DETENTION, THE WAR ON TERROR, AND THE FEDERAL COURTS

AN ESSAY IN HONOR OF HENRY MONAGHAN

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Between 2004 and 2009, the United States Supreme Court relied numerous times on habeas corpus to protect the rights of citizens and of aliens detained after 9/11. Various claims could be marshaled to bracket the 9/11 decisions—as “war” cases; “Guantánamo” cases; “torture” cases; aberrational responses to documented procedural unfairness; unusual instances of federal pretrial detention; and either as extraordinary judicial rejections of challenges to the Court’s authority or as disappointingly narrow procedural remedies licensing forms of preventive detention. Further, one could argue that the specter of terrorism raises normative questions distinct from those related to confinement for other reasons.

But neither the problems nor the law produced through 9/11 detention are exotic. Rather, they are continuous with judicial responses to decisions by governments trying to maintain peace and security and, hence, incapacitating some individuals feared likely to inflict grave harm. Officials deal with uncertainty about which persons are threatening in the contexts of 9/11, of ordinary criminality, and of border regulation. In response, more than two million persons are detained in the United States, and some 25,000 segregated in solitary confinement in “supermax” facilities. Courts in turn have, over the last several decades, addressed or demurred on claims about the illegality of both the length and conditions of confinement, and Congress has repeatedly sought to structure or limit routes that various kinds of detainees may take to court.

Therefore, the 9/11 decisions are exemplary of what Henry Monaghan termed the “timeless” questions within the federal courts canon about the role of courts in this constitutional order. One sees, repeatedly, the many effects of “foreign” law on U.S. precepts, as well as the distinctive contributions made by courts, obliged to function independently, to treat all persons as equally entitled to dignity, and to work in public. But the limited role for courts is also vivid; even as adjudication can frame some parameters of confinement, the protection of human dignity depends on a diverse set of officials interacting at all levels and in all sectors of government.

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Brenda Hale for help on the law of detention outside the United States; and to Reva Siegel for reflections on race, crime, and detention. My work has been informed by participating in a listserve, Torture, set up by Kim Scheppele and regularly recounting the practice’s prevalence, as well as by information from litigators, including Jonathan Hafetz and Tom Jawetz, both of whom worked at the ACLU on behalf of individuals in detention. A huge debt is owed to many students, and specifically to Travis Crum, Kathleen Claussen, Victoria Degtyareva, Brendan Groves, Adam Grogg, Sophie Hood, Elliot Morrison, Joe Pace, Allison Tait, Vasudha Talla, and Sarah J. Watson for able research. Lacing this paper are aspirations for better treatment of detained individuals. I was fortunate to have learned from Dan Freed, John Frank, Morris Lasker, Arthur Liman, and William Wayne Justice, all of whom were devoted to making law respect detainees. Special thanks go to Jennifer Sokoler of the *Columbia Law Review*, to Gillian Metzger and Jack Coffee for convening the symposium, and to Henry Monaghan, not only for his comments on this draft but because he cares so passionately about constitutional conversations and, hence, inspired this one.

In a few cases discussed, I was involved in amici briefs on behalf of those seeking access to the federal courts. See Brief of Professors of Constitutional Law and Federal Jurisdiction as Amici Curiae in Support of Petitioners, *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (Nos. 06-1195, 06-1196); Brief for Amici Curiae Professors of Constitutional Law

I. JUDGES, CUSTODY, AND THE FEDERAL COURTS CANON

To celebrate Henry Monaghan is to take law seriously. An area of law close to his heart (and to those of many others writing in this Symposium) is the jurisprudence of the federal courts. As Monaghan explained in 1970, the field's "basic problem is, of course, a timeless one: what is the proper role of the federal courts in light of the limitations which inhere in the judicial process, in separation of powers, and in federalism."¹ This Essay, written to honor Monaghan's work, addresses an aspect of that "timeless" problem: claims brought to the federal courts by individuals alleging unlawful detention. This subject has drawn many commentators in the last nine years as—through the sad and horrifying sagas of Guantánamo, Abu Ghraib, Bagram, and torture—we have all become involuntary witnesses to vivid examples of the totalizing authority that can inhere in detention.²

Law sits inside and around these events. Thus far, habeas corpus has provided the principal jurisdictional predicate that has enabled individuals detained in the wake of 9/11 to appear before judges who were not directly commissioned by the Department of Defense. Between 2004 and 2009, the Supreme Court rendered six decisions involving habeas corpus and the war on terror—*Hamdi*,³ *Hamdan*,⁴ *Rasul*,⁵ *Padilla*,⁶ *Munaf*,⁷ and *Boumediene*⁸—and a seventh, *Iqbal*, in which the plaintiff sought redress for mistreatment while in detention.⁹ In the six habeas cases, a majority of Justices (on an often deeply divided Court) concluded that 9/11 detainees, including U.S. citizens abroad and aliens under U.S. control, have rights of access to independent Article III judges.¹⁰ Further, several

and of the Federal Courts in Support of the Habeas Petitioners Omar and Munaf, *Munaf v. Geren*, 128 S. Ct. 2207 (2008) (Nos. 07-394, 06-1666); Brief of Amici Curiae Norman Dorsen, Frank Michelman, Burt Neuborne, Judith Resnik, and David Shapiro in Support of Petitioner [Supreme Court Appellate Jurisdiction], *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184). In addition, aspects of this discussion relate to a forthcoming book, co-authored with Dennis E. Curtis and entitled *Representing Justice: From Nascent City-States to Democratic Courtrooms and Guantánamo Bay* (Yale Press forthcoming 2010).

1. Henry P. Monaghan, Book Review, 83 Harv. L. Rev. 1753, 1754 (1970) (reviewing David P. Currie, *Federal Courts, Cases and Materials* (1968)).

2. See generally Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (2008).

3. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

4. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

5. *Rasul v. Bush*, 542 U.S. 466 (2004).

6. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

7. *Munaf v. Geren*, 128 S. Ct. 2207 (2008).

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

9. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

10. The Court did not conclude that Article III judges had to make initial decisions on the merits of the validity of detention. For example, in *Hamdi*, the plurality opinion suggested that detention of citizens during hostilities could be sustained through administrative decisions made by neutral decisionmakers with subsequent access, in appropriate circumstances, through habeas corpus to Article III judges. *Hamdi v. Rumsfeld*, 542 U.S. 507, 536–37 (2004) (plurality opinion). In the wake of *Boumediene*,

of these opinions insist on the limits of executive authority and, in *Hamdan* and *Boumediene*, on the constraints on congressional authority over federal habeas jurisdiction. In contrast, in *Iqbal*, the Court (again sharply divided) reached a different conclusion, interpreting pleading and liability rules to make it difficult to obtain judicial redress for injuries alleged to have stemmed from detention.

The task of my discussion is to understand the analytic relationship between the recent law and the jurisprudential “canon” of the federal courts.¹¹ The idea that there is a “canon” (that a particular body of cases and statutes focused on federal courts represents a jurisprudence of the federal courts) stems from work in the 1930s by Felix Frankfurter, Harry Schulman, and Wilbur Katz.¹² In 1953, it became entrenched when Henry Hart and Herbert Wechsler published the first edition of the casebook, *The Federal Courts and the Federal System* (Hart and Wechsler).¹³ As Henry Monaghan explained in 1974, *Hart and Wechsler* is the “extraordinary” casebook that prods its readers “to think over their heads about the deepest problems of the legal process.”¹⁴

Monaghan made his comments when the second edition of *Hart and Wechsler* was published two decades after the book had first appeared. Monaghan noted that, while the overarching questions of the 1953 edition had endured,¹⁵ the next generation of editors (Paul Bator, Paul Mishkin, and David Shapiro, who joined Herbert Wechsler) had intro-

district judges have reviewed more than thirty requests for habeas relief. See *infra* notes 22–25 and accompanying text.

11. See Judith Resnik & Vicki C. Jackson, *The Idea of a Jurisprudence, a Course, and a Canon: Introducing Federal Courts Stories*, in *Federal Courts Stories* 1, 1–28 (Vicki Jackson & Judith Resnik eds., 2009); see also Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 Vand. L. Rev. 953, 961–64 (1994); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. Chi. L. Rev. 671, 680–87 (1989); Judith Resnik, *Rereading “The Federal Courts”: Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 Vand. L. Rev. 1021, 1022–25 (1994); Akhil Amar, *Law Story*, 102 Harv. L. Rev. 688, 690 (1989) (reviewing Paul M. Bator, Daniel J. Meltzer, Paul J. Mishkin & David L. Shapiro, *Hart and Wechsler’s the Federal Courts and the Federal System* (3d ed. 1988)).

12. See *Cases and Other Authorities on Federal Jurisdiction and Procedure* (Felix Frankfurter & Harry Shulman eds., rev. ed. 1937); *Cases and Other Authorities on Federal Jurisdiction and Procedure* (Felix Frankfurter & Wilber G. Katz eds., 1931). For a detailed history of Frankfurter’s role in crafting contemporary federal courts jurisprudence, see generally Mary Brigid McManamon, *Felix Frankfurter: The Architect of “Our Federalism,”* 27 Ga. L. Rev. 697 (1993).

13. The first edition, published in 1953, was dedicated by Hart and Wechsler to Felix Frankfurter, “who first opened our minds to these problems.” Henry M. Hart Jr. & Herbert Wechsler, *The Federal Courts and the Federal System*, at ix (1953) [hereinafter 1953 Hart & Wechsler].

14. Henry P. Monaghan, *Book Review*, 87 Harv. L. Rev. 889, 889 (1974) (Paul M. Bator, Paul J. Mishkin, David L. Shapiro & Herbert Wechsler, *Hart and Wechsler’s The Federal Courts and the Federal System* (1973)) [hereinafter Monaghan, Hart & Wechsler] (quoting Kingman Brewster, Jr., President of Yale University, in awarding an honorary degree posthumously to Henry Hart in 1969).

15. Monaghan noted that “familiar landmark cases” had been retained. *Id.* at 890.

duced areas of law that had “no real counterpart” in the first edition.¹⁶ “[T]he most dramatic illustration of change” was the chapter on habeas corpus that was “for all practical purposes . . . wholly new.”¹⁷ Moreover, the pace of change required “further revision” of the just-published 1973 edition because the Supreme Court had worked “important changes in doctrine” related to habeas corpus.¹⁸ As Monaghan reported, between 1953 and 1973, the law of habeas corpus had been transformed, prompting a major reconceptualization of federal courts’ relationship to prisoners.

My questions are whether the 9/11 detention law works yet more “important changes in doctrine” altering the understanding of the Constitution’s role in structuring the predicates for, as well as the length and conditions of, confinement. Does the new spate of cases affect law governing other detainees, held in state or in federal custody, before or after conviction, rather than in the limbo that we call Guantánamo Bay?¹⁹ Does the 9/11 case law illuminate the reach of congressional and executive control over the jurisdiction of life-tenured judges or the reach of judicial oversight over government officials whom we now know authorized violent treatment of detainees?

One response is to answer these questions in the negative—based on the view that 9/11 law is peculiar and discrete, dealing with executive, pretrial detention of alleged terrorists and thus having little to offer a general theory of separation of powers. Below, in Part II, I identify six claims that could be marshaled in support of such jurisprudential containment—bracketing 9/11 decisions as “war” cases; “Guantánamo” cases; “torture” cases; aberrational judgments founded on collapses of procedural fairness; idiosyncratic responses to federal executive pretrial detention; and as either extraordinary moments of judicial pushback against challenges to court authority or as disappointingly narrow insistences on procedural remedies that, in practice, have licensed forms of preventive detention and rejected the imposition of liability for torture and degrading treatment. The distinctions among populations of detainees could thus serve to limit the import of 9/11 case law—either because

16. *Id.*

17. *Id.*

18. *Id.* Monaghan referred to cases, such as *Davis v. United States*, 411 U.S. 233 (1973), that imposed limits on post-conviction review. Monaghan, Hart & Wechsler, *supra* note 14, at 890 n.11.

19. As Monaghan noted, these questions are at the core of the shifting conception of federal courts jurisprudence, once preoccupied with the “relationship between state and federal law” and the sometimes “irritating difficulty” of sorting between the two kinds. *Id.* at 891. In the wake of *Brown v. Board of Education*, 347 U.S. 483 (1954), a second focus emerged, about whether the federal courts had a special role to play in the enforcement and “vindication” of “federally secured rights.” Monaghan, Hart & Wechsler, *supra* note 14, at 894. Of course, the two aspects intersect, in that challenges to state detention by prisoners often entail deciding whether state law operated in tension with a “federally secured right[].” *Id.* The question of an affirmative role for state courts in protecting detainees is explored *infra* Part IV.E.

terror raises unique normative questions justifying different or less process or because pretrial detention should entitle those confined by 9/11 to more access to courts than prisoners held after conviction.

My argument, however, set forth in Part III, is that neither the problems nor the case law represented in 9/11 detention are exotic. Rather, they are continuous with judicial responses to the central challenges, faced daily, by governments trying to maintain peace and security and, hence, incapacitating some individuals feared likely to inflict grave harm to the social order. Whether in the context of 9/11 or of more familiar kinds of criminality and border regulation, officials must deal with uncertainty about which persons have done or will do harm. Governments regularly desire to obtain information through intense interrogations aimed at preventing injuries and at apprehending wrongdoers, and governments regularly detain various persons. Courts in turn have, over the last several decades, ruled many times on the legality of detention and of confinement conditions.

The underlying encounters producing detention are prompted by different levels of threat, from minor crimes to transnational terrorism. The fact of confinement is shared by criminal defendants awaiting trial as well as those held without the prospect of a trial (as has been the situation for some 9/11 detainees), certain kinds of migrants, and individuals deemed dangerous after their sentences have expired. Further, detention does not end government needs for investigation and assessment of individuals held in its jails and prisons. Even after defendants are convicted and incarcerated, custodians must decide prison placements. Thereafter, officials deal with individuals suspected of violating prison rules or posing a danger to others. Thus, in legally diverse settings, custodial regimes must distinguish among and classify detainees to justify why a particular subset is to be confined in more restrictive conditions than others, and for longer periods of time.

After 9/11, the Executive asserted its exclusive authority to make all these decisions for a set of detainees and, through legislation in 2005 and 2006, obtained congressional support for some versions of that proposition.²⁰ The Supreme Court's six habeas 9/11 opinions constitute a refusal by life-tenured judges to accede to these assertions of total power. These decisions read the Constitution to confer a substantive entitlement

20. See Military Commissions Act (MCA) of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10 and 18 U.S.C.). For further discussion of the 2006 MCA, see *infra* notes 118, 134 and accompanying text; see also Detainee Treatment Act (DTA) of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (codified as amended in scattered sections of 10, 28, and 42 U.S.C.), discussed *infra* notes 118, 135 and accompanying text. On October 28, 2009, the President signed into law the Military Commissions Act of 2009, which altered several aspects of the 2006 enactment. See Military Commissions Act (MCA) of 2009, Pub. L. No. 111-84, § 1801, 123 Stat. 2190, 2574, discussed *infra* notes 95–99 and accompanying text.

to liberty that cannot be deprived without some process.²¹ Lower federal courts then applied the Court's rulings and, by December of 2009, had concluded that thirty-one people were held at Guantánamo without sufficient evidentiary support for confinement.²² Before then, the Bush Administration had ordered many people transferred from Guantánamo; when President Obama took office, he created a task force that also found some Guantánamo detainees to be eligible for release.²³ Thus, a population estimated at its height to have included 774 detainees was, by the fall of 2009, reduced to about 225 people.²⁴ By December of 2009,

21. This reading became clear in the 2008 ruling of *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). See also Gerald L. Neuman, *The Habeas Corpus Suspension Clause After Boumediene v. Bush*, 110 Colum. L. Rev. 536, 551–55, 575–76 (2010).

22. The number of decisions and their impact depends in part on when accountings are made (and the spelling of the base's name also varies with authors, some using Guantánamo and others dropping the accent over the a). As of December 1, 2009, the courts had granted habeas relief for thirty-one detainees and denied the writ in eight cases. Of the thirty-one who prevailed, twenty had been resettled or repatriated to their home countries. Of the eleven who had not then obtained relief, the government had sought appellate review in two cases; the other nine cases involved seven petitioners from Uighurs, a Kuwaiti, and an Algerian. See David H. Remes, *Legal Dir., Appeal for Justice, Guantánamo Habeas Grants, Denials, and Appeals*, as of 12/01/09 (on file with the *Columbia Law Review*). An analysis of the outcomes somewhat earlier comes from Jonathan Hafetz & Jonathan Manes, *ACLU National Security Project, List of Judgments Related to Guantánamo Detainees* (2009) (on file with the *Columbia Law Review*) [hereinafter Hafetz & Manes, *Guantánamo Detainee Judgments*], and from Chisun Lee, *An Examination of 38 Gitmo Detainee Lawsuits*, ProPublica, Sept. 29, 2009, at <http://www.propublica.org/special/an-examination-of-31-gitmo-detainee-lawsuits-722> (on file with the *Columbia Law Review*).

23. The Executive Order issued in January 2009 called for the closing of Guantánamo and mandated that the government undertake a comprehensive review of the detainees. See *Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities*, Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009). Thereafter, Attorney General Holder announced the creation of a task force to review individual cases. See William Glaberson, *Pentagon Finds Guantánamo Follows Geneva Conventions*, N.Y. Times, Feb. 21, 2009, at A11. As of October 12, 2009, the findings of the Guantanamo Detainee Review Task Force had not been made public. See Christopher Flavelle, *Why Many Guantanamo Detainees Ordered Released Are Still Stuck There*, ProPublica, Oct. 12, 2009, at <http://www.propublica.org/feature/gitmo-guantanamo-detainees-ordered-released-are-still-stuck-there-1012> (on file with the *Columbia Law Review*). However, in December of 2009, Secretary of Defense Robert Gates testified that the task force had cleared 116 of some 215 detainees then remaining for transfer. That number may include some of the persons for whom habeas relief was granted. See *Afghanistan: Assessing the Road Ahead: Hearing on Afghanistan Policy Before the S. Comm. on Foreign Relations*, 111th Cong. (2009), LEXIS, Federal News Service Transcript (on file with the *Columbia Law Review*).

24. See Andy Worthington, *The Guantánamo Files: The Stories of the 774 Detainees in America's Illegal Prison* (2007); *The Guantánamo Docket*, N.Y. Times, at <http://projects.nytimes.com/guantanamo> (last visited Jan. 17, 2010) (on file with the *Columbia Law Review*) [hereinafter *The Guantánamo Docket*]. Somewhat different numbers come from the Washington Post. See *Wash. Post, Guantanamo Bay Timeline*, at <http://projects.washingtonpost.com/guantanamo/timeline/> (last visited Nov. 18, 2009) (on file with the *Columbia Law Review*) [hereinafter *Guantánamo Bay Timeline*]. The exact numbers are imprecise because the "Pentagon has consistently refused to comprehensively identify

about twenty of the thirty who had prevailed in their habeas petitions had in fact been released from Guantánamo,²⁵ along with dozens of others who had left by virtue of executive action.

The 9/11 case law has prompted diverse assessments, with arguments that the judiciary has done too much, or too little, or left unanswered important questions about the permissible scope of executive detention and surveillance powers.²⁶ Evaluations depend on a baseline, and my focus is on how these rulings illuminate the “federal courts canon” addressing the constitutionality of detention of various populations in jails, prisons, and immigration centers. The 9/11 habeas decisions have afforded more opportunities for these detainees to contest the legality of their confinement than do current rules governing access for prisoners con-

those it holds.” Benjamin Wittes & Zaahira Wyne, Brookings Inst., *The Current Detainee Population of Guantánamo: An Empirical Study 1* (2008), available at http://www.brookings.edu/~media/Files/rc/reports/2008/1216_detainees_wittes/1216_detainees_wittes.pdf (on file with the *Columbia Law Review*); see also David Bowker & David Kaye, *Guantanamo by the Numbers*, N.Y. Times, Nov. 10, 2007, at A15. Researchers at the *Washington Post* generated a comprehensive list, through checking court documents and international sources, of the names and countries of origin of 550 Guantánamo detainees held between 2002 and 2006. See *Names of the Detained in Guantanamo Bay, Cuba*, Wash. Post, at <http://projects.washingtonpost.com/guantanamo> (last visited Nov. 20, 2009) (on file with the *Columbia Law Review*).

25. See *supra* note 22. The district judges involved in the litigation included Judges Urbina, Leon, Huvelle, Kessler, and Kollar-Kotelly. They had granted writs in various cases, including seventeen Uighurs of whom four were released to Bermuda; five Bosnian-Algerians, of whom four were released—three to Bosnia and one (Lakhdar Boumediene, the named plaintiff in the 2008 Supreme Court judgment) to France; one person from Chad released to that country; three Yemenis, of whom one was returned to Yemen; three Kuwaitis, of whom one was returned to Kuwait; one Afghan, released to that country; and a Syrian who remained in custody. As noted *supra* note 22, eight writs had been denied; those cases include Judge Leon’s denials of those filed by Belkacem Bensayah of Bosnia, Hisham Sliti and Hammamy of Tunisia, and Muaz Al Alawi and Ghaleb Nassar Al Bihani of Yemen; Judge Robertson’s denial of the writ from Waqas Mohammed Ali Awad of Yemen; Judge Kollar-Kotelly’s denial of the writ from Fawzi Al Odah of Kuwait; and, Judge Collyer’s denial of the writ from Sufyan Barhoumi of Algeria. See *Hafetz & Manes, Guantánamo Detainee Judgments*, *supra* note 22. Given that, at some periods, more than 770 persons had been known to have been held at Guantánamo and that the population in the fall of 2009 was estimated to be under 225, the decline in population through release and relocation came primarily through executive action. See *supra* notes 22–24.

26. Benjamin Wittes argued the judiciary had, or was likely to impose, too many constraints on the other branches as they dealt with a warlike situation. See Benjamin Wittes, *Law and the Long War: The Future of Justice in the Age of Terror* 103–13 (2008). Jenny Martinez and Stephen Vladeck read the courts as doing too little. Jenny S. Martinez, *Process and Substance in the “War on Terror,”* 108 *Colum. L. Rev.* 1013, 1017–18 (2008); see also Stephen I. Vladeck, *The Long War, The Federal Courts, and the Necessity/Legality Paradox*, 43 *U. Rich. L. Rev.* 893, 896 (2009) [hereinafter Vladeck, *The Long War*] (reviewing Wittes’s book). In this volume, Richard Fallon looks to doctrine and political science to explain the Court’s reticence to “resolve large questions” including “the legally permissible breadth of the category of suspected ‘enemy combatants’ or terrorist suspects that the Executive Branch can detain.” See Richard H. Fallon, Jr., *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science*, 110 *Colum. L. Rev.* 352, 357 (2010) [hereinafter Fallon, *Habeas Corpus*].

fined after convictions. Indeed, the Court's pronouncements have helped to produce an all-branch, multiple-institution, and cross-border debate about the treatment of 9/11 detainees.

But looking only at the habeas jurisprudence prompted by 9/11 is too narrow a focus, for some litigants have also sought redress for past, allegedly unlawful, confinement. The seventh major Supreme Court 9/11 decision is *Ashcroft v. Iqbal*, a lawsuit seeking damages for alleged abuse during a post-9/11 detention.²⁷ Echoing the treatment accorded ordinary prisoners seeking redress for oppressive conditions of confinement and harsh treatment,²⁸ the Supreme Court responded by creating new doctrines to shelter government officials from liability.²⁹ As detailed below, during the period producing the seven 9/11 decisions, the Supreme Court issued some eighty rulings dealing with regular prisoners. In a few instances, the Court provided relief, but more often concluded that narrow routes to court for prisoners precluded merits reviews and remedies. Thus, by placing 9/11 case law in the context of the constitutional law of detention, one can see both the impact of judicial rulings and the deep reluctance of federal judges to take on roles policing the violence entailed in custodial settings.

Furthermore, disquieting parallels emerge between conditions at Guantánamo that have drawn international attention and those afforded ordinary prisoners. The prolonged isolation of some of the detainees at that base is paralleled by conditions of confinement in "supermax" facilities throughout the United States. For example, as the Supreme Court detailed in its 2005 decision of *Wilkinson v. Austin*,³⁰ prisoners could be placed for years in isolation cells, with constant surveillance facilitated by lights illuminated twenty-four hours a day. The Court did require a correctional system to conduct minimal procedural inquiries but imposed no constitutional oversight of the underlying offenses justifying the isolation of individuals or of the permissible duration of such confinement.³¹

To preview some of the conclusions in Part IV, the integration of the law emerging from 9/11 detention with that governing confinement occasioned by police, prison, and immigration officials provides several insights. A first is that the state regularly faces tremendous challenges in securing safety, at both local and global levels. Sorting the dangerous from the benign is a daunting task. While the context of terror has distinctive features, including a scale of harm almost unimaginable, terrorism is part of a fabric of threats coming from diverse sources that challenge the peace and security of the state. The point is captured by the deployment of the metaphor of "war"—the "war on drugs," "war on crime," and "war on terror." The result is that diverse groups of individu-

27. 129 S. Ct. 1937 (2009).

28. See *infra* Part III.C.

29. See *infra* notes 197–211 and accompanying text.

30. 545 U.S. 209 (2005).

31. *Id.* at 225, discussed *infra* notes 261–288 and accompanying text.

als are in detention, and that the 9/11 detainees are not the only set of individuals confined outside the criminal process.

A second lesson is the special utility of a particular facet of litigation—that it generates “publicity,” a term borrowed from Jeremy Bentham.³² The information-forcing function of public adjudication spawns debate about the state’s practices. What the judicial limits on 9/11 detention have helped to produce is widespread discussion about the legitimacy and sustainability of the confinement just as, episodically, court decisions about treatment of other kinds of detainees have brought attention to incarcerated individuals.³³ But public debate ought not be equated with particular outcomes. Legislative initiatives since 9/11 have repeatedly sought to bar detainees from access to redress,³⁴ akin to efforts by Congress to limit federal review of claims brought by onshore prisoners and detained migrants.³⁵ By reading 9/11 law alongside the doctrine and statutes governing various detained populations, one finds repeated patterns of lawmaking that leave confined persons with minimal or no access to independent judges working before the public.

Thus, and third, decades of debate about detention have neither produced a consensus nor securely anchored an engaged role for courts in developing norms. At some points, judges have imposed substantive and procedural constraints. In the 1960s, for example, a federal court outlawed the “whipping to the bare skin of prisoners” in an Arkansas

32. See Jeremy Bentham, *Rationale of Judicial Evidence* (1827) [hereinafter *Bentham, Rationale*], in 6 *The Works of Jeremy Bentham* 351 (John Bowring ed., Edinburgh, William Tait 1843) [hereinafter *Bowring, Works*]; infra Part IV.C. Volumes of the *Works of Jeremy Bentham* were published after Bentham’s death in 1832 by John Bowring, Bentham’s literary executor. Bowring’s editions are available online at http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php&title=1920 (last visited Nov. 18, 2009). Republication, with revisions reflecting a review of original manuscripts, is underway through the Bentham Project, located at the University College London’s Law Faculty (UCL) and guided by Professor Philip Schofield. See UCL Bentham Project: Publications, at <http://www.ucl.ac.uk/Bentham-Project/Publications/public.htm> (last visited Nov. 18, 2009).

33. A contemporary illustration is the litigation about California prisons, which have been held to be so overcrowded as to violate the prisoners’ constitutional rights. See *Coleman v. Schwarzenegger* (*Coleman I*), Nos. CIV S-90-0520 & C01-1351, 2009 WL 330960 (E.D. Cal. & N.D. Cal. Feb. 9, 2009) (preliminary ruling); see also *Coleman v. Schwarzenegger* (*Coleman II*), Nos. CIV S-90-0520 & C01-1351, 2009 WL 2430820 (E.D. Cal. & N.D. Cal. Aug. 4, 2009) (subsequent order requesting development of a plan to reduce population), discussed *infra* notes 268, 307–309 and accompanying text.

34. See MCA of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10 and 18 U.S.C.), discussed *infra* notes 118, 134, and accompanying text; DTA of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (codified as amended in scattered sections of 10, 28, and 42 U.S.C.).

35. See Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 28 U.S.C.); Prison Litigation Reform Act (PLRA) of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66 (1996) (codified in scattered sections of 11, 18, 28, and 42 U.S.C.); Illegal Immigration Reform and Immigrant Responsibility Act (IIRIA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified at 8 U.S.C. § 1226(e) (2006)).

prison but noted that use of “the strap” for corporal punishment might be permissible, if “appropriate safeguards” were put into place.³⁶ In the same era, the Supreme Court concluded that practices that had once been common—conviction and imprisonment for felonies that were achieved without the provision of lawyers for indigent defendants and custodial interrogations without the right to silence—were unconstitutional.³⁷ In the 1980s, the Court addressed the duration of confinement, concluding that life imprisonment based on a minor offense was disproportionately harsh.³⁸ More recently, both courts and legislatures have been deeply deferential to executive action by limiting prisoner access and licensing a great deal of discretion as to both the form and substance of confinement.³⁹ In 1987, in *McCleskey v. Kemp*, the Supreme Court refused to evaluate claims of structural racial bias in sentencing, just as in 2003, the Court declined in *Lockyer v. Andrade* to license judges to inquire regularly into the proportionality of life sentences.⁴⁰

Fourth, this integrated approach offers insight into the relevance of the political structure of federalism to the constitutional law of custody. In the 1960s and 1970s, the state courts were seen as failing to provide sufficient protections for defendants and prisoners, and hence in need of federal court oversight via both habeas corpus and civil rights oversight through § 1983 litigation. In subsequent decades, federalism has been invoked to justify deference to state officials. The attention to federal custody generated by 9/11 and immigration detention ought, however, to serve as a reminder that custodial excesses can occur in any jurisdiction, as can arguments for deference to jailers’ expertise. The fundamental question of the proper role for outside oversight (judicial or otherwise) is not an artifact of federalism, and thus the law of 9/11 detention invites reconsideration of the part for state court judges to play in buffering the encounter between detainee and custodian.

Fifth, the political and legal culture framing decisionmaking about detainees is not a product made from exclusively domestic exchanges. When courts generate responses that are at times constraining and more often licensing custodial authority, their judgments reflect—expressly and at points implicitly—comparisons made between American and “foreign” norms.⁴¹ The Cold War dots the development of the law of the Fourth and Fifth Amendment during the 1950s–1970s, just as the con-

36. *Jackson v. Bishop*, 268 F. Supp. 804, 812–16 (E.D. Ark. 1967), discussed *infra* note 296 and accompanying text. The Supreme Court upheld the assessment of attorneys’ fees against the state as part of the remedies in the Arkansas prison litigation in *Hutto v. Finney*, 437 U.S. 678, 691–93 (1978).

37. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963).

38. *Solem v. Helm*, 463 U.S. 277, 303 (1983).

39. See, e.g., discussion of statutes *supra* notes 34–35.

40. *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987), discussed *infra* notes 400–402; *Lockyer v. Andrade*, 538 U.S. 63, 77 (2003), discussed *infra* note 403.

41. See *infra* notes 223–244 and accompanying text.

temporary War on Terror marks these decades' decisions. The "American" law of detention and of criminal defendants' rights more generally is laced with jurisprudential rights and fears that criss-cross the boundaries of the nation-state.

Finally, what Henry Monaghan called "self-regulating official behavior"⁴² remains central. Monaghan used that phrase in the 1970s to bring attention to the relationship between federal law and first-tier decisionmakers, such as schoolteachers and police officers, whose judgments were central to students and to individuals suspected of crimes. In the context of this discussion, the relevant officials include employees of the Department of Defense, the Central Intelligence Agency, and Immigration and Customs Enforcement; line officers and soldiers in the armed forces; lawyers in the Department of Justice; police officers; immigration judges, and other initial adjudicators in specialized tribunals, as well as state and federal trial judges. These various frontline personnel have a more immediate and greater role to play than do appellate courts, sitting at a distance from the underlying interactions. Hence it is their "official behavior" that is pivotal.

But the issue is the content of such "self-regulation." What treatment is to be required, in what Monaghan called "sufficiently concrete terms," for detainees and what incentives for compliance will law impose?⁴³ Is preventive detention permissible? The placement of individuals in long-term solitary confinement? What institutions—courts, legislatures, professional organizations of these various first-tier authorities—determine the answers? The 9/11 decisions put these questions—at the core of the federal courts' canon—vividly on display. Some officials claimed the totality of government power over the bodies of other human beings, while other members of the government insisted on the limits of state authority. What human dignity required was, and is, deeply contested.

II. JURISPRUDENTIAL CONTAINMENT: MARGINALIZING 9/11 DETENTION

A. "War" Cases

Various arguments can be marshaled for jurisprudential containment of the 9/11 Supreme Court case law. The cases could be clustered under the rubric of war, to resurface when again at war. Precedent for this approach comes from another group of cases that have returned to currency through the 9/11 case law. Once relegated to a very brief discussion in federal courts jurisprudence, these newly rediscovered "old" war cases include the 1866 decision of *Ex parte Milligan*,⁴⁴ the 1942 judg-

42. Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1, 26 (1975) [hereinafter Monaghan, *Constitutional Common Law*].

43. I am paraphrasing Monaghan's discussion about how to control "official misbehavior." *Id.* at 21 & n.111.

44. 71 U.S. (4 Wall.) 2 (1866).

ment of *Ex parte Quirin*,⁴⁵ the 1948 *Hirota v. MacArthur* opinion,⁴⁶ and the 1950 ruling of *Johnson v. Eisentrager*.⁴⁷

In brief summary, the Civil War era decision of *Milligan* held that the military's effort to try civilians, in lieu of a trial in the federal courts, was unconstitutional.⁴⁸ Lambdin P. Milligan, a "lawyer and a minor politician . . . with well-known Southern sympathies," was arrested in October of 1864 in Indiana and charged with "conspiracy against" the government, giving "aid and comfort to rebels," and violating the laws of war.⁴⁹ Tried by a military commission and ordered "to be hanged," Milligan and four codefendants sought relief directly from President Lincoln, who appeared willing to review the issue but was then assassinated. President Andrew Johnson's direction that the executions go forward was met by "frantic efforts" to save the defendants' lives, including Milligan's Supreme Court litigation challenging the jurisdiction of the commission.⁵⁰

That 1866 decision drew a sharp distinction between wartime, when martial law governed and ordinary courts could not function, and the aftermath, when courts were open. Drawing on "precedents in English and American history," including post-1789 English parliamentary debates,⁵¹ the majority rejected the Executive's security assessment; the Court concluded that the safety of the country had not required martial law in Indiana.⁵² Thus, because Milligan had been arrested when federal courts were open, he was entitled to the protections of the Fourth, Fifth, and Sixth Amendments—the "birthright of every American citizen."⁵³ *Milligan* appeared to cabin non-Article III adjudication through the Court's insistence on citizens' constitutional rights of access to courts, if they were functioning. *Milligan* thus divested Union military officers of

45. 317 U.S. 1 (1942).

46. 338 U.S. 197 (1948).

47. 339 U.S. 763 (1950). Several other decisions could be included, but these four have framed much of the discussion in the 9/11 habeas judgments.

48. 71 U.S. (4 Wall.) at 123; see also Brian McGinty, *Lincoln and the Court* 249–50 (2008).

49. McGinty, *supra* note 48, at 248. McGinty detailed that Milligan and his codefendants were members of the "Sons of Liberty," dedicated to "ending the war on terms favorable to the South." *Id.*

50. *Id.* at 249–50.

51. 71 U.S. (4 Wall.) at 128.

52. *Id.* at 127.

53. *Id.* at 119. While the majority provided a constitutional basis for release, a concurring opinion by Chief Justice Chase argued that Indiana was a military district at the time of Milligan's arrest and that, given the potential for invasion, Congress had authority to create special tribunals. But Chase thought that Milligan should prevail based on a statutory claim—that in contradiction of the Habeas Corpus Act of 1863, which gave persons arrested under military authority rights to release unless a grand jury had indicted them, Milligan had not been indicted by a grand jury. *Id.* at 133–35 (Chase, C.J., concurring); see also Daniel J. Meltzer, *The Story of Ex Parte McCordle: The Power of Congress to Limit the Supreme Court's Appellate Jurisdiction*, in *Federal Courts Stories*, *supra* note 11, at 57, 60–61 [hereinafter Meltzer, *Ex Parte McCordle*].

power in favor of judges and juries in Southern and border states, presumptively less enthusiastic about Reconstruction and more likely sympathetic to the defendants.

