangers whom one will probably never see again.”).

175. AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* 8 (2004) [hereinafter *GIDEON'S BROKEN PROMISE*].

176. *Id.* at 9.

by lawyers whose fees were capped by statute at \$1000.¹⁷⁷ A New Orleans public defender reported defending more than 400 clients in the first seven months of the year, during which time he pled more than 130 clients at arraignment and had a serious felony case scheduled for trial every single available day.¹⁷⁸ As a result of similar stories, the Louisiana Supreme Court held that lawyers in New Orleans were to be presumed ineffective.¹⁷⁹

The results of underfunding are predictable: states and counties cannot hire enough competent lawyers and cannot train or supervise those they do. Attorneys do not have resources to hire investigators or experts, and because of the crushing caseloads, do not have time to investigate cases themselves. At the extreme, some clients plead guilty without ever meeting their attorney. An American Bar Association report found over 12,000 defendants had pled guilty to misdemeanor charges in Riverside County, California, without having consulted a lawyer.¹⁸⁰ In a Louisiana parish, the public defender had never met over eighty percent of his clients outside of court.¹⁸¹ Indeed, the fact that many poor defendants do not have lawyers is one of the reasons for the high rate of guilty pleas.¹⁸² Nothing concentrates the mind around the benefits of a guilty plea like hearing the prosecutor answer “ready for trial” when the judge calls your case and looking over to realize that your lawyer has never met you and barely knows your name.

Even when a state does make an effort to find and correct its shortcomings, reform efforts can be short lived. For example, in 2003, when Georgia noted systematic flaws in its inconsistent and under-funded indigent defense systems, it passed legislation to create a state-wide public defender office. The effort was praised by the American Bar Association, and, surprisingly, the office was created, funded, and moderately effective. The success was short-lived; less than a year later the Public Defenders’ Office was under attack from an unsympathetic legislature, which began cutting its budget. The future of the office is now in doubt.¹⁸³

177. Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 343 (2006). In 2000, Alabama removed the statutory cap for capital cases. Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE (forthcoming) (manuscript at 8 n.38, on file with New York University Review of Law & Social Change).

178. Stephen B. Bright, *Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty are at Stake*, 1997 N.Y.U. ANN. SURV. AM. L. 783, 816.

179. *State v. Peart*, 621 So. 2d 780, 783 (La. 1993). For a review of structural litigation challenging indigent defense funding, see Drinan, *supra* note 177.

180. *GIDEON'S BROKEN PROMISE*, *supra* note 175, at 26.

181. *Id.* at 16.

182. RHODE, *supra* note 172, at 4. Approximately ninety percent of criminal cases are resolved with guilty pleas. *Id.*

183. See, e.g., Mary Lou Pickel, *Bill Would Strip Public Defender Board of Its Authority*, ATLANTA J.-CONST., Feb. 19, 2009, available at http://www.ajc.com/metro/content/metro/stories/2009/02/19/georgia_legislature_public_defender.html.

The inadequacies I have sketched are now well known.¹⁸⁴ Reams of reports have been issued.¹⁸⁵ Books have been written. Highly publicized stories of defendants being sentenced to death while their attorneys literally slept in court have circulated.¹⁸⁶ The image of the overwhelmed public defender who wants to plead out the client she hardly knows is well known. The Supreme Court has left the field largely unregulated, intervening only rarely in cases of extreme lawyer incompetence.¹⁸⁷ It would seem that our ambivalence toward defense counsel has become part of our culture, and we meet stories of marginal lawyering with a collective shrug.

At best a shrug. The last piece of the story about how we view defense counsel in the war on terror and the war on crime concerns the aggressive anti-defense lawyer rhetoric which has come to mark our culture. During the 1990s, federal funding for capital defense lawyers was largely eliminated.¹⁸⁸ Individual defense attorneys have faced attack for their work as well. In the 2005 Virginia gubernatorial race, candidate Tim Kaine faced attack ads for his work as a defense attorney earlier in his

184. DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 64 (1999) [hereinafter COLE, NO EQUAL JUSTICE] (“At least every five years since *Gideon* was decided, a major study has been released finding that indigent defense is inadequate.”).