In contrast, the World War II era ruling in *Ex parte Quirin* upheld the authority of an ad hoc military commission despite the availability of civilian courts and the possibility that one of the defendants was a U.S. citizen.⁵⁴ Moreover, *Quirin* validated a military-based process in which several individuals, apprehended on U.S. shores after a botched plan to engage in sabotage, were sentenced to death.⁵⁵ As unpacked in later decades, the decisionmaking process in *Quirin* was infused with unfairness. At least one Justice was involved in the initial decision to constitute the ad hoc tribunal whose constitutionality the Court subsequently reviewed.⁵⁶

The Supreme Court's own process was truncated and its decision premature. In a special sitting in July of 1942,⁵⁷ the Court heard arguments as the defendants were on trial before the military commission. Given just a few days to brief the issues, the lawyers began their arguments although not all the Justices had returned to Washington for the session.⁵⁸ On July 31, the Court issued a per curiam decision upholding the commission's authority.⁵⁹ On August 8, six of the eight were executed. Some three months later, on October 29, 1942, the Court issued its opinion justifying what had already occurred.

As Justice Scalia commented in 2004 in *Hamdi* (when *Quirin* gained what Carlos Vázquez has called its "second life"⁶⁰), the 1942 decision did not represent "the Court's finest hour."⁶¹ But in one respect, *Quirin* was admirable. President Roosevelt's July 7, 1942, Proclamation provided that persons to be tried by military commissions "shall not be privileged to seek any remedy or maintain any proceeding directly or indirectly . . . in the courts of the United States, or of its States."⁶² Yet, the Court in-

54. *Ex parte Quirin*, 317 U.S. 1, 48 (1942).

55. One of those before the Supreme Court claimed to be an American citizen, but the *Quirin* Court distinguished the holding in *Milligan* by characterizing the American as an "unlawful belligerent," whereas *Milligan* argued his loyalty. *Id.* at 45.

56. Carlos M. Vázquez, "Not a Happy Precedent": The Story of *Ex parte Quirin*, in *Federal Courts Stories*, supra note 11, at 219, 230 [hereinafter Vázquez, *Quirin*].

57. 317 U.S. at 19.

58. Vázquez, *Quirin*, supra note 56, at 229.

59. 317 U.S. at 18. The July 31, 1942, per curiam opinion is included, as an unmarked initial note, within Justice Stone's full opinion for the Court, filed on October 29, 1942. The July per curiam stated that the Court had "fully considered the questions raised in these cases and thoroughly argued at the bar, and has reached its conclusion upon them." *Id.* It therefore announced "its decision and enters its judgment in each case, in advance of the preparation of a full opinion which necessarily will require a considerable period of time." *Id.*

60. Vázquez, *Quirin*, supra note 56, at 220.

61. *Hamdi v. Rumsfeld*, 542 U.S. 507, 569 (2004) (Scalia, J., dissenting).

62. See Denying Certain Enemies Access to the Courts of the United States, Proclamation No. 2561, 3 C.F.R. § 309 (1968), reprinted in 56 Stat. 1964 (1942). The order provided that

sisted that its own authority reached “enemy aliens.”⁶³ Thus, *Quirin* stands for federal court authority to review military tribunal rulings despite the effort by President Roosevelt to close off judicial redress.⁶⁴

A few years thereafter, the Supreme Court refused to entertain habeas petitions coming from convictions of “war criminals” in military tribunals convened in the “Far East,” such as the 1948 judgment of *Hirota v. MacArthur*,⁶⁵ and in Germany, exemplified by the 1950 decision of *Johnson v. Eisentrager*.⁶⁶ The cases involved claims that offshore tribunals controlled by the United States had tried and sentenced individuals in a manner violative of constitutional rights. The Supreme Court repeatedly declined jurisdiction over various petitions, often ruling by divided decisions and offering little by way of explanation.⁶⁷

all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States or any territory or possession thereof, through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals; and that such persons shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on their behalf, in the courts of the United States, or of its States, territories, and possessions

Id.

63. “[N]either the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners’ contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission.” *Quirin*, 317 U.S. at 25.

64. As Vázquez recounted, on the same day this Proclamation was issued, President Roosevelt issued a Military Order that created the commission, appointed its members, and appointed prosecutors and defense counsel. The commission was to make its own rules for fair trials “consistent with the powers of military commissions under the Articles of War,” and could receive evidence that had “probative value to a reasonable man.” Convictions and sentencing required a two-thirds agreement. None of the seven generals who were picked by the government to preside had legal training. See Exec. Order No. 9185, 7 Fed. Reg. 5103 (July 2, 1942); Vázquez, *Quirin*, supra note 56, at 224–26.

65. 338 U.S. 197 (1948) (per curiam). A group of Japanese officials, including the former premier, Koki Hirota, filed motions under the Supreme Court’s original jurisdiction after having been convicted by the International Military Tribunal for the Far East, which they argued was under U.S. control. Id. at 198; see also Timothy P. Maga, Judgment at Tokyo: The Japanese War Crimes Trials 2–3 (2001).

66. 339 U.S. 763 (1950). German nationals, alleged to have committed war crimes outside the United States, were apprehended and convicted in China and then detained in an American military prison in occupied Germany. Id. at 765–66. They sought relief, but unlike *Hirota* and several other World War II cases, *Johnson v. Eisentrager* was first filed in the federal lower courts. Id. at 765. The Court held that lower courts lacked jurisdiction. Id. at 778. The scope and basis of that judgment was central to the debate in *Boumediene*, discussed infra notes 77–78.

67. See, e.g., *Everett v. Truman*, 334 U.S. 824 (1948). The petition in *Everett* (brought by seventy-four Germans seeking “relief from sentences upon the verdicts of a General Military Government Court at Dachau”) was one of a series in 1948 in which the Court split, four to four, and hence refused to permit motions for filing of original writs of

habeas corpus. *Id.* at 824. Chief Justice Vinson as well as Justices Reed, Frankfurter, and Burton were of the “opinion that there is want of jurisdiction,” while Justices Black, Douglas, Murphy, and Rutledge would have permitted the petition and put the cases on the argument calendar. *Id.* Justice Jackson, who had been the presiding jurist at Nuremburg, did not participate. *Id.* As *Hart and Wechsler* explained, “identical orders” denied fifteen more petitions that term and another thirteen the following. Paul M. Bator, Paul J. Mishkin, David L. Shapiro & Herbert Wechsler, *Hart and Wechsler’s The Federal Courts and the Federal System* 305 (2d ed. 1973) [hereinafter 1973 *Hart & Wechsler*].

Justice Jackson altered his approach in *Hirota v. MacArthur*, 335 U.S. 876 (1948), which arose from decisions in Asia in which he had not been involved. He noted that the country needed to get beyond the “stalemate.” *Id.* at 881 (Jackson, J., concurring in granting leave to file petitions for writs of habeas corpus); see 1973 *Hart & Wechsler*, *supra*, at 305. As Justice Jackson explained:

If I add my vote to those who favor denying these applications for want of jurisdiction, it is irrevocable. The Japanese will be executed and their partisans will forever point to the dissents of four members of the Court to support their accusation that the United States gave them less than justice If, however, I vote with those who would grant temporary relief, it may be that fuller argument and hearing will convert one or more of the Justices on one side or the other from the views that have equally divided them in the German cases. In those cases I did not feel at liberty to cast the deciding vote and there was no course to avoid leaving the question unresolved. But here I feel that a tentative assertion of jurisdiction, which four members of the Court believe does not exist, will not be irreparable if they ultimately are right.

Hirota, 335 U.S. at 880.

Thereafter, a brief per curiam decision was issued in December of 1948. The Court concluded that under the circumstances—including the fact that the International Tribunal for the Far East was not created or directly controlled by the United States and that the petitioners were all Japanese citizens and residents—courts of the United States had “no power or authority to review, to affirm, set aside or annul the judgments and sentences.” *Hirota*, 338 U.S. at 198.

Six months later, in June of 1949, Justice Douglas filed a concurrence in which he stated that jurisdiction did lie in the District Court for the District of Columbia, but that the disposition was permissible because the international nature of the problem rendered it a political question about which the “President as Commander-in-Chief, and as spokesman for the nation in foreign affairs, had the final say.” *Id.* at 215 (Douglas, J., concurring). Justice Jackson continued after the decision in *Hirota* not to participate in cases coming from Germany, and petitions continued to be denied based on the same split that had preceded the *Hirota* ruling. See 1973 *Hart & Wechsler*, *supra*, at 307.

Hirota gained new saliency in 2008, when the Court decided *Munaf v. Geren*, 128 S. Ct. 2207 (2008), addressing habeas access for American citizens detained or convicted by an Iraqi criminal tribunal that had been set up after the U.S. invasion. The Court (per Chief Justice Roberts) found that citizen detainees were in United States custody and therefore the district court had jurisdiction. *Id.* at 2217–18. The “equitable principles” governing habeas, however, precluded the federal courts from enjoining the transfer of the petitioners to the control of a foreign sovereign (Iraq) alleging violation of its laws. *Id.* at 2220–25 (citation omitted).

The majority also concluded that allegations that transfer would “result in torture” were to be dealt with “by the political branches, not the judiciary.” *Id.* at 2225. Justice Souter, joined by Justices Ginsburg and Breyer, concurred and underscored that the Court had reserved judgment on what the majority had termed an “extreme case in which the Executive has determined” that transfer would result in torture. *Id.* at 2228 (Souter, J., concurring, joined by Ginsburg and Breyer, JJ.) (citation omitted). The concurrence added that “the caveat” ought to extend to “a case in which the probability of torture is well

The four (old) cases—*Milligan*, *Quirin*, *Hirota*, and *Eisentrager*—address some of what Henry Monaghan termed “timeless” problems, including the power of the President to close off access to Article III courts, the obligations of the executive branch within and outside the United States, the role to be played by Congress in configuring non-Article III adjudication, and the degree of deference to be accorded when claims of military necessity are proffered. Yet until 9/11, legal and political theorists rarely asked their students to think about military tribunals as exemplary of these broad (and hard) questions.

One can see this marginality by using the four military tribunal cases as bellwethers and examining the five editions of *Hart and Wechsler* published from 1953 through 2003, the 2008 supplement, and a sixth edition that hit the bookstands in the spring of 2009.⁶⁸ Until 2003, the most extended treatment was a few-page subsection headed “Note on the War Crimes Cases” and focused on whether the Supreme Court would hear petitions filed directly by individuals convicted abroad after World War II.⁶⁹ After 9/11, however, the length of the *Hart and Wechsler* materials jumped to ten pages in 2003 and to more than ninety in the supplement

documented, even if the Executive fails to acknowledge it.” *Id.* Further, the concurrence noted that “habeas would not be the only avenue open to an objecting prisoner.” *Id.*

68. The seven versions of *Hart and Wechsler* are, in chronological order: 1953 Hart & Wechsler, *supra* note 13; 1973 Hart & Wechsler, *supra* note 67; Paul M. Bator, Daniel J. Meltzer, Paul J. Mishkin & David L. Shapiro, *Hart and Wechsler’s The Federal Courts and the Federal System* (3d ed. 1988) [hereinafter 1988 Hart & Wechsler]; Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler’s The Federal Courts and the Federal System* (4th ed. 1996) [hereinafter 1996 Hart & Wechsler]; Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler’s The Federal Courts and the Federal System* (5th ed. 2003) [hereinafter 2003 Hart & Wechsler]; Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler’s The Federal Courts and the Federal System: 2008 Supplement* (5th ed. 2008) [hereinafter 2008 Supplement to 2003 Hart & Wechsler]; Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler’s The Federal Courts and the Federal System* (6th ed. 2009) [hereinafter 2009 Hart & Wechsler].

69. The four cases were mentioned briefly in relation to an elaboration of congressional authority over federal court jurisdiction, the scope of the Supreme Court’s original jurisdiction, and suspension of the writ of habeas corpus. See (in chronological order) 1953 Hart & Wechsler, *supra* note 13, at 284–87; 1973 Hart & Wechsler, *supra* note 67, at 304–08; 1988 Hart & Wechsler, *supra* note 68, at 357–61; 1996 Hart & Wechsler, *supra* note 68, at 344–47. The most extensive “Note on War Crimes Cases” provided excerpts from two of the per curiam decisions rendered in 1948—*Everett v. Truman*, 334 U.S. 824, and *Hirota*, 338 U.S. 197, discussed *supra* note 67.

The limited court review of the commissions evidently troubled the authors of the casebook. In the short note used through 1988, the comments invoked a 1949 law review article that detailed how confusing the information in the original petitions had been, and explained the need for decisionmaking in the lower courts rather than reliance on original habeas petitions in the Supreme Court. See, e.g., 1973 Hart & Wechsler, *supra* note 67, at 304 (citing Charles Fairman, *Some New Problems of the Constitution Following the Flag*, 1 *Stan. L. Rev.* 587 (1949)). Furthermore, in the original version of the famous “dialogue,” reproduced through 1988 as it was in the first edition, one of the “answers” insisted that *Quirin* stood for access to courts and that *Johnson* and *Hirota* were sufficiently “obscure” as to leave “undecided” the question of the “position of a citizen imprisoned abroad who

provided for 2008.⁷⁰ The 2009 edition codifies this expansion.⁷¹ The point is summarized through a table (Figure 1), called “Chapter and Verse: War Detainees in *Hart and Wechsler*” (detailed in part to reflect Henry Monaghan’s affection for the casebook).⁷²

states a genuine challenge to the legality, or even the constitutionality, of his detention.” See, e.g., 1988 Hart & Wechsler, *supra* note 68, at 422.

One can hear the echoes of the Vietnam War in the 1973 edition, for that volume devoted some commentary to military courts and to selective service challenges. 1973 Hart & Wechsler, *supra* note 67, at 365–72. By the fourth edition, in 1996, these issues came under the subject matter of “extraordinary writs and the original jurisdiction” of the Supreme Court, in a few pages devoted to a “Note on the War Crimes Cases.” 1996 Hart & Wechsler, *supra* note 68, at 344–47. The jurisdiction of military tribunals is included, with a reference to *Solorio v. United States*, 483 U.S. 435 (1987), as well as to *Ex parte Quirin*, 317 U.S. 1 (1942) (per curiam). 1996 Hart & Wechsler, *supra* note 68, at 345 n.2. *Solorio*—dealing with the question of jurisdiction over military personnel—was mentioned again in the context of abstention under *Younger v. Harris*, 401 U.S. 37 (1971). 1996 Hart & Wechsler, *supra* note 68, at 1274 n.16.

In addition, *Johnson v. Eisentrager*, 339 U.S. 763, can be found in the 1996 edition in a few scattered footnotes relating to postconviction habeas or congressional control over access to Article III courts. Both the lower court decision of *Eisentrager v. Forrestal*, 174 F.2d 961 (D.C. Cir. 1949), and the reversal by the Supreme Court in *Johnson v. Eisentrager* were mentioned as part of the inquiry into whether Article III court access would be required, if state courts were not able to hear cases. The commentary on *Johnson v. Eisentrager* also underscored that the opinion had not been clear about whether the “detention was lawful or . . . simply beyond the reach of jurisdictional inquiry.” 1996 Hart & Wechsler, *supra* note 68, at 365. A footnote also mentioned *Burns v. Wilson*, 346 U.S. 137 (1953), which did not address the jurisdictional issue directly. 1996 Hart & Wechsler, *supra* note 68, at 365 n.15. Both *Milligan* and *Quirin* also appeared in brief commentary related to habeas corpus, military commissions, or federal court jurisdiction. See, e.g., *id.* at 1239, 1338 n.4, 1369 n.1.

70. 2008 Supplement to 2003 Hart & Wechsler, *supra* note 68. Some materials were presented in relationship to Chapter IV’s discussion of congressional power to regulate the federal courts. *Id.* at 54–80. About sixty pages related to the topic augmented Chapter XI’s discussion of habeas corpus. *Id.* at 177–236. By way of comparison to the law governing postconviction detention, the 2008 Supplement provided about twenty-five pages devoted to doctrinal changes. *Id.* at 237–62.

71. The “Note on the War Crimes Cases” was reproduced, largely intact, in a three-page form. 2009 Hart & Wechsler, *supra* note 68, at 271–73. In addition, in the context of discussing congressional control over federal court jurisdiction, the 2009 edition added a “Further Note on Preclusion of All Judicial Review and on the Right to Seek Judicial Redress: Habeas Corpus and the Suspension Clause.” *Id.* at 314–20. The note wove together the efforts to cut off jurisdiction for immigrants, the Court’s response in *INS v. St. Cyr*, 533 U.S. 289 (2001), and some of the 9/11 case law. In the later chapter devoted to “Federal Habeas Corpus,” more than fifty pages were devoted to “Habeas Corpus and Executive Detention.” 2009 Hart & Wechsler, *supra* note 68, at 1159–213. *Boumediene* formed that section’s centerpiece. *Id.* at 1168–78, 1192–210.

72. One can watch the introduction of questions about the breadth of executive authority by looking closely at the 2003 version (the fifth edition). 2003 Hart & Wechsler, *supra* note 68, at 316–18. One goal was to reduce the length, resulting in a volume 100 pages shorter than the 1996 version, which in turn had 160 fewer pages than the 1973 version. *Id.* at v.

In the 2003 volume, the brief “Note on the War Crimes Cases” reappeared. *Id.* at 316–18. The case about the German saboteurs, *Ex parte Quirin*, was again a short note, but this time accompanied by reference to a rich description of the case. *Id.* at 316 & n.2

**Chapter and Verse:
War Detainees in *Hart and Wechsler*, 1953–2009**

1953	1st edition	Note on the War Crimes Cases	pages 283–287
1973	2d edition	Note on the War Crime Cases	pages 304–308
		Court Martial Jurisdiction	pages 372–374
1988	3d edition	Note on the War Crimes Cases	pages 356–361
1996	4th edition	Note on the War Crimes Cases	pages 344–347
2003	5th edition	Note on the War Crime Cases	pages 316–319
		Note on Military Tribunals or Commissions	pages 407–415
2008	Supplement	Note on Military Tribunal or Commissions (including <i>Hamdan</i>)	pages 54–79
		Note on the Availability of Habeas Corpus to Challenge Detention Arising from the “War on Terror”	pages 177–236
2009	6th edition	Note on War Crime Cases	pages 271–273
		Further Note on Preclusion of All Judicial Review and on the Right to Seek Judicial Redress: Habeas Corpus and the Suspension Clause	pages 314–320
		Habeas Corpus and Executive Detention	pages 1159–1213

FIGURE 1

But the trajectory can go in the other direction. Over time, one could put the case law back in the box of “war” through a retitled note that revised the discussion of the “War Crimes Cases” by expanding the rubric to “Military Commissions and Detention.” One could read the twenty-first century cases along with the classic discussion about congressional control over Supreme Court jurisdiction in the Civil War era case of *Ex parte McCordle*,⁷³ make brief mention of *Milligan*,⁷⁴ *Quirin*,⁷⁵ and the like, all to be defined by the idiosyncrasy of their historical moments. One could thus hop from the Civil War to World War II to 9/11 when thinking about access to federal courts in a time of war—an issue that returns to interest only when parallels occur.

B. “Guantánamo” Cases

Another way to see the specificity of the problem of detention presented after 9/11 is through the peculiarity of its best known site—Guantánamo, a military base on a bay in Cuba at which some (but by no means all) of the habeas petitioners have been detained.⁷⁶ In both *Rasul*

(citing Boris Bittker, *The World War II German Saboteurs’ Case and Writs of Certiorari Before Judgment by the Court of Appeals: A Tale of Nunc Pro Tunc Jurisdiction*, 14 Const. Comment. 431 (1997)). In addition, a new set of materials, titled a “Note on Military Tribunals or Commissions,” provided a ten-page discussion of the relationship between Article III courts and non-Article III federal tribunals that included references to President George W. Bush’s November 13, 2001, Executive Order creating military tribunals and the possible pertinence of the Geneva Conventions. *Id.* at 407–16. Some of the text of the decision of *Ex parte Milligan* was reproduced, followed by discussion of *Ex parte Quirin*, *Johnson v. Eisentrager*, and the role of habeas corpus in permitting access by detainees to Article III courts. *Id.* at 408–16. *Quirin* and *Milligan* were also discussed in relationship to suspension of the writ as the authors addressed postconviction remedies. *Id.* at 1285, 1289.

73. *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868).

74. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

75. *Ex parte Quirin*, 317 U.S. 1 (1942).

76. The petitioners in *Rasul*, *Hamdan*, and *Boumediene* were at Guantánamo. *Rasul* was a case brought on behalf of fourteen detainees. *Rasul v. Bush*, 542 U.S. 466, 470 (2004). *Hamdan* brought an individual challenge to trial by a military commission. *Hamdan v. Rumsfeld*, 548 U.S. 557, 566–67 (2006). The *Boumediene* decision was issued in response to two petitions for certiorari, one filed by thirty-nine Guantánamo prisoners. See Petition for Writ of Certiorari at 2, *Al Odah v. United States*, decided sub nom. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (No. 06-1196). The other petition had been filed on behalf of six Guantánamo prisoners. Petition for a Writ of Certiorari at 4–6, *Boumediene*, 128 S. Ct. 2229 (No. 06-1195).

Yaser Esam Hamdi was originally held at Guantánamo Bay, but was transferred to a naval brig in Norfolk, Virginia and then to another brig in Charleston, South Carolina. *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004) (plurality opinion). José Padilla was also held in a naval brig in South Carolina. *Rumsfeld v. Padilla*, 542 U.S. 426, 432 (2004). Shawqi Omar and Mohammad Munaf were both detained in Iraq. *Munaf v. Geren*, 128 S. Ct. 2207, 2214–15 (2008). A case presented in the 2008–2009 term, *Al-Marri v. Pucciarelli*, 129 S. Ct. 680 (2008) (granting certiorari), arose from detainee Ali Saleh Kahliah al-Marri’s capture in the United States and subsequent detention at a naval brig in South Carolina. *Al-Marri v. Wright*, 487 F.3d 160, 164–65 (4th Cir. 2007), rev’d en banc sub nom. *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc). After the government lodged

and *Boumediene*, the government argued that the base, under United States jurisdiction through a long-term agreement with Cuba, was outside the boundaries of United States law.⁷⁷ The majority opinions disagreed, holding that activities there were subject to statutory and constitutional constraints.⁷⁸ Yet both decisions are laced with discussions of why Guantánamo fell within the authority of the federal courts, even if some other (unspecified) offshore sites under U.S. control might not.⁷⁹ In the 2008 *Munaf* decision, the Court also recognized that another narrow category—American citizens held abroad by the United States—could gain access to Article III courts by way of habeas petitions.⁸⁰

Figure 2 reproduces a portion of the material displayed on the Department of Defense website to capture the isolation and peculiar history of the base at Guantánamo. Less easily reported are the facts about

criminal charges in federal district court in the Central District of Illinois, the Supreme Court vacated the Fourth Circuit's decision and remanded with instructions to dismiss the case as moot. *Al-Marri v. Spagone*, 129 S. Ct. 1545 (2009), discussed *infra* notes 197–198 and accompanying text.

Several cases in the lower courts deal with efforts to obtain habeas relief by individuals held at Bagram Airfield, Afghanistan. See, e.g., *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205 (D.D.C. 2009), appeal pending, Nos. 06-1669, 08-1307, 08-2143, 620 F. Supp. 2d 51 (D.D.C. 2009); *Al Bakri v. Obama*, 604 F. Supp. 2d 205 (D.D.C. 2009); *al-Najar v. Gates*, 604 F. Supp. 2d 205 (D.D.C. 2009); see also *Al Maqaleh v. Gates*, 620 F. Supp. 2d 51 (D.D.C. 2009) (granting the government's motion for certification, pursuant to 28 U.S.C. § 1292(b), for interlocutory review); *In re Gates*, No. 09-8003, 2009 U.S. App. LEXIS 17032 (D.C. Cir. July 30, 2009) (granting petition for permission to appeal).

77. See Brief for the Respondents at 9–10, *Boumediene*, 128 S. Ct. 2229 (Nos. 06-1195 & 06-1196); Brief for the Respondents at 10–11, *Rasul*, 542 U.S. 466 (Nos. 03-334 & 03-343).

78. *Rasul* read 28 U.S.C. § 2241 to authorize federal courts to hear such claims. 542 U.S. at 484. In *Boumediene*, the Court concluded that the Constitution likewise required that those held at the base should have access to federal courts. 128 S. Ct. at 2262. Justice Souter added, in his concurrence, that the government ought to have read *Rasul* to have made plain what the Constitution would require. *Id.* at 2278 (Souter, J., concurring).

79. See *Boumediene*, 128 S. Ct. at 2253–62; *Rasul*, 542 U.S. at 475–79. See generally Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 Colum. L. Rev. 225 (2010); David D. Cole, *Rights over Borders: Transnational Constitutionalism and Guantanamo Bay*, 2008 Cato Sup. Ct. Rev. 47; Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. Cal. L. Rev. 259 (2009). In *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, a district court judge concluded that three detainees, transferred from elsewhere to Bagram Theater Internment Facility in Afghanistan, could pursue their federal habeas claim, as the United States's control over Bagram was “not appreciably different” from its control over Guantánamo, and that any existing “practical barriers” were caused by the U.S. government's decision to bring those particular individuals to that site. *Id.* at 209. Another detainee, an Afghan whose site of capture was disputed, did not obtain relief. *Id.*

80. *Munaf*, 128 S. Ct. at 2213. One could understand the import of *Munaf*, as well as *Milligan* and *Hamdi*, to be that U.S. citizens can invoke constitutional rights of habeas corpus regardless of where in the world they are confined. See Stephen I. Vladeck, *Deconstructing Hirota: Habeas Corpus, Citizenship, and Article III*, 95 Geo. L.J. 1497, 1499 n.3 (2007). Sarah Cleveland argues that the acknowledgement of extraterritorial obligations aligns the U.S. doctrine with that of transnational law. Cleveland, *supra* note 79, at 269–78.

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Guantanamo Gazette
Feb. 29, 2008

Guantanamo Bay Gazette
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Inside this week's edition:

Page 1: Association celebrates Black History Month, diversity with Gala

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Page 4: NAVSTA GTMO names 2007 BJOY

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Welcome to the website for the oldest overseas U.S. Naval Station and the only one in a country with which the U.S. does not maintain diplomatic relations.

U.S. Naval Station Guantanamo Bay, Cuba, serves as the cornerstone of U.S. military operations in the Caribbean Theater providing logistics support to both U.S. Navy and Coast Guard vessels and aircraft, and to assets of the assigned Joint Task Force-Guantanamo.

The station is on the front lines of the battle for regional security and protection from drug trafficking and terrorism, and protection for those who attempt to make their way through regional seas in un-seaworthy craft.

Guantanamo Bay History

In February 1903, the United States leased 45 square miles of land and water at Guantanamo Bay for use as a coaling (fueling) station. The treaty was finalized and the document ratified by both governments and signed in Havana in December 1903.

A 1934 treaty, reaffirming the lease, granted Cuba and her trading partners free access through the bay, modified the lease payment from \$2,000 in gold coins per year, to the 1934 equivalent value of \$4,085 U.S. Treasury dollars, and added a requirement that termination of the lease requires the consent of both the U.S. and Cuba governments, or the U.S. abandonment of the base property.

For more on GTMO's history see:
[History of U.S. Naval Station Guantanamo Bay](#)

<https://www.cnic.navy.mil/Guantanamo/index.htm>, website excerpt from week of Feb. 29, 2008.

FIGURE 2

all the people who have been detained there; the government has not provided a public accounting. Estimates are that at some point, about 770 people were detained at the base.⁸¹ After the 2004 Supreme Court decision in *Hamdi*, the Department of Defense created a special administrative process and set up plans for military commissions to be held in a recycled building designated for the “Joint Task Force” (JTF) for Guantánamo,⁸² depicted in Figure 3.⁸³ Enlarged above the photograph is the text above the doorway. There inscribed is the phrase “Honor Bound to Defend Freedom,” which comes from the “call” (Honor bound) and “response” (to defend freedom) that personnel on the base are described as exchanging regularly as a greeting.⁸⁴ (By way of con-

81. See Worthington, *supra* note 24; The Guantánamo Docket, *supra* note 24; The Guantánamo Bay Timeline, *supra* note 24.

82. The website describes the Guantanamo JTF’s “Mission” as follows:

JTF-Guantanamo conducts safe and humane care and custody of detained enemy combatants. We conduct interrogation operations to collect strategic intelligence in support of the Global War on Terror. We support law enforcement and war crimes investigations. We are committed to the safety and security of American servicemembers and civilians working inside the wire.

CNIC-Naval Station Guantanamo Bay, Joint Task Force, at <https://www.cnic.navy.mil/Guantanamo/Fighters/JointTaskForce/index.htm> (last visited Nov. 18, 2009) (on file with the *Columbia Law Review*).

83. In February 2006, several images of the JTF Commission Building and its hearing room appeared on the Joint Task Force Guantanamo Public Affairs website. Joint Task Force Guantanamo, at <http://www.jtftgmo.southcom.mil> (last visited Oct. 31, 2009) (on file with the *Columbia Law Review*). Figure 3 and Figure 4 (the interior of a hearing room) are reproduced with permission of Major Jeffrey Weir, who served in 2006 as the Deputy Director of Public Affairs at Joint Task Force Guantanamo. Eugene Fidell assisted in locating the images. An observer who traveled to the base in Fall 2009 reported viewing what appeared to be the same room (somewhat reconfigured) during a proceeding in the military commission dealing with *United States v. Khadr*, Court of Military Commission Review Case No. 07-001 (2009) (on file with the *Columbia Law Review*). See Valarie Kaur, October 5–8, 2009, in 2 NIMJ Reports from Guantánamo 14, 14–15 (2010), available at <http://www.wcl.american.edu/nimj/documents/finalreport2.pdf> [hereinafter Kaur, NIMJ Report]; Email from Valarie Kaur, Student, Yale Law School, to author (Oct. 10, 2009) (on file with the *Columbia Law Review*).

84. John Van Natta, GTMO Superintendent, explained that the exchange was meant to “encourage esprit de corps among the soldiers.” Frontline: The Torture Question (PBS television broadcast Oct. 18, 2005), available at <http://www.pbs.org/wgbh/pages/frontline/torture/etc/script.html> (on file with the *Columbia Law Review*). The text can also be found on “handouts and official documents and signs and is constantly recited, soldier to soldier, at the camp’s checkpoints.” Ted Conover, In the Land of Guantánamo, N.Y. Times, June 29, 2003, § 6 (Magazine), at 42. The phrase has also been used as the name for a book and a play critical of the treatment of detainees. See Victoria Brittain & Gillian Slovo, Guantánamo: ‘Honor Bound to Defend Freedom’ (2004); see also Timeline Theatre Co., Guantánamo: Honor Bound to Defend Freedom, at www.timelinetheatre.com/guantanamo/index.htm (last visited Jan. 15, 2010) (on file with the *Columbia Law Review*).

trast, the words “Equal Justice Under Law” are the words inscribed above the Supreme Court’s entrance.⁸⁵)

“HONOR BOUND TO DEFEND FREEDOM.”

Inscription on the door below

Building entrance of the Joint Task Force (JTF) Guantanamo Commissions Building, February 2006. Photograph reproduced courtesy of JTF Guantanamo Bay Public Affairs, and with the assistance of Major Jeffrey Weir, then serving as the Deputy Director of Public Affairs at JTF.

FIGURE 3

Inside the JTF building sat a deliberation room (Figure 4) that could be described as court-like—or court-lite, given what is now understood about the processes provided. Some detainees were assessed and classified via procedures called Combatant Status Review Tribunals (CSRTs), bodies comprised of military personnel.⁸⁶ Those procedures could, at

85. Those words are reiterated in various decisions by the Supreme Court, as Justices explain their injunction to administer laws impartially. See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 317 (2004) (Stevens, J., dissenting); *Cooper v. Aaron*, 358 U.S. 1, 20 (1958).

86. See Paul Wolfowitz, Deputy Sec’y of Def., Order Establishing Combatant Status Review Tribunal (July 7, 2004), available at http://www.defenselink.mil/news/Jul2004/d20_040707review.pdf (on file with the *Columbia Law Review*). The initial provisions for classification came by way of the November 2001 Executive Order that had sought to foreclose judicial review. See Military Order of Nov. 13, 2001, Detention, Treatment, and

Interior of a hearing room, Guantánamo Bay, January 2006. Photograph reproduced courtesy of Joint Task Force (JTF) Guantanamo Bay Public Affairs and with the assistance of Major Jeffrey Weir.

FIGURE 4

the sole discretion of the Department of Defense, be followed by a review conducted by the Administrative Review Board (ARB), another group of military officials charged with making a yearly decision about “whether each detainee should be released, transferred or further detained.”⁸⁷ Through such procedures, some people were confirmed as properly labeled “unlawful enemy combatants” and a very few (perhaps two dozen) were put into a pipeline for trial before military commissions, for which the room depicted in Figure 4 was to provide the setting.⁸⁸

Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001) [hereinafter Nov. 13, 2001 Executive Order on Detention]. More of the policies stemming from that order were codified at 32 C.F.R. § 10.3 (2003). As discussed *infra*, Congress codified some procedures through the Detainee Treatment Act and the Military Commissions Acts of 2006 and 2009. See *infra* note 118.

87. Press Release, U.S. Dep’t of Def., Guantanamo Bay Detainee Administrative Review Board Decisions Completed (Feb. 9, 2006), available at <http://www.defenselink.mil/releases/release.aspx?releaseid=9302> (on file with the *Columbia Law Review*).

88. See Nov. 13, 2001 Executive Order on Detention, *supra* note 86; U.S. Dep’t of Def., Military Commission Order No. 1 (Mar. 21, 2002), available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf> (on file with the *Columbia Law Review*) [hereinafter Military Commission Order No. 1]. In 2004, challenges were brought to the configuration of those tribunals, and the process was halted for a time. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 560 (2006).

By the summer of 2009, individuals held at the base were in another form of the Guantánamo limbo. After President Obama came into office in January of 2009, he issued an Executive Order aimed at closing Guantánamo within a year.⁸⁹ But thereafter, a concerted effort by opponents depicted the detainees as too threatening to confine on the mainland.⁹⁰ During the fall of 2009, Congress enacted legislation refusing the President's request for eighty million dollars in funding for closing the detention facility. Congress first prohibited the use of authorized funds for the release of detainees into the United States and subsequently imposed requirements on decisions about transfers of detainees to the mainland.⁹¹

The 2009 legislation, micromanaging the Executive, contrasts with Congress's initial response in the fall of 2001. Then, Congress had given the Executive great leeway in its Authorization for the Use of Military Force (AUMF)⁹²—subsequently read broadly by the plurality in *Hamdi* to license executive decisionmaking and permit what could be understood as preventive detention.⁹³ In the 2009 legislation, however, Congress re-

89. Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009). That order stated that the detention facilities at Guantánamo Bay should be "closed as soon as practicable, and no later than 1 year from the date of this order." *Id.* at 4898.

90. FBI Director Robert Mueller told members of the House of Representatives that "Guantánamo detainees could foment terrorism if they were sent to the United States." David M. Herszenhorn, Funds to Close Guantánamo Denied, *N.Y. Times*, May 20, 2009, at <http://www.nytimes.com/2009/05/21/us/politics/21detain.html> (on file with the *Columbia Law Review*) (internal quotation marks omitted). Senator John Thune, a Republican of South Dakota, told reporters, "The American people don't want these detainees held at a military base or federal prison in their back yard" *Id.* (internal quotation marks omitted). One argument was that the place where detainees were held (or tried) would become a site for terrorists to attack.