185. See generally CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009); BRENNAN CTR. FOR JUSTICE, ELIGIBLE FOR JUSTICE: GUIDELINES FOR APPOINTING DEFENSE COUNSEL (2008); Anne Bowen Poulin, *Strengthening the Criminal Defendant’s Right to Counsel*, 28 CARDOZO L. REV. 1213 (2006); Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031 (2006); NAACP LEGAL DEF. AND EDUC. FUND, ASSEMBLY LINE JUSTICE: MISSISSIPPI’S INDIGENT DEFENSE CRISIS (2003); *GIDEON’S BROKEN PROMISE*, *supra* note 175.

186. Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1843 (1994).

187. See, e.g., Abbe Smith, *Strickland v. Washington: Gutting Gideon and Providing Cover for Incompetent Counsel*, in WE DISSENT: TALKING BACK TO THE REHNQUIST COURT 188, 194 (Michael Avery ed., 2009) (“[S]ince *Strickland* [which defined the standard for ineffective assistance of counsel] was decided, the Supreme Court has found ineffective assistance of counsel in only three cases, all of which were capital cases. Not a single noncapital ineffective assistance of counsel case—where ineffectiveness was the main issue the Court sought to review—has been heard by the Supreme Court since *Strickland* was decided.”); Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1603 (2005) (noting that the *Strickland* test “does not capture modest errors that turn out to have momentous consequences, such as failure to track down additional witnesses”). See also Kim Taylor-Thompson, *Tuning Up Gideon’s Trumpet*, 71 FORDHAM L. REV. 1461, 1463 (2003) (arguing that while the Supreme Court must share the blame for not vigorously enforcing the right to quality counsel, other actors—including defense lawyers themselves—are also at fault).

188. Omnibus Consolidated Rescissions and Appropriations Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (eliminating federal funding for Death Penalty Resource Centers); COLE, NO EQUAL JUSTICE, *supra* note 184, at 93 (“What bothered the critics was not that the [death penalty resource] centers were too costly, but that they were too *effective*.”).

career. One notorious ad featured a visibly emotional parent chastising Kaine for “voluntarily represent[ing] the person who murdered my son.” The grieving parent then alleged, “Tim Kaine says that Adolf Hitler doesn’t qualify for the death penalty.”¹⁸⁹ By humanizing those accused of monstrous acts, the reasoning goes, defense lawyers are themselves monsters. Deval Patrick received similar treatment during his run for Massachusetts governor. While in private practice, Patrick had worked on the appeal of a man sentenced to death for killing a police officer. Patrick’s opponent ran an ad asking, “While lawyers have a right to defend admitted cop-killers, do we really want one as our governor?”¹⁹⁰

This context helps to make some sense of Pentagon official Charles D. Stimson’s infamous attack on the pro bono efforts of elite American law firms that have defended detainees in the war on terror. According to Stimson, “when corporate C.E.O.’s [*sic*] see that those firms are representing the very terrorists who hit their bottom line back in 2001, those C.E.O.’s [*sic*] are going to make those law firms choose between representing terrorists or representing reputable firms.”¹⁹¹ Stimson was not alone. A year before Stimson’s attacks, Deroy Murdock of the *National Review* was already impugning the efforts of the Guantanamo habeas lawyers. Murdock ends with a call to arms designed to highlight the lunacy of providing adequate defense counsel: “So, join al Qaeda, fall into allied hands, land in Guantanamo, and top-flight U.S. lawyers will fight for your freedom while the Great Satan’s captains of industry unwittingly underwrite your legal expenses. Only in America.”¹⁹² Debra Burlingame, co-founder of the victim-advocacy group 9/11 Families for a Safe & Strong America, strikes a similar theme. “Lawyers can literally get us killed,” she says and accuses the Guantanamo defense lawyers of “subvert[ing] the truth and transform[ing] the Constitution into a lethal weapon in the hands of our enemies.”¹⁹³

VII. INNOCENCE

To this point I have focused on connections between the wars on crime and terror that point towards harshness. But there is one final comparison worth our attention, and it pushes back in the other direction.

189. Editorial, *Death Penalty Smear*, WASH. POST, Oct. 12, 2005, at A16.

190. DeWayne Wickham, *In Boston, the Smell of a Dirty Trick*, USA TODAY, Oct. 17, 2006, at A19.

191. Neil A. Lewis, *Official Attacks Top Law Firms over Detainees*, N.Y. TIMES, Jan. 13, 2007, at A1.

192. Deroy Murdock, *Gitmo Legal: Why Are Top-Notch Law Firms Aiding Gitmo Detainees?*, NAT’L REV., Dec. 5, 2005, at 28, 29.

193. Debra Burlingame, Commentary, *Gitmo’s Guerrilla Lawyers*, WALL ST. J., Mar. 8, 2007, at A17.

This is the innocence movement, which has done something to shake the certainty with which our nation has prosecuted both wars.

Not long after Guantanamo Bay opened, reports began to emerge that some of the suspects held there were innocent.¹⁹⁴ That innocent people had been hauled to Guantanamo was of little surprise to those familiar with errors in our domestic criminal system. After all, our criminal system errs most often in cases where informant testimony plays a large role, defendants are not caught at the scene, and defendants do not confess or confess in unreliable circumstances (such as coercion).¹⁹⁵ These circumstances marked many of the arrests in the war on terror. Initially, however, the Bush administration and its allies in the media mocked these suggestions, much as defenders of the domestic criminal system long scoffed at the notion that innocents were on death row. In both cases, the arguments were the same: we have extensive screening processes so that only the worst of the worst get to Guantanamo, just as we have elaborate procedural protections to ensure that only the guiltiest of the guilty end up on death row.

Even in individual cases where the evidence of innocence was overwhelming, the government fought tenaciously against release. Clive Stafford Smith, an anti-death penalty crusader turned Guantanamo detainee advocate, describes this dynamic in one of his Guantanamo cases. The government had long alleged that Smith's client appeared in a video linking him to terrorism. Even after a *BBC Newsnight* report produced compelling evidence that the man in the video was not Smith's client, the government still refused to relinquish its case. Instead, the government simply said that rather than being in the tape, he was only "suspected" of being in the tape.¹⁹⁶

194. *E.g.*, MARGULIES, *supra* note 23, at 65. According to Karen Greenberg, Recent interviews with troops from the early days at Guantanamo confirm that the 'worst of the worst' charge was suspect from the very first encounters with the detainees. There wasn't any reliable vetting. . . . Overall, the U.S. military was blindsided by who they received at Gitmo and by the condition in which the detainees arrived. Arriving dehydrated, and start[lingly] thin, the detainees were mostly not only small and weak, but did not even speak the languages which the troops on the ground had been told to expect. Many came from countries outside of the Afghanistan/Pakistan area. Some did not even seem capable of any dire acts. Among the earliest arrivals, one was apparently an octogenarian; another was over ninety. One was a diagnosed schizophrenic. However possible the danger quotient of these first arrivals, the inclusion of these cases made the team at Gitmo suspect that the vetting process had been haphazard at best.

Scott Horton, *Six Questions for Karen Greenberg, Author of The Least Worst Place*, HARPER'S MAG., Feb. 2009, <http://harpers.org/archive/2009/02/hbc-90004423>.

195. Brown, *supra* note 187, at 1596. As Brown importantly reminds us, the risk of error in the criminal justice system affects guilty defendants as well, because some defendants are guilty of something but end up being erroneously overcharged. *Id.* For a comprehensive review of wrongful convictions in the domestic criminal justice system, see *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* (Saundra D. Westervelt & John A. Humphrey eds., 2001).

196. SMITH, *supra* note 169, at 254–56.

Domestic prosecutors have sometimes been just as reluctant to accept that they were wrong, even in cases where the evidence was overwhelming. I once represented a client who had served over a decade in prison before Laura Hankins, a public defender and attorney at the NAACP Legal Defense Fund, took his case and those of his two friends. Hankins's meticulous reinvestigation of the case produced exculpatory evidence sufficiently compelling that *Nightline* picked up the story. The accused men had time-stamped receipts proving their alibi—that they were shopping at a nearby mall—which made it physically impossible for them to have reached the crime scene in time.¹⁹⁷ I still show the *Nightline* video to my first year criminal procedure students, who every year remain flabbergasted that the prosecutors refused to relent after seeing the proof of innocence.¹⁹⁸