91. See Supplemental Appropriations Act of 2009, Pub. L. No. 111-32, § 14103(a), 123 Stat. 1859, 1920 ("None of the funds made available in this or any prior Act may be used to release an individual who is detained as of the date of enactment of this Act, at Naval Station, Guantanamo Bay, Cuba, into the continental United States, Alaska, Hawaii, or the District of Columbia."). In October 2009, Congress made these provisions applicable from October 1, 2009 through December 31, 2010 but added the proviso that funds could be used for transfers, subject to a presidential explanation of specific needs to do so, such as for trial, as is discussed *infra* note 426. See National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1041(a)-(e), 123 Stat. 2190, 2454-55 (2009); Andrew Taylor, Senate OKs Transfer of Gitmo Prisoners for Trials, Associated Press, Oct. 20, 2009, available at LexisNexis, AP File (on file with the *Columbia Law Review*).

92. Pub. L. No. 107-40, 115 Stat. 224 (2001).

93. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 518-22 (2004) (O'Connor, J., plurality opinion). That decision did not refer to "preventive detention" as such but upheld the detention of individuals for those within a "narrow category" who were "part of or supporting forces hostile to the United States or coalition partners in Afghanistan" and who there "engaged in an armed conflict against the United States." *Id.* at 516-17 (internal quotation marks omitted). In that sense, one could understand the plurality as focused on detention as an ordinary incident of warmaking, functioning as a form of incapacitation to preclude individuals from participating during the war and followed, presumably, by repatriation after a war's end. Further, the opinion expressly noted that indefinite detention would cause the interpretation of the AUMF to "unravel." *Id.* at 521.

quired the President to provide information on each decision related to detainee mainland transfers. Congress instructed that, at least forty-five days before a proposed mainland transfer, the President was to submit a classified report explaining whether the transfer presented “any risk to the national security of the United States,” the associated costs, a “plan for mitigation of any” national security risk, and the “legal rationale” for the transfer.⁹⁴

The question of the closing of Guantánamo is analytically distinct from whether some of those detained will be subjected to military commissions. But, because *Milligan* stands for the proposition that, when courts are open, trial by commission is suspect, keeping the detainees at bay (literally and metaphorically) makes more plausible the use of military commissions. In October of 2009, Congress enacted the Military Commissions Act (MCA) of 2009. The 2009 MCA provided a new definition of “unprivileged enemy belligerent” to replace “unlawful enemy combatant” and set forth many details on the procedures for military commissions.⁹⁵ On November 13, 2009, Attorney General Eric Holder announced that five detainees would appear before military commissions (the place of which was not specified) and that the 9/11 co-conspirators would be tried in the United States District Court for the Southern District of New York; the Attorney General also noted the intention of transferring the detainees through the specified notification procedures.⁹⁶ On November 18, 2009, President Obama acknowledged that

Yet, as was learned subsequently, not all detainees held at Guantánamo fell within those parameters. See *Kiyemba v. Bush*, Nos. 08-5424, 08-5425, 08-5426, 08-5427, 08-5428 & 08-5429, 2008 WL 4898963, at *1 (D.C. Cir. Oct. 20, 2008), cert. granted sub nom. *Kiyemba v. Obama*, 77 U.S.L.W. 3237, 78 U.S.L.W. 3010, 78 U.S.L.W. 3233, 78 U.S.L.W. 3237 (U.S. Oct. 20, 2009) (No. 08-1234), 2009 WL 935637; *Parhat v. Gates*, 532 F.3d 834, 836 (D.C. Cir. 2008). See generally David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 Cal. L. Rev. 693 (2009) [hereinafter Cole, *Preventive Detention*]. Cole argued that, while not so labeled, various statutes and practices in the United States have authorized preventive detention—with 9/11 Guantánamo detainees as one example of a group so confined. *Id.* at 703–06.

Dissenting in *Hamdi*, Justices Souter and Ginsburg concluded that the AUMF was not sufficiently specific to limit a prior statute, the Non-Detention Act, 18 U.S.C. § 4001(a) (2006), that required that no “citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” 542 U.S. at 547–48 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment, joined by Ginsburg, J.). That legislation was enacted in 1971 to avoid repeating internments such as had occurred for Japanese-Americans. See Non-Detention Act of 1971, Pub. L. No. 92-128, 85 Stat. 347 (codified at scattered sections of 18 U.S.C.). Discussion of the 1971 enactment can be found in Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 Yale L.J. 1801, 1833 (2004).

94. Supplemental Appropriations Act of 2009 § 14103(d).

95. See MCA of 2009, Pub. L. No. 111-84, § 948a–d, 123 Stat. 2190, 2574–76 (defining “unprivileged enemy belligerent”); *id.* § 948r (changing the criteria for admissibility of evidence obtained through torture, or cruel, inhuman, or degrading treatment).

96. See Charlie Savage, *U.S. to Try Avowed 9/11 Mastermind Before Civilian Court in New York*, N.Y. Times, Nov. 14, 2009, at A1. The question had been debated over the summer. See Del Quentin Wilber & Julie Tate, *Criminal Charges Against Detainee*

his administration would not be able to close Guantánamo's detention center by the deadline originally set—January of 2010.⁹⁷ During the fall, a detainee was sent to the mainland to await trial in Article III courts; proceedings on preliminary issues in military commissions resumed at Guantánamo,⁹⁸ and, as noted, plans were announced to proceed at some undetermined date to try a few detainees by military commissions.⁹⁹

These details illuminate why Guantánamo is an apt signifier for reading the set of 9/11 Supreme Court cases as circumscribed. The pictures (Figures 2–4) are provided because the base is a place to which the public has no access, absent visits on the web. One needs special clearances, producing a seat on a ferry or on planes flying onto the base, to travel there.¹⁰⁰ The controlled routes mimic the procedures provided for detainees. Decisionmaking processes have been closed, subject to being opened by the Department of Defense (“the Appointing Authority”), which issued regulations according itself sole discretion to permit or to block public attendance.¹⁰¹ The Department of Defense positioned itself

Weighed, *Wash. Post*, July 25, 2009, at A2; Lyle Denniston, *Civilian Court: First Stop for Terrorism Cases?*, SCOTUSBlog, July 20, 2009, at <http://www.scotusblog.com/wp/civilian-court-first-stop-for-terrorism-cases/> (on file with the *Columbia Law Review*); see also Lyle Denniston, *Civilian Trials for 9/11 Accused*, SCOTUSBlog, Nov. 13, 2009, at <http://www.scotusblog.com/wp/civilian-trials-for-911-accused> (on file with the *Columbia Law Review*).

97. See Anne E. Kornblut, *Obama Admits Guantanamo Won't Close by Jan. Deadline*, *Wash. Post*, Nov. 18, 2009, at <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/18/AR2009111800571.html> (on file with the *Columbia Law Review*).

98. Observers may, with permission of the Department of Defense, attend; the National Institute of Military Justice has sent some individuals to do so, and they have reported on what they have seen. See, e.g., Travis Crum, October 19–22, 2009, in 2 NIMJ Reports from Guantánamo 20 (2010), available at <http://www.wcl.american.edu/nimj/documents/finalreport2.pdf>; Kaur, NIMJ Report, *supra* note 83.

99. See Peter Finn, *Resumed Military Panels Face New Challenges*, *Wash. Post*, Dec. 4, 2009, at A15; Savage, *supra* note 96.

100. See Clive Stafford Smith, *Eight O'Clock Ferry to the Windward Side: Seeking Justice in Guantánamo Bay*, at xi–xii, 1–19 (2007).

101. Military Commission Order No. 1, *supra* note 88, at 6(B)(3). The regulation provided that the Commission should:

Hold open proceedings except where otherwise decided by the Appointing Authority or the Presiding Officer in accordance with the President's Military Order and this Order. Grounds for closure include the protection of information classified or classifiable under reference (d); information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests. The Presiding Officer may decide to close all or part of a proceeding on the Presiding Officer's own initiative or based upon a presentation, including an *ex parte*, in camera presentation by either the Prosecution or the Defense. A decision to close a proceeding or portion thereof may include a decision to exclude the Accused, Civilian Defense Counsel, or any other person, but Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof. Except with the prior authorization of the Presiding Officer . . . Defense Counsel may not disclose any information presented during a closed session to

as facilitating access through a planned broadcast feed, depicted in mock format on the Department’s website in 2004 (Figure 5). As one can read from the text reproduced in the picture, the plan was to broadcast the “first U.S. military commissions in more than 50 years.”¹⁰² The *Hamdan*

<http://www.defenselink.mil/photos/newsphoto.aspx?newsphotoid=5762>, image posted on Oct. 29, 2004 and available as of Sept. 1, 2009 at the photo archive of the U.S. Department of Defense.

FIGURE 5

litigation, challenging the legality of the Commissions, interrupted that plan.¹⁰³ While an independent organization, the National Institute of Military Justice, has collected and published a volume of all “publicly available” and “known” decisions issued by military commissions at the base, the Department of Defense continues to control both the flow of

individuals excluded Open proceedings may include, at the discretion of the Appointing Authority, attendance by the public and accredited press, and public release of transcripts at the appropriate time. Proceedings should be open to the maximum extent practicable. Photography, video, or audio broadcasting, or recording of or at Commission proceedings shall be prohibited, except photography, video, and audio recording by the Commission pursuant to the direction of the Presiding Officer as necessary for preservation of the record of trial.

Id. (emphasis omitted).

102. This image, borrowed from the website of the U.S. Department of Defense, and modified for legibility but not content, was online in 2004, and can be found in the archives of the Department. See Photo of Closed-Circuit Television System at Commissions Rehearsal, U.S. Dep’t of Def., DefenseLINK News Photos (2004), available at <http://www.defenselink.mil/photos/newsphoto.aspx?newsphotoid=5762> (on file with the *Columbia Law Review*).

103. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

and access to information.¹⁰⁴ That the Department could have cut whatever video links would be used for broadcasting reflected how events at the base were subject to unique laws and, hence, could be understood to produce *sui generis* federal court rulings.

C. “Torture” Cases

If one way to contain the new habeas law of 9/11 is to view it as a product of war and a second is to locate it in the peculiarity of Guantánamo, a third rationale for containment comes from influential underlying facts that (one would hope) are also rare—the continuing revelations of torture and of cruel, unusual, and degrading treatment. The decision by the executive branch to create a secret alternative dispute resolution system for detainees at Guantánamo was intertwined with the decision to torture and to extract information by coercion.

The sequence of public disclosures about the horrific treatment of detainees in various sites provides the context in which to understand the evolution of the Supreme Court’s majority decisions about 9/11 detention. The 2004 decision in *Hamdi* rejected the government’s claim of immunity from oversight in holding citizen detainees indefinitely; the Court held that some process was the required predicate for ongoing detention.¹⁰⁵ The Court, however, gave no deadlines for the creation of adequate procedures or specific directions about their qualities.¹⁰⁶ In contrast, when concluding that Congress had illegally suspended the writ of habeas corpus in the five-to-four *Boumediene* decision in 2008, the Court insisted on an independent factfinding role for life-tenured judges.¹⁰⁷ Moreover, *Boumediene* moved beyond the premise of *Hamdi*—that citizens had rights—to recognize rights-holding by aliens, just as it limited *Eisentrager*’s rejection of rights-assertion by individuals beyond the boundaries of the United States.

Boumediene should be viewed through the frame of facts not detailed in the opinion. Between 2004 and 2008, pictures from Abu Ghraib¹⁰⁸

104. As explained by Eugene Fidell, the President of The National Institute of Military Justice, in the 2009 publication of the Military Commission Reporter, Volume I, the aim was to provide “every publicly available decision, order, and ruling issued by the military commissions conducted at the U.S. Naval Base, Guantánamo Bay, Cuba, and all known substantive opinions and rulings of the United States Court of Military Commission Review from October 2006 through June 1, 2009.” See Eugene R. Fidell, Preface, I Military Commission Reporter, at xiii (2009) [hereinafter *Military Commission Reporter*].

105. *Hamdi v. Rumsfeld*, 542 U.S. 507, 538–39 (2004) (plurality opinion).

106. *Id.* at 532–37 (referring to “basic process,” a citizen’s “core rights to challenge meaningfully . . . and to be heard,” and holding that “due process demands some system” of procedures).

107. *Boumediene v. Bush*, 128 S. Ct. 2229, 2262–66 (2008). The contrast between these two opinions is also explored in Linda Greenhouse, *The Mystery of Guantánamo Bay*, 27 Berkeley J. Int’l L. 1, 17–21 (2009).

108. See generally Seymour M. Hersh, *Chain of Command: The Road from 9/11 to Abu Ghraib* 20–46 (2004).

and the text of the “Torture Memos”¹⁰⁹ came into public view. I replicate excerpts of one of those memoranda (Figure 6) to underscore their officialdom. (The Department of Justice logo has been enlarged to make it legible, and only a few lines of the many-page memorandum are reproduced.) As can be seen from the excerpt, in August 2002, Department of Justice officials set forth their view that to violate federal statutes prohibiting “torture,” acts must be “extreme Where the pain is physical, it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure. Severe mental pain requires suffering not just at the moment of infliction but it also requires lasting psychological harm.”¹¹⁰ Moreover, torture required the specific intent to torture.¹¹¹ The memos also opined that the President, when acting as commander in chief during a war, was not bound by various treaties and conventions the United States has signed, nor constrained by domestic law when authorizing interrogation procedures.¹¹²

Why were these memos written? The United States Constitution affords detainees guarantees against mistreatment, and the United States has joined with nations around the world in a treaty banning torture.¹¹³ Violations of federal statutes put individuals in jeopardy of criminal pros-

109. See Memorandum from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, on Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–40A (Aug. 1, 2002), available at <http://news.findlaw.com/nytimes/docs/doj/bybee80102ltr.html> (on file with the *Columbia Law Review*) [hereinafter Bybee Memorandum]. The *Washington Post* put these materials online on June 13, 2004. See Dana Priest, Dana Milbank & R. Jeffrey Smith, Justice Department Memo Said Torture ‘May Be Justified,’ *Wash. Post*, June 13, 2004, at A3; see also Memorandum from Alberto Gonzales, Att’y Gen., to President George W. Bush, on Decision Re: Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf> (on file with the *Columbia Law Review*); Memorandum from John Yoo, Deputy Assistant Att’y Gen., Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, U.S. Dep’t of Def., on Application of Treaties and Laws to Al Qaeda and Taliban Detainees (Jan. 9, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf> (on file with the *Columbia Law Review*).

An overview, prepared by the *New York Times*, and links to PDFs of the Torture Memos are available online. See A Guide to the Memos on Torture, *N.Y. Times*, at <http://www.nytimes.com/ref/international/24MEMO-GUIDE.html> (last visited Nov. 18, 2009) (on file with the *Columbia Law Review*). The Bybee Memorandum can also be found, along with other Justice Department documents written between 2002 and 2004 and related to the treatment of detainees, in *The Torture Debate in America* 283–393 (Karen J. Greenberg ed., 2006).

110. Bybee Memorandum, *supra* note 109, at 46.

111. *Id.* at 16.

112. See Owen Fiss, *The Example of America*, 119 *Yale L.J. Pocket Part* 1, 6 (2009), at <http://www.yalelawjournal.org/content/view/764/23/.html> (on file with the *Columbia Law Review*).

113. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.

[logo enlarged]

Excerpts from the “Torture Memos”
(pages 1, 46)

U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, DC 20530

August 1, 2002

Memorandum for Alberto R. Gonzales
Counsel to the President
Re: Standards of Conduct for Interrogation under 18 U.S.C. §§2340-2340A

You have asked for our Office’s views regarding the standards of conduct under the Convention Against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment as implemented by Sections 2340-2340A of title 18 of the United States Code. As we understand it, this question has arisen in the context of the conduct of interrogations outside the United States. We conclude below that Section 2340A proscribes acts inflicting, and that are specifically intended to inflict, severe pain or suffering, whether mental or physical. Those acts must be of an extreme nature to rise to the level of torture within the meaning of Section 2340A and the Convention. We further conclude that certain acts may be cruel, inhuman, or degrading, but still not produce pain and suffering of the requisite intensity to fall within Section 2340A’s proscription against torture. We conclude by examining possible defenses that would negate any claim that certain interrogation methods violate the statute.

... We conclude that torture as defined in and proscribed by Sections 2340–2340A, covers only extreme acts. Severe pain is generally of the kind difficult for the victim to endure. Where the pain is physical, it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure. Severe mental pain requires suffering not just at the moment of infliction but it also requires lasting psychological harm, such as seen in mental disorders like posttraumatic stress disorder. Additionally, such severe mental pain can arise only from the predicate acts listed in Section 2340. Because the acts inflicting torture are extreme, there is significant range of acts that though they might constitute cruel, inhuman, or degrading treatment or punishment fail to rise to the level of torture.

Available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>

FIGURE 6

ecutions and perhaps civil lawsuits.¹¹⁴ By crafting, on Department of Justice stationery, what Chris Edley has described as “tortured definitions of ‘torture’” that reduced the “Rule of Law to the Reign of Politics,”¹¹⁵ Bush Administration lawyers sought to manufacture legal defenses for interrogators and for others involved in the mistreatment of detainees.¹¹⁶

Thus, one could also dub these documents “alibi memos,” in that they were written to protect those imposing such pain from liability.¹¹⁷ This facet gives the memos, in retrospect, an oddly (if chillingly) appealing quality. They were drafted before Congress sought, through the enactments of the Detainee Treatment Act (DTA) of 2005 and the Military Commissions Act of 2006 (2006 MCA), to limit the federal courts authority to hear such claims of wrongdoing.¹¹⁸ The memo writers assumed—as

114. See 18 U.S.C. §§ 2340A, 2441 (2006).

115. Press Release, Christopher Edley, Jr., Dean, U.C. Berkeley Sch. of Law, The Torture Memos and Academic Freedom (Apr. 10, 2008), available at <http://www.law.berkeley.edu/news/2008/edley041008.html> (on file with the *Columbia Law Review*). David Cole offered another critique focused on the role played by members of the Office of Legal Counsel in 2005. David Cole, The Torture Memos: The Case Against the Lawyers, N.Y. Rev. Books, Oct. 8, 2009, at 14–16; see also Anthony Lewis, Official American Sadism, N.Y. Rev. Books, Sept. 25, 2008, at 45.

116. Under various doctrines relating to the availability of implied causes of action from statutes and the Constitution and official immunity, lower courts have concluded that efforts to obtain damages and declaratory relief against government officials for “torture and abuse” cannot proceed. See, e.g., *Arar v. Ashcroft*, No. 06-4216-CV, 2009 U.S. App. LEXIS 23988, at *5–*12 (2d Cir. Nov. 2, 2009) (en banc), affirming the panel decision of 532 F.3d 157 (2d Cir. 2008); *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85, 88 (D.D.C. 2007); see also discussion of *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), *infra* notes 199–215 and accompanying text.

117. Judith Resnik, When the Justice Department Played Defense, *Slate*, Oct. 27, 2006, at <http://www.slate.com/id/2152211/> (on file with the *Columbia Law Review*). In a book about the decisionmaking around these issues, Jack Goldsmith, who held the position of Assistant Attorney General for the Office of Legal Counsel (OLC), discussed the memos. He noted that CIA officials “viewed the opinion as a ‘golden shield’” and were upset when he ordered one of the OLC opinions withdrawn. Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* 144, 162–63 (2007). As Goldsmith also explained, the “message of the August 1, 2002 OLC opinion was indeed clear: violent acts aren’t necessarily torture; if you do torture, you probably have a defense; and even if you don’t have a defense, the torture law doesn’t apply if you act under color of presidential authority.” *Id.* at 144.

118. In December of 2005, Congress enacted the DTA, discussed *supra* notes 20, 34. That legislation condemned torture, but also sought to limit the ability of aliens at Guantánamo to access courts as well as to provide defenses to those who were accused of torturing or imposing grave harms on individual detainees. See DTA of 2005, Pub. L. No. 109-148, §§ 1001–1006, 119 Stat. 2680, 2739–44 (codified as amended in scattered sections of titles 10, 28, and 42 U.S.C.); see also *id.* § 1005(e), 119 Stat. at 2742 (codified at 28 U.S.C. § 2241(e) (2008)) (“[N]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantánamo Bay, Cuba.”). The section further deprived courts of jurisdiction to hear “any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantánamo Bay, Cuba, who (A) is currently in military custody; or (B) has been determined . . . to have been properly detained as an enemy combatant” by the United

did many others¹¹⁹—a world in which public courts were functioning and defendants would be required to explain their actions.

The Torture Memos sanctioned actions that, as hundreds of pages of reports from an array of sources now document, took place. Independent investigations (by, *inter alia*, the United States Senate,¹²⁰ the Canadian government,¹²¹ and the International Committee of the Red Cross¹²²) detail the abuses at various detention sites. Under the direction or with the approval of the United States government, individuals were

States Court of Appeals for the District of Columbia in accordance with the DTA of 2005. *Id.*

In the MCA of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of titles 10, 28, and 42 U.S.C.), Congress again sought to close off jurisdiction by providing that no “court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus” from detainees at Guantánamo, as well as “any other action . . . relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States . . .” 28 U.S.C. § 2241(e). Neither the DTA of 2005 nor the MCA of 2006 directly addressed the jurisdiction of prosecutors to bring criminal actions. The MCA of 2009, enacted after *Boumediene*, continued to centralize litigation in the D.C. Circuit but omitted the door-closing prohibition. Pub. L. No. 111-84, §§ 950g(a), 1801–1807, 123 Stat. 2190, 2603, 2574–614.

119. For example, in an argument held in December of 2003, a lawyer for the Department of Justice took the position before a panel of three judges of the Ninth Circuit that the United States could imprison anyone it deemed an “enemy combatant” and that no court had the power to oversee the detention. As the opinion recounts, during the argument, judges posed questions about torture as a rhetorical device to probe the position. Would the Justice Department be making the same argument against judicial review, “even if the claims were that [the government] was engaging in acts of torture or that it was summarily executing the detainees”? *Gherebi v. Bush*, 352 F.3d 1278, 1299–1300 (9th Cir. 2003), cert. granted, judgment vacated, and case remanded for further consideration in light of *Rumsfeld v. Padilla*, 542 U.S. 952 (2004). The question might have seemed to be a “gotcha”—backing the government lawyer into the obvious admission that, of course, the Constitution grants a right of access to court under such circumstances. But the Justice Department lawyer said otherwise, answering that no court could hear claims, even of torture or of summary executions. As the published appellate decision records, the judges were taken aback. “To our knowledge, prior to the current detention of prisoners at Guantánamo, the U.S. government has never before asserted such a grave and startling proposition.” *Id.* at 1300. About a year later, in 2004, the rhetorical proved to be real, with revelations of the Torture Memos, followed by disclosures of waterboarding and other forms of abuse, and then congressional enactments purporting to strip the federal courts of jurisdiction.

120. Inquiry into the Treatment of Detainees in U.S. Custody Before the S. Comm. on Armed Services, 110th Cong. (2008), available at <http://levin.senate.gov/newsroom/supporting/2008/Detainees.121108.pdf> (on file with the *Columbia Law Review*) [hereinafter Armed Services Inquiry].

121. Comm’n of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Report of the Events Relating to Maher Arar: Analysis and Recommendations (2006), available at http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/AR_English.pdf (on file with the *Columbia Law Review*) [hereinafter Canadian Arar Inquiry].

122. Int’l Comm. of the Red Cross, ICRC Report on the Treatment of Fourteen “High Value Detainees” in CIA Custody (2007), available at <http://www.nybooks.com/icrc-report.pdf> (on file with the *Columbia Law Review*).

subjected to solitary confinement and “incommunicado detention,”¹²³ extremes of temperature,¹²⁴ lights left on unremittingly twenty-four hours a day,¹²⁵ shackling,¹²⁶ standing for hours or days,¹²⁷ “prolonged nudity,”¹²⁸ waterboarding (what the Red Cross describes as “suffocation by water poured over a cloth placed over the nose and mouth”¹²⁹), and on some occasions, beatings.¹³⁰ As the Senate Armed Services Committee concluded in 2008, the “abuse of detainees in U.S. custody cannot simply be attributed to the actions of ‘a few bad apples’ acting on their own”¹³¹ but rather was the result of senior officials who were willing to consider more aggressive techniques and “redefine[d] torture.”¹³²

The labels “enhanced interrogation,” “harsh” techniques, and “coercion” have been offered up in lieu of the words torture, and cruel, inhuman, and degrading treatment.¹³³ In 2005, Congress objected to these practices even as it also authorized use in military commissions of information extracted through some forms of coercive interrogations, provided that other indices of reliability existed and various conditions were satisfied.¹³⁴ In 2009, Congress imposed additional constraints on infor-

123. See *id.* at 4, 7.

124. See *id.* at 9. The report stated that some detainees were purposely exposed to cold air and made to lie in cold water with only their heads protruding from the water. *Id.*

125. *Id.* at 36.

126. See *id.* at 6, 11–12.

127. See *id.* at 11–12.

128. *Id.* at 14. The report stated that nudity was the “most common method of ill-treatment” found in the inquiry. *Id.*

129. *Id.* at 8.

130. See *id.* at 8, 12–13.

131. Armed Services Inquiry, *supra* note 120, at xii.

132. *Id.* at xiii, xvi. According to the Senate Report, Secretary Rumsfeld added a handwritten note related to stress positions that read: “I stand for 8–10 hours a day. Why is standing limited to 4 hours?” *Id.* at xix (internal quotation marks omitted). Following Secretary Rumsfeld’s approval of a variety of “aggressive interrogation” methods, “techniques such as waterboarding, nudity, and stress positions . . . were authorized for use in interrogations of detainees in U.S. custody.” *Id.* at xxvi. Further, the Senate Committee concluded that the President had made a “written determination” that the Geneva Conventions did not apply to al Qaeda or Taliban detainees. As a consequence, individuals were put at “serious risk of physical and psychological harm.” *Id.*

133. What to call the underlying acts prompted exchanges in the *New York Times* about what terms the press ought to use. See, e.g., Clark Hoyt, *Telling the Brutal Truth*, *N.Y. Times*, Apr. 26, 2009, at WK12.

134. See 10 U.S.C. § 948r(d) (2006). The MCA of 2006 authorizes “statements obtained” after the DTA of 2005’s enactment, “in which the degree of coercion is disputed,” to be admitted into evidence “only if” three requirements are met:

(1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; (2) the interests of justice would best be served by admission of the statement into evidence; and (3) the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment prohibited by section 1003 of the Detainee Treatment Act of 2005.

Id. In contrast, the “chief prosecutor for the military commissions at Guantánamo” took the position that “evidence derived through waterboarding was off limits.” Overruled for taking that position, he resigned. See Morris Davis, *Op-Ed.*, *Unforgivable Behavior*,

mation obtained through such aggression.¹³⁵ Terms once demanding explanation (such as “waterboarding”) became all too familiar, as arguments continued about whether such practices constituted torture and were, in any event, appropriate.¹³⁶

Revelations of mistreatment continued into 2009. Under court-ordered disclosures, the Department of Justice released a report written in 2004 by the Inspector General of the Central Intelligence Agency (CIA).¹³⁷ Provided there (and in other materials) was further evidence “in grim detail” of abuses including “how CIA officers carried out mock executions and threatened at least one prisoner with a gun and a power drill.”¹³⁸ New debates emerged about whether the government should disclose pictures documenting the gross mistreatment of detainees, as a lower court had ordered.¹³⁹ In the fall of 2009, Congress proffered its

Inadmissible Evidence, N.Y. Times, Feb. 17, 2008, at WK12. Colonel Davis served in Guantánamo from 2005 to 2007. *Id.*

135. Congress broadened the application of its provisions to statements beyond those extracted after enactment of the DTA. See MCA of 2009, Pub. L. No. 111-84, § 948r, 123 Stat. 2190, 2580. Congress also required that, for use, statements had either to be made “incident to lawful conduct” or voluntarily. The MCA of 2009 added criteria for a military commission tribunal judge to use to determine voluntariness—including the “details of the taking of the statement,” the “characteristics of the accused, such as military training, age, and education level,” the pattern of interrogation, and the persons conducting the interrogations. *Id.*

136. See Rachel L. Swarns, *Cheney Offers Sharp Defense of C.I.A. Interrogation Tactics*, N.Y. Times, Aug. 31, 2009, at A1; Letter from Michael B. Mukasey, U.S. Att’y Gen., to Senator Patrick J. Leahy, Chair, Senate Judiciary Comm. (Jan. 29, 2008), available at <http://i.a.cnn.net/cnn/2008/images/01/29/letter.to.senator.leahy.pdf> (on file with the *Columbia Law Review*). Examinations of the theory and practice of torture as well as the normative import of a “debate” about torture can be found in many recent publications. See generally Paul W. Kahn, *Sacred Violence: Torture, Terror, and Sovereignty* (2008); *Torture: A Collection* (Sanford Levinson ed., 2004); *The Torture Debate in America*, supra note 109; Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 *Colum. L. Rev.* 1681 (2005); see also Judith Resnik, *Moving American Mores: From Women’s Education to Torture*, 36 *Women’s Stud. Q.* 339 (2008). For the canonical history of torture in English law, see John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime* (2006).

In his discussion of the 9/11 habeas jurisprudence, Richard Fallon concluded that the case law proved George Bush a failed “reconstruction” president, because courts insisted on an oversight role. See Fallon, *Habeas Corpus*, supra note 26, at 39–74. Another metric of the President’s impact, however, comes from the conflicts about the permissibility of torture and its analogues. By that yardstick, President Bush succeeded in reorienting the norms of what constituted permissible treatment of detainees.

137. See *ACLU v. U.S. Dep’t of Def.*, 339 F. Supp. 2d 501, 505 (S.D.N.Y. 2004); *Orders of July 20 in ACLU v. U.S. Dep’t of Def.*, No. 04 Civ. 4151 (S.D.N.Y. July 20, 2009); *ACLU v. U.S. Dep’t of Justice*, No. 05 Civ. 9620 (AKH) (S.D.N.Y. July 20, 2009). Those orders provided some of the injunctive relief requested. Another lawsuit, also successful, sought the names of detainees and transcripts of CSRTs. See *Associated Press v. U.S. Dep’t of Def.*, 410 F. Supp. 2d 147, 149 (S.D.N.Y. 2006).

138. Mark Mazzetti, *Report Provides New Details on C.I.A. Prisoner Abuse*, N.Y. Times, Aug. 23, 2009, at A4 [hereinafter Mazzetti, *New Details on C.I.A. Abuse*].

139. See *ACLU v. U.S. Dep’t of Def.*, 543 F.3d 59, 63–64 (2d Cir. 2008) (affirming lower court’s order directing the Department of Defense to release photographs depicting

answer, precluding disclosure.¹⁴⁰ By then, the Attorney General had authorized a designated prosecutor to investigate whether treatment of detainees constituted a violation of federal law.¹⁴¹ The debate shifted to whether the inquiry would include Guantánamo as well as Iraq and Afghanistan, whether the focus would be only on those interrogators who exceeded “guidelines” such as those put forth in the 2002 document excerpted in Figure 6 (thereby reinscribing the function of the Torture memos as “alibi” memos) and whether attorneys or other officials would be considered as potential violators.¹⁴²

The uncovering of layers of brutality, sanctioned in some respects by the Executive, interacted with congressional attempts to cut Article III judges out of decisionmaking and thus close off avenues for forcing such information into public view. These developments framed the Court’s

abusive treatment of detainees by U.S. soldiers); Scott Wilson, *Obama Shifts on Abuse Photos; Releasing Images of Detainee Mistreatment Would Endanger U.S. Troops*, *President Says*, *Wash. Post*, May 14, 2009, at A1.

140. See Protected National Security Documents Act of 2009, Pub. L. No. 111-83, 123 Stat. 2142. Under this legislation, notwithstanding “any other provision of the law to the contrary, no protected document . . . shall be subject to disclosure” under FOIA. *Id.* § 565(b). “Protected documents” were defined to include photography taken between September 11, 2001 and January 22, 2009 relating to the “treatment of individuals engaged, captured, or detained after September 11, 2001, by the Armed Forces . . . outside of the United States.” *Id.* § 565(c). To obtain the status of a protected document, the Secretary of Defense had to so certify that “disclosure . . . would endanger” citizens or employees “deployed outside the United States.” *Id.* § 565(d)(1). The certification expires in three years unless renewed. *Id.* § 565(d)(2).

To the extent that it purports to direct outcomes different than that adjudicated by a federal court, this statute raises what federal courts’ jurisprudence calls a “*Klein* problem.” See *United States v. Klein*, 80 U.S. 128 (1871). In *Klein*, the Court invalidated a federal statute that would have required the courts to interpret the grant of a presidential pardon to be proof of Confederate affiliation and therefore ineligible for the return of property. The basis for that decision has perplexed jurists and scholars; one could read the case as protecting presidential pardon powers and/or judicial authority to apply law to facts. Contemporary case law addressing variations of this issue include *Miller v. French*, 530 U.S. 327, 348–49 (2000); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19 (1995). See generally Amanda L. Tyler, *The Story of Klein: The Scope of Congress’s Authority to Shape the Jurisdiction of the Federal Courts*, in *Federal Courts Stories*, *supra* note 11, at 87, 87–113.

141. See Mark Mazzetti & Scott Shane, *Investigation Is Ordered into C.I.A. Abuse Charges*, *N.Y. Times*, Aug. 25, 2009, at A1 [hereinafter Mazzetti & Shane, *Investigation into C.I.A. Abuse*].

142. See David Johnston, *Justice Report Advises Pursuit of Abuse Cases*, *N.Y. Times*, Aug. 24, 2009, at A1. The Department of Justice Report recommended a focus on allegations of detainee abuse in Iraq and Afghanistan, where some held in detention had died. *Id.* The Torture Memos may work to circumscribe such an inquiry as the press reported the investigation was aimed at identifying acts that exceeded the guidelines set forth “in a series of legal opinions by the Justice Department” that were “abandoned” by the Obama Administration. *Id.* Some commentators argue that the Justice Department directives did not constitute a “dramatic break with the past,” as post-World War II law had given a good deal of “latitude” used by interrogators thereafter. See William Ranney Levi, *Interrogation’s Law*, 118 *Yale L.J.* 1434, 1442, 1483 (2009).

rulings in the 9/11 sextet ending in *Boumediene*, the first instance in which the Supreme Court held that Congress had unconstitutionally suspended the writ of habeas corpus.¹⁴³ Yet the judgments are largely silent about the evidence of torture and brutality, as is the sixth edition of *Hart and Wechsler*, which does not explore the impact of the Torture Memos.¹⁴⁴ Nonetheless, the stream of normatively painful revelations (including congressional efforts to suspend the writ of habeas corpus through the DTA and the MCA) could provide a basis for an argument that a jurisprudence borne from extremity ought to be confined to extraordinary events.

D. *Aberrational Collapses of Procedural Fairness*

An additional reason to cabin the doctrinal developments comes from another form of abuse—the abuse of process. Several individuals who served at Guantánamo made public the profound procedural failures that laced decisions about detention of several individuals. For example, a military prosecutor, Lt. Col. Darrel Vandeveld, submitted a declaration in 2008 in support of Mohammed Jawad, one of the detainees whom he had prosecuted before resigning.¹⁴⁵ Vandeveld detailed a litany of procedural deficiencies, including the fact that “[p]otentially exculpatory evidence has not been provided.”¹⁴⁶ Vandeveld’s disclosures followed upon those of Lt. Col. Stephen Abraham, a civilian lawyer and a reservist commissioned in 1982 as an officer in the Intelligence Corps,¹⁴⁷

143. That holding is “notable as the only case clearly to hold that a congressional enactment purporting to limit federal court jurisdiction is unconstitutional.” Meltzer, *Ex Parte McCordle*, *supra* note 53, at 84.

144. In *Munaf v. Geren*, 128 S. Ct. 2207 (2008), the majority and concurrence debated what courts should do in the face of allegations that a transfer of an American citizen to Iraqi custody could result in torture. See *supra* note 67. The evidence of and memos on torture are not the subject of discussion in the Hart and Wechsler casebook. See 2009 Hart & Wechsler, *supra* note 68, at 1166–213. The discussion of the 9/11 litigation is within the chapter on “Federal Habeas Corpus;” included are excerpts or notes on the DTA of 2005, *id.* at 1158; the MCA of 2006, *id.* at 1158, 1212; the Suspension Clause (Art. I, § 9, cl. 2), *id.* at 1159; the “territorial reach of the writ,” *id.* at 1164; *Johnson v. Eisentrager*, *id.* at 1165; *Rasul v. Bush*, *id.* at 1166–68; *Boumediene v. Bush*, *id.* at 1168–78, 1192–204; *Rumsfeld v. Padilla*, *id.* at 1180–82; *Hamdi v. Rumsfeld*, *id.* at 1183–90; *al-Marri v. Pucciarelli*, *id.* at 1190–92; and the “exhaustion of non-habeas remedies,” *id.* at 1210.