Despite these obstacles, the innocence movement has raised important questions about the accuracy of our criminal justice system.¹⁹⁹ As the empirical evidence of innocent people convicted mounts,²⁰⁰ it has become increasingly difficult for even staunch defenders of the system to deny its flaws.²⁰¹ Numerous states have launched task forces or commissioned

197. *Nightline: Beyond Reasonable Doubt* (ABC television broadcast Aug. 4, 2000). After the *Nightline* piece aired, the two men who remained in prison were granted new trials and released on bond. NAACP LEGAL DEFENSE FUND, 2000 ANNUAL REPORT 17 (2000).

198. A closely related phenomenon is the tenacity some prosecutors show in fighting defense requests to test DNA or other forensic evidence. This evidence, after all, would verify guilt if the conviction were accurate. Liebman, *supra* note 150, at 2050 n.84.

199. The innocence movement has not been the only force mitigating the punitive turn our criminal system has taken. Concerns about the rising cost of incarceration have also had an impact; cost has led some states to repeal mandatory minimums for certain offenses, lower maximum penalties, provide treatment rather than incarceration in some situations, and require sentencing commissions to provide “resource impact statements” with their recommendations. Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1285–90 (2005).

200. See, e.g., *Kansas v. Marsh*, 548 U.S. 163, 207–08 (2006) (Souter, J., dissenting) (“[T]he period starting in 1989 has seen repeated exonerations of convicts under death sentences, in numbers never imagined before the development of DNA tests.”); Gross, *supra* note 27 (outlining what we know—and do not yet know—about the numbers of wrongly convicted defendants); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761 (2007) (examining empirical data of wrongful conviction rate for capital rape-murders); Innocence Project, Fact Sheet: Facts on Post-Conviction DNA Exoneration, <http://www.innocenceproject.org/Content/351.php#> (last visited April 30, 2009) (reporting and analyzing data on all U.S. post-conviction exonerations by DNA evidence).

201. Conservative columnist and death penalty supporter George Will concluded, after reading a book by Barry Scheck, Peter Neufeld, and Jim Dwyer detailing the stories of the wrongfully convicted, that some innocent people must have been convicted since the death penalty's reinstatement. George F. Will, *Innocent on Death Row*, WASH. POST, Apr. 6, 2000, at A23. See also Brown, *supra* note 187, at 1594 (“DNA analysis is decisive in only a small minority of cases, but the forms of evidence that it has proven to be unreliable—other forensic analysis, eyewitnesses, informant testimony—are extremely widespread.

studies examining the causes of error in their systems.²⁰² Nationwide, the number of executions has declined,²⁰³ as has support for the death penalty.²⁰⁴

In some unlikely places, prosecutors have even been able to run for office on reform platforms.²⁰⁵ Dallas County, Texas, was once known as “the one county that you did not wanna get accused of a crime in, because in this county, if you got charged with a crime you were likely gonna go to prison.”²⁰⁶ In 2006, a new district attorney, Craig Watkins, was elected and his office is now spending state funds to re-examine past convictions. Watkins also invited the Innocence Project of Texas to review cases back to the 1970s involving DNA evidence, which has resulted in clearing the convictions of at least seventeen men.²⁰⁷ That followed other reforms, including the use of the open-file policy of the Tarrant County District Attorney’s Office, which allows defense attorneys access to some of the prosecutors’ evidence.²⁰⁸

Finally, while it is always perilous to speculate as to what may have caused changes in judges’ thinking, it is worth noting that the increased proof of innocence coincided with more rigorous review of the domestic criminal justice system by Supreme Court Justices Sandra Day O’Connor and Anthony Kennedy. Justice O’Connor—a supporter of the death penalty since her time in the Arizona legislature—provided the deciding vote to the conservative majority in several death penalty cases during her

Adjudication has repeatedly failed to detect these errors, and that has not escaped public notice.”). *But see* *Kansas v. Marsh*, 548 U.S. at 198 (Scalia J., concurring) (quoting a *New York Times* article by an Oregon district attorney estimating that American criminal convictions have an error rate of less than 0.027%); *id.* at 193 (“Reversal of an erroneous conviction on appeal or on habeas, or the pardoning of an innocent condemnee through executive clemency, demonstrates not the failure of the system but its success.”).