145. Declaration of Lieutenant Colonel Darrel J. Vandeveld, *United States v. Mohammed Jawad*, CMCR No. 08-004 (U.S. Sept. 22, 2008), available at http://s3.amazonaws.com/propublica/assets/docs/vandeveld_declaration_080922.pdf (on file with the *Columbia Law Review*) [hereinafter Vandeveld Declaration]. Details of the treatment of Mr. Jawad are provided in Major David J.R. Frakt, Closing Argument at Guantánamo: The Torture of Mohammed Jawad, 22 Harv. Hum. Rts. J. 1, 19–21 (2009). In August 2009, Jawad was released and returned to his native Afghanistan. Associated Press, Guantánamo Detainee Released, N.Y. Times, Aug. 25, 2009, at A8.

146. Vandeveld Declaration, *supra* note 145, ¶ 10.

147. Declaration of Lieutenant Colonel Stephen Abraham, Reply to Opposition to Petition for Rehearing of Denial of Certiorari app. ¶¶ 1–24, *Al Odah v. United States*, 127 S. Ct. 3067 (2007) (No. 06-1196) [hereinafter Abraham Declaration]. In an interview,

whose submissions have been cited as pivotal to the Court's decision to hear the *Boumediene* case.¹⁴⁸

Abraham had prepared information for CSRTs and served as a decisionmaker on one; he made his declaration in June 2007 when detainee lawyers sought a rehearing of the denial of the certiorari petition in *Boumediene*.¹⁴⁹ Abraham explained the poverty of the "information used to prepare the files [that] . . . frequently consisted of finished intelligence products of a generalized nature—often outdated, often 'generic,' rarely specifically relating to the individual subjects of the CSRTs or to the circumstances related to those individuals' status."¹⁵⁰ Further, "[w]hat were purported to be specific statements of fact lacked even the most fundamental earmarks of objectively credible evidence."¹⁵¹ The one CSRT on which Abraham sat "determined that there was no factual basis for concluding that the individual should be classified as an enemy combatant."¹⁵² After being ordered to "reopen the hearing," the panel did not change its ruling, and Abraham was never again assigned to sit on a CSRT.¹⁵³

Abraham's account underscores the contributions made by independent tribunals staffed by decisionmakers free to insist on quality information. The holding in *Boumediene*, in turn, is a resounding endorsement of

Abraham later explained that he joined a group of workers ill trained to create quality decisionmaking procedures and unable to access the kind of information requisite for making fact-based decisions about detainees. See Andy Worthington, An Interview with Guantanamo Whistleblower Stephen Abraham (Dec. 30, 2008), at <http://www.lewrockwell.com/orig9/worthington7.html> (on file with the *Columbia Law Review*) [hereinafter Abraham Interview]; see also Carol D. Leonnig & Josh White, An Ex-Member Calls Detainee Panels Unfair, *Wash. Post*, June 23, 2007, at A3.

148. See William Glaberson, In Shift, Justices Agree to Review Detainees' Case, *N.Y. Times*, June 30, 2007, at A1.

149. See Reply to Opposition to Petition for Rehearing of Denial of Certiorari at 5, *Al Odah*, 127 S. Ct. 3067 (No. 06-1196). Abraham explained that, between September 2004 and March 2005, he had been assigned to the Office for the Administrative Review of the Detention of Enemy Combatants to gather and review information for CSRTs. Abraham Declaration, *supra* note 147, ¶ 1.

150. Abraham Declaration, *supra* note 147, ¶ 8.

151. *Id.* ¶ 22; see also Kyndra Miller Rotunda, Honor Bound: Inside the Guantanamo Trials 133–36 (2008). Criticism of the quality of information came from many of the detainee lawyers, some of whom attended proceedings, and from observers dispatched by NGOs such as Human Rights Watch. See, e.g., H. Candace Gorman, My Experiences Representing a Guantánamo Detainee, *Litig.*, Spring 2009, at 10, 12–14; Audrey Macklin, The Omar Khadr Case, *Jurist*, Oct. 31, 2008, at <http://jurist.law.pitt.edu/forumy/2008/10/omar-khadr-case-redefining-war-crimes.php> (on file with the *Columbia Law Review*); Ben Wizner, Impressions of Guantanamo, *Blog of Rights: Official Blog of the American Civil Liberties Union*, Jan. 13, 2006, at <http://blog.aclu.org/2006/01/13/impressions-of-guantanamo> (on file with the *Columbia Law Review*).

152. Abraham Declaration, *supra* note 147, ¶ 23.

153. *Id.* ¶¶ 23–24. Abraham later commented that "tribunal members were told to trust all of the information presented against the detainee without hesitation or question, and to distrust any inconsistent testimony or other information." Abraham Interview, *supra* note 147.

the importance of factfinding by Article III judges. Over an acerbic dissent by the Chief Justice,¹⁵⁴ Justice Kennedy's majority identified the core attribute of habeas jurisdiction as the capacity to make inquiries, when necessary, into factual predicates for detention—"to call the jailer to account."¹⁵⁵ The same month, judges in the D.C. Circuit demonstrated the utility of that practice when they concluded that a CSRT had no basis to require detention of an "ethnic Uighur, who fled his home in the People's Republic of China" out of fear of persecution of Muslims.¹⁵⁶

The Guantánamo cases are thus rare instances when participants—prosecutors and lower tier decisionmakers within the CSRT process—broke ranks to report failures in their own work. Further, in several instances, the government conceded the lack of evidence to support ongoing detention, even as it also argued for the authority to continue to confine certain individuals. As Patricia Wald, a retired judge from the D.C. Circuit who served on the International Criminal Tribunal for the former Yugoslavia, described, the military commission process had an "almost hopeless lopsidedness" in its evidentiary rules.¹⁵⁷ Further, decisions often lacked explanations—making plain the "risk of a system . . . created uniquely for a widely despised group of defendants," who were given "substantively fewer rights and protections," and lacked access to structurally independent judges.¹⁵⁸ One might therefore isolate the import of this set of judgments by arguing that the peculiarity of the CSRTs and the pressures of terrorist threats resulted in irregularities that, through documentation, produced exceptional federal court decisions.¹⁵⁹

154. *Boumediene v. Bush*, 128 S. Ct. 2229, 2279 (Roberts, C.J., dissenting). The Chief Justice protested that the majority had found the administrative adjudication defective but failed to specify what was required. See *id.* at 2279, 2299.

155. *Id.* at 2247 (majority opinion). The Court "consider[ed] it uncontroversial . . . that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." *Id.* at 2266 (quoting *INS v. St. Cyr*, 533 U.S. 289, 302 (2001)).

156. *Parhat v. Gates*, 532 F.3d 834, 835 (D.C. Cir. 2008). A CSRT had found Huzaifa Parhat, one of a group who fled from China to Pakistan but whom local villagers "handed . . . over to Pakistani officials who turned them over to the U.S. military" in 2001, to be an "enemy combatant." *Id.* at 837. But as the D.C. Circuit detailed in a lengthy opinion, the documents alleging that the Uighur group was "'associated' with al Qaida and the Taliban" included insufficient "indicia of the statements' reliability." *Id.* at 836. The court ordered a release or transfer, or a new CSRT that complied with the evidentiary requirements set forth. *Id.* at 854.

157. Patricia M. Wald, Foreword to the Military Commission Reporter, *supra* note 104, at xv, xvi.

158. *Id.* at xvi–xvii.

159. An alternative argument is that threats of terrorism license procedural irregularities. See Eric Posner & Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* 12 (2007). For a critique of this approach, see Alice Ristroph, Professors Strangelove, 11 *Green Bag* 2d 245, 257 (2008).

E. *Federal Executive Detention as a Basis for Doctrinal Differentiation*

A fifth basis for containment of the principles that emerge in the 9/11 habeas cases comes not from a focus on the place of detention, the personal degradation suffered, or the contexts of war and of procedural disarray, but from the status of the petitioners. All of those seeking relief were subjected to pretrial executive detention by the *federal* government operating outside the criminal justice system. The number of persons so affected is minuscule when contrasted with those confined through the criminal justice and immigration systems run by the state and federal governments.

The prison at Guantánamo held only a few hundred people. As noted, estimates put the highest number in the 700s and, by the end of 2008, the population was down to under 250, reduced by December of 2009 to about 215.¹⁶⁰ Adding detainees at Bagram held for longer terms (maybe some 630),¹⁶¹ as well as those in “temporary” detention including “black” and secret sites abroad,¹⁶² a much higher estimate—perhaps reaching 10 or 20,000 persons detained over the years—can be imagined.

But those numbers are dwarfed by the 2.3 million people who, as of 2008, were in state and federal prisons pursuant to convictions and other court orders.¹⁶³ Another group, whose numbers are not readily calculated, are those detained or subjected to supervision after service of sentences for violating various sex offender laws.¹⁶⁴ Further, in 2008, more than 378,000 people had been held by Immigration and Customs

160. As of December 16, 2008, following a series of prisoner releases, approximately 250 detainees remained at Guantánamo. See Press Release, U.S. Dep’t of Def., Detainee Transfer Announced (Dec. 16, 2008), available at <http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=12394> (on file with the *Columbia Law Review*).

161. In January 2008, the *New York Times* reported that there were approximately 630 detainees held at Bagram. Tim Golden, Defying U.S. Plan, Prison Expands in Afghanistan, *N.Y. Times*, Jan. 7, 2008, at A1.

162. See Dafna Linzer & Julie Tate, New Light Shed on CIA’s “Black Site” Prisons, *Wash. Post*, Feb. 28, 2007, at A1; Marcel Rosenbach & John Goetz, New Report Cites Proof of CIA Black Sites, *Spiegel Online*, Aug. 6, 2007, at <http://www.spiegel.de/international/world/0,1518,487325,00.html> (on file with the *Columbia Law Review*); Human Rights First, The CIA’s Secret Detention Program, May 1, 2008, at <http://www.humanrightsfirst.org/blog/torture/2008/05/cias-secret-detention-program.html> (on file with the *Columbia Law Review*).

163. See Pew Center on the States, *One in 100: Behind Bars in America 2008*, at 5 (2008), available at <http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf> (on file with the *Columbia Law Review*) [hereinafter *Pew, One in 100*].

164. See Daniel M. Filler, Silence and the Racial Dimension of Megan’s Law, 89 *Iowa L. Rev.* 1535, 1549–50 (2004). One calculation comes from the Department of Justice, which in 2001 stated that over 386,000 people were registered in state sex offender registries. See Devon B. Adams, U.S. Dep’t of Justice, Summary of State Sex Offender Registries, 2001, at 2 (2002), available at <http://ojp.usdoj.gov/bjs/pub/pdf/ssor01.pdf> (on file with the *Columbia Law Review*). In addition, the KlaasKids Found. maintains a tabulation of sex offender registrants per state. KlaasKids Foundation, Megan’s Law Legislation in All 50 States, at <http://www.klaaskids.org/pg-legmeg.htm> (last visited Oct. 23, 2009) (on file with the *Columbia Law Review*).

Enforcement in some 300 detention facilities; daily counts run at about 31,000 in detention.¹⁶⁵

The Supreme Court's 9/11 case law is likewise dwarfed, numerically, by holdings related to these many regular detainees. As illustrated in the chart, "U.S. Supreme Court Decisions on Detainee or Prisoner Cases, October 2003–June 2009" (Figure 7), during the same six terms in which the Court ruled on seven 9/11 cases, the Court also decided eighty other cases filed by state or federal prisoners. Sixty-three cases came from post-conviction habeas corpus petitions, mostly brought by state prisoners,¹⁶⁶

In the fall of 2009, the Supreme Court agreed to decide whether congressional powers under the "Necessary and Proper Clause" of Article I supported legislation authorizing ongoing detention of mentally ill, "sexually dangerous" persons found either incompetent to stand trial or nearing the expiration of their sentences. See *United States v. Comstock*, 551 F.3d 274 (4th Cir. 2009), cert. granted, 129 S. Ct. 2828 (2009). The statute at issue, Title III of the Adam Walsh Child Protection and Safety Act of 2006, is codified at 18 U.S.C. § 4248 (2006). Commitment occurs after a hearing in federal district court. See § 4248(a)–(d). The statute expressly provides that persons committed pursuant to its provisions may seek release through habeas corpus. See § 4247(g). State procedures for the commitment of "dangerous persons" have been upheld, albeit with due process constraints imposed. See *Kansas v. Hendricks*, 521 U.S. 346, 368–69 (1997).

165. See Dora Schriro, U.S. Dep't of Homeland Sec., Immigration Detention Overview and Recommendations 2 (2009), available at http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf (on file with the *Columbia Law Review*) [hereinafter Schriro, Immigration Detention]. The 31,000 figure is the number in detention on September 1, 2009. *Id.*; see also Organizational Structure, Spending, and Staffing for the Health Care Provided to Immigration Detainees: Testimony Before the Subcomm. on Homeland Sec. of the H. Comm. on Appropriations, 111th Cong. 2 (2009) (statement of Alicia Puente Cackley, Director Health Care, Government Accountability Office), available at http://appropriations.house.gov/Witness_testimony/HS/Alicia_Cackley_03_03_09.pdf (on file with the *Columbia Law Review*) [hereinafter Cackley, Health Care for Immigration Detainees]; Fact Sheet, U.S. Immigration and Customs Enforcement, U.S. Dep't of Homeland Sec., Detention Management (Nov. 20, 2008), available at http://www.ice.gov/pi/news/factsheets/detention_mgmt.htm (on file with the *Columbia Law Review*). The Cackley materials have somewhat different numbers for 2007.

166. These cases are filed under 28 U.S.C. § 2254, which authorizes jurisdiction in federal courts for persons in state custody. The cases in Figure 7 filed under § 2254 include (in chronological order): *Yarborough v. Gentry*, 540 U.S. 1 (2003); *Mitchell v. Esparza*, 540 U.S. 12 (2003); *Banks v. Dretke*, 540 U.S. 668 (2004); *Baldwin v. Reese*, 541 U.S. 27 (2004); *Dretke v. Haley*, 541 U.S. 386 (2004); *Middleton v. McNeil*, 541 U.S. 433 (2004); *Yarborough v. Alvarado*, 541 U.S. 652 (2004); *Pliler v. Ford*, 542 U.S. 225 (2004); *Tennard v. Dretke*, 542 U.S. 274 (2004); *Schriro v. Summerlin*, 542 U.S. 348 (2004); *Beard v. Banks*, 542 U.S. 406 (2004); *Holland v. Jackson*, 542 U.S. 649 (2004); *Brown v. Payton*, 544 U.S. 133 (2005); *Rhines v. Weber*, 544 U.S. 269 (2005); *Pace v. DiGuglielmo*, 544 U.S. 408 (2005); *Medellin v. Dretke*, 544 U.S. 660 (2005); *Bradshaw v. Stumpf*, 545 U.S. 175 (2005); *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Gonzalez v. Crosby*, 545 U.S. 524 (2005); *Mayle v. Felix*, 545 U.S. 644 (2005); *Bell v. Thompson*, 545 U.S. 794 (2005); *Dye v. Hofbauer*, 546 U.S. 1 (2005); *Schriro v. Smith*, 546 U.S. 6 (2005); *Kane v. Garcia Espitia*, 546 U.S. 9 (2005); *Bradshaw v. Richey*, 546 U.S. 74 (2005); *Evans v. Chavis*, 546 U.S. 189 (2006); *Brown v. Sanders*, 546 U.S. 212 (2006); *Rice v. Collins*, 546 U.S. 333 (2006); *Day v. McDonough*, 547 U.S. 198 (2006); *House v. Bell*, 547 U.S. 518 (2006); *Ayers v. Belmontes*, 549 U.S. 7 (2006); *Carey v. Musladin*, 549 U.S. 70 (2006); *Burton v. Stewart*, 549 U.S. 147 (2007); *Lawrence v. Florida*, 549 U.S. 327 (2007);

some of which entailed interpretations of the meaning of restrictions on access to habeas that Congress imposed in 1996 in the Antiterrorism and Effective Death Penalty Act (AEDPA).¹⁶⁷

As Figure 7 also illustrates, a few cases raised claims about conditions of confinement or the procedures for execution under a capital sentence. Under Supreme Court doctrine, if prisoners do not seek release as the remedy, they must rely on jurisdictional bases other than habeas corpus—such as invoking rights protected under statutes such as 42 U.S.C. § 1983.¹⁶⁸ Finally, some cases filed by prisoners in the state courts reach the Court through its authority to review state court judgments.¹⁶⁹ The sheer number of decisions reflect that post-trial detention is the common state of affairs for tens of thousands of individuals.

Whorton v. Bockting, 549 U.S. 406 (2007); Abdul-Kabir v. Quarterman, 550 U.S. 233 (2007); Brewer v. Quarterman, 550 U.S. 286 (2007); Schiro v. Landrigan, 550 U.S. 465 (2007); Roper v. Weaver, 550 U.S. 598 (2007); Uttecht v. Brown, 551 U.S. 1 (2007); Fry v. Pliler, 551 U.S. 112 (2007); Bowles v. Russell, 551 U.S. 205 (2007); Panetti v. Quarterman, 551 U.S. 930 (2007); Allen v. Siebert, 128 S. Ct. 2 (2007); Wright v. Van Patten, 128 S. Ct. 743 (2008); Arave v. Hoffman, 128 S. Ct. 749 (2008); Hedgpeth v. Pulido, 129 S. Ct. 530 (2008); Jimenez v. Quarterman, 129 S. Ct. 681 (2009); Waddington v. Sarausad, 129 S. Ct. 823 (2009); Knowles v. Mirzayance, 129 S. Ct. 1411 (2009); Harbison v. Bell, 129 S. Ct. 1481 (2009); Cone v. Bell, 129 S. Ct. 1769 (2009); and Bobby v. Bies, 129 S. Ct. 2145 (2009).

Federal prisoners challenging their convictions file “post-conviction motions” under 28 U.S.C. § 2255. See, e.g., Dodd v. United States, 545 U.S. 353 (2005); Johnson v. United States, 544 U.S. 295 (2005); Castro v. United States, 540 U.S. 375 (2003). The chart does not include cases brought by individuals detained through the immigration system.

167. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 28 U.S.C.); see, e.g., *Lawrence*, 549 U.S. at 331 (holding that AEDPA’s statute of limitations period for seeking federal habeas corpus relief is tolled when a petition for postconviction relief is pending in state court); *Evans*, 546 U.S. at 198, 201 (holding state supreme court decision denying petition on the merits does not automatically mean petition was timely for purposes of tolling AEDPA’s statute of limitations, and requiring federal courts to decide whether petition was filed in state court within reasonable time—six months, without explanation, was not reasonable). See generally James S. Liebman & William F. Ryan, “Some Effectual Power”: The Quantity and Quality of Decisionmaking Required of Article III Courts, 98 Colum. L. Rev. 696 (1998); *infra* notes 389–436, and accompanying text.

168. Cases pursuing claims based on § 1983 included, in chronological order: *Muhammad v. Close*, 540 U.S. 749 (2004); *Nelson v. Campbell*, 541 U.S. 637 (2004); *Johnson v. California*, 543 U.S. 499 (2005); *Wilkinson v. Dotson*, 544 U.S. 74 (2005); *Wilkinson v. Austin*, 545 U.S. 209 (2005); *Hill v. McDonough*, 547 U.S. 573 (2006); *Woodford v. Ngo*, 548 U.S. 81 (2006); *Beard v. Banks*, 548 U.S. 521 (2006); *Jones v. Bock*, 549 U.S. 199 (2007); *Erickson v. Pardus*, 127 S. Ct. 2197 (2007); and *Dist. Atty’s Office v. Osborne*, 129 S. Ct. 2308 (2009). In *United States v. Georgia*, 546 U.S. 151 (2006), the prisoner sought relief under both § 1983 and the Americans with Disabilities Act (ADA). Examples of cases relying on other statutory predicates include: *Ali v. Fed. Bureau of Prisons*, 128 S. Ct. 831 (2008) (Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671–2680 (2006)), and *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc–2000cc-5 (2006)).

169. 28 U.S.C. § 1257 (2006); see, e.g., *Haywood v. Drown*, 129 S. Ct. 2108 (2009); *Baze v. Rees*, 128 S. Ct. 1520 (2008); *Medellín v. Texas*, 128 S. Ct. 1346 (2008); *Danforth v. Minnesota*, 128 S. Ct. 1029 (2008); *Smith v. Texas*, 127 S. Ct. 1686 (2007); *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006).

U.S. Supreme Court Decisions in Detainee or Prisoner Cases
October 2003 – June 2009

FEDERAL AND STATE PRISONER CASES (80 DECISIONS)		
2003-2004 Term	2004-2005 Term	2005-2006 Term
<u>§ 2254 Habeas</u> Yarborough v. Gentry (2003) Mitchell v. Esparza (2003) Banks v. Dretke (2004) Baldwin v. Reese (2004) Dretke v. Haley (2004) Middleton v. McNeil (2004) Yarborough v. Alvarado (2004) Piler v. Ford (2004) Tennard v. Dretke (2004) Schiroy v. Summerlin (2004) Beard v. Banks (2004) Holland v. Jackson (2004)	<u>§ 2254 Habeas</u> Brown v. Payton (2005) Rhines v. Weber (2005) Pace v. DiGuglielmo (2005) Medellin v. Dretke (2005) Bradshaw v. Stumpf (2005) Miller-El v. Dretke (2005) Rompilla v. Beard (2005) Gonzalez v. Crosby (2005) Mayle v. Felix (2005) Bell v. Thompson (2005)	<u>§ 2254 Habeas</u> Dye v. Hofbauer (2005) Schiroy v. Smith (2005) Kane v. Garcia Espitia (2005) Bradshaw v. Richey (2005) Evans v. Chavis (2006) Brown v. Sanders (2006) Rice v. Collins (2006) Day v. McDonough (2006) House v. Bell (2006)
<u>§ 2255 Habeas</u> Castro v. United States (2003)	<u>§ 2255 Habeas</u> Dodd v. United States (2005) Johnson v. United States (2005)	<u>§ 1983 Claims</u> Hill v. McDonough (2006) Woodford v. Ngo (2006) Beard v. Banks (2006)
<u>§ 1983 Claims</u> Muhammad v. Close (2004) Nelson v. Campbell (2004)	<u>§ 1983 Claims</u> Johnson v. California (2005) Wilkinson v. Dotson (2005) Wilkinson v. Austin (2005)	<u>§ 1983 and ADA Claim</u> United States v. Georgia (2006)
	<u>RLUIPA</u> Cutter v. Wilkinson (2005)	<u>Review via § 1257</u> Sanchez-Llamas v. Oregon (2006)
2006-2007 Term	2007-2008 Term	2008-2009 Term
<u>§ 2254 Habeas</u> Ayers v. Belmontes (2006) Carey v. Musladin (2006) Burton v. Stewart (2007) Lawrence v. Florida (2007) Whorton v. Bockting (2007) Abdul-Kabir v. Quarterman (2007) Brewer v. Quarterman (2007) Schiroy v. Landrigan (2007) Roper v. Weaver (2007) Uttecht v. Brown (2007) Fry v. Piler (2007) Bowles v. Russell (2007) Panetti v. Quarterman (2007)	<u>§ 2254 Habeas</u> Allen v. Siebert (2007) Wright v. Van Patten (2008) Arave v. Hoffman (2008)	<u>§ 2254 Habeas</u> Hedgpeth v. Pulido (2008) Jimenez v. Quarterman (2009) Waddington v. Sarausad (2009) Knowles v. Mirzayance (2009) Harbison v. Bell (2009) Cone v. Bell (2009) Bobby v. Bies (2009)
	<u>Federal Tort Claims Act</u> Ali v. Fed. Bureau of Prisons (2008)	
	<u>Review via § 1257</u> Danforth v. Minnesota (2008) Medellin v. Texas (2008) Baze v. Rees (2008)	<u>§ 1983 Claims</u> Haywood v. Drown (2009) District Attorney's Office v. Osborne (2009)
<u>§ 1983 Claims</u> Jones v. Bock (2007) Erickson v. Pardus (2007)	“WAR ON TERROR” DETAINEE CASES (7 DECISIONS)	
<u>Review via § 1257</u> Smith v. Texas (2007)	Rumsfeld v. Padilla (2004) Rasul v. Bush (2004) Hamdi v. Rumsfeld (2004)	Hamdan v. Rumsfeld (2006) Boumediene v. Bush (2008) Munaf v. Geren (2008)
	Ashcroft v. Iqbal (2009)	

FIGURE 7

Yet the problems posed by the 9/11 detainees have become the centerpiece of much academic commentary and case law, produced through tens of thousands of lawyer and judge hours devoted to the questions raised by government decisions on 9/11.¹⁷⁰ In addition to rulings by the

170. A full analysis of the comparisons requires consideration of the differences among the lawyers who represent various groups of detainees, as well as the sociology of detention and distinctions or overlap among custodial and administrative officials. For example, a small literature addresses the specific issues of lawyering at Guantánamo, once discouraged by some government officials and becoming a sought-after assignment. See Neil A. Lewis, *Official Attacks Top Law Firms Over Detainees*, N.Y. Times, Jan. 13, 2007, at A1. As Jenny Martinez described,

More than one thousand attorneys were involved in the litigation of the *Hamdan* case in the Supreme Court in 2006, for example. Dozens of the nation's biggest law firms and hundreds of attorneys are currently involved in representing the Guantanamo detainees or filing amicus briefs on their behalf. At this point, a law firm that does not have its own Guantanamo detainee might have difficulty attracting summer associates.

Martinez, *supra* note 26, at 1062–63 (footnotes omitted); see also Stacy Sullivan, *The Minutes of the Guantanamo Bay Bar Association*, N.Y. Mag., June 26, 2006, at 44.

Further, as of 2006, statutory rights to counsel attached for those subjected to military commissions. See MCA of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948a–950w (2006) and scattered sections of titles 10, 18, and 42 U.S.C.); 10 U.S.C. § 949a(b)(1)(C) (“The accused shall receive the assistance of counsel as provided for by section 948k.”); id. § 948k(b) (providing criteria for trial counsel); see also MCA of 2009, Pub. L. No. 111-84, § 948k(b), 123 Stat. 2190, 2578 (reenacting 2006 MCA’s trial counsel provisions); id. § 950h, 123 Stat. 2190, 2604 (reenacting 2006 MCA’s appellate counsel provisions). Nonetheless, lawyers have faced various obstacles, including difficulties in communicating with their clients. See Mark P. Denbeaux & Jonathan Hafetz, *Introduction to The Guantánamo Lawyers: Inside a Prison, Outside the Law* 1–2 (Mark P. Denbeaux & Jonathan Hafetz eds., 2009); David Luban, *Lawfare and Legal Ethics at Guantánamo*, 60 Stan. L. Rev. 1981, 1989–98 (2008).

State and federal prisoners have no constitutional rights to postconviction representation, even when death row prisoners are pursuing habeas remedies. See *Murray v. Giarratano*, 492 U.S. 1, 3–4 (1989). Further, Sixth Amendment counsel rights apply to the initial trial followed by an appeal, if one is provided as of right, but not to discretionary reviews thereafter, including to the Supreme Court. See *Ross v. Moffitt*, 417 U.S. 600, 604–05 (1974). A federal statute, however, makes provision for appointment of lawyers for indigent defendants sentenced to death in federal or state court and pursuing postconviction relief under 28 U.S.C. §§ 2254–2255. See 18 U.S.C. § 3599(a)(2) (2006). That statute also specifies the experience required for counsel, support for experts, and the availability of counsel for federal defendants charged with capital crimes. Id. § 3599(c)–(f). Moreover, an interpretation of that statute held that federally appointed lawyers may represent and must be compensated for assisting those individuals in state clemency proceedings. See id. § 3599(e); *Harbison v. Bell*, 129 S. Ct. 1481, 1491 (2009). In addition, the PLRA of 1995, Pub. L. No. 104-134, 110 Stat. 1321–66 (1996) (codified in scattered sections of 11, 18, 28, and 42 U.S.C.), imposes various limitations on the fees to be awarded for successful representation of prisoners challenging conditions of confinement. See, e.g., 42 U.S.C. § 1997e(d)(3) (2006) (“No award of attorney’s fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18 for payment of court-appointed counsel.”).

Another group of detainees, immigrants, has neither statutory nor constitutionally established rights to counsel for those unable to afford representation. Several commentators have noted the lack of lawyers, and a few have launched projects to improve

Supreme Court, those attentive to 9/11 detainees can review a host of opinions from the lower courts, with decisions on the availability of implied causes of action, the defense of state secrets,¹⁷¹ and the continuing questions of the lawfulness of detention and the conditions of confinement at Guantánamo.¹⁷² (Indeed, the writing of this Essay required the

the quality of representation. See M. Margaret McKeown & Allegra McLeod, The Counsel Conundrum: Effective Representation in Immigration Proceedings, in Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform 286 (2009) [hereinafter Ramji-Nogales, Schoenholtz & Schrag, Disparities in Asylum Adjudication]; see also Robert A. Katzmann, The Legal Profession and the Unmet Needs of the Immigrant Poor, 21 Geo. J. Legal Ethics 3, 7–8 (2008).

171. Two well-known cases are *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006), *aff'd*, 532 F.3d 157 (2d Cir. 2008), *aff'd en banc*, No. 06-4216-cv, 2009 WL 3522887 (2d Cir. Nov. 2, 2009), and *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992 (9th Cir. 2009), *reh'g en banc* granted (argued Dec. 15, 2009). Maher Arar, a citizen of both Canada and Syria, was detained by U.S. officials while in transit through John F. Kennedy International Airport and then sent to Syria where he was interrogated under torture by Syrian authorities. Arar brought claims against the United States and various government officials under the Torture Victims Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (2006)). *Arar*, 532 F.3d at 162–63. The Canadian government investigated the case, cleared Arar of any links to terrorism, and found that it was likely that the United States relied on inaccurate information about Mr. Arar that had been provided by Canadian officials. See Canadian Arar Inquiry, *supra* note 121, at 13, 59. The Second Circuit, sitting en banc and splitting 7–4, held that Arar could not pursue remedies in federal court, as the court declined to recognize both his *Bivens* and statutory claims—in part because open court proceedings could undercut the security needs entailed in the “extraordinary rendition context.” *Arar*, 2009 WL 3522887, at *11–*17. Each of the four dissenting judges (Calabresi, Parker, Pooler, and Sack) wrote separately to record their disagreements, as they also joined each other “to underscore the miscarriage of justice that leaves Arar without a remedy in our courts.” *Id.* at *43. (Parker, J., dissenting).

In *Mohamed v. Jeppesen Dataplan, Inc.*, plaintiffs Mohamed, Agiza, Britel, al-Rawi, and Bashmilah sued Jeppesen Dataplan, a subsidiary of Boeing. Jeppesen Dataplan was alleged to have helped transport the plaintiffs to prisons in Morocco, Egypt, Afghanistan, and an unknown location (the CIA “black site” prison), under the CIA’s extraordinary rendition program. See 563 F.3d at 997–98. The government argued that the complaint had to be dismissed because the defense would reveal “state secrets,” and the district court agreed. *Id.* at 1000. The Ninth Circuit reversed and remanded, concluding that the proper approach was to “excis[e] secret evidence on an item-by-item basis,” rather than to “foreclos[e] litigation altogether at the outset.” *Id.* at 1003 (citations omitted). That decision is under review, en banc. See *Mohamed v. Jeppesen Dataplan, Inc.*, No. 08-15693, 2009 WL 3526219 (9th Cir. Oct. 27, 2009) (granting rehearing en banc).

172. While no longer adhering to the classification of individuals as “enemy combatants,” the Obama Administration asserted its authority to detain anyone who had “substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States.” Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantánamo Bay at 2, In re Guantánamo Bay Detainee Litig., No. 09-442 (D.D.C. Mar. 13, 2009), available at <http://www.justice.gov/opa/documents/memo-re-det-auth.pdf> (on file with the *Columbia Law Review*).

District judges have responded differently to the question of what suffices to sustain detention. Compare In re Guantánamo Bay Detainee Litig., 581 F. Supp. 2d 33 (D.D.C.

imposition of an artificial deadline, early December of 2009, as daily news reports would have necessitated constant revision.)

The oddity of executive pretrial detention at Guantánamo produces arguments for limiting the import of the resulting Supreme Court interventions. The specific statutory regimes differ; the DTA and the two MCAs structure routes to court for 9/11 detainees, while AEDPA controls the path for convicted prisoners. Further, one could focus on *pretrial* detention as the pivotal variable; none of the 9/11 detainees had been through either a public trial or regular judicial procedures, and the vast majority would never face formal accusations in American criminal courts. Thus, they could be understood as specially authorized to access Article III jurists, in contrast to those who dominate the prison population—convicted defendants. Yet the DTA and the MCAs also provide evidence of the opposite view—that, as alleged terrorists, these individuals ought to have *less* access than ordinary detainees.

F. *The Unique Vindication of Habeas Jurisdiction or Pyrrhic Procedural Victories Resulting in Preventive Detention*

Additional reasons for seeking to isolate the judgments come by way of either special praise or critique. One interpretation of the 9/11 law is that, despite the popularity of cutting off alleged terrorists' access to courts and rights, federal courts held their ground. The Court's 2004 *Hamdi* decision could be read as a wise placeholder, firmly insistent on a role for the courts and carving out a space for further action that proved, subsequently, to be needed. Through the dialectic exchange thereafter

2008), rev'd sub nom. *Kiyemba v. Obama*, 555 F.3d 1022, 1024 (D.C. Cir. 2009), cert. granted, 77 U.S.L.W. 3237, 78 U.S.L.W. 3010, 78 U.S.L.W. 3233, 78 U.S.L.W. 3237 (U.S. Oct. 20, 2009) (No. 08-1234), 2009 WL 935637, with *Hamli v. Obama*, 616 F. Supp. 2d 63 (D.D.C. 2009). In another high profile case, U.S. District Court Judge Ellen Segal Huvelle, noted that, after seven years, the case was "riddled with holes." Transcript of Hearing at 7, *Bacha v. Obama*, No. 05-2385, 2009 WL 2149949 (D.D.C. July 16, 2009). At issue was the imprisonment of an Afghan, Mohammed Jawad, captured and detained as a teenager and allegedly abused by both Afghan and U.S. officials. See *supra* note 145. Jawad's case evoked international protests. Later in July, the judge reiterated that the government's case "fell apart," in large part because of "the judicial findings that almost all of the evidence against Mr. Jawad was the confessions he made as a result of torture." William Glaberson, U.S. Judge Challenges Evidence on a Detainee, N.Y. Times, July 23, 2009, at A22 (internal quotation marks omitted). In August, Jawad was released in Kabul. See Associated Press, Guantánamo Detainee Released, N.Y. Times, Aug. 24, 2009, at A8. Thereafter, Jawad announced plans to seek redress against the U.S. government. Heidi Vogt, Young Afghan Freed From Guantanamo to Sue US Gov't, Seattle Times, Aug. 27, 2009, at http://seattletimes.nwsources.com/html/nationworld/2009754090_apasafghan_guantanamoprisoner.html (on file with the *Columbia Law Review*).

In the fall of 2009, Congress offered different parameters for prosecution through military commissions as well as a revised definition of "unprivileged enemy belligerent[s]"—to be individuals who have "engaged in hostilities" or "purposefully and materially supported hostilities against the United States or its coalition partners," or who were members of al Qaeda when they committed an alleged offense prosecutable under its parameters. MCA of 2009 § 948a.

between the courts and the other branches, judges were able to moderate the harshness of the confinement regime and engage in serious oversight of the decisions on detention.