202. Helen Shin, *Is the Death of the Death Penalty Near? The Impact of Atkins and Roper on the Future of Capital Punishment for Mentally Ill Defendants*, 76 *FORDHAM L. REV.* 465, 495 (2007). *See also* Liebman, *supra* note 150, at 2140 n.264.

203. TRACY L. SNELL, DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT 2007–STATISTICAL TABLES, AT TBL. 9 EXECUTIONS, 1930–2008, *available at* <http://www.ojp.usdoj.gov/bjs/glance/exe.htm>.

204. While a majority of Americans polled still support the death penalty, in 2006—for the first time in two decades—a slight majority preferred life without parole when presented with that option. Jeffrey M. Jones, *Support for the Death Penalty 30 Years After the Supreme Court Ruling*, GALLUP NEWS SERV., Jun. 30, 2006, <http://www.gallup.com/poll/23548/Support-Death-Penalty-Years-After-Supreme-Court-Ruling.aspx>.

205. Radley Balko, *Is This America’s Best Prosecutor?*, REASON, Apr. 7, 2008, <http://www.reason.com/news/show/125596.html>.

206. *60 Minutes: DNA Helps Free Inmate After 27 Years* (CBS News television broadcast May 4, 2008), *available at* <http://www.cbsnews.com/stories/2008/05/02/60minutes/main4065454.shtml>.

207. *Id.*

208. John Council, *New Open-File Policy Includes Appellate Info*, *TEX. LAW.*, Oct. 10, 2006, *available at* <http://www.law.com/jsp/tx/PubArticleTX.jsp?id=1202425008168&slreturn=1>.

time on the Court.²⁰⁹ In 1989 she wrote the majority opinion ruling that a mentally retarded murderer with the reasoning capacity of a seven-year-old could be executed.²¹⁰ But by 2002 she had reversed her view, joining five other justices in *Atkins v. Virginia* in ruling that “death is not a suitable punishment for a mentally retarded criminal.”²¹¹ So too with Justice Kennedy, who voted to uphold the death penalty for some juvenile offenders in 1989,²¹² but wrote the majority opinion overturning that holding sixteen years later in *Roper v. Simmons*.²¹³

In between those reversals, both justices made some startlingly candid statements about the criminal justice system. In 2001, Justice O’Connor gave a speech in which she said, “If statistics are any indication, the system may well be allowing some innocent defendants to be executed.”²¹⁴ She pointed out that “[s]erious questions are being raised about whether the death penalty is being fairly administered in this country” and argued that we should “look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used.”²¹⁵ For Justice Kennedy’s part, he gave a highly publicized speech in 2003 to the American Bar Association in which he discussed the “inadequacies—and the injustices—in our prison and correctional systems.”²¹⁶ He argued that the entire legal profession holds a responsibility to convicted individuals to improve our correctional system. In particular, he noted the issues of racial disparities in prison systems, the high cost of imprisoning people, and the severity of punishments within our criminal justice system.²¹⁷

Even if confidence in the domestic criminal system has been somewhat undermined by the evidence of innocents being convicted, it is unclear whether the same thing will happen in the context of the war on terror. The evidence of innocence is certainly present, as administration and military officials have occasionally admitted.²¹⁸ A study conducted in 2006

209. Editorial, *Justice O’Connor on Executions*, N.Y. TIMES, July 5, 2001, at A16.

210. *Penry v. Lynaugh*, 492 U.S. 302 (1989).

211. 536 U.S. 304, 321 (2002).

212. *Stanford v. Kentucky*, 492 U.S. 361 (1989).

213. 543 U.S. 551 (2005).

214. *Justice O’Connor on Executions*, *supra* note 209.