Congress pressed back, but the Court continued to identify the constitutional mandate for the judiciary, prompting the first-ever holding of a violation of the Suspension Clause. After *Boumediene*, district judges admirably took up the task of oversight. They have shaped a common law of habeas corpus rights and remedies as, in dozens of rulings, district and appellate judges mined the parameters of lawful confinement for alleged enemy combatants. In several instances, the lower courts found insufficient evidence to continue the detention,¹⁷³ and on occasion, the government did not contest those rulings.¹⁷⁴ Thus, through an incremental approach, life-tenured judges made plain that 9/11 detainees were not “outside the law”¹⁷⁵ because the Court drew “the line when it needed to be drawn.”¹⁷⁶

The problems of release that have ensued, on this account, come primarily from diplomatic challenges. Various detainees—such as a group of Uighurs fleeing their country of origin—have no easy berth. Yet judges have continued to be vigilant. For example, a district judge has ruled that, if repatriation or other countries were not available for relocation, a group of Uighurs should be released in the United States.¹⁷⁷ The D.C. Circuit then concluded that the lower court lacked the power to order entry into the United States because border-crossing was a decision committed to immigration authorities.¹⁷⁸ In 2009, the Supreme Court

173. See Hafetz & Manes, *Guantánamo Detainee Judgments*, *supra* note 25.

174. After the *Parhat* decision in the D.C. Circuit, the “government saw no material differences in its evidence against the other Uighurs, and therefore decided that none . . . should be detained as enemy combatants.” *Kiyemba*, 555 F.3d at 1024. For a discussion of *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008), see *supra* note 156 and accompanying text.

175. See, e.g., Fallon, *Habeas Corpus*, *supra* note 26, at 355–57.

176. Vladeck, *The Long War*, *supra* note 26, at 913.

177. *Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d at 43.

178. *Kiyemba*, 555 F.3d. 1022. Judge Randolph, for himself and Judge Henderson, held that the district court could not order the inclusion of these persons in the United States. *Id.* at 1029. Judge Rogers, who concurred, objected that the majority’s view was not “faithful to *Boumediene*,” nor in compliance with the Great Writ, but that the release order was “prematurely” issued. *Id.* at 1032 (Rogers, J., concurring). She also noted that the Executive had not filed returns on petitions. *Id.* The detainees then petitioned for Supreme Court review, in part predicated on the claim that Article III courts could not be “powerless to remedy indefinite and illegal Executive detention.” Petition for Certiorari at 1, *Kiyemba*, 77 U.S.L.W. 3237, 78 U.S.L.W. 3010, 78 U.S.L.W. 3233, 78 U.S.L.W. 3237 (No. 08-1234), 2009 WL 934097. In response, the government argued that the lower court lacked the power to order transfer to the United States “outside of the framework of the federal immigration laws.” Letter from Elena Kagan, Solicitor Gen. of the U.S., to William K. Suter, Clerk, U.S. Supreme Court (Sep. 23, 2009), available at <http://www.scotusblog.com/wp/wp-content/uploads/2009/09/SG-letter-re-Kiyemba-9-23-091.pdf> (on file with the *Columbia Law Review*). But, the government explained, it had helped some of the detainees resettle in Bermuda. *Id.* Further, the government reported it was “working diligently to find an appropriate place to resettle the remaining Uighur detainees.” *Id.*

agreed to take up this issue, to decide the scope of federal court remedial authority under the writ.¹⁷⁹ As of this writing, the government continues its relocation efforts, a measure that would obviate the need to explain to the Court why individuals found eligible for habeas remain detained.¹⁸⁰ In addition to releases through court action, scores more had been sent out of Guantánamo by virtue of executive decisions made “in the shadow of the law.” The 9/11 litigation could thus be seen as a success but one driven by the exceptional actions of all three branches—therefore offering little guidance on Court/Congress/Executive interactions under different circumstances.

An alternative interpretation is that the Court’s rulings were painfully slow, enabling a regime of preventive detention and doing relatively little to alter the conditions of those in detention, to reorient popular understandings about treatment to be accorded such detainees, or to provide remedies for individuals wrongfully detained or abused. This view suggests that the rulings ought not be proffered as jurisprudential models because, in several respects, the decisions have had a relatively minimal impact. The 2004 decision in *Hamdi*¹⁸¹ provides a first example. There, the Court departed from the traditional remedial order in habeas proceedings—that either a person be tried in accordance with due process within a specified period of time or released. Instead, the plurality read the 2001 AUMF to license what has proved over the years to be preventive detention.¹⁸² Moreover, the Court did not exercise its prerogative¹⁸³ to give much direction on the procedural parameters of the pro-

179. See *Kiyemba*, 555 F.3d 1022.

180. Soon after the Supreme Court granted certiorari, six of the thirteen remaining Uighurs were transferred from Guantánamo and released in Palau, an archipelago in the Pacific Ocean. Lyle Denniston, *Six Uighurs Resettled*, SCOTUSBlog, Oct. 31, 2009, at <http://www.scotusblog.com/wp/six-uighurs-resettled/> (on file with the *Columbia Law Review*). If all the individuals seeking relief are relocated outside of the United States, the case could be mooted. See Adam Liptak, *Justices to Hear Appeal From Uighurs Held at Guantánamo*, N.Y. Times, Oct. 21, 2009, at A14.

181. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

182. See *id.* at 517 (plurality opinion). As discussed *supra* note 93, the plurality decision did impose a limiting condition on its reading of the AUMF: “indefinite detention for the purpose of interrogation is not authorized.” *Hamdi*, 542 U.S. at 521 (plurality opinion). Thus, at some point, its interpretation of the AUMF as supporting detention could “unravel.” *Id.* In contrast, Justices Souter and Ginsburg thought *Hamdi*’s detention illegal, in that it violated the Non-Detention Act, 18 U.S.C. § 4001(a) (2000). That specific federal statute, in their view, was not overridden by the generality of the AUMF; they joined the plurality insofar as it required procedural protections. *Hamdi*, 542 U.S. at 540 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment, joined by Ginsburg, J.).

183. In earlier cases, the government had argued that deference was owed to the legislature (and potentially the executive branch) on the quantum of process due. That view was rejected in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542–46 (1985). Thus, the Court has taken it upon itself to determine when liberty interests, and even certain forms of property interests, exist as well as to decide the kind of process appropriate to particular kinds of interests. See, e.g., *Sandin v. Conner*, 515 U.S. 472

cess it insisted was “due.” Justice O’Connor’s decision for the plurality upheld a burdenshifting system, which permitted “a presumption in favor of the Government’s evidence.”

The opinion’s optimism that such evidentiary rules would suffice to prevent the “errant tourist, embedded journalist, or local aid working” to show “military error” in detention has not (as exemplified by the *Uighers*) proved warranted.¹⁸⁴ Further, while calling for a “neutral decisionmaker,” the plurality did not rule out deployment of individuals within the chain of the military to make classification decisions.¹⁸⁵ Moreover, instead of indicating that the delineated due process rights flowed to persons detained outside the theatre of war by the United States, the plurality described the entitlement as limited to individuals, such as *Hamdi*, who were “citizen[s] held in the United States.”¹⁸⁶

In hindsight, this approach could be read as minimalism at its worst,¹⁸⁷ resulting in glacial changes that have been criticized by a range of commentators starting from very different premises. The Honorable Richard Leon, sitting in the District of Columbia, had (in rulings before the 2008 decision of *Boumediene*) registered his views that federal judges had no authority over “non-resident aliens” held at Guantánamo and that no “viable theory” provided them with a basis for relief.¹⁸⁸ In the remand

(1995), discussed *infra* notes 277–281. Criticism of the Court’s approach, both in terms of its theoretical underpinnings and its directives modeling process on court-based traditions, are set forth in Jerry L. Mashaw, *The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. Chi. L. Rev. 28, 37–57 (1976).

184. *Hamdi*, 542 U.S. at 534 (plurality opinion).

185. *Id.* at 509, 537–38. The plurality was insistent that “interrogation by one’s captor . . . hardly constitutes a constitutionally adequate factfinding before a neutral decisionmaker.” *Id.* at 537.

186. *Id.* at 509, 533. Justices Scalia and Stevens viewed the detention of citizens such as *Hamdi* to be unconstitutional under the Suspension Clause and dissented. *Id.* at 554 (Scalia, J., dissenting, joined by Stevens, J.). Justice Thomas also dissented on the view that detention was permissible. *Id.* at 579 (Thomas, J., dissenting).

187. See Owen Fiss, *The Perils of Minimalism*, 9 *Theoretical Inquiries L.* 643, 646–48 (2008); Jerry L. Mashaw, *Due Process of Governance: Terror, the Rule of Law, and the Limits of Institutional Design*, 22 *Governance: Int’l J. Pol’y Admin. & Institutions* 353, 358, 363 (2009) (discussing lack of “clear specification” of process required and lack of guidance on substantive rights). The virtues of minimalism are examined by Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999); Cass R. Sunstein, *Minimalism at War*, 2004 *Sup. Ct. Rev.* 47.

188. As explained in a 2005 decision, Judge Leon found no “viable” theories that gave a court the authority to “issue a writ of habeas corpus challenging the legality of the detention of non-resident aliens captured abroad and detained outside the territorial sovereignty of the United States, pursuant to lawful military orders, during a Congressionally authorized conflict.” *Khalid v. Bush*, 355 F. Supp. 2d 311, 314 (D.D.C. 2005), vacated and dismissed by *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007). The court in *Khalid* read Supreme Court case law to conclude that such individuals had “no cognizable constitutional rights,” and specifically interpreted *Rasul* narrowly, to relate only to statutory habeas corpus. *Id.* at 320–23; see also *Al Alwi v. Bush*, 593 F. Supp. 2d 24, 28–29 (D.D.C. 2008) (concluding government did not need to prove individual “actually

of *Boumediene* in November 2008, however, Judge Leon not only granted habeas relief to five of six Algerian men then held at Guantánamo (including Lakhdar Boumediene, the lead plaintiff), but also called on the government not to prolong the detention by filing an appeal.¹⁸⁹ Further proceedings, he declared, would only strip the detainees of “another 18 months to two years of their lives.”¹⁹⁰ He wrote, “[s]even years of waiting for our legal system to give them an answer to a question so important, in my judgment, is more than plenty.”¹⁹¹

Another *cri de coeur* comes from Professor Jenny Martinez, who had litigated on behalf of detainees. Martinez focused on the degree to which the “war on terror” had produced “profound infringements of individual rights;”¹⁹² she detailed that detainees had been subjected to torture, other forms of cruel treatment, and prolonged imprisonment or deportation.¹⁹³ And yet, in the years after September 11, 2001, court decisions had rarely addressed directly the claims of violation of substantive rights.

Instead, the judgments had focused on process, including whether particular courts had jurisdiction to entertain claims, whether individuals had standing to bring challenges, whether the proper branch of government had authority to issue a particular policy, whether evidence was protected from discovery by the state secrets privilege, and the like.¹⁹⁴ Professor Martinez wrote before the decision in *Boumediene* but her thesis could be reiterated in that context. Despite the majority’s evident discomfort and concern with the CSRTs process, the Supreme Court did not rule out administrative decisionmaking nor specify how to restructure procedures to be constitutionally adequate.¹⁹⁵ Rather, the Court again

us[ed] arms against U.S. or coalition forces” for that person to be classified as an enemy combatant); *Sliti v. Bush*, 592 F. Supp. 2d 46, 51 (D.D.C. 2008) (denying habeas relief because government “established by a preponderance of the evidence that . . . petitioner traveled to Afghanistan as an al Qaeda recruit and trained at the local military training camp”).

189. Transcript of Open Habeas Opinion Hearing at 28–30, *Boumediene v. Bush*, 579 F. Supp. 2d 191 (D.D.C. 2008) (No. CV04-1166).

190. *Id.* at 30.

191. *Id.* at 28–29. While noting the government’s right to appeal, Judge Leon commented that he, too, had a right to appeal to the leadership of the “Department of Justice, Department of Defense, and the CIA and other intelligence agencies.” *Id.* at 28. “My appeal to them is to strongly urge them to take a hard look at the evidence, both presented and lacking, as to these five detainees.” *Id.*

192. Martinez, *supra* note 26, at 1015.

193. Martinez’s critique was broader, objecting to the failure of the Court to curb governmental surveillance of the public’s private phone calls and other personal records. *Id.* at 1015, 1031. Martinez’s concerns parallel those of Stephen Vladeck. See Vladeck, *The Long War*, *supra* note 26, at 897–98 (lamenting Supreme Court’s passivity in “missing opportunities to identify limits on the government’s authority in a number of cases”).

194. Martinez, *supra* note 26, at 1015.

195. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2266 (2008) (“We do not endeavor to offer a comprehensive summary of the requisites for an adequate substitute for habeas corpus.”). The *Boumediene* opinion continues, noting that “[a]lthough [the Court] make[s] no judgment as to whether the CSRTs, as currently constituted, satisfy due process

ceded initial judgments, including the crafting of procedures for making judgments to executive officials overseen by lower court judges.¹⁹⁶

As discussed above, the praiseworthy analysis of the Court's 9/11 decisions underscores the resiliency of the Supreme Court and the promptness with which, after *Boumediene*, the lower courts have responded. The critical approach argues that a full accounting requires looking at more cases, ranging from rulings on relief other than habeas to the claims that the Supreme Court did not reach, either through jurisprudential doctrines or by declining to grant review. The question of indefinite preventive detention in the United States was posed by Ali Saleh Kahlal al-Marri, an alien who had entered the country lawfully.¹⁹⁷ The Court, however, concluded that, because of the government's decision to transfer al-Marri out of military custody and indict him in federal district court, the case was moot.¹⁹⁸

A second decision, *Iqbal*,¹⁹⁹ addressing the question of remedies beyond a plaintiff's release and decided on its merits, provides further arguments for critiquing the Court's response to 9/11. A Pakistani national, Javid Iqbal, had been detained in the Metropolitan Detention Center (MDC) in New York in November 2001 because of charges that his identification documents were fraudulent. For several months, Iqbal was put in solitary confinement in a special housing unit.²⁰⁰ Released after more

standards . . . there is considerable risk of error in the tribunal's findings of fact." *Id.* at 2270. The Court also found that "[t]he Executive is entitled to a reasonable period of time to determine a detainee's status before a court entertains that detainee's habeas corpus petition," and that "[e]xcept in cases of undue delay, federal courts should refrain from entertaining an enemy combatant's habeas corpus petition at least until after the Department, acting via the CSRT, has had a chance to review his status." *Id.* at 2276.

196. *Id.* at 2277. The Court also left open the route to the Court of Appeals for the District of Columbia to review the decisions, but the D.C. Circuit concluded thereafter that the provisions in the DTA of 2005 that shaped that provision could not be severed from the language precluding habeas jurisdiction. See *Bismullah v. Gates*, 551 F.3d 1068, 1070–71 (D.C. Cir. 2009).

197. *Al-Marri v. Pucciarelli*, 534 F.3d 213, 217 (4th Cir. 2008) (per curiam) (Motz, J. concurring), cert. granted, 129 S. Ct. 680 (2008), vacated and remanded with instructions to dismiss as moot sub nom. *Al-Marri v. Spagone*, 129 S. Ct. 1545 (2009); see also *Padilla v. Rumsfeld*, 352 F.3d 695, 701–11, 717–18 (2d Cir. 2003), vacated as moot sub nom. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

198. *Al-Marri's* lawyers argued that it was not moot because the government had not "renounced the legal authority under which al-Marri was designated and detained as an 'enemy combatant' and has made no commitment that al-Marri will not be re-designated and re-detained as an 'enemy combatant' in the future." Brief Opposing Motion to Dismiss at 1, *Al-Marri*, 129 S. Ct. 1545 (No. 08-368). Thereafter *Al-Marri* pled guilty to one count of conspiracy to provide material support to Al Qaeda, and the government dropped the second count. See John Schwartz, *Plea Agreement Reached with Agent for Al Qaeda*, N.Y. Times, May 1, 2009, at A16.

199. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

200. *Id.* at 1943. Iqbal was arrested on November 2, 2001, and was detained "in the MDC's general prison population until January 8, 2002, when he was removed from the general prison population and assigned to a special section of the MDC known as the Administrative Maximum Special Housing Unit ('ADMAX SHU'), where he remained

than a year, Iqbal sought damages for the violence to which he alleged he had been subjected.²⁰¹ Iqbal also claimed that Attorney General John Ashcroft, FBI Director Robert Mueller, and many other officials had violated his constitutional rights to equal protection and free exercise by relying on Iqbal's race, national origin, and Muslim faith to designate him a person of "high interest" and then to impose abusive conditions of confinement.²⁰² Iqbal's complaint described that the "lights in his cell were left on almost 24 hours a day, and MDC staff deliberately turned on air conditioning during the winter and heating during the summer." He also alleged that he "was not provided with adequate food and lost 40 pounds while in custody."²⁰³ Further, he alleged that he had been "brutally beaten by MDC guards on two occasions," "denied medical care for two weeks even though he was in excruciating pain," and "subjected to daily strip and body-cavity searches."²⁰⁴

At issue before the Supreme Court were the sufficiency of the complaint and the immunity of high-level government officials.²⁰⁵ In *Boumediene*, the five-person majority (in an opinion by Justice Kennedy) had insisted that the precept of separation of powers required access to courts through habeas corpus for detainees. In contrast, the *Iqbal* five-person majority decision (also written by Justice Kennedy) made bringing damage claims—at least against government officials (and arguably in general for all kinds of plaintiffs)—more difficult.²⁰⁶ *Iqbal* shaped a new rule for assessing pleadings: Before defendants were to be required to

until he was reassigned to the general prison population at the end of July 2002." *Iqbal v. Hasty*, 490 F.3d 143, 148 (2d Cir. 2007). In April 2002, Iqbal pled guilty; he was released from the ADMAX SHU before being sentenced in September. In January 2003, Iqbal was released and "was removed to Pakistan." *Id.* at 149.

201. Second Amended Complaint and Jury Demand at 4, 44, *Elmaghraby v. Ashcroft*, No. 04 CV 1809, 2005 U.S. Dist. LEXIS 21434 (E.D.N.Y. Sept. 27, 2005).

202. *Elmaghraby*, 2005 U.S. Dist. LEXIS 21434, at *2–*4. Other officials named in the complaint included Michael Rolince, former Chief of the Federal Bureau of Investigation's International Terrorism Operations Section, Counterterrorism Division; Kenneth Maxwell, former Assistant Special Agent in Charge, New York Field Office, Federal Bureau of Investigation; and employees of the Federal Bureau of Prisons at national or regional levels—Kathleen Hawk Sawyer, former Director; David Rardin, former Director of the Northeast Region; Michael Cooksey, former Assistant Director for Correctional Programs; individuals running the Metropolitan Correction Center; Dennis Hasty, former Warden; Michael Zenk, Warden; Linda Thomas, former Associate Warden of Programs; Associate Warden Sherman, Associate Warden of Custody; and additional corrections officers. Petitioning to the Supreme Court were only John Ashcroft and Robert Mueller, both of whom challenged the sufficiency of the complaint and the degree to which they could be held personally responsible. See Petition for a Writ of Certiorari, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2008) (No. 07-1015).

203. *Iqbal*, 490 F.3d at 149.

204. *Id.*

205. See, e.g., Brief for the Petitioners at I, *Iqbal*, 129 S. Ct. 1937 (No. 07-1015).

206. The majority wrote that a *Bivens* action could not be brought against government officials on a theory of "supervisory liability" and that allegations of knowledge of the actions of subordinates—without more—were not sufficient to plead that the named defendants had the requisite intent to discriminate. *Iqbal*, 129 S. Ct. at 1949.

answer, district judges were to evaluate the “plausibility” of allegations based on “judicial experience and common sense.”²⁰⁷

The Court also took the occasion to narrow the possibility of asserting rights of action implied from the Constitution’s text;²⁰⁸ the decision insulated senior government officials from liability. The allegations in the complaint alleged that Attorney General Ashcroft had been the “principal architect” of the invidious policy and that FBI Director Mueller had been “instrumental” in adopting it.²⁰⁹ Further, various official reports provided supporting evidence of government-directed mistreatment of 9/11 detainees. But the majority concluded that Iqbal’s allegations did not suffice to state claims against Ashcroft and Mueller: “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”²¹⁰

Thus, what could have been understood to be the core premise of the majority decision in *Boumediene*, that courts played a critical role by standing between individuals and the Executive, did not carry forward—at least at the Supreme Court—to protect detainees such as Mr. Iqbal who, once released, sought redress.²¹¹ *Iqbal* means that *Boumediene* is confined to the unusual circumstances of pretrial habeas corpus, forecast, perhaps by the stress placed in the *Boumediene* opinion on the unique history of habeas corpus as one of the “few safeguards” specified in the Constitution prior to the addition of the Bill of Rights.²¹² *Iqbal* could

207. *Id.* at 1949–50. The majority remanded for the lower courts to apply the new test. *Id.* at 1954. *Iqbal* followed the path laid out by *Bell Atlantic v. Twombly*, 550 U.S. 544, 556 (2007).

208. *Iqbal*, 129 S. Ct. at 1947–48. The majority stated that “implied causes of action are disfavored.” *Id.* at 1948. Further, the Court noted that it had not recognized a cause of action implied “under the Free Exercise Clause” and implicitly would be unlikely to do so. *Id.* The Court previously had frowned upon implied constitutional causes of action. See, e.g., *Wilkie v. Robbins*, 127 S. Ct. 2588 (2007).

209. *Iqbal*, 129 S. Ct. at 1944, 1951.

210. *Id.* at 1949. Further, the allegations were not “plausible” because nondiscriminatory reasons could have supported Iqbal’s classification. *Id.* at 1951.

211. The impact of *Iqbal* is debated, with some lower courts finding that it does not require dismissal of claims, including one lodged against former Attorney General Ashcroft. See, e.g., *al-Kidd v. Ashcroft*, 580 F.3d 949, 974–78 (9th Cir. 2009). *Al-Kidd*, a U.S. citizen, was seized at Dulles Airport, confined for days in “high security cells,” and placed under supervision for fifteen months, by which time he had lost his job and separated from his wife. *Id.* at 951. The government acted based on alleged authority to hold him through the “federal material witness statute.” *Id.* at 954. Refusing to dismiss the complaint, the Ninth Circuit explained, “unlike Iqbal’s allegations, *al-Kidd*’s complaint ‘plausibly suggest[s]’ unlawful conduct,” by providing “specific statements that Ashcroft himself made regarding the post-September 11th use of the material witness statute” to take “suspected terrorists off the street.” *Id.* at 975. As of this writing, the government’s petition for rehearing en banc is pending before the court. See *Petition for Rehearing En Banc*, No. 06-36059 (9th Cir. Oct. 19, 2009).

212. “[P]rotection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights.” *Boumediene v. Bush*, 128 S. Ct. 2229, 2244 (2008). The constitutional parameters of the Suspension Clause have occasioned debate. See generally Trevor W. Morrison, *Hamdi’s Habeas*

limit individual accountability and civil liability for the harms imposed during detention—thereby offering a measure of protection for those involved in the ongoing program of preventive detention that, functionally, has been put into place.²¹³

Moreover, as Stephen Vladeck counsels, to assess the import of the Supreme Court's jurisprudence on 9/11 requires consideration of what the Court did not decide when it declined to accept jurisdiction over petitions raising important substantive claims. The Court refused to take on issues such as the closure of immigration hearings, the definition of material witnesses, the reach of the state secrets privilege, and the legality of wiretapping.²¹⁴ The mootness of *al-Marri*, the new doctrinal limits on rights assertion under *Iqbal*, the claims not explored underscore the limited nature of habeas corpus as a remedy. Not only has the case law not confronted the horrific experiences of some detainees, lower courts have generally refused to address requests to ameliorate conditions of confinement. Detainees have, for example, generally been rebuffed when seeking less restrictive confinement at Guantánamo, blankets and mattresses, and a ban on forced feeding.²¹⁵ Habeas's remedy of release (even when implemented) has not been responsive to the array of injuries experienced due to the detention.

Thus, as Richard Fallon put it, the Supreme Court's 9/11 decisions operate "at the margins,"²¹⁶ and one could then add, distressingly so. While painful to acknowledge, the Torture Memos (even after being withdrawn) could be seen to have produced a more profound change on the ground, not only for the detainees but also in popular discourse and in political and legal theory, than the Supreme Court habeas decisions. As a 2006 volume's title—*The Torture Debate*²¹⁷—makes plain, what might have

Puzzle: Suspension as Authorization?, 91 Cornell L. Rev. 411 (2006); Trevor W. Morrison, Suspension and the Extrajudicial Constitution, 107 Colum. L. Rev. 1533 (2007); Amanda L. Tyler, Suspension as an Emergency Power, 118 Yale L.J. 600 (2009).

213. The impact of detention does not, of course, end with release. See generally Laurel E. Fletcher & Eric Stover, *The Guantánamo Effect: Exposing the Consequences of U.S. Detention and Interrogation Practices* (2009).

214. Vladeck, *The Long War*, supra note 26, at 913–17. Examples included *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007), cert. denied, 128 S. Ct. 373 (2007); *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007), cert. denied, 128 S. Ct. 1334 (2008).

215. See *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-0442, 580 F. Supp. 13 (D.D.C. 2008) (less restrictive confinement); 2008 WL 4725712 (D.D.C. 2008) (less restrictive visiting for counsel); 577 F. Supp. 2d 312 (D.D.C. 2008) (blanket and mattress); *Al-Adhai v. Obama*, 596 F. Supp. 2d 211 (D.D.C. 2009) (forced feeding).

216. Fallon, *Habeas Corpus*, supra note 26, at 367 & n.63. As he noted there, he had (along with Daniel Meltzer) previously argued that constitutional doctrine supported rights of access of detainees at Guantánamo Bay to civilian courts, and further, that American citizens had constitutional rights not to be detained indefinitely. Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L. Rev. 2029, 2031 (2007).

217. *The Torture Debate in America*, supra note 109.

been understood to be beyond “debate” has become normatively plausible.

III. THE CORE AND THE COMMONPLACE PHENOMENA OF POLICING, INTERROGATING, AND DETAINING

I have outlined various arguments that could be deployed to cabin the import of the 9/11 law. But consider the key elements that form the predicate for 9/11 detention: interrogation and the need to get information from people who may well be planning to or have done terrible harm to others; holding some set of people for prolonged interrogation and creating incentives for them to provide information; sorting out people who are guilty from those who are innocent; deciding who to detain, and dealing over long periods of time with people determined to be egregiously dangerous, even as they too are in need of safety or discipline while confined. These challenges are not *sui generis* to 9/11 but are variations on the core problems of criminal law and of national security more generally.

Turn to the revelations of terrible treatment of 9/11 detainees. Harsh treatment of detainees by police and correctional officials, some of which rises to cruel, inhuman, degrading, and even torturous behavior, can be found stateside as well as offshore.²¹⁸ The brutality of super security prisons—“supermax”—detailed below, imposes indefinite postconviction solitary confinement on tens of thousands of prisoners. The streams of facts emerging about abuse at Guantánamo are radical exemplars of the illegal and immoral use of the state’s power but have precedents and parallels in other arenas in the United States.

Another strand potentially rendering 9/11 law exotic is the fear of war. Yet the impact of war can be found in case law about ordinary criminal defendants. As I sketch below in discussing the Supreme Court decisions leading up to *Miranda v. Arizona*,²¹⁹ new interpretations of constitutional rights have long been developed in a complex relationship with foreign affairs and wars, both threatened and active. The effects of World War II and the Cold War influenced the expansion of criminal defendants’ rights between the 1940s and the 1960s, as judges sought to distinguish the treatment accorded by the United States from that of totalitarian countries. In addition, during that era, the term “dignity”—so central to the 1948 United Nations Declaration of Human Rights but not found in the text of the United States Constitution—was domesticated through interpretation of the Bill of Rights.²²⁰ During several decades of the

218. See James Forman, Jr., Exporting Harshness: How the War on Crime Has Made the War on Terror Possible, 33 N.Y.U. Rev. of L. & Soc. Change 331, 350–52 (2009); John T. Parry, Torture Nation, Torture Law, 97 Geo. L.J. 1001, 1022–28 (2008).

219. 384 U.S. 436 (1966).

220. See Judith Resnik & Julie Chi-hye Suk, Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty, 55 Stan. L. Rev. 1921, 1933–58 (2003) [hereinafter Resnik & Suk, The Role of Dignity]. While the Supreme Court had many

twentieth century, new commitments to racial equality coupled with substantial anxiety about crime and safety, both local and global, generated revised understandings of the Fourth, Fifth, Sixth, and Fourteenth Amendments. The doctrine stemmed from an interaction between American practices and those of other countries. At times, foreign law provided a negative example, as efforts were made to distinguish the United States from regimes described as totalitarian. In other instances, transnational premises were embraced or abjured—either because they were seen as congruent *with* or as colonizing *of* American constitutional norms.

Further, the kinds of critiques of 9/11 law—that it has provided too narrow a band of remedies focused on process and failed to elaborate a body of constitutional constraints on detention and confinement²²¹—can be leveled against detention law more generally. Indeed, the Supreme Court's pattern in the 9/11 cases—a modicum of oversight coupled with a great deal of deference to officials in other branches of government, even when the Court is faced with evidence of violence done to detainees—was foreshadowed in the Court's dealings with police and prison officials. The tension among tiers within the federal judiciary is also patent across sets of detainees. In several cases involving ordinary defendants or prisoners, lower court judges, close to the facts, have imposed substantive constraints on the behavior of custodians but those judgments were subsequently undone on appeal.

Similarly, efforts by Congress to limit access to courts span detention contexts. All the branches of government have created rules imposing judicial distance and, at times, disengagement,²²² resulting in a failure to stop and a refusal to impose liability for abuses in detention. In short, the recent 9/11 law, produced through a three-branch interaction, is continuous with judgments made about the treatment and confinement of various sets of detainees over the last sixty years. Therefore, the 9/11 decisions are exemplary of what Monaghan termed the “timeless” questions within the federal courts canon, and hence offer several lessons for con-

times referred to “dignity” before then, it was in the context of institutional protections, such as “the peace and dignity of the state,” rather than the Bill of Rights. *Id.* at 1934–42.

221. Critiques of the Court akin to that of Martinez, *supra* notes 192–194, for using narrow conceptions of process to miss larger unfairness are paralleled in the domestic context. Tracey Meares, for example, has argued that the Supreme Court's decision announcing a right to counsel for felons under the right to counsel in the Sixth Amendment has not produced an appropriate level of oversight on the overall substantive fairness of trials. See Tracey L. Meares, What's Wrong with *Gideon*, 70 U. Chi. L. Rev. 215, 215–16 (2003); see also Charles D. Weisselberg, Mourning *Miranda*, 96 Cal. L. Rev. 1519 (2008) [hereinafter Weisselberg, Mourning *Miranda*], discussed *infra* notes 429, 450–456 and accompanying text.

222. Richard Fallon called for understanding the Court as a “they,” not an “it.” Fallon, Habeas Corpus, *supra* note 26, at 384–85. In addition, disaggregation is also needed across the tiers of the federal judiciary. See generally Vicki Jackson, Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy, 86 Geo. L.J. 2445, 2452–55 (1998).

stitutional scholars about the relationship between judges, Congress, and populations detained through executive action.

A. *The Cold War Predicates of Miranda v. Arizona*

A few examples of decisions culminating in the 1966 Supreme Court ruling of *Miranda v. Arizona*²²³ illuminate how American law came to struggle with coercive detentions aimed at extracting information and confessions. In 1943, the United States Supreme Court insisted on rights of individuals, detained by the police, to be brought before a neutral third party.²²⁴ The majority opinion in *McNabb v. United States*, written by Justice Frankfurter, stressed the need for a prompt appearance because a “democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process.”²²⁵ In 1944, Justice Black reiterated that concern, as he distinguished the United States from “certain foreign nations,” who would “wring from [detainees’] confessions by physical and mental torture.”²²⁶

Less than a decade later, the Court replayed the theme of a democratic—as opposed to a “despotic”—criminal justice system. The 1951 decision of *United States v. Carignan*²²⁷ upheld the reversal of a conviction based on the grounds that a defendant had not been permitted to testify before a jury about the “involuntary nature” of his confession.²²⁸ Although no evidence appeared “of violence, of persistent questioning, or of deprivation of food or rest,”²²⁹ the defendant confessed only after he was assured by a court officer that no one had been hung in the past twenty-seven years.²³⁰ In a concurring opinion, Justice William O. Douglas detailed the disturbing degree of power held by jailors:

[T]he accused is under the exclusive control of the police, subject to their mercy, and beyond the reach of counsel or of

223. 384 U.S. 436.

224. *McNabb v. United States*, 318 U.S. 332, 342 (1943).

225. *Id.* at 343. The use of the term “dignity” in relationship to individual rights was one of the earliest deployments of the word in that context. Resnik & Suk, *The Role of Dignity*, *supra* note 220, at 1934. Various legal commentaries of the era underscored the importance of distinguishing the United States from the oppressive Russia. See, e.g., Jerome Hall, *Police and Law in a Democratic Society*, 28 *Ind. L.J.* 133 (1953). Hall explained that “private interrogation of suspects immediately after their arrest is essential in any system of effective detection. And, at the same time, one cannot avoid the duty to subject law-enforcement, including interrogation, to democratic ideals.” *Id.* at 176.

226. *Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944). That case concluded that “[t]he Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession.” *Id.*

227. 342 U.S. 36 (1951).

228. Harvey Louis Carignan, who had been in custody in the Territory of Alaska for another crime, was identified in a lineup and then questioned about a murder. *Id.* at 39–40. After time alone with a priest, Carignan confessed to some acts but not to the murder. *Id.* at 40–41.

229. *Id.* at 40.

230. *Id.* at 40–41.

friends. What happens behind doors that are opened and closed at the sole discretion of the police is a black chapter in every country—the free as well as the despotic, the modern as well as the ancient.²³¹

Although, Justice Douglas explained, coercive interrogations might be efficient, “[w]e in this country . . . early made the choice—that the dignity and privacy of the individual were worth more to society than an all-powerful police.”²³²

One can find a similar reference to American values in a decision of the Second Circuit during the mid-1950s, when that court provided federal postconviction relief for Santo Caminito, who had been interrogated while held “incommunicado” for twenty-seven hours.²³³ More than a decade earlier, Caminito had been convicted, based in large part on his confession of felony murder, and sentenced with his two codefendants to life imprisonment.²³⁴ Looking back, the federal appellate court criticized the New York police for “refusing to allow his lawyer, his family, and his friends to consult with him,” and for questioning him continually in a cell that made “sleep virtually impossible.”²³⁵ Judge Jerome Frank explained that “all decent Americans soundly condemn satanic practices,” which were methods used by “totalitarian regimes” and did not “comport with

231. *Id.* at 46 (Douglas, J., concurring). Justice Douglas also commented that the “time-honored police method for obtaining confessions is to arrest a man on one charge (often a minor one) and use his detention for investigating a wholly different crime.” *Id.* Under such circumstances, the “police can have access to the prisoner day and night.” *Id.* Justice Douglas highlighted the 1943 decision of *McNabb v. United States*, 318 U.S. 332 (1943), finding unconstitutional the detention of individuals without an arraignment. *Carigan*, 342 U.S. at 46–47 (Douglas, J., concurring).

232. *Carigan*, 342 U.S. at 46 (Douglas, J., concurring). Other decisions at various levels of courts adverted to the oppressions of totalitarianism. See, e.g., *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 218 (1953) (Jackson, J., dissenting). The majority rebuffed a constitutional challenge by an alien to detention, while the dissent objected and invoked both the English history of habeas corpus as well as the Nazi regime’s system of “protective custody.” *Id.* at 218–19, 225–26.

233. *United States ex rel. Caminito v. Murphy*, 222 F.2d 698, 700–01 (2d Cir. 1955). Caminito’s codefendants were Frank Bonino and Charles Noia. A rich history of the case is provided in Larry Yackle, *The Story of Fay v. Noia: Another Case About Another Federalism*, in *Federal Courts Stories*, *supra* note 11, at 192 [hereinafter Yackle, *Fay v. Noia*]. As Yackle noted, the bench that decided the case was comprised of “three titans”: Jerome Frank, Charles E. Clark (both formerly on the faculty at Yale Law School), and William H. Hastie, who had been the dean at Howard University Law School and was “then the most prominent African American jurist in the country.” *Id.* at 202.

234. The details of the murder of Murray Hammeroff and the interrogation of the codefendants are detailed in Yackle, *Fay v. Noia*, *supra* note 233, at 197.

235. *Caminito*, 222 F.2d at 701. “Female undercover agents . . . had posed as witnesses . . . [who] purported to identify” the codefendants, making the detainees believe that resistance to questioning would be “futile.” Yackle, *Fay v. Noia*, *supra* note 233, at 196. Alibi witnesses, as well as the defendant Caminito, testified. Noia, who had previously been convicted of robbery, did not testify. *Id.* at 197.

the barest minimum of civilized principles of justice.”²³⁶ Fourteen years after the conviction, Caminito was released, followed soon thereafter by one of his codefendants, Frank Bonino.²³⁷

That 1955 opinion, in turn, paved the way for the other codefendant, Charles Noia, to be heard by the Supreme Court, which issued an opinion, written by Justice Brennan in 1963. The Court concluded that Noia’s failure to appeal, as his codefendants had, would not serve as an absolute bar (an “independent and adequate state ground” in Federal Courts parlance²³⁸) to federal habeas corpus review.²³⁹ In *Fay v. Noia*, the Brennan opinion concluded that absent a deliberate bypass by a criminal defendant, state procedural errors should not cut off access to the federal courts.²⁴⁰

The reference to despotic regimes was reiterated just a few years later in the briefing on behalf of Ernesto Miranda. His lawyer, John Frank, quoted the words Justice Douglas had written in 1951 in his *Carignan* concurrence about the totalizing powers of the jailer.²⁴¹ Frank added:

We are not talking with some learned historicity about the *lettre de cachet* of pre-Revolutionary France or the secret prisons of a distant Russia. We are talking about conditions in the United States, in the Twentieth Century, and now.²⁴²

As is familiar, these arguments carried the day, resulting in the 1966 Supreme Court *Miranda* ruling, which has served as a major symbol of a

236. *Caminito*, 222 F.2d at 701. Judge Charles Clark concurred but objected specifically to his colleagues’ criticism of the police. *Id.* at 706 (Clark, J., concurring).

237. Yackle, *Fay v. Noia*, *supra* note 233, at 204.

238. See generally Henry Paul Monaghan, Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases, 103 Colum. L. Rev. 1919, 1947–56 (2003) [hereinafter Monaghan, Supreme Court Review].

239. Noia, “alleged to have been the trigger-man, was independently charged with premeditated murder.” Yackle, *Fay v. Noia*, *supra* note 233, at 194. When sentencing the three defendants the trial judge had told Noia that, given his “background as a robber,” the judge had been disinclined to follow the jury recommendation of life imprisonment but that Noia had had the luck of the judge’s wife. “The last thing she told me this morning is to give you a chance.” Hence, Noia feared that had he appealed and won a reversal, he risked the death penalty. *Fay v. Noia*, 372 U.S. 391, 397 n.3 (1963).

240. *Id.* at 433, 439. In doing so, Justice Brennan distinguished habeas jurisdiction from the direct review provided in the Supreme Court that was subject to the court-imposed interpretation that it lacked authority to review state court decisions resting on independent and adequate state grounds. The Supreme Court’s rule in *Noia*, in turn, paved the way for a somewhat more relaxed interpretation of that prohibition on direct review. See *Lee v. Kemna*, 534 U.S. 362 (2002); *Henry v. Mississippi*, 379 U.S. 443 (1965). The rule in *Fay v. Noia* has since been overturned. See *Coleman v. Thompson*, 501 U.S. 722 (1991). Nonetheless, Chief Justice Roberts cited the decision when concluding that the “equitable principles” governing habeas justified refusing to grant habeas relief to *Munaf*, held by the United States, and arguing that his return to Iraqi control could result in torture. *Munaf v. Geren*, 128 S. Ct. 2207, 2220 (2008); see *supra* notes 67 & 144.

241. Brief for Petitioner at 46–47, *Miranda v. Arizona*, 384 U.S. 436 (1966) (No. 759) (quoting *United States v. Carignan*, 342 U.S. 36, 46 (1951)).

242. *Id.* at 47.

constitutional commitment against coercion of individuals subject to custodial interrogations.²⁴³

As one can see by dipping into opinions such as *Carignan* that are less regularly read today, as well as reading lower court decisions like *Caminito* and the briefs in *Miranda*, the expansion of criminal defendants' rights was influenced by comparisons made to other legal systems, some of which provided negative examples. Federal constitutional law development sometimes entailed express references to regimes abroad and, at other points, the transnational dialogue has been sub silentio.²⁴⁴

B. *The Total Isolation of Onshore Supermax*

The question of government extraction of information from those detained is one template; the confinement of persons found to be culpable and dangerous after pleas or trials is another. Inside the territorial United States, prison officials have built a new level of secured incarceration in facilities called "supermax," subjecting inmates to a level of confinement beyond that in high security or temporary punitive segregation.²⁴⁵ These facilities rely on a practice of prolonged isolation that some consider a form of torture—confining individuals in what one physician termed "hellhole."²⁴⁶

Members of the medical establishment are not alone at raising concerns about this form of confinement. Social scientists,²⁴⁷ policy organizations such as the Vera Institute,²⁴⁸ task forces chartered by the

243. See *Miranda*, 384 U.S. at 469–70.

244. See generally Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 *Stan. L. Rev.* 61, 65 (1988); Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Points of Entry*, 115 *Yale L.J.* 1564, 1598–99 (2006) [hereinafter Resnik, *Law's Migration*]; David Alan Sklansky, *Anti-Inquisitorialism*, 122 *Harv. L. Rev.* 1635, 1636 (2009).

245. A variety of definitions exist for supermax. See Daniel P. Mears, *Urban Inst. Justice Policy Ctr., Evaluating the Effectiveness of Supermax Prisons* 4 (2006), available at http://www.urban.org/UploadedPDF/411326_supermax_prisons.pdf (on file with the *Columbia Law Review*) [hereinafter Mears, *Supermax Effectiveness*]. A survey by the National Institute of Corrections used the term to denote a "free-standing facility or a distinct unit within a facility that provides for the management and secure control of inmates who have been officially designated as exhibiting violent or serious and disruptive behavior while incarcerated." *Id.* See generally Sharon Dolovich, *Foreword: Incarceration American-Style*, 3 *Harv. L. & Pol'y Rev.* 237 (2009) (discussing conditions in supermax and long-term isolation prisons).

246. Atul Gawande, *Hellhole: The United States Holds Tens of Thousands of Inmates in Long-Term Solitary Confinement. Is this Torture?*, *The New Yorker*, Mar. 30, 2009, at 36.

247. See, e.g., Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 *Crime & Delinq.* 124, 130–32 (2003); William Glaberson, *Detainees' Mental Health is Latest Legal Battle*, *N.Y. Times*, Apr. 26, 2008, at A1.

248. Vera Inst. of Just., *Confronting Confinement: A Report of the Commission on Safety and Abuse in America's Prisons* (2006), available at http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf (on file with the *Columbia Law Review*) [hereinafter *Confronting Confinement*]. The Vera Institute report specifically objected to

American Bar Association,²⁴⁹ and, on occasion, legislators have criticized the practice and argued for its regulation.²⁵⁰ Transnational human rights law has also taken up the issue of isolation. Judgments of the European Court of Human Rights and the Inter-American Court of Human Rights have concluded that, depending on the degree of isolation, the conditions, and the length, solitary confinement can constitute a viola-

the overreliance on and counterproductive effect of solitary confinement. *Id.* at 14–15, 52–61; see also Daniel P. Mears, *An Assessment of Supermax Prisons Using an Evaluation Research Framework*, 88 *Prison J.* 43 (2008); Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 *Crime & Just.* 441 (2006).

249. In 2004, the American Bar Association chartered a new task force to “revise 25-year old legal standards regarding the legal rights of prisoners.” Margaret Love & Michelle Deitch, *Legal Status of Prisoners and Criminal Justice Standards*, in *The State of Criminal Justice 2006*, at 83, 83 (Victor Steib ed., 2007). A proposed draft, temporarily posted, became available in the fall of 2009. See Am. Bar Ass’n Criminal Justice Standards Comm., Am. Bar Ass’n, *The Treatment of Prisoners*, in 23 Proposed ABA Standards for Criminal Justice (Prof. Margo Schlanger rep., 3d ed. 2009), available at <http://sites.google.com/site/treatmentofprisoner/> (on file with the *Columbia Law Review*) [hereinafter 2009 DRAFT ABA, Prisoner Standards]. Upon approval by the ABA Criminal Justice Section Council the standards are to be submitted in February of 2010 to the ABA House of Delegates to become official policy. See Criminal Justice Standards Comm., Am. Bar Ass’n, *Who We Are*, available at <http://www.abanet.org/dch/committee.cfm?com=CR105000> (last visited Oct. 24, 2009) (on file with the *Columbia Law Review*).

The proposed standards cover a host of issues including defining “long-term segregated housing,” as extending “for a period of time exceeding 30 days.” 2009 DRAFT ABA, Prisoner Standards, *supra*, § 23-1.0(m). General principles include that “[n]o prisoner should be subjected to cruel, inhuman, or degrading treatment or conditions.” *Id.* § 23-1.1(d). The draft calls for segregation “for the briefest term and under the least restrictive conditions practicable.” *Id.* § 23-2.6(a). Furthermore, prisoners “diagnosed with serious mental illness” are not to be placed in “long-term segregated housing.” *Id.* § 23-2.8(a). The standards require that mental health screenings be provided within a day of placement in such housing and that the mental health of prisoners be monitored daily. *Id.* § 23-2.8(b)–(c). Additionally, the proposed standards set forth more procedural protections than those required by the Supreme Court in *Wilkinson*. Included are requirements of regular monitoring, full classification reviews at periodic intervals (with ninety days proposed as of October, 2009), and a presumption in favor of release. *Id.* § 23-2.9(b)–(d).

250. See Lance Tapley, *Limiting Supermax Solitary*, *Portland Phoenix*, Oct. 8, 2009, available at <http://thephoenix.com/Portland/News/91025-Limiting-Supermax-solitary> (on file with the *Columbia Law Review*) (describing proposal by Rep. James Schatz). The Act to Reduce the Use and Abuse of Solitary Confinement was, as of October of 2009, to be taken up by the Maine House of Representatives in January. See Susan Sharon, *Limits Sought on Use of Solitary Confinement in Maine Prisons* (Me. Public Broad. Network broadcast Oct. 16, 2009), available at <http://www.mpbn.net/News/MaineNews/tabid/181/ctl/ViewItem/mid/3475/ItemId/9414/Default.aspx> (on file with the *Columbia Law Review*). Maine prisons held a relatively small number of inmates (around 2,260) of which under thirty were said to be in solitary confinement. Press reports, however, had described prisoners being sent to supermax for minor infractions and without mechanisms to seek return to the general population. See Julia Dahl, *Is It Time To Ban Solitary Confinement?*, *Crime Rep.*, Oct. 12, 2009, at <http://thecrimereport.org/2009/10/12/is-it-time-to-ban-solitary-confinement> (on file with the *Columbia Law Review*).

tion of prohibitions on torture or inhuman and degrading treatment.²⁵¹ Moreover, under European law, states must provide mechanisms for regular review of solitary confinement.²⁵²

The Special Rapporteur for the United Nations' Human Rights Council concluded that the "weight of accumulated evidence to date points to the serious and adverse health effects of solitary confinement"—and hence that "prolonged solitary confinement" could constitute a breach of the International Covenant on Civil and Political Rights.²⁵³ Thus, in 2006, the United Nations Committee on Torture questioned the United States representatives about monitoring the practice of solitary confinement and its effects on detainees' mental health.²⁵⁴ The federal government responded that the "United States takes exception to the as-

251. See, e.g., *Ramirez Sanchez v. France*, 2006-IX Eur. Ct. H.R. 1161. In *Ramirez-Sanchez*, the court concluded that an avowed political terrorist, who was held in a cell with natural light and permitted regular visits by lawyers and family members, had not established a violation of Article 3 of the European Convention on Human Rights. He had, however, established a violation of Article 13, requiring "effective" remedies, because national law had not provided him with sufficient methods to challenge his prolonged confinement. *Id.* ¶¶ 152–66; see also *Ilascu v. Moldova*, 2004-VII Eur. Ct. H.R. 1030 (Grand Chamber).

In *Loayza Tamayo Case*, 4 Inter-Am. Ct. H.R. (ser. C) 3, ¶¶ 54–55 (Sept. 17, 1997), the Inter-American Court on Human Rights held that "incommunicado detention . . . solitary confinement in a tiny cell with no natural light, . . . a restrictive visiting schedule . . . all constitute forms of cruel, inhumane, and degrading treatment" violating Article 5(2) of the Inter-American Convention. In addition, administrative decisions address calls for limits on such treatment. See, e.g., Comm. of Ministers of the Council of Eur., Management by Prison Administrations of Life-Sentence and Other Long-Term Prisoners, Recommendation 23, ¶ 19c, at 6 (2003), available at [http://www.coe.int/t/e/legal_affairs/legal_co-operation/prisons_and_alternatives/legal_instruments/\(Rec%20_2003_%2023%20E%20Manag%20PRISON%20ADM%20Life%20Sent%20Pris%20%20REPORT%2015_205\).pdf](http://www.coe.int/t/e/legal_affairs/legal_co-operation/prisons_and_alternatives/legal_instruments/(Rec%20_2003_%2023%20E%20Manag%20PRISON%20ADM%20Life%20Sent%20Pris%20%20REPORT%2015_205).pdf) (on file with the *Columbia Law Review*). The Inter-American Court also noted that, under "exceptional circumstances" isolation may be required, but if used, efforts should be made to "reduce the period of its use." *Loayza Tamayo*, 4 Inter-Am. H.R. ¶¶ 54–55; see also Roy D. King, *The Rise and Rise of Supermax: An American Solution in Search of a Problem?*, 1 *Punishment & Soc'y* 163, 177–82 (1999). King detailed the "European Experience" with the use of supermax and the general refusal to rely on that form of incarceration.

252. *Ramirez-Sanchez*, 2006-IX Eur. Ct. H.R. ¶¶ 152–66.

253. See Special Rapporteur of the Human Rights Council, Interim Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ¶¶ 77–85, delivered to the General Assembly, U.N. Doc. A/63/175 (July 28, 2008). The breach would be of Article 7, which provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." International Covenant on Civil and Political Rights, Dec. 19, 1966, S. Exec. Doc. E, 95-2, 999 U.N.T.S. 171; see also Human Rights Comm., CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) ¶ 9, 44th Sess. (Mar. 10, 1992), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6924291970754969c12563ed004c8ae5?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument).

254. See Comm. Against Torture, Report of the Committee Against Torture 67, U.N. Doc. A/61/44 (Nov. 14–15, 2005; May 1–19, 2006). See generally Tracy Hresko, *In the Cellars of the Hollow Men: Use of Solitary Confinement in U.S. Prisons and its Implications Under International Laws Against Torture*, 18 *Pace Int'l L. Rev.* 1 (2006);

sumption contained in the question that prolonged isolation and indefinite detention *per se* constitutes cruel, inhuman, or degrading treatment or punishment.”²⁵⁵

That answer did more than protect the government’s position with respect to the many detainees then held in isolation at Guantánamo.²⁵⁶ According to one survey, as of 1996, “34 states reported to the National Institute of Corrections that they had supermax prisons,” at which more than 20,000 prisoners were detained.²⁵⁷ A list of facilities by region and state, as well as the number of beds available in such institutions, is reproduced in “States with Supermax Facilities, 1997–1998” (Figure 8).²⁵⁸ By 2004, another ten states had opened supermax institutions, and wardens

Elizabeth Vasiliades, *Solitary Confinement and International Human Rights: Why the U.S. Prison System Fails Global Standards*, 21 *Am. U. Int’l L. Rev.* 71 (2005).

255. U.S. Dep’t of State, *List of Issues to be Considered During the Examination of the Second Periodic Report of the United States of America*, Response of the United States of America 107 (2006), available at <http://www.state.gov/documents/organization/68662.pdf> (on file with the *Columbia Law Review*); see also Tom Monheim, Associate Deputy Att’y Gen., U.S. Delegation Oral Responses to CAT Committee Questions 10–12 (May 5, 2006), available at <http://www.state.gov/g/drl/rls/68561.htm> (on file with the *Columbia Law Review*). See generally U.S. Dep’t of State, *Second Periodic Report of the United States to the Committee Against Torture (CAT)* (May 6, 2006), available at <http://www.state.gov/g/drl/rls/45738.htm> (on file with the *Columbia Law Review*).

256. As of 2008, 130 of some 250 detainees held at Guantánamo were described as housed in solitary confinement at the base. See Carol J. Williams, *Guantánamo Detainees Face Uncertain Future*, *L.A. Times*, Dec. 9, 2007, at A3. For a breakdown of the types of detainees housed at Guantánamo as of 2008, see Wittes & Wyne, *supra* note 24, at 1–3.

257. Mears, *Supermax Effectiveness*, *supra* note 245, at ii.

258. This chart is reproduced with the permission of Professors Mears and King; the chart comes from Mears, *Supermax Effectiveness*, *supra* note 245, at app. tbl.1, reproducing (with minor modifications) a chart by King, *supra* note 251, at 175 tbl.1. The Mears data were based on a “national survey of state prison wardens in fall 2003” coupled with some site visits, review of documents and policies, and telephone interviews. Mears, *Supermax Effectiveness*, *supra* note 245, at 10–14.

After I showed this chart at the AALS Federal Courts session in January of 2009, law professor Jeffrey Renz, familiar with conditions in Montana, commented that he thought the information about that state was erroneous. See Email from Jeffrey T. Renz, Professor, Univ. of Mont. Sch. of Law, to author (Jan. 15, 2009) (on file with the *Columbia Law Review*). Our additional research located a 1997 National Institute of Corrections study identifying Deer Lodge in Montana as a supermax facility that opened in 1986 and provided sixty-four beds. See Nat’l Inst. of Corrections, U.S. Dep’t of Justice, *Supermax Housing: A Survey of Current Practice* 5 (1997), available at www.nicic.org/pubs/1997/013722.pdf (on file with the *Columbia Law Review*). After reporting that description, Professor Renz suggested that the maximum security unit was misclassified. Email from Jeffrey T. Renz, Professor, Univ. of Mont. Sch. of Law, to author (Jan. 23, 2009) (on file with the *Columbia Law Review*). The point of recounting this exchange is to underscore that use of facilities may have changed since publication of the report and further, conflicts over classification of programs as “supermax” exist.

States with Supermax Facilities, 1997–1998

	Supermax Beds	Sentenced Prison Pop.	Incarceration Rate per 100,000	Percent of Total Beds
Northeast	<i>3,214</i>	<i>163,836</i>		<i>2.0</i>
Connecticut	586	13,005	397	4.5
Maine	100	1,542	123	6.5
Massachusetts	124	10,847	278	1.1
New Jersey	96	28,361	351	0.3
New York	2,000	70,026	386	2.9
Pennsylvania	200	34,963	291	0.6
Rhode Island	108	2,100	213	5.1
Midwest	<i>2,290</i>	<i>216,391</i>		<i>1.1</i>
Illinois	500	40,788	342	1.2
Indiana	85	17,730	301	0.5
Michigan	421	44,771	457	0.9
Minnesota	120	5,306	113	2.3
Nebraska	164	3,329	200	4.9
Ohio	500	48,002	429	1.0
Wisconsin	500	14,682	283	3.4
South	<i>7,584</i>	<i>480,061</i>		<i>1.6</i>
Florida	1,000	64,540	437	1.5
Georgia	10	35,722	472	0.3
Louisiana	1,048	29,265	672	3.6
Maryland	286	21,088	413	1.4
Mississippi	1,756	14,548	531	12.0
North Carolina	300	27,726	370	1.1
Oklahoma	392	20,542	617	1.9
South Carolina	200	20,264	536	1.0
Texas	1,229	140,729	717	0.9
Virginia	1,267	27,524	407	4.6
West Virginia	96	3,160	174	3.0
West	<i>6,542</i>	<i>242,315</i>		<i>2.7</i>
Arizona	1,728	22,353	484	7.7
California	2,942	154,368	475	1.9
Colorado	750	13,461	342	5.6
Idaho	96	3,946	323	2.4
Montana	64	2,242	25	2.9
Nevada	430	8,884	518	4.8
Oregon	196	7,589	232	2.6
Washington	300	13,198	233	2.3
Wyoming	36	1,566	326	2.3
All states	19,630	1,102,603	—	1.8
<i>Sources: King 1999, updating figures from Riveland 1999b.</i>				

Table 1 from Daniel P. Mears, *Evaluating the Effectiveness of Supermax Prisons* 74 app. tbl.1 (2006), originally published as Table 1 in Roy D. King, *The Rise and Rise of Supermax: An American Solution in Search of a Problem?*, 1 *Punishment & Soc'y* 163, 175 tbl.1 (1999), reproduced with the permission of Professors Mears and King.

FIGURE 8

reported housing about 25,000 inmates in such settings.²⁵⁹ Such counts do not include individuals held in isolation outside supermax units.²⁶⁰

Details of one supermax, opened in Ohio in 1998 to confine more than 500 prisoners, come from a 2005 unanimous Supreme Court decision, *Wilkinson v. Austin*.²⁶¹ Like the 9/11 habeas cases, at issue was the process due as a predicate to a particular form of incarceration. As in Guantánamo, the government—in this instance the State of Ohio, supported by an amicus filing from the United States²⁶²—had argued that it had unfettered authority to put people in its supermax. Unlike the Guantánamo cases, in which little mention has been made of the particular conditions of confinement, the Court's opinion provided stark details of what it meant for an individual to be placed in Ohio's supermax. Conditions there were

more restrictive than any other form of incarceration in Ohio, including conditions on its death row . . . [A]lmost every aspect of an inmate's life is controlled and monitored. Inmates must remain in their cells, which measure 7 by 14 feet, for 23 hours per day. A light remains on in the cell at all times, though it is sometimes dimmed, and an inmate who attempts to shield the light to sleep is subject to further discipline. During the one hour per day that an inmate may leave his cell, access is limited to one of two indoor recreation cells.

Incarceration . . . is synonymous with extreme isolation. In contrast to any other Ohio prison . . . [the] cells have solid metal doors with metal strips along their sides and bottoms which prevent conversation or communication with other inmates. All meals are taken alone in the inmate's cell instead of

259. See Mears, *Supermax Effectiveness*, *supra* note 245, at 4. The numbers varied somewhat from those described by the Supreme Court in *Wilkinson v. Austin*, 545 U.S. 209 (2005), discussed *infra* notes 262–263, 269–275, 282–288 and accompanying text. The majority opinion reported that as of 2005, “About 30 States now operate Supermax prisons, in addition to the two somewhat comparable facilities operated by the Federal Government.” *Id.* at 213–14. For another data set, see Jamie Fellner & Joanne Mariner, Human Rights Watch, *Cold Storage: Super-Maximum Security Confinement in Indiana* 18 (1997).

260. Some of the new construction came through federal incentives to build new prisons if state law required that eighty-five percent of sentenced time was served. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 20102(a)(1)–(2), 108 Stat. 1796, 1816 (codified as amended at 42 U.S.C. § 13704 (2006)) (also called the Violent Offender Incarceration/Truth-in-Sentencing Act); see also Jennifer R. Wynn & Alisa Szatrowski, *Hidden Prisons: Twenty-Three Hour Lockdown Units in New York State Correctional Facilities*, 24 *Pace L. Rev.* 497, 504 (2004).

261. 545 U.S. at 214.

262. See Brief for the United States as Amicus Curiae Supporting Petitioners, *Wilkinson*, 545 U.S. 209 (No. 04-495) [hereinafter *Wilkinson* Brief]. In the appellate court, Ohio had argued that inmates had no liberty interest in detention in the supermax, but in the Supreme Court it “conceded that the inmates have a liberty interest in avoiding assignment” to the supermax. *Wilkinson*, 545 U.S. at 221. The United States, however, argued that “inmates have no liberty interest” in avoiding that restrictive confinement. *Id.*; see also *Wilkinson* Brief, *supra*, at 10.

in a common eating area. Opportunities for visitation are rare and in all events are conducted through glass walls. It is fair to say [supermax] inmates are deprived of almost any environmental or sensory stimuli and of almost all human contact.

Aside from the severity of the conditions, placement at [the supermax] is for an indefinite period of time, limited only by an inmate's sentence. For an inmate serving a life sentence, there is no indication how long he may be incarcerated . . . once assigned there.²⁶³

One might think that such a description would lead to a prohibition—that individuals could not be subjected to isolation, sensory deprivation, and observance indefinitely.²⁶⁴ Indeed, in 1890, the Supreme Court had objected to the solitary confinement of an individual convicted of murder; the Court described that, “after even a short confinement,” such detention put a prisoner “into a semi-fatuous condition,” making him unable to “recover sufficient mental activity to be of any subsequent service to the community.”²⁶⁵ About a century later, in the 1970s, the Court approved district court findings that Arkansas's use of indefinite punitive isolation (in that instance, an “average of 4 . . . prisoners were crowded into windowless 8'x10' cells containing no furniture other than a source of water and a toilet that could only be flushed from outside the cell”) violated the Eighth Amendment.²⁶⁶ Thus, in lower court decisions addressing prison conditions in various parts of the United States, judges limited the duration of isolation and regulated the process for placement.²⁶⁷

Moreover, prisoners evidencing mental instability were seen as especially susceptible to deterioration. In the 1990s, a federal district court judge concluded that confinement of mentally ill inmates in a supermax

263. *Wilkinson*, 545 U.S. at 214–15.

264. See generally Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. Pa. J. Const. L. 115 (2008).

265. *In re Medley*, 134 U.S. 160, 168 (1890). The decision was written by Justice Samuel Miller, who registered “serious objections” to solitary confinement. *Id.*

266. *Hutto v. Finney*, 437 U.S. 678, 682 (1978).

267. See, e.g., *Finney v. Ark. Bd. of Corr.*, 505 F.2d 194, 207–08 (8th Cir. 1974) (concluding conditions of solitary confinement in Arkansas were unconstitutional and ordering that prisoners receive basic necessities of light, heat, ventilation, clothing, and proper nutrition); *Gates v. Collier*, 501 F.2d 1291, 1305 (5th Cir. 1974) (finding Mississippi's use of “dark hole” for solitary confinement a violation of prisoner's Eighth Amendment rights); *Ruiz v. Estelle*, 503 F. Supp. 1265, 1364–67 (S.D. Tex. 1980) (finding Texas's administrative segregation policies unconstitutional and ordering additional procedural protections).

The decisions in some of these cases provide painful detail. For example, in *Parchman*, a prison in Mississippi, prisoners were “placed in the dark hole, naked, without any hygienic material, without any bedding, and often without adequate food.” *Gates*, 501 F.2d at 1305. While holding that such placement of “naked persons” for more than twenty-four hours in such settings violated the Eighth Amendment, the court did not enjoin the practice but imposed limits on it—that placement could not be for more than twenty-four hours, and that clothing, food, and clean surroundings had to be provided. *Id.*

facility in California violated their Eighth Amendment rights.²⁶⁸ Further, in 2003, the trial judge in *Wilkinson* sought to impose a substantive constraint on supermax—overturned on appeal—by limiting the grounds that could be a predicate for such confinement.²⁶⁹

In 2005, in *Wilkinson*, none of the Justices focused on the harms of long-term isolation, nor mentioned the various studies presented by health care professionals in an amicus brief documenting the disabling effects of supermax and the limited evidence of its utility.²⁷⁰ The Court's failure to raise concerns could have been based on the case's legal pos-

268. See *Madrid v. Gomez*, 889 F. Supp. 1146, 1267 (N.D. Cal. 1995). Chief Judge Thelton E. Henderson held that, while the extreme isolation of supermax units did not violate the Eighth Amendment prohibition on cruel and unusual punishment for all, it did for "two categories of inmates: those who are already mentally ill and those who, as identified above, are at an unreasonably high risk of suffering serious mental illness" if confined in such conditions. *Id.* Prohibited was assignment to the "Security Housing Unit" or "SHU" which, as Chief Judge Henderson wrote, had

gained a well-deserved reputation as a place which, by design, imposes conditions far harsher than those anywhere else in the California prison system. The roughly 1,000–1,500 inmates confined in the SHU remain isolated in windowless cells for 22 and 1/2 hours each day, and are denied access to prison work programs and group exercise yards. Assignment to the SHU is not based on the inmate's underlying offense; rather, SHU cells are reserved for those inmates in the California prison system who become affiliated with a prison gang or commit serious disciplinary infractions once in prison. They represent, according to a phrase coined by defendants, "the worst of the worst."

Id. at 1155.

269. Specifically, the district court had held that placement had to be based on a stated quantity of contraband, and for drugs, a threshold amount that reflected "a level that would subject an inmate to incarceration for at least a third degree felony" or based on multiple infractions. *Austin v. Wilkinson*, 204 F. Supp. 2d 1024, 1028 (N.D. Ohio 2002). Further, to establish that an inmate posed a threat based on being part of a group, prison officials had to demonstrate a certain degree of involvement. Finally, retention decisions had to be keyed to a time frame, so that only prior behavior within two to five years (depending on the issue) would be considered. *Id.* Those rulings, imposing "substantive modifications" of Ohio's policies, were overturned as beyond the district court's remedial power. *Austin v. Wilkinson*, 372 F.3d 346, 356 (6th Cir. 2004); see also *infra* note 270. Those issues were not before the Supreme Court.

The judge in *Wilkinson* was not the first to have imposed such restrictions. Decisions in prison cases during the 1970s and 1980s had put parallel restrictions into place. For example, in *Hardwick v. Ault*, 447 F. Supp. 116 (M.D. Ga. 1978), the district court held that the offenses committed (such as advocating "work stops") were "not sufficiently serious to warrant several months of confinement in near-solitary." *Id.* at 125; see also *Adams v. Carlson*, 368 F. Supp. 1050, 1053 (E.D. Ill. 1973) (putting inmates into segregation for sixteen months for advocating work stoppages violated the Eighth Amendment).

270. See Brief of Professors and Practitioners of Psychology and Psychiatry as Amicus Curiae in Support of Respondent, *Wilkinson v. Austin*, 545 U.S. 209 (2005) (No. 04-495). According to the brief, all studies of "the effects of solitary or supermax-like confinement that lasted longer than 60 days" had found evidence of "negative psychological effects." *Id.* at 4; see also *id.* at 14–27. Another overview focused on published studies of "solitary or supermax-like confinement in which nonvoluntary confinement last[ed] for longer than 10 days." Haney, *supra* note 247, at 130–32. Where "participants were unable to terminate their isolation at will . . . negative psychological effects" resulted. *Id.* at 132.

ture; the Eighth Amendment issue was not directly before the Court because some claims relating to the constitutionality of conditions had been dealt with by way of settlement.²⁷¹

But the decision was not silent on the question of supermax; rather the opinion appeared to bolster its legitimacy, perhaps to ward off substantive Eighth Amendment challenges, on or offshore. Justice Kennedy's opinion detailed the fearsomeness of inmates and the fragility of prison security; the Court described the institution as "imperiled by the brutal reality of prison gangs, . . . [c]landestine, organized, fueled by race-based hostility, and committed to fear and violence."²⁷² The *Wilkinson* Court further advised that the "harsh conditions [of supermax] may well be necessary and appropriate in light of the danger that high-risk inmates pose both to prison officials and to other prisoners."²⁷³ Thus, "[p]rolonged confinement in Supermax may be the State's only option for the control of some inmates."²⁷⁴

The Court's gruesome details ("almost all human contact is prohibited, even to the point that conversation is not permitted from cell to cell") served only to explain that inmates so confined had a "liberty interest" that was extinguished when they were put in supermax.²⁷⁵ Therefore a modicum of process was required under the Fourteenth Amendment. That proposition ought to have been obvious, but other Supreme Court decisions stood in the way. In the 1970s, the Court affirmed that the Constitution did not stop at the prison door, and the Court obliged correctional officials to provide procedural safeguards when disciplining prisoners by taking away good-time or by placing persons in administrative or punitive segregation.²⁷⁶

But from the vantage point of some federal judges, too many cases would result if inmates were able to contest not only the loss of good-time but also their transfers to higher security institutions and their placement in "the hole." Rather than install a system of court-based oversight of either the substantive grounds for solitary confinement or the procedural protections required for placements exceeding a certain number of days, the Court has repeatedly concluded that conviction and incarceration ex-

271. According to the Court, the inmates had argued that "certain conditions" violated their Eighth Amendment rights but that claim was "settled in the District Court" although the "extent to which the settlement resolved the practices that were the subject of the inmates' Eighth Amendment claim [was] unclear." *Wilkinson*, 545 U.S. at 218. The Sixth Circuit reported that the settlement dealt with Eighth Amendment claims "related primarily to medical care and the provision of outdoor recreation." *Austin*, 372 F.3d at 349.

272. *Wilkinson*, 545 U.S. at 227. The commentary came in the context of explaining why the process due ought not to include the right to have witnesses appear.

273. *Id.* at 224.

274. *Id.* at 229.

275. *Id.* at 223–24.

276. See *Wolff v. McDonnell*, 418 U.S. 539, 563 (1974).

tinguished most liberty interests of prisoners.²⁷⁷ Under its framework, the Court circumscribed judicial review of various decisions of prison officials, such as restrictions or prohibitions on visitors,²⁷⁸ prisoner transfers from one facility to another,²⁷⁹ and placement in segregation after alleged disciplinary infractions.²⁸⁰ The Court's jurisprudence has blocked challenges to various aspects of prisons because, absent a showing of an "atypical and significant hardship,"²⁸¹ no federal judicial intervention is permissible.

The Court's detailed description of the isolating conditions at the Ohio Supermax, however, sufficed to constitute a "dramatic departure from the basic conditions of [the inmate's] sentence."²⁸² Because Ohio's supermax imposed an "atypical and significant hardship,"²⁸³ prisoners had a "protected liberty interest in avoiding assignment" to the Ohio Supermax Prison.²⁸⁴ Nonetheless, the Court overturned the lower courts' imposition of more procedural requirements (such as a right of review of the supermax placement²⁸⁵) and reinstated Ohio's minimal process. All that was required was notice of "a brief summary of the factual basis for the classification," and "a rebuttal opportunity" at the two

277. See, e.g., *Shaw v. Murphy*, 532 U.S. 223 (2001); *Sandin v. Conner*, 515 U.S. 472 (1995). As the *Shaw* Court put it, because constitutional rights are limited by incarceration, courts "generally . . . defer[] to the judgments of prison officials" in challenges to regulations that allegedly infringe these rights. *Shaw*, 532 U.S. at 228–29.

278. See, e.g., *Overton v. Bazzetta*, 539 U.S. 126 (2003). The decision upheld a restriction that cut off visits (except lawyers and clergy) for a period of two years for prisoners found to have twice violated substance abuse rules. The Court concluded that the rule bore a rational relationship to penological goals of deterring abuse. *Id.* at 134. Reinstatement of the privilege was at the warden's discretion, and other limits (such as on the number of adults other than family permitted to visit) were also upheld.

279. *Meachum v. Fano*, 427 U.S. 215 (1976). The Court concluded that the transfer of a prisoner from one institution to a higher security prison did not trigger due process liberty interests requiring a hearing.

280. See *Sandin*, 515 U.S. at 472. Criticism of the conditions at issue there—"near-solitary confinement for two months"—can be found in Michael B. Mushlin & Naomi Roslyn Galtz, *Getting Real about Race and Prisoner Rights*, 36 *Fordham Urb. L.J.* 27, 29, 34 (2009).

281. *Sandin*, 515 U.S. at 484.

282. *Wilkinson v. Austin*, 545 U.S. 209, 223 (2005) (alteration in original) (quoting *Sandin*, 515 U.S. at 485).

283. The contrast was to the "ordinary incidents of prison life." *Id.* at 223 (quoting *Sandin*, 515 U.S. at 484).

284. *Id.* at 220.

285. The appellate court had affirmed the district court's holding that prior to confinement, more process was due. At the classification hearing, the inmate was to have a right to reasons for placement and "a summary of the evidence to be presented," a right to present evidence and witnesses, and a right to a record of the proceedings. *Austin v. Wilkinson*, 372 F.3d 346, 358 (6th Cir. 2004). The court also affirmed the prisoners' right to the warden's "independent review" of the classification recommendation, to protections from the use of confidential statements, to a detailed written "justification" for supermax placement, and to subsequent review by a panel that included none of those who had made the decision originally. *Id.* (internal quotation marks omitted). Those requirements were overturned by the Supreme Court. See *Wilkinson*, 545 U.S. at 224–30.

levels of internal review.²⁸⁶ Detained prisoners could not present adverse witnesses; the Court concluded that any right to confront adverse witnesses was outweighed by the state's interests in order and control.²⁸⁷ The obligation for a short statement of reasons for confinement was, according to the Court, enough to buffer against "arbitrary decisionmaking."²⁸⁸

The Court's decision came in 2005, when some information was available about treatment of 9/11 detainees, many of whom were also held in isolation.²⁸⁹ As applied in the lower courts, the *Wilkinson* ruling has limited oversight of inmate treatment. Since the ruling, a few forms of solitary confinement have been found actionable, such as "28 to 35 year confinements" in lockdown in the Louisiana State Penitentiary in Angola.²⁹⁰ But courts also have rejected a variety of claims, including the

286. *Wilkinson*, 545 U.S. at 226.

287. *Id.* at 228–29.

288. *Id.* at 226. The Court concluded that officials had "to provide a brief summary of the factual basis for the classification review," as well as "to allow the inmate a rebuttal opportunity to safeguard against the inmate's being mistaken for another or singled out for insufficient reason." *Id.* The ability of an inmate to "submit objections prior to the final level of review . . . further reduce[d] the possibility of an erroneous deprivation." *Id.* Thereafter, Ohio modified its processes. In one case, the lower court found that the state had failed to provide sufficient process to comport with the Supreme Court's mandates on the process due. See *Austin v. Wilkinson*, 502 F. Supp. 2d 675, 679–82 (N.D. Ohio 2006). In that case, an inmate, Frederick Tate, had been involved in a fight that resulted in another inmate's death; Tate was placed in supermax. The district court concluded that "[a]ll physical evidence and both inmates' behavioral records support Tate's claims that [the other inmate] instigated the fight and that Tate acted largely in self-defense." *Id.* at 677. Therefore, the prison's system had not complied with the procedures; "[i]ssuing a decision without any explanation does not constitute a 'reasoned decision.'" *Id.* at 681; see also *Austin v. Wilkinson*, No. 4:01-CV-71, 2007 WL 2840352, at *1 (N.D. Ohio Sept. 27, 2007) (granting in part plaintiffs' motion for modification of procedures related to supermax placements). That ruling required correctional officials to "communicate in sufficient detail their consideration of an inmate's positive behavior at the [Ohio State Penitentiary] to the inmate" during the "annual security review." *Id.* at *6. In addition, the court ordered the prison's Classification Committee to provide prisoners with a "reasoned decision" that informed them how to alter their classification status. *Id.* at *7.

289. Between 2002 and 2007, detailed information was not forthcoming from the government on the number detained and the conditions of confinement at Guantánamo. Data instead came from critics reporting, for example, that as of April 2007, eighty percent of the then-385 or so detainees were isolated. See Amnesty Int'l, *United States of America: Cruel and Inhuman: Conditions of Isolation for Detainees at Guantánamo Bay 1* (Apr. 5, 2007), available at <http://www.amnesty.org/en/library/info/AMR51/051/2007> (on file with the *Columbia Law Review*). As of early 2009, a majority of the 240 men held at Guantánamo were kept in isolation cells. See Ctr. for Constitutional Rights, *Current Conditions of Confinement at Guantanamo: Still in Violation of the Law 3* (2009), available at http://ccrjustice.org/files/CCR_Report_Conditions_At_Guantanamo.pdf (on file with the *Columbia Law Review*).

290. *Wilkerson v. Stalder*, No. 00-304-C, 2007 WL 2693852, at *1 (M.D. La. Sept. 11, 2007); see also *Scarver v. Litscher*, 434 F.3d 972, 974 (7th Cir. 2006); *Bailey v. Fansler*, No. 04-1175-PHX-MHM, 2009 WL 151204, at *1 (D. Ariz. Jan. 21, 2009); *Farmer v. Kavanagh*, 494 F. Supp. 2d 345, 347 (D. Md. 2007). Further, in *Westefer v. Snyder*, 422 F.3d 570 (7th Cir. 2005), the court noted that placement in supermax resulted in the almost complete

isolation of a prisoner for an aggregate of thirty months, the transfer of an individual for six weeks to isolation pending the investigation into his culpability for a prison murder, and a three-year stint in segregation.²⁹¹ Furthermore, and in line with *Iqbal*, even when conditions of confinement constitute a “dramatic” departure warranting procedural protections, prison officials’ qualified immunity from suit generally shields them from liability for damages.²⁹²

On the other hand, a few lower court judges have registered objections, and in one case, a judge invoked the parallel between conditions in “the United States, . . . now” and those of totalitarian countries. Judge Terence Evans of the Court of Appeals for the Seventh Circuit began one opinion reinstating a case that the lower court had dismissed by commenting:

Stripped naked in a small prison cell with nothing except a toilet; forced to sleep on a concrete floor or slab; denied any human contact; fed nothing but “nutri-loaf”; and given just a modicum of toilet paper—four squares—only a few times. Although this might sound like a stay at a Soviet gulag in the 1930s, it is, according to the claims in this case, Wisconsin in 2002.²⁹³

C. *Regular Prisoners, Abuse, and the Prison Litigation Reform Act of 1995*

Turn from the small set of 9/11 detainees and the larger but still discrete set of prisoners (80,000 by some estimates) in supermax and in “ordinary” isolation²⁹⁴ to regular prisoners, who number more than two million.²⁹⁵ Beginning in the 1970s, prisoners challenged conditions in

deprivation of “human contact,” attorneys included. *Id.* at 589. Given that at least some prisoners confined to the facility were not given the reasons for their placement, the case survived a motion for summary judgment. *Id.* at 590.

291. See, e.g., *Estate of DiMarco v. Wyo. Dep’t of Corr.*, 473 F.3d 1334, 1336 (10th Cir. 2007); *al-Amin v. Donald*, 165 F. App’x 733, 738 (11th Cir. 2006); *Skinner v. Cunningham*, 430 F.3d 483, 485 (1st Cir. 2005).

292. Occasional exceptions should be noted. For example, the Supreme Court rejected that defense when prison guards had, allegedly, chained an individual to a hitching post for hours on end. The Court held that such an action was a violation of the Eighth Amendment, as the infliction of wanton and gratuitous harm, and was a clearly established constitutional right of which a reasonable person should have been aware. See *Hope v. Pelzer*, 536 U.S. 730, 738 (2002), discussed *infra* note 398. Justice Thomas dissented. *Id.* at 748 (Thomas, J., dissenting).

293. *Gillis v. Litscher*, 468 F.3d 488, 489 (7th Cir. 2006). The district court had granted summary judgment for the defendant. The plaintiff, Nathan Gillis, had been sent to a “Behavioral Modification Program” within a Wisconsin supermax, allegedly for having slept with his head toward the front of the cell and away from the toilet. *Id.*

294. *Confronting Confinement*, *supra* note 248, at 56. That number included individuals in administrative, protective, and disciplinary segregation as of 2000.

295. See *Mass Incarceration in the United States: At What Cost?: Hearing Before the J. Economic Comm.*, 110th Cong. 1 (2007) [hereinafter *Senate 2007 Prison Population Hearing*] (statement of Sen. Jim Webb, Member, J. Economic Comm.). By 2008, the figure generally cited was 2.3 million. See *Pew, One in 100*, *supra* note 163, at 5; see also

facilities in various states, including Arkansas (notorious for serving “grue” in lieu of food to prisoners in isolation and for administering electric shocks in response to perceived misbehavior²⁹⁶), Alabama, New York, Texas, and elsewhere. Federal judges responded with insistence on a role for federal law—and specifically the Constitution—behind bars.

Lengthy trials and extensive factfinding resulted in a set of decisions that imposed structural injunctions. Judges found violations of the Eighth Amendment’s protection against cruel and unusual punishment based on a lack of medical care, unsafe conditions, sexual violence, overcrowding, and, as noted above, isolation in disabling conditions or for undue amounts of time.²⁹⁷ Moreover, correctional officials—often working with state officials as well as the American Bar Association and the American Medical Association—developed manuals and standards to specify the kind of care and superintendence needed, so as to professionalize correctional work and protect officials’ authority.²⁹⁸

In the 1980s, Congress joined in supporting reform of facilities holding prisoners and the mentally ill. Through the Civil Rights of Institutionalized Persons Act (CRIPA), Congress authorized the Depart-

Senate 2007 Prison Population Hearing, *supra*, at 19 (statement of Michael P. Jacobson, Director, Vera Institute of Justice). Within that population, “Black Americans and Hispanics, together, account for about one-quarter” of those detained, and “two-thirds of State and Federal prison populations.” *Id.* at 12 (statement of Glenn C. Loury, Professor of Economics and Social Sciences, Brown University).

296. The four-inch squares of a mashed food paste provided “fewer than 1,000 calories a day.” *Hutto v. Finney*, 437 U.S. 678, 683 (1978). The device used to administer shocks, dubbed a “Tucker telephone,” was a hand-cranked machine that prison employees applied to “various sensitive parts of an inmate’s body.” *Id.* at 682 n.5 (citing *Jackson v. Bishop*, 268 F. Supp. 804, 812 (E.D. Ark. 1967)). The prison also had rules providing for corporal punishment, not to “exceed Ten lashes with the strap.” *Jackson*, 268 F. Supp. at 808 (citing prison regulations). The district court concluded that corporal punishment was not itself cruel and unusual but that use of “the strap” without “proper and adequate safeguards” was impermissible. *Id.* at 815. Further, the “use of any such devices as the crank telephone . . . or [t]he application of any whipping to the bare skin of prisoners” was enjoined. *Id.* at 816; see *supra* note 36.

297. See Malcolm Feeley & Edward Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America’s Prisons* 39–42 (1998); Larry W. Yackle, *Reform and Regret: The Story of Federal Judicial Involvement in the Alabama Prison System* 11–14 (1989) [hereinafter Yackle, *Reform and Regret*]; see also William Wayne Justice, *The Origins of Ruiz v. Estelle*, 43 Stan. L. Rev. 1, 4–5 (1990) (providing account, by Judge Justice, who presided, over Texas prison litigation). See generally Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and Extraordinary in Institutional Litigation*, 93 Harv. L. Rev. 465 (1980).

298. See, e.g., Am. Corr. Ass’n, *Agency Manual of Accreditation Policy and Procedure* (rev. ed. 2007), available at <http://www.aca.org/standards/pdfs/AccreditationPolicyProcedure.pdf> (on file with the *Columbia Law Review*). The problems of health care while confined, and the specific problems of particular populations, are longstanding. See Judith Resnik & Nancy Shaw, *Prisoners of Their Sex: Health Problems of Incarcerated Women*, in 2 *Prisoners’ Rights Source Book: Theory, Litigation, Practice* 319, 332–39 (Ira P. Robbins ed., 1980). As noted *supra* note 249, in 2010, the ABA is to consider approval of revised standards for prisoners.

ment of Justice to investigate institutions and, upon notice to state and local officials, to bring lawsuits on behalf of inmates.²⁹⁹ In some respects, CRIPA parallels the DTA, for both address mistreatment of those confined. But unlike the DTA, which sought to cut off access to courts, the 1980 enactment both authorized the Department of Justice to negotiate with states to improve conditions and helped institutionalized persons get into courts if they were unable to obtain redress through administrative routes.

The impact of these various routes to courts was, for a time, significant.³⁰⁰ But even as federal judges became involved in oversight, the Supreme Court began to curb their authority. In a variety of cases, the Supreme Court insisted on deference to prison officials, thereby cutting back the role federal courts could play in shaping substantive standards

299. Pub. L. No. 96-247, §§ 3-4, 94 Stat. 349, 350-51 (1980) (codified as amended at 42 U.S.C. § 1997a-b (2006)). Congress both authorized federal action and imposed requirements that the Justice Department first provide notice to permit the state or local officials opportunities to ameliorate conditions, and for remedial responses through negotiation in lieu of litigation. *Id.* § 4, 94 Stat. at 351. The Act permitted the federal government to respond to problems in mental health facilities or other institutionalized settings, and not only in prisons. *Id.* § 2, 94 Stat. at 349.

The use of CRIPA has varied with different presidential administrations. See Karen E. Holt, *When Officials Clash: Implementation of the Civil Rights of Institutionalized Persons Act* (1998). Holt's study traced the impact of the Reagan Administration, which sought to reduce "intrusion on the states," on CRIPA implementation. *Id.* at 31-32. She reported that in the eight months before Reagan's inauguration, the Justice Department had begun nine investigations, whereas five were launched during the first year of the Reagan Administration. *Id.* at 33. All told, that administration launched eighty-two investigations, filed sixteen "non-contested lawsuits," and began eight contested cases. *Id.* at 34. Holt questioned the implementation efforts of the Executive and faulted Congress for enacting language, born from compromise, that was laden with vague injunctions and detailed procedural requirements. *Id.* at 107-08.

From January 2001 through September 2008, the Department "opened 94 CRIPA investigations, issued 71 findings letters, filed 32 cases, and obtained 69 substantial agreements." Civil Rights Div., U.S. Dep't of Justice, Department of Justice Activities Under the Civil Rights of Institutionalized Persons Act Fiscal Year 2008, at 2 (2008), available at http://www.usdoj.gov/crt/split/documents/split_cripa08.pdf (on file with the *Columbia Law Review*). Within a few months of the beginning of the Obama Administration, the Department of Justice relied on CRIPA to seek changes in jails and juvenile facilities in New York. See *infra* notes 318-319 and accompanying text.

In 1994, Congress amended CRIPA to encourage prisoners who were bringing individual claims, as contrasted with Department of Justice initiated litigation, to seek redress primarily in administrative, rather than court, venues. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 20416, 108 Stat. 1796, 1833-34 (amending section 7 of CRIPA, exhaustion of administrative remedies). Those changes were subsequently modified as part of the Prison Litigation Reform Act, discussed *infra* note 312 and accompanying text. See Pub. L. No. 104-134, § 803, 110 Stat. 1321, 1321-70 (1996) (codified at 42 U.S.C. § 1997e (2006)). Unlike other litigants bringing § 1983 claims, prisoners are required to show exhaustion of administrative remedies. See 42 U.S.C. § 1997e(a).

300. See Feeley and Rubin, *supra* note 297, at 45-46; Yackle, *Reform and Regret*, *supra* note 297, at 256-60.

governing conditions.³⁰¹ Further, the Court insulated individual correctional officers from liability, absent proof that they acted “maliciously and sadistically for the very purpose of causing harm.”³⁰² Under the developing doctrine, harsh conditions and injuries did not result in judgments against defendant officials, absent showings that they had acted with deliberate indifference in denying prisoners “the minimal civilized measure of life’s necessities.”³⁰³

In some facilities, prisoners remained subject to violence at the hands of the state. In California, at a prison known as Pelican Bay, a federal judge found that inmates had been put in “fetal restraints” (“handcuffing an inmate’s hands at the front of his body, placing him in leg irons, and then drawing a chain between the handcuffs and legs until only a few inches separate the bound wrists and ankles”)—a technique that could “pose a serious health risk to inmates with respiratory ailments” as well as impose “significant pain and yet not fully secure the inmate.”³⁰⁴ Some were caged nude,³⁰⁵ and many subjected to both lethal and nonlethal force followed by inadequate medical treatment.³⁰⁶

The rising number of incarcerated prisoners exacerbated the problems. In 2009, a three-judge court found conditions so overcrowded in California prisons (places of “extreme peril to the safety of persons’ they house”) that population reductions (a “remedy of last resort”) were required as a matter of federal right.³⁰⁷ The court’s opinion, running

301. See, e.g., *Turner v. Safley*, 482 U.S. 78, 85 (1987) (invoking “separation of powers concerns” as counseling “a policy of judicial restraint” with respect to state prison administration); *Bell v. Wolfish*, 441 U.S. 520, 547 (1979) (“Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices”); *Pell v. Procunier*, 417 U.S. 817, 827 (1974) (advising that “courts should ordinarily defer to [prison officials’] expert judgment” on rehabilitation considerations such as limiting visitors).

302. *Farmer v. Brennan*, 511 U.S. 825, 835 (1994) (quoting *Hudson v. McMillian*, 503 U.S. 1, 6 (1992)).

303. *Id.* at 834 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

304. *Madrid v. Gomez*, 889 F. Supp. 1146, 1168 (N.D. Cal. 1995).

305. See *id.* at 1171–72.

306. *Id.* at 1176–92, 1200–14.

307. *Coleman v. Schwarzenegger (Coleman II)*, Nos. CIV S-90-0520 & C01-1351, 2009 WL 2430820, at *1, *2, *29, *63 (E.D. Cal. & N.D. Cal. Aug. 4, 2009) (citing Governor Schwarzenegger’s Oct. 4, 2006 Prison Overcrowding State of Emergency Declaration and H.R. Rep. 104-21, at 25 (1995), as well as 18 U.S.C. § 3626(a)(3) (2006)). The underlying litigation—two conjoined cases—had run for eight and nineteen years respectively. See, e.g., *Plata v. Schwarzenegger*, No. C01-1351, 2005 WL 2932253, at *1 (N.D. Cal. Oct. 3, 2005). A preliminary ruling in the combined cases on population caps was issued in February 2009. *Coleman v. Schwarzenegger (Coleman I)*, Nos. CIV S-90-0520 & C01-1351, 2009 WL 330960 (E.D. Cal. & N.D. Cal. Feb. 9, 2009). At that time, overcrowding at reception centers ran to 300%. *Coleman II*, 2009 WL 2430820, at *35. On September 1, Governor Schwarzenegger announced his plans to seek Supreme Court review of the decision, which under the PLRA would review the three-judge court ruling when the judgment gains sufficient finality. The state also sought a stay, which was denied at both the trial and Supreme Court levels. See *Coleman v. Schwarzenegger*, Nos. CIV S-90-0520 & C01-1351, 2009 WL 2851846 (E.D. Cal. & N.D. Cal. Sept. 3, 2009); *Schwarzenegger v.*

more than 180 pages in its “slip” form, detailed the harms of a system operating at 190% of its capacity.³⁰⁸ Decades of denial of a “minimal level of medical and mental health care” left some in “horrific conditions” and resulted in a “significant number” of prisoner deaths.³⁰⁹

But by the time that the 2009 opinion about the California prison system was issued, Congress had also joined the Court in limiting the role of federal judges vis-à-vis prisoners, just as it would later try to cut off access for 9/11 detainees. In 1996, Congress enacted what is officially called the Prison Litigation Reform Act of 1995 (PLRA), which imposed various constraints on prison litigation, including legislating end-dates for structural injunctions absent new findings by federal judges of ongoing constitutional violations.³¹⁰ As courts later explained, the “PLRA established ‘a comprehensive set of [statutory] standards to govern prospective relief in prison condition cases.’”³¹¹ To be plain, those “comprehensive standards” aimed to restrict the role of federal courts.³¹² Moreover, Congress limited the authority of single-judge district court decisions to provide reduction in population as a remedy³¹³—thereby requiring three-judge courts, such as the panel issuing the decision on overcrowding in the California prison system.³¹⁴

Coleman, No. 09A234, 2009 WL 2915066 (U.S. Sept. 11, 2009) (denying stay); Michael Rothfeld & Patrick McGreevy, Prison Plan Delay Sought, L.A. Times, Sept. 2, 2009, at A3.

308. *Coleman II*, 2009 WL 2430820, at *31.

309. *Id.* at *1.

310. Congress instructed courts that they could continue prospective relief beyond two years (in duration) only if the Court found that such relief “remains necessary to correct a current and ongoing violation of the Federal right . . .” 18 U.S.C. § 3626(b)(3). The PLRA imposed various other constraints on prisoner filings. For example, indigent prisoners were treated differently than other indigent plaintiffs; the law imposed filing fee obligations—prorated over time—in a complex formula. See 28 U.S.C. § 1915(a)–(b) (2006). Further, judges were empowered to screen filings before defendants had to answer. See *Id.* § 1915(e). Remedies in addition to injunctions were also limited, for example, by precluding money damages for mental or emotional harm without *physical* injury. See 42 U.S.C. § 1997e(e) (2006).

311. *Coleman II*, 2009 WL 2430820, at *28 (quoting *Gilmore v. California*, 220 F.3d 987, 998 (9th Cir. 2000)).

312. The statute speaks of the requirements of relief being “narrowly drawn,” and as least “intrusive” as possible, coupled with mandatory ending points. 18 U.S.C. § 3626(a)(1)(A), (b)(1). As noted *supra* note 299, the PLRA also imposed exhaustion requirements on prisoners bringing individual claims. In addition, the PLRA amended CRIPA to require the Attorney General to sign personally the complaint initiating action. See PLRA of 1995, Pub. L. No. 104-134, § 803, 110 Stat. 1321, 1321–73 (codified at 42 U.S.C. § 1997a(c)). See generally 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 U. Pa. J. Const. L. 139, 141 (2008).

313. See 18 U.S.C. § 3626(a)(3)(B), (E) (“In any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court . . . [I]f the court finds by clear and convincing evidence that (i) crowding is the primary cause of the violation of the Federal right; and (ii) no other relief will remedy the violation of the Federal right.”).

314. See *Coleman II*, 2009 WL 2430820, at *24 n.38.

Several lower court judges thought that aspects of the congressional intervention in the PLRA violated separation of powers by dictating results and interfering with final judgments of the courts.³¹⁵ The Supreme Court, however, upheld the challenge it heard on the PLRA.³¹⁶ As a result, even in cases such as *Wilkinson v. Austin*, in which the trial court had repeatedly issued orders to enforce the minimal protections ordered by the Supreme Court, the statute required the judge to cede jurisdiction, absent findings made every two years of “current and ongoing” violations.³¹⁷

Parallels between 9/11 detainees and regular prisoners can be continually drawn. During the week of August 24, 2009, newspapers carried headlines of revelations of CIA “guidelines” that had instructed interrogators on the procedures to be used for waterboarding and otherwise physically abusing individuals. At the very same time, the national press reported that New York State officials had badly mistreated juveniles in its prison system.³¹⁸ According to a thirty-two page report sent in August 2009 by the U.S. Department of Justice to the governor of New York, in four “residential centers” for juveniles:

Anything from sneaking an extra cookie to initiating a fistfight may result in a full prone restraint with handcuffs. This . . . approach has not surprisingly led to an alarming number of serious injuries to youth, including concussions, broken or knocked-out teeth, and . . . fractures.³¹⁹

315. Two such decisions were *French v. Duckworth*, 178 F.3d 437, 445–46 (7th Cir. 1999), and *Benjamin v. Jacobson*, 124 F.3d 162, 169–74 (2d Cir. 1997).

316. *Miller v. French*, 530 U.S. 327, 342 (2000), rev’g *French*, 178 F.3d 437.

317. See *Austin v. Wilkinson*, No. 4:01-CV-00071, 2008 WL 697679, at *2 (N.D. Ohio Mar. 12, 2008).

318. See, e.g., Nicholas Confessore, 4 Youth Prisons in New York Used Excessive Force, N.Y. Times, Aug. 25, 2009, at A1; see also Susan Dominus, Girls in Trouble, Humiliated and Injured at the Hands of the State, N.Y. Times, Aug. 29, 2009, at A15.

The press coverage made the parallels literally manifest. The story about the youth facilities bordered a picture of Attorney General Eric H. Holder, Jr., who had—as the caption of that photo explained—the day before “named a federal prosecutor to investigate abuse of prisoners held by the Central Intelligence Agency.” The right hand column story described the plan to investigate CIA abuses. Mazzetti & Shane, Investigation into C.I.A. Abuse, *supra* note 141.

319. Letter from Loretta King, Acting Assistant Att’y Gen., to the Honorable David A. Paterson, Governor of N.Y., at 5 (Aug. 14, 2009), available at http://www.usdoj.gov/crt/split/documents/NY_juvenile_facilities_findlet_08-14-2009.pdf (on file with the *Columbia Law Review*) (footnote omitted) (detailing Department of Justice’s investigation of Lansing Resident Center, Louise Gossett, Jr. Residential Center, Tryon Residential Center, and Tryon Girls Center). The letter was sent pursuant to CRIPA, see *supra* note 299, and provided notice that, absent changes by the state, the Department was prepared to file suit.

The Justice Department has also investigated abuses in Erie County Jails, which receive around 23,000 people annually. The Department filed a fifty page report that described violations of the obligation to protect prisoners from harm, inadequate suicide prevention, inadequate provision of medical services, and other, similar evidence of inadequate care. See Matthew Spina, U.S. Probe Finds Abuses at Erie County Jails, Buffalo News, July 29, 2009, at A1; Letter from Loretta King, Acting Assistant Att’y Gen., to the Honorable Chris

That same week, Hawaii announced the need to withdraw “168 female inmates at a privately run Kentucky prison . . . because of charges of sexual abuse by guards.”³²⁰ Yet—and akin to the claims of popular support for the torturous treatment of 9/11 detainees³²¹—in Arizona, one sheriff was celebrated as a folk hero for his flagrantly inhumane treatment of jailed inmates and his hostility towards immigrants.³²²

D. *Detention, Migration, and Adjudication*

One other set of detainees, technically falling on the civil side of the docket, requires consideration—those individuals alleged to have entered the United States unlawfully or otherwise subject to deportation. In 2008, more than 378,000 persons “from 221 countries” had been placed in custody or were otherwise being supervised by the U.S. Immigration and Customs Enforcement system.³²³ On any given day, some 31,000 persons were detained in one of more than 300 facilities and some persons, including small children, were held for extended periods of time.³²⁴

In 1996, through the Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA),³²⁵ Congress both imposed obligatory detention for certain categories of individuals facing removal and sought to limit federal courts’ ability to oversee deportation decisions.³²⁶ These actions paralleled congressional approaches to prisoners in AEDPA and in the PLRA, and foreshadowed the efforts to limit federal court jurisdiction in the DTA of 2005 and the MCA of 2006. Moreover, because IIRIRA did not detail a length of time for detention of those falling within its param-

Collins, County Executive, Erie County (July 15, 2009), available at www.usdoj.gov/crt/split/documents/Erie_findlet_redact_07-15-09.pdf (on file with the *Columbia Law Review*).

320. Ian Urbina, *Hawaii to Remove Inmates Over Sex Abuse Charges*, N.Y. Times, Aug. 26, 2009, at A12. The transfer to Kentucky had been prompted by cost savings; instead of the eighty-six dollars per day it cost to keep the inmates in Hawaii, the private facility charged about fifty-eight dollars per day. *Id.*

321. See, e.g., Donald Lambro, *An Incomplete 100 Days: Coming Up Short of All the Media Hoopla*, Wash. Times, Apr. 30, 2009, at A21 (reporting Pew Research Center poll’s findings that “nearly half of Americans”, including “[a] 54 percent majority of independents”, believe that “torturing terrorists is often or sometimes justified”).

322. See William Finnegan, *Sheriff Joe*, New Yorker, July 20, 2009, at 42, 45; Editorial, *Pulling Back the Immigration Posses*, N.Y. Times, Apr. 30, 2009, at A18. In response to his critics, Sheriff Joe Arpaio has defended his harsh treatment of inmates. See generally Joe Arpaio & Len Sherman, *America’s Toughest Sheriff: How to Win the War Against Crime* (1996).

323. Schriro, *Immigration Detention*, *supra* note 165, at 2. The number detained is a small percentage of the more than eleven million people estimated to be in the United States without legal status. *Id.* at 11.

324. *Id.*

325. Pub. L. No. 104-208, div. C, 110 Stat. 3009, 3009–546 (1996). In 2005, Congress provided different methods for transferring cases that challenge final orders of removal, deportation, or exclusion from federal district courts to courts of appeal under section 309(c)(4)(D) of the IIRIA. See Real ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231, 302 (codified as amended in scattered sections of 8 and 49 U.S.C.).

326. See 8 U.S.C. § 1226(c), (e) (2006).

eters,³²⁷ it raised the specter of indefinite preventive detention, just as 9/11 detention did in the following decade.

In 2001, the Supreme Court issued a decision that in some respects forecast *Hamdi*. The majority refused the paradigm of unrestrained executive authority to detain without any court oversight. Instead, the Court concluded it had authority to review decisions under particular provisions; further, when immigration authorities had determined a migrant was to be removed but that person had not been deported, the Court inferred a statutory presumption of a maximum stay of six months in detention.³²⁸ Yet the Court subsequently authorized a good deal of deference to administrative authorities by concluding, for example, that individualized hearings were not required for detentions authorized through a different provision so long as aliens were confined for less than the six months.³²⁹ According to immigrant advocates, the possibility of prolonged detention serves in some cases to induce unrepresented detainees to waive their rights to hearings (*Miranda* has no purchase in this context) and proceed directly to deportation by what are known as “stipulated removal orders.”³³⁰

327. *Id.* § 1226(c)–(d); see also Muneer I. Ahmad, *Guantánamo Is Here: The Military Commissions Act and Noncitizen Vulnerability* 13 (2007), at <http://www.acslaw.org/files/ACS%20Issue%20Brief%20-%20Guantanamo%20-%20Final.pdf> (on file with the *Columbia Law Review*).

328. *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). To avoid the Fifth Amendment due process questions that would arise if the statute was read to permit indefinite detention, the Court interpreted the act as imposing a reasonable period of time—presumptively six months absent some unusual circumstances—for detention after a decision on removability had been made. The *Zadvydas* rule applies in limited circumstances, when a person has a “final order of removal” but cannot be “removed” for some reason, such as a country of origin is in disarray. *Id.* at 682; see also *Clark v. Martinez*, 543 U.S. 371, 386 (2005) (extending the *Zadvydas* presumption of six months detention to cover “inadmissible” aliens). Questions about the permissibility of prolonged detention based on other facets of immigration law remain. See, e.g., *Rodriguez v. Hayes*, 578 F.3d 1032 (9th Cir. 2009).

329. See *Demore v. Kim*, 538 U.S. 510, 513, 527–30 (2003). The Court concluded that procedural protections such as individualized bond hearings are not required during the “reasonable” time period, explained as a “brief” and “limited period.” *Id.* at 513, 531. Various lower court opinions document the length of time in which certain categories of migrants have been held, without trial. In *Ly v. Hansen*, for example, an individual had been confined for “one and one-half years as part of a civil, nonpunitive proceeding when there was no chance of actual, final removal.” 351 F.3d 263, 271 (6th Cir. 2003). The court concluded that in general a reasonableness requirement was implicit in the statutory scheme and that, in this case the period was “unreasonable”—making habeas relief appropriate. *Id.* at 273. In *Tijani v. Willis*, Monsuru Tijani had been “imprisoned by the federal government for almost two and one-half years[,]” not because of “a criminal conviction” nor because he “face[d] imminent removal” through deportation. 430 F.3d 1241, 1243 (9th Cir. 2005) (Tashima, J., concurring). Rather, the government had yet to prove that he was subject to removal. *Id.*

330. See Problems with ICE Interrogation, Detention, and Removal Procedures: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec. & Int’l Law of the H. Comm. on the Judiciary, 110th Cong. 43–44 (2008) (statement of Kara Hartzler, Esq., Attorney, Florence Immigrant & Refugee Rights Project), available at <http://>

The fact of confinement is one problem, and the conditions of confinement another. ICE operates immigration detention facilities in accordance with “correctional detention standards designed for pre-trial felons,” which is to say that many immigrant detainees are in jails or prisons imposing more restrictions than are needed.³³¹ In addition, a 2009 report commissioned by the federal Department of Homeland Security concluded that provisions for classification, health care, family needs, visitors, lawyers, recreation, and religious observances were inadequate.³³² Documentation of these concerns is ample. Between 2004 and 2007, an estimated sixty-nine persons died while in facilities run by ICE,³³³ with new revelations in the summer of 2009 of previously unidentified individuals who had also lost their lives.³³⁴ A series of lawsuits and congressional hearings have detailed problems of inadequate access to health care and deliberate indifference to known medical needs.³³⁵ Materials produced through litigation were also compiled in a report, *A Broken System*—a “first-ever system-wide” overview of the government’s “failures” to comply with its own standards for safekeeping of immigration detainees.³³⁶

In its 2009 report, the governing authority—the Department of Homeland Security—described how it ran “the largest detention system

/judiciary.house.gov/hearings/printers/110th/40742.pdf (on file with the *Columbia Law Review*). Language barriers were a contributing factor. See Nat’l Immigrant Justice Ctr., *Language Barriers May Lead Immigrants to Waive Right to Hearing Before Deportation*, June 3, 2008, at <http://www.immigrantjustice.org/news/detention/preleasestiporderdata20080603.html> (on file with the *Columbia Law Review*).

331. Schriro, *Immigration Detention*, supra note 165, at 16.

332. *Id.* at 17–28.

333. See Cackley, *Health Care for Immigration Detainees*, supra note 165, at 1; see also *Castaneda v. United States*, 546 F.3d 682, 684–87 (9th Cir. 2008); Richard M. Stana, U.S. Gov’t Accountability Office, *Alien Detention Standards: Observations on the Adherence to ICE’s Medical Standards in Detention Facilities 2* (2008), available at <http://www.gao.gov/new.items/d08869t.pdf> (on file with the *Columbia Law Review*).

These problems have been acknowledged by ICE. As Schriro reported, as of the fall of 2009, there was “no medical classification system other than a limited use coding of healthy and unhealthy” and no mental health classification system. Schriro, *Immigration Detention*, supra note 165, at 25.

334. Cam Simpson, *More Immigration Detainee Deaths Disclosed*, Wall St. J., Aug. 18, 2009, at A3.

335. See *Detention and Removal: Immigration Detainee Medical Care: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec. & Int’l Law of the H. Comm. on the Judiciary, 110th Cong.* 56–60 (2007) (statement of Tom Jawetz, American Civil Liberties Union National Prison Project), available at <http://judiciary.house.gov/hearings/printers/110th/38115.pdf> (on file with the *Columbia Law Review*) (discussing the lack of treatment provided to a detainee suffering from penile cancer); see also Nina Bernstein, *New Scrutiny as Immigrants Die in Custody*, N.Y. Times, June 26, 2007, at A1.

336. Karen Tumlin, Linton Joaquin & Ranjana Natarajan, Nat’l Immigration Law Ctr., *A Broken System: Confidential Reports Reveal Failures in U.S. Immigrant Detention Centers*, at vi–viii (2009), available at <http://www.nilc.org/immlawpolicy/arrestdet/A-Broken-System-2009-07.pdf> (on file with the *Columbia Law Review*).

in the country”³³⁷ and that this system relied too heavily for placements on facilities built as jails and prisons.³³⁸ The 2009 recommendations called for finding new structures for confinement that were less restrictive, identifying “community-based alternatives,” improving medical care, and expanding opportunities for those detained to have access to visitors, to practice their religions, and to obtain legal materials.³³⁹ Further, the report concluded that certain populations—“women, families, and asylum seekers”—ought to have services targeted to their needs.³⁴⁰ Thus, the administrative proposals for improvement continued to rely on the model of detention, albeit with better facilities,³⁴¹ and the judicial responses have insisted, despite legislative obstacles, on some procedural protections for detained aliens.

A window into the process and quality of decisionmaking about deportation is provided by an extensive study of adjudicatory decisions that was undertaken by a group of law professors. The empirical survey, *Refugee Roulette*,³⁴² by Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag, tracked rulings by 928 asylum officers in some 30,000 cases decided between 1999 and 2004; their article also gives data on the administrative review provided by “immigration judges” and thereafter by the “Board of Immigration Appeal,” as well as on more than 2,000 federal appellate rulings in 2004 and a similar number in 2005.³⁴³

Their data parallel—at a general level—what the Abraham affidavit submitted in *Boumediene* provided on the decisionmaking deficits in CSRTs. Both illuminate the arbitrariness of and the difficulties faced by adjudicators in the two systems. The asylum researchers reported, for ex-

337. Schriro, Immigration Detention, *supra* note 165, at 6. Most of the facilities were “approved . . . for detention greater than 72 hours.” *Id.* at 9. ICE sometimes placed individuals in facilities run by the U.S. Bureau of Prisons and in “shared-use county jails.” *Id.* at 9–10.

338. *Id.* at 2–3. The “design, construction, staffing plans, and population management strategies are based largely upon the principles of command and control.” *Id.* at 4.

339. *Id.* at 3.

340. *Id.*

341. Concerns about the detention model were reported in news coverage of the 2009 report. As the director of a statewide immigrant advocacy center in Florida put it: “Even though it’s a nicer environment than a jail, . . . these are still the people we would hold up for release, not just nicer detention.” Nina Bernstein, Ideas for Immigration Detention Include Converting Hotels and Building Models, *N.Y. Times*, Oct. 6, 2009, at A14 (quoting Charu al-Sahli, Director, Florida Immigrant Advocacy Center).

342. Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 *Stan. L. Rev.* 295 (2007) [hereinafter Ramji-Nogales, Schoenholtz & Schrag, *Refugee Roulette*]. Their work, accompanied by commentary, was published in 2009 by NYU Press in a book of the same name. See Ramji-Nogales, Schoenholtz & Schrag, *Disparities in Asylum Adjudication*, *supra* note 170; see also David Ngaruri Kenney & Philip G. Schrag, *Asylum Denied: A Refugee’s Struggle for Safety in America* (2008).

343. Ramji-Nogales, Schoenholtz & Schrag, *Refugee Roulette*, *supra* note 342, at 301 n.10, 303–04, 362 tbl.2.

ample, that one immigration judge was more than “1820% more likely to grant an application for important relief than another judge” at the same location.³⁴⁴ Further, a “Chinese asylum seeker unlucky enough to have her case heard before the Atlanta Immigration Court had a 7% chance of success on her asylum claim, as compared to 47% nationwide.”³⁴⁵ The review provided by the Immigration Board of Appeals was “streamlined” under Attorney General John Ashcroft to reduce the number of persons sitting to review decisions.³⁴⁶ The new process turned “panel” reviews into decisions by a single-member, and those procedures in turn yielded higher affirmance rates without opinions than had the prior procedure, requiring rulings by panels.³⁴⁷

Much criticism has been leveled at these lower tier judges, all of whom are employees of the executive branch (specifically the Department of Justice), which has the power to fire or reassign them, as several were under the tenure of Attorney General Ashcroft.³⁴⁸ Workload is another problem; as of 2008, the 238 immigration judges averaged about 1,200 cases a year, as contrasted with federal district court judges who are assigned about 380 cases a year.³⁴⁹ Some immigration

344. *Id.* at 301. For example, the researchers looked at a set of asylum officers dealing with at least “100 Chinese cases,” which are governed by specific statutory provisions. *Id.* at 317–25; see also 8 U.S.C. § 1101(a)(42) (2006). That provision enables a refugee who has “been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program” to be “deemed to have been persecuted on account of political opinion.” A person with the “well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.” *Id.* The statutory directive has not avoided the challenges of interpretation of facts and discretionary assessments. For example, one appellate court reversed an immigration judge’s finding of no coercion because it was based only on “speculation.” See *Ding v. Ashcroft*, 387 F.3d 1131, 1138 (9th Cir. 2004). Further, grant rates varied, ranging by individuals in different regions from granting less than ten percent to granting almost ninety percent of the applications they received. Ramji-Nogales, Schoenholtz & Schrag, *Refugee Roulette*, *supra* note 342, at 319 fig.9.

345. Ramji-Nogales, Schoenholtz & Schrag, *Refugee Roulette*, *supra* note 342, at 329.

346. See Dorsey and Whitney LLP, Am. Bar Ass’n Comm’n on Immigration Policy, Board of Immigration Appeals: Procedural Reforms to Improve Case Management 28–29 (2003), available at http://www.dorsey.com/files/Publication/e649960f-30c0-408f-8965-0df604f69523/Presentation/PublicationAttachment/690ec02a-94b9-4115-a1a0-5d14cf0d7a6d/DorseyStudyABA_8mgPDF.pdf (on file with the *Columbia Law Review*).

347. Ramji-Nogales, Schoenholtz & Schrag, *Refugee Roulette*, *supra* note 342, at 356–58.

348. See David A. Martin, Another Second-Class Citizen: How the Justice Department Has Been Debasing Immigration Courts for Years, *Legal Times*, Aug. 11, 2008, at 43; see also Dana Marks Keener & Denise Noonan Slavin, Nat’l Ass’n of Immigration Judges, An Independent Immigration Court: An Idea Whose Time Has Come 7–11 (2002), available at <http://www.woodrow.org/teachers/esi/2002/CivilLiberties/Projects/PositionPaperImmigrationJudges.pdf> (on file with the *Columbia Law Review*).

349. See Marcia Coyle, Immigration Judges Seek Article I Status, *Nat’l L.J.*, Aug. 10, 2009, at 13. According to Schriro, 253 immigration judges are authorized. Schriro, *Immigration Detention*, *supra* note 165, at 13.

judges have themselves joined in the critique.³⁵⁰ Proposals for restructuring have come from various organizations, urging that immigration judges be moved out of the Justice Department to enable more independence.³⁵¹

Several Article III judges, including Richard Posner of the Seventh Circuit and Robert Katzmann of the Second Circuit, have been in the forefront of detailing problems, while M. Margaret McKeown on the Ninth Circuit has led an effort to provide more counsel to immigrants on the West Coast.³⁵² In published opinions, circuit judges have objected that immigration judges have been arbitrary or unfair, citing judges unaware of relevant facts and making findings unsupported by the record.³⁵³ Federal judges have criticized both the Department of Homeland

350. Stuart L. Lustig, Niranjan Karnik, Kevin Delucci, Lakshika Tennakoon, Brent Kaul, Dana Leigh Marks & Denise Slavin, *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 *Geo. Immigr. L.J.* 57 (2008); Coyle, *supra* note 349.

351. Coyle, *supra* note 349; see also Executive Office for Immigration Review: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec. & Int'l Law of the H. Comm. on the Judiciary, 110th Cong. 53–54 (2008) (statement of Mary M. Schroeder, Judge, United States Court of Appeals, Ninth Circuit), available at <http://judiciary.house.gov/hearings/printers/110th/44611.pdf> (on file with the *Columbia Law Review*).

352. While serving as the Chair of the Standing Committee on Federal Judicial Improvements, Judge McKeown helped to launch the Immigration Justice Project (IJP) in San Diego. Its goal was “to promote due process and access to justice at all levels of the immigration and appellate court system, through the provision of high-quality pro bono legal services for those in immigration proceedings in San Diego.” Am. Bar Ass’n Comm’n on Immigration, *About the ABA Immigration Justice Project*, at <http://www.abanet.org/publicserv/immigration/ijp/home.html> (last visited Nov. 19, 2009) (on file with the *Columbia Law Review*). The IJP website detailed problems, including how people claiming to be lawyers or specialists preyed “upon unsuspecting individuals.” *Id.* Another such effort, under the aegis of Robert Katzmann of the Second Circuit, is underway on the East Coast. See Jennifer Colyer, Sarah French Russell, Robert E. Juceum & Lewis Liman, *The Representation and Counseling Needs of the Immigrant Poor*, 78 *Fordham L. Rev.* 461 (2009); Nina Bernstein, *In City of Lawyers, Many Immigrants Fighting Deportation Go It Alone*, *N.Y. Times*, Mar. 13, 2009, at A21.

353. One decision concluded that the immigration judge’s opinion was “literally incomprehensible” and the BIA explanation of its action “incoherent.” *Recinos de Leon v. Gonzales*, 400 F.3d 1185, 1187 (9th Cir. 2005); see also *Bensilimane v. Gonzales*, 430 F.3d 828, 833 (7th Cir. 2005) (chastising immigration judge and BIA for ordering removal of an alien because he failed to submit a duplicate form of a document that immigration authorities already possessed and was peripheral to the alien’s claim); *Dawoud v. Gonzales*, 424 F.3d 608, 610 (7th Cir. 2005) (criticizing immigration judge’s opinion, “riddled with inappropriate and extraneous comments”); *Ssali v. Gonzales*, 424 F.3d 556, 563 (7th Cir. 2005) (observing that the “very significant mistake suggests that the Board was not aware of the most basic facts of [the petitioner’s] case”); *Sosnovskaia v. Gonzales*, 421 F.3d 589, 594 (7th Cir. 2005) (concluding that procedure used by immigration judge was “an affront to [petitioner’s] right to be heard”); *Fiadjoe v. Att’y Gen.*, 411 F.3d 135, 154–55 (3d Cir. 2005) (commenting that immigration judge’s “hostile” and “extraordinarily abusive” conduct toward petitioner “by itself would require a rejection of his credibility finding”); *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1054 (9th Cir. 2005) (finding that immigration judge’s assessment of credibility “was skewed by prejudgment, personal

Security and the Justice Department for failing to provide systematic guidance about how to deal with witness credibility issues.³⁵⁴ Moreover, while lawyers are often absent, some who were present made patent errors. According to a decision of the Second Circuit, a “disturbing pattern of ineffectiveness” of counsel was evidenced “with alarming frequency, in . . . immigration cases.”³⁵⁵

Yet radically varying outcomes in similar cases can also be found within the Article III judiciary as well. Figure 9, a graph reproduced from *Refugee Roulette*,³⁵⁶ captures some of the problems. The researchers concluded that “one U.S. Court of Appeals is 1148% more likely to rule in favor of a petitioner than another U.S. Court of Appeals considering similar cases.”³⁵⁷ In the Fourth Circuit, during 2004 and 2005, fewer than two

Remand Rates in Asylum and Related Cases, 2004–05, by Circuit

Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 50 Stan. L. Rev. 295, 363 (2007), reproduced with the permission of the authors and the *Stanford Law Review*.

FIGURE 9

speculation, bias, and conjecture”). See generally Adam Liptak, *Courts Criticize Judges’ Handling of Asylum Cases*, N.Y. Times, Dec. 26, 2005, at A1.

354. See *Djouma v. Gonzales*, 429 F.3d 685, 688 (7th Cir. 2005) (“The departments seem committed to case by case adjudication in circumstances in which a lack of background knowledge denies the adjudicators the cultural competence required to make reliable determinations of credibility.”).

355. *Aris v. Mukasey*, 517 F.3d 595, 600 (2d Cir. 2008); see also Katzmman, *supra* note 170, at 3.

356. The chart first appeared in Ramji-Nogales, Schoenholtz & Schrag, *Refugee Roulette*, *supra* note 342, at 362 tbl.2. Permission to reproduce this chart was provided by the authors and the *Stanford Law Review*.

357. *Id.* at 301.

percent of the cases were remanded to the Immigration Board of Appeals, whereas the Seventh Circuit reversed decisions in thirty-six percent of the cases reviewed during that interval.³⁵⁸ Furthermore, Article III judges report feeling flooded by the immigration caseload and have done various forms of triage, such as the Second Circuit's decision to place immigration appeals on the nonargument calendar unless any of the three judges, sequentially reviewing the papers, thinks otherwise.³⁵⁹

IV. THE LESSONS OF AN INTEGRATED CONSTITUTIONAL JURISPRUDENCE OF DETENTION

A. *Factual Distinctions, Legal Homogenization*

The details of Part III aim to make plain that, despite the rationales outlined in Part II to box the 9/11 case law into various categories of exotica, 9/11 jurisprudence mirrors debates about the roles to be played by independent judges and public proceedings in relationship to various detained populations. Repeatedly, arguments are proffered that the characteristics of a specific set of detainees—that they are alleged terrorists, postconviction prisoners, or migrants entering without permission—justify detention with little oversight by outsiders. Similarly, claims are made that special forms of expertise—of intelligence officers, of prison administrators, or of immigration officials—ought to be treated with deep deference. The distinctions among populations are also cited to justify a lack of third-party oversight. Thus, some argue that the problems of terror raise distinctive normative questions that ought to produce judicial reticence to intervene, while others suggest that after defendants are convicted, outsiders (be they judges, legislators, and/or the public) should stand in abeyance, leaving executive actors to their tasks.

Yet once the various sets of detainees, custodians, and the legal regimes that govern are brought together, one can see that—in practice—courts and legislators have responded similarly, at times imposing oversight and in other eras providing detainees with little by way of insulation from their custodians. The homogenization in fact and in law is one of many lessons to be garnered by integrating Supreme Court and congressional decisions on 9/11 detainees with those dealing with “regular” habeas corpus, prisoners, other detainees, and the puzzles of separation of powers in general.

358. *Id.* at 363 fig.46.

359. See 2d Cir. R. § 0.29 (interim), available at <http://www.ca2.uscourts.gov/Docs/Rules/LR.pdf> (on file with the *Columbia Law Review*); Jon O. Newman, The Second Circuit's Expedited Adjudication of Asylum Cases: A Case Study of a Judicial Response to an Unprecedented Problem of Caseload Management, 74 *Brook. L. Rev.* 429, 432–34 (2009).

B. *The Challenges of Peace, Security, and Factfinding—Before and After Trial*

Another lesson is that attention must be paid to the precarious position of the state. The facts of torture, physical abuse, solitary confinement, and lack of medical care in various detention centers require a focus on the profound vulnerability of the detained. But criminal suspects, hardened prisoners in supermax, ordinary prisoners, and migrants, as well as 9/11 detainees, pose tremendous challenges for governments charged with maintaining peace and security in the face of acute practical difficulties. Gathering information to ward off injuries is essential, as is identifying individuals posing special threats, some of whom need to be held for years on end.

Determining the underlying merits of claims—especially when individuals have crossed the borders of nation-states—is especially challenging and, in some instances, functionally impossible. As the asylum study showed, even statutory presumptions, codified for certain claims by asylum seekers coming from China, have not produced consistent decisions for applicants across the country.³⁶⁰ More generally, government officials, often hampered by limited funds, are dependent on the detained for information and cooperation. In every setting I have described, the initial decisions—arrest, detention of noncriminals, interrogations, placement in solitary confinement, and applications for asylum—are made in one-on-one exchanges between government officials and individuals.

Such decisions are followed by somewhat more formalized procedures to determine ongoing detention. In all the various systems analyzed here, the power to decide individuals' ongoing interrogation or confinement (in police stations, Ohio's supermax, segregation within ordinary prisons, immigration, and Guantánamo) is located in individuals working for the administrations that run the detention facilities. The person subject to confinement is often left to his or her own resources when disputing placements within a bureaucratic system. While rights of counsel attach to individuals held as criminal defendants³⁶¹ and to 9/11

360. Ramji-Nogales, Schoenholtz, and Schrag explain in the book version of *Refugee Roulette* that, in the late 1990s, Congress changed immigration laws by specifying certain criteria for asylum involving specific countries. Ramji-Nogales, Schoenholtz & Schrag, *Disparities in Asylum Adjudication*, *supra* note 170, at 71–72. A “person . . . forced to abort a pregnancy or undergo involuntary sterilization was deemed to have been persecuted on account of political opinion,” presumably making asylum claims easier for certain Chinese applicants to establish. *Id.* at 71. Yet, in a relatively large number of cases “likely to be the most similar, because they all involve claims of persecution by the same country,” the researchers found “wide variation in the remand rate from circuit to circuit;” none of twenty-eight cases in 2002–2005 were remanded in the Fourth Circuit and about twenty percent or more were remanded in six other circuits. *Id.* at 81 & tbl.5.2.

361. See *Rothgery v. Gillespie County*, 128 S. Ct. 2578 (2008). That decision concluded that this Sixth Amendment right attached when a defendant made an initial appearance before a magistrate. *Id.* at 2591–92.

detainees at Guantánamo,³⁶² neither immigrants, convicted prisoners, nor 9/11 detainees outside the United States have free lawyers to assist them. The absence of equipage is not only a problem for the individuals but, as illustrated by judicial complaints in the immigration context, for decisionmakers as well.

Many judgments about detention are made without testimony from nonparties, friendly or adverse. Further, in some instances, observers are barred and, in others, the proceedings are functionally inaccessible.³⁶³ And even as one moves from administrative contexts to courts, a good many decisions about prisoners are made by judges “on the papers,” reviewing legal filings of pro se (or self-represented) litigants. The *Boumediene* majority extolled the importance of independent factfinding, yet evidentiary hearings in federal postconviction habeas cases are a statistical rarity, exemplified by one study recording hearings in fewer than two percent of the petitions filed.³⁶⁴

The administrative paradigms exemplified by the CSRTs at Guantánamo and immigration proceedings are part of a more general outsourcing and devolution of adjudication from regular courts to resolution mechanisms that render processes invisible to the public. One can find numerous affirmations in constitutions and in case law at the state, national, and international levels about obligations to provide “open and public courts” and independent judges,³⁶⁵ obliged to accord adversaries equal opportunities. Yet many decisionmaking procedures with deep ef-

362. See MCA of 2006, 10 U.S.C. §§ 949c, 950h (providing detainees trial and appellate counsel).

363. In terms of the hearings described here, as noted *supra* notes 86–88 and accompanying text, the Department of Defense controlled the openness of CSRTs and Military Commission proceedings. Prison administrators, in turn, do not generally permit observers at disciplinary or placement hearings. Evidentiary asylum hearings, on the other hand, are formally open to the public unless the alien requests closure. 8 C.F.R. § 1240.11(c)(3)(i) (2009). In other kinds of immigration proceedings, immigration judges may limit attendees due to space constraints or to protect “witnesses” and “parties” when certain kinds of protective orders are sought, or, to guard the “public interest” which could include national security concerns. See *id.* § 1003.27(a)–(d).

364. See Charles D. Weisselberg, Evidentiary Hearings in Federal Habeas Corpus Cases, 1990 BYU L. Rev. 131, 165–68. According to Weisselberg, “[i]n 1988, only 1.11 percent of the habeas corpus petitioners received evidentiary hearings, compared with 5.03 percent of all other civil cases.” *Id.* at 167.

365. See, e.g., U.S. Const. art. III, § 1; Ga. Const. art. 1 (1777); Md. Declaration of Rights art. 6 (1776); Mass. Const. pt. I, art. XXIX; N.H. Const. pt. I, art. 37 (1783). The transnational precept can be found in the Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 10, U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948). It provides: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal” in determining criminal charges. See also Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, ¶ 1, Nov. 4, 1950, 213 U.N.T.S. 221 (requiring tribunals be “independent and impartial”). For more discussion of the public function of courts and of privatization of adjudicatory procedure, see Judith Resnik, Courts: In and Out of Sight, Site, and Cite, 53 Vill. L. Rev. 771 (2008).

fects on individuals' lives lack these attributes.³⁶⁶ Thus, an integrated jurisprudence reveals not only that the challenges of policing against aggression are endemic but that the result has been, repeatedly, to spawn internal, closed administrative decisionmaking procedures.

C. Litigation's Utilities: Jeremy Bentham's Publicity and Normative Contestation

How is it known that "C.I.A. officers carried out mock executions and threatened at least one prisoner with a gun and a power drill"?³⁶⁷ That disclosure came because (a) in 1966, Congress had enacted the Freedom of Information Act (FOIA); (b) the American Civil Liberties Union, other lawyers, physicians, and veterans filed disclosure requests in 2003;³⁶⁸ (c) in 2005, the Associated Press filed another lawsuit for access to information about those held at Guantánamo and transcripts of CSRTs;³⁶⁹ (d) dozens of individuals, represented by volunteer attorneys from small and large practices, as well as specialized institutional litigators, contested their detention in court; (e) members of Congress, factfinding agents in nonprofits such as the International Red Cross, and non-governmental organizations in other countries published the results of their investigations; (f) an estimated 10,000 lawyer hours were spent litigating just one of the FOIA cases;³⁷⁰ (g) lower federal courts ordered disclosures of various information, putting before the public more than 2,800 documents from the Department of Defense, about 1,000 from the State Department, some 870 from the FBI, another 145 from elsewhere in the Justice Department, and just under 50 from the CIA;³⁷¹ (h) the Justice Department cooperated by complying in part with various court orders after; (i) the Supreme Court issued a series of six decisions that

366. See, e.g., 29 C.F.R. § 1614.109(e) (2008) (providing that for Equal Employment Opportunity Commission proceedings dealing with claims about discrimination in federal employment: "Attendance at hearings will be limited to persons determined by the administrative judge to have direct knowledge relating to the complaint. Hearings are part of the investigative process and are thus closed to the public."); 38 C.F.R. § 20.701 (2008) (providing that, in veterans' claims, "[o]nly the appellant and/or his or her authorized representative may appear and present argument in support of an appeal").

367. Mazzetti, *New Details on C.I.A. Abuse*, *supra* note 138.

368. *ACLU v. U.S. Dep't of Def.*, 339 F. Supp. 2d 501, 502 (S.D.N.Y. 2004); see also *supra* note 137 and accompanying text.

369. *Associated Press v. U.S. Dep't of Def.*, 410 F. Supp. 2d 147, 149 (S.D.N.Y. 2006).

370. Scott Shane, *A.C.L.U. Lawyers Mine Documents for Truth About Detainees and Interrogations*, *N.Y. Times*, Aug. 30, 2009, at A4.

371. *Id.* Some of what has been provided is posted on the website of the Center for Constitutional Rights. See Press Release, Ctr. for Constitutional Rights, CCR, Amnesty and NYU Receive Docs Cheney Wanted Declassified to Justify Torture (Aug. 24, 2009), at <http://ccrjustice.org/newsroom/press-releases/ccr%2C-amnesty-and-nyu-receive-docs-cheney-wanted-declassified-justify-torture> (on file with the *Columbia Law Review*).

protected habeas jurisdiction and imposed a modicum of review even as Congress tried to block access.³⁷²

I have provided this recitation of events and court orders as an ode to the information-forcing qualities of litigation. Hence, one can see the impact of public conflict, enabled by courts' commitments to openness. The 9/11 sequence underscores the political frame that both shapes and is affected by court decisionmaking. As administrations changed through majoritarian politics, the government altered some of its positions,³⁷³ acceding to some disclosure requests (such as the names of inmates held in Iraq and in Afghanistan)³⁷⁴ and launching its own investigation. Thus the public came to know about a 2004 report by the Inspector General of the CIA, as well as other documents including a 2007 Department of Justice memorandum that "reauthoriz[ed] the C.I.A.'s 'enhanced' interrogation techniques" and detailed conditions at CIA jails.³⁷⁵

Lawsuits are not the only source for obtaining information, but they have a special utility. The formal rules of litigation require that plaintiff and defendant, be they detainee or custodian, treat each other respectfully in public. Lawsuits in democratic regimes oblige even the government to disgorge information and hence to be subjected to scrutiny. Indeed, the efforts by other branches to block access to courts and to argue that "state secrets" required dismissal of individual suits are themselves testimonials to the power of this facet of adjudication.³⁷⁶

372. In addition, a federal district judge authorized some discovery so that a Guantánamo detainee, Abdul Raheem Ghulam Rabbani, held "as a terrorism suspect for five years despite claiming that he did only menial work," could serve limited written interrogatories on Khalid Shaikh Mohammed, "the self-proclaimed mastermind of Al Qaeda's Sept. 11 plot." See John H. Cushman, Jr., *Detainee to Question 9/11 Suspect*, N.Y. Times, Aug. 23, 2009, at A4; see also *Al Odah v. United States*, 559 F.3d 539, 541 (D.C. Cir. 2009) (remanding discovery order for additional findings on what disclosures should be required). Federal judges have also relied on habeas jurisdiction to require medical monitoring. See *Zuhair v. Bush*, 592 F. Supp. 2d 16, 16–17 (D.D.C. 2008).

373. For example, the Department of Justice had contested disclosures and, in the case seeking facts about detention at Guantánamo, advanced the argument (rejected by the court) that by doing so, it was protecting the privacy interests of detainees there. See *Associated Press*, 410 F. Supp. 2d at 152–55.

374. Eric Schmitt, U.S. Shifts, Giving Detainees' Names to the Red Cross, N.Y. Times, Aug. 23, 2009, at A1. Under the Bush Administration, the CIA ran "secret prisons," that the Obama Administration ordered in January of 2009 to be closed. *Id.* In addition, foreign prisoners have also been held at "Special Operation camps" (also called "temporary screening sites") in Balad, Iraq, and in Bagram, Afghanistan. Those detentions are supposed to be temporary, as individuals are sent thereafter to long-term detention in Iraq or Afghanistan. The Red Cross has been given access to those prisons. *Id.* "The New York Times reported in 2006 that some soldiers [at such sites] beat prisoners with rifle butts, yelled and spit in their faces, and used detainees for target practice in a game of jailer paintball." *Id.*

375. Mazzetti, *New Details on C.I.A. Abuse*, *supra* note 138.

376. See, e.g., *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992 (9th Cir. 2009), reh'g en banc granted, 586 F.3d 1108 (9th Cir. 2009); *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007), cert. denied, 128 S. Ct. 373 (2007); see also *supra* note 171.

In *Boumediene*, Justice Kennedy wrote of the historic role of the writ of habeas corpus. I would term its function *proto-democratic*: For hundreds of years, habeas corpus has authorized an individual to require an accounting by the government in public. The narrow category of rights protected through habeas has broadened as, over the course of the last three centuries, constitutions (both domestic and transnational) have guaranteed that trials be public, judges be impartial, and all courts be “open.”³⁷⁷ Through developments in the twentieth century, individuals of every color, gender, and status (prisoners included) gained rights of access to courts, thereby changing adjudication by imbuing it with democratic principles of equality. Adjudication itself entails democratic practices of reciprocal respect, as courts oblige judges to protect disputants’ rights (including equipping the indigent with counsel in certain instances) and require litigants to treat their opponents as equals.³⁷⁸

A key distinction between CSRTs, military commissions, asylum hearings, and supermax confinement proceedings on the one hand, and adjudication in courts on the other, is the public nature of the proceedings. 9/11 decisionmaking is but one of many instances of an increasingly pervasive reliance on administrative modes that, in diverse settings, undermine the norm of “open” adjudication.³⁷⁹ Indeed when the “Appointing

377. See, e.g., Mass. Const. pt. I, art. XXIX; see also U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him . . .”); Mass. Const. pt. II, chap. VI, art. VII (“The privilege and benefit of the writ of *habeas corpus* shall be enjoyed in this commonwealth, in the most free, easy, cheap, expeditious, and ample manner, and shall not be suspended by the legislature . . .”); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 14, U.N. Doc. 1/6316 (Dec. 16, 1966) (“[E]veryone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”); Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 365, art. 6 at 228 (“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly . . .”).

378. My focus is on the constitutional commitments to open egalitarian adjudicatory procedures. Alice Ristroph has argued that the Constitution requires “respectful punishment,” which entails appreciation of the dignitary interests of convicted prisoners. She links that thesis to Fifth Amendment rights of silence that could be understood as based in recognition of self-preservation rights. Alice Ristroph, *Respect and Resistance in Punishment Theory*, 97 Cal. L. Rev. 601, 627–30 (2009).

379. The September 21, 2001 decision to close many “special interest” deportation hearings in immigration courts prompted litigation, in which the Sixth Circuit found the blanket closures unconstitutional under the First Amendment, while the Third Circuit concluded that presumptions of openness in courts did not apply to immigration administrative hearings, and deferred to the Attorney General’s determination of the need for closure. Compare *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002), with *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), cert. denied, 538 U.S. 1056 (2003). The Foreign Intelligence Surveillance Court (FISA) also operates under closed procedures. See Theodore W. Ruger, Chief Justice Rehnquist’s Appointments to the FISA Court: An Empirical Perspective, 101 Nw. U. L. Rev. 239, 244 (2007).

Authority” at Guantánamo first banned public access to its classification hearings, it styled them “administrative” to explain their closure.³⁸⁰

An understanding of some of what is lost by using private processes in lieu of open courts comes in part from Jeremy Bentham. Writing in the early part of the nineteenth century, Bentham argued that “publicity” was “the soul of justice.”³⁸¹ Bentham advocated public processes for a host of settings including, infamously, the “panopticon” prison to put inmates under constant surveillance, a situation that supermax facilities have brought to horrific realization. But Bentham did not advocate the indefinite isolation of supermax and moreover, he was equally committed to bringing legislators into plain view—with new designs for buildings that would let the public watch their officials at work.

As for judges, Bentham offered a detailed account of the utilities of public courts, which he saw as educating the populace, enhancing the accuracy of decisionmaking, and enabling oversight of, as well as providing legitimacy for, the judiciary. Bentham was deeply skeptical about both the common law and judges (whom he grouped with lawyers and referred to as “Judge & Co.”); he thought that they promoted their own interests through procedural complexities and obfuscating jargon.³⁸² Bentham advocated publicity as a mechanism to police the exercise of discretion by common law judges; as he put it, while presiding at trial, the judge was himself “on trial.”³⁸³ In today’s terms, Bentham could be understood both as a procedural reformer (focused on the interstices of legal rules) and a political theorist, shaping a role for many institutions (courts included) to contribute to what has come to be called “the public sphere”³⁸⁴ or more aptly public spheres, as multiple arenas exist in which members of a polity develop views about governing norms and practices.³⁸⁵

The conflicts over Guantánamo demonstrate the extent to which courts can encourage norm contestation. But unlike Bentham, who thought that such information exchanges would result in maximizing the greater good for the greater number, I do not presume that the public

380. See Military Commission Order No. 1, *supra* note 88, at 14.

381. See Bentham, *Rationale*, *supra* note 32, in 6 Bowring, *Works*, *supra* note 32, at 355. The materials related to publicity were written around 1812.

382. See, e.g., Jeremy Bentham, *Scotch Reform*, in 3 Bowring, *Works*, *supra* note 32, at 511; see also Philip Schofield, *Utility and Democracy: The Political Thought of Jeremy Bentham* 307 (2006); William Twining, *Theories of Evidence: Bentham and Wigmore* 28, 41–42, 76–79 (1985). Twining explained Bentham’s claim as not predicated on corruption but on a “single class or corporation” forged by judges and lawyers shaping a regime that served their own interests. *Id.* at 76.

383. Bentham, *Rationale*, *supra* note 32, in 6 Bowring, *Works*, at 355.

384. See generally Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg trans., 1996).

385. See Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, in Habermas and the Public Sphere 109 (Craig Calhoun ed., 1992).

debate generated through open dispute resolution will necessarily illuminate what the greater good is (if that is one's metric) or how to produce deeply just results. What public courts do achieve is acknowledgment of the existence of conflicts and, through repeated reiterations, opportunities to gain a better understanding of the diversity of fact patterns and arguments, and hence opportunities to develop or revisit governing precepts.

By imposing processes that dignify individuals and treat them as equals before the law, litigation makes good on one of democracy's promises, even as it may also reveal its failures. Moreover, rights of audience divest the litigants and the government of exclusive control over conflicts and their resolution. Empowered, participatory audiences can therefore see and then debate what legal parameters ought to govern. Free and ready access permits us all to be observers, equipped through the free flow of information to be competent debaters about norms.³⁸⁶

The constitutional writ of habeas corpus sought to mediate the authority exercised in custodial detention that is otherwise far from public view. While 9/11 has demonstrated that habeas corpus remains a route, the enactment in 1980 of legislation empowering the Department of Justice to file suits to protect the "civil rights of institutionalized persons" serves as a reminder that detainee initiation ought not be the only trigger for outside inquiry, nor are courts the only public institution that could be charged with oversight. Another mechanism can be found in provisions of the International Criminal Tribunal for the former Yugoslavia; there detainees have a right of address to courts—every 120 days—when they are brought physically before a judicial panel in open court to explain whatever problems they may have.³⁸⁷

Thus, through focusing on the continuities among the war crime tribunals, the military commissions, detainee review procedures, and administrative decisions in prisons and for immigrants, one can see the limited but creative possibilities for courts (and outsiders more generally) come into play. Third-party scrutiny illuminates the treatment of suspects, detainees, prisoners, and immigrants, all reliant on government for their well-being. Procedures that offer access thus provide a demonstration that the government understands detainees to be persons who must be treated with respect, even while confined and punished.

The next question is to consider the impact this analysis could have on American constitutional law. Article III could be read to require that devolution of "judicial power"—in this context, to make decisions sanctioned by law resulting in months and years of detention—be accompa-

386. Robert Post, *Democracy and Knowledge: Opinion and the First Amendment* 38 (forthcoming 2010), available at http://www.law.yale.edu/documents/pdf/Intellectual_Life/Post_RosenthalLectures830.pdf (on file with the *Columbia Law Review*).

387. R. Proc. & Evid. (ICTY) 65 bis (as amended Dec. 13, 2001 and reenacted 22 July 2009), available at http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_Rev43_en.pdf (on file with the *Columbia Law Review*).

nied by obligations that those quasi-judges receiving such authority adopt the attribute of openness that has come to be definitional of adjudication. The Sixth Amendment offers, for example, a model of process for criminal defendants that gives rise to rights of address, confrontation, and public scrutiny (“a speedy and public trial”). The due process clauses of the Fifth and Fourteenth Amendments, coupled with First Amendment rights to petition for redress, support public access to civil proceedings, including materials filed with courts. While the Court has required administrative decisions to comport with due process, it has not yet inscribed a role for the public. Just as a convicted defendant has a right of allocution—to speak, in person and in public—at sentencing, and just as third parties have rights to attend civil hearings, law could require that some members of the public (subject to appropriate security screening) be permitted to observe decisions resulting in the long-term detention of persons, whether alleged to be terrorists, illicit migrants, or misbehaving prisoners. One can conceive of detention-placement and duration decisions as a form of sentencing or of “resentencing” (for those convicted), framed as a kind of adjudication requiring acknowledgment of its significance through a structure of both procedural and substantive obligations.

The broader point is that the robust critique that has developed challenging the closed proceedings for classification at Guantánamo should be the predicate for leveling parallel complaints against decisionmaking for asylum seekers, for prolonged confinement in isolation within prisons, and for other forms of detention. Based on the interaction among provisions of the United States Constitution, augmented by statutes as well as through rules made by all three branches, law ought to oblige open decisionmaking when confinement is at stake. Permitting observation of various government decisionmaking hearings would serve an important disciplinary function for, as both Bentham and Michel Foucault understood, surveillance is power—deployed in this context against (rather than by) the government as a constraint on its custodians.³⁸⁸

D. *Engagement and Anxiety: Substantive Proportionality and Jurisdictional Insularity*

In May 2009, a federal trial judge asked the question: “[W]hat is the scope of the government’s authority to detain” individuals at Guantánamo?³⁸⁹ As he pointed out, since the mention of the “‘permissible bounds’ of the government’s detention authority” in *Hamdi* in 2004, neither the Supreme Court nor appellate courts had revisited that issue.³⁹⁰ In response, the judge imposed a substantive constraint by con-

388. Michel Foucault, *Discipline and Punish: The Birth of the Prison* 77 (Alan Sheridan trans., Vintage Books 1979) (1977).

389. *Hamdily v. Obama*, 616 F. Supp. 2d 63, 66 (D.D.C. 2009).

390. *Id.* at 66–67 (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 522 n.1 (2004) (plurality opinion)).

cluding that, under the laws of war, the government's framework for which persons were eligible for preventive, pretrial detention could not be accepted in its entirety. While individuals found to have "committed a belligerent act" or to be a "part" of Al Qaeda or the Taliban could be held, those found only to have provided "substantial support" or "directly supported hostilities" could not.³⁹¹ Another example of substantive constraints on detention that mixes prevention and punishment comes from the trial court decision in *Wilkinson v. Austin*. As discussed above, a district judge ruled that an individual could not be sent to supermax based on too small a quantity of contraband drugs or too loose an association with a gang.³⁹²

These decisions embrace a kind of proportionality analysis, broached expressly in the 1980s by the Court in sentencing cases and used more regularly in other constitutional systems.³⁹³ In *Solem v. Helm*, the Supreme Court concluded that a life sentence for minor checking-fraud was "grossly disproportionate" and hence a violation of the Eighth Amendment's prohibition on cruel and unusual punishment.³⁹⁴ In addition to regulating the length of confinement, the Supreme Court has imposed constitutional constraints on custodial practices. For example, in 2002, the Court relied on the Eighth Amendment to conclude that handcuffing a prisoner to a hitching post for seven hours in the sun violated "the dignity of man."³⁹⁵ In 2005, judicial authority curbed the discretion of custodians by holding that, if