215. *Id.*

216. Kennedy, A.B.A. Speech, *supra* note 66.

217. *Id.*

218. According to an anonymous CIA operative speaking to a PBS television station in April 2004, “[o]nly like ten percent of the people at Guantanamo are really dangerous, [and] should be there, and the rest are people that don’t have anything to do with it.” SMITH, *supra* note 169, at 163. “Sometimes we just didn’t get the right folks,” Major-General Jay Hood, then commander at Guantanamo, told the *Wall Street Journal* in January 2005. *Id.* And a former interrogator told the *Wisconsin State Journal* in August 2004 that “[t]here are a large number of people at Guantanamo who shouldn’t be there. They have no meaningful connection to al-Qaeda or the Taliban.” *Id.*

by Mark and Joshua Denbeaux revealed staggering numbers pertaining to the possible innocence of many detainees at Guantanamo Bay. The study found that for fifty-five percent of the detainees, there is no determination that they have committed any hostile acts against the United States or its allies, and that forty percent of the detainees have no connection with al-Qaeda. Only eight percent have fought for a terrorist group, while sixty percent are accused of merely being ‘associated with’ terrorists—the lowest such categorization possible.²¹⁹ Many were also affiliated with groups not on the Department of Homeland Security’s terrorist watchlist.²²⁰

Was Justice Kennedy, the deciding vote in *Boumediene v. Bush*,²²¹ influenced by the increasing evidence that many innocent men had been swept into Guantanamo? Did this influence him to be less deferential to the government’s claim that courts should stay out of the way and trust the executive? Is this part of what he had in mind when he discussed the value of the great writ of habeas corpus as a hedge against “the practice of arbitrary imprisonments,” which “have been, in all ages, the favorite and most formidable instruments of tyranny?”²²² After all, Kennedy openly expressed his doubts about the government’s proposed tribunals, noting that “even where all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal’s findings of fact.”²²³ Given the influence that the evidence of innocence appears to have had on his domestic criminal law jurisprudence, there is reason to suspect that Kennedy had similar concerns in the terror context. In the same vein, it is worth paying careful attention to the future habeas proceedings and trials of terror detainees. In the first habeas hearing after the Supreme Court’s decision in *Boumediene*, U.S. District Court Judge Richard Leon ordered the government to free five detainees because the evidence against them was too weak to stand up in court.²²⁴ Evidence that the executive branch detained innocent people is likely to continue to be the strongest argument available for those who would restrain the harshness with which we prosecute the war on terror.²²⁵

219. MARK DENBEAUX & JOSHUA DENBEAUX, REPORT ON GUANTANAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA 2 (2006), http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf.

220. *Id.*

221. *Boumediene v. Bush*, 128 S.Ct. 2229 (2008).

222. DENBEAUX & DENBEAUX, *supra* note 219, at 14 (quoting ALEXANDER HAMILTON, FEDERALIST NO. 84).

223. *Id.* at 56.

224. William Glaberson, *Judge Declares Five Detainees Held Illegally*, N.Y. TIMES, Nov. 21, 2008, at A1.

225. Even if the detainee is found guilty, evidence that the executive branch significantly overstated her role in terrorism may also cause courts to be skeptical. Consider what happened to Salim Hamdan. In *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006),

VIII. CONCLUSION: WAR METAPHORS

Throughout this article, I have attempted to show how, in some important ways, 9/11 did not change everything. In comparing the war on terror with our domestic war on crime, I have tried to raise questions about how we have prosecuted both. There is one final analogy that is worth our consideration, one which might help explain all the others. It concerns the very metaphor of war.

From the inception of the war on terror, many criticized the Bush administration's use of a "war" approach, instead arguing for what they called a "law enforcement" approach.²²⁶ The Obama administration has, for its part, signaled that it will no longer use the term "war on terror." But one of the lessons of this Article is that American "law enforcement" can be quite war-like in its approach, so there may be less gained from the rebranding than advocates of the "law enforcement" approach might hope.

Indeed, it is worth remembering that our current law enforcement approach was—just like the war on terror—originally presented and defended as a series of wars. The first war was on crime, and closely thereafter the nation launched the war on drugs. The arguments themselves were similar. Like the advocates of harsh tactics in the war on terror, domestic crime warriors have also claimed to be combating a new

Justice Kennedy listed the litany of crimes the government asserted Hamdan had committed: "[he] stands accused of overt acts in furtherance of a conspiracy terrorism: delivering weapons and ammunition to al Qaeda, acquiring trucks for use by Osama bin Laden's bodyguards, providing security services to bin Laden, and receiving weapons training at a terrorist camp." *Id.* at 646 (Kennedy J., concurring in part). Two years later, a military jury ended up acquitting Hamdan of some of these charges and convicting him of others. Free to select any sentence up to life, the jury sentenced Hamdan to less than six years—including time served. He was free just a few months later. Jess Bravin, *Hamdan Jury Felt Evidence Didn't Back U.S. Claim*, WALL ST. J., Aug. 11, 2008, at A3. Hamdan was released in January 2009 to his family in Yemen. *Yemen Releases Former bin Laden Driver from Jail*, N.Y. TIMES, Jan. 11, 2009, at A9. One might think that one of the "worst of the worst" would be found deserving of more than six years in prison. If the executive branch's threat assessment continues to prove unreliable, courts may be less likely to defer in the future.

226. See, e.g., JAMES RENWICK & GREGORY F. TREVERTON, RAND CTR. FOR GLOBAL RISK & SEC., THE CHALLENGES OF TRYING TERRORISTS AS CRIMINALS, PROCEEDINGS OF A RAND/SAID COLLOQUIUM 12–13 (2008), available at http://www.rand.org/pubs/technical_reports/2008/RAND_CF249.pdf. Defenders of the war approach to fighting terror have ridiculed the law enforcement response as too soft. For example, in arguing that alleged terrorists should not have access to civilian courts, the *Wall Street Journal* argued, "This is war, not a car theft in Chevy Chase." *Terrorists on Trial*, *supra* note 162. But the *Journal's* juxtaposition of terrorism with car thefts is misleading. Domestic crime warriors have built a tough criminal justice system by invoking images of serious crimes such as rape, murder, and gang warfare. And, as I have argued, they have been successful. Against that history, it is clever—but ultimately wrong—to suggest that our domestic criminal system is built to respond to relatively minor crimes like car thefts.

breed of violence that is uniquely threatening and will only be contained with an iron-fisted response. In arguing for harsh laws against drug users and drug dealers in the 1970s, for example, New York Governor Nelson Rockefeller said, "The crime, the muggings, the robberies, the murders associated with addiction continue to spread a reign of terror. . . . Whole neighborhoods have been as effectively destroyed by addicts as by an invading army."²²⁷ A generation later, California Governor Pete Wilson echoed Rockefeller's characterization of domestic crime as form of terrorism, calling on the state legislature to create a set of laws for juvenile criminals that are "as unforgiving as the terrorism that's been inflicted on innocent victims for too long now."²²⁸

Because it is war, there will be casualties; innocent people will be hurt as we hunt down the terrorists. "In a war like this, where our enemies fight that way, I think the error rate is necessarily going to be higher than what it is in other kinds of conflicts," argued Bradford Berenson, an aide to Alberto Gonzalez during his time as White House Counsel. "That's regrettable. It's also inevitable."²²⁹ This too we have heard before. In calling the fight against crime a war, advocates for harsher measures told us we must accept that some innocents will suffer. James Q. Wilson, one of the most well-known criminologists of the past forty years, said street searches of innocent people, mostly black and Hispanic men, would be a necessary sacrifice in order to reduce the violence on America's streets. In a piece entitled "Just Take Away Their Guns," Wilson said, "[i]nnocent people will be stopped. Young black and Hispanic men will probably be stopped more often than older white Anglo males or women of any race. But if we are serious about reducing drive-by shootings, fatal gang wars and lethal quarrels in public places, we must get illegal guns off the street."²³⁰

Nelson Rockefeller, Pete Wilson, and James Q. Wilson all employed rhetoric that both responded to, and reinforced, our fear of domestic crime. They did so in service of punitive criminal legislation. Advocates for the war on terror have chosen a similar set of tactics to accomplish even more extreme ends. Like the crime warriors, and in part because of the foundation laid by the crime warriors, they have largely succeeded.

227. MICHAEL MASSING, *THE FIX* 126 (1998).

228. ABRAMSKY, *HARD TIME BLUES*, *supra* note 76, at 220.

229. LICHTBLAU, *supra* note 5, at 25.

230. James Q. Wilson, *Just Take Away Their Guns*, N.Y. TIMES, March 20, 1994 (Magazine), at 47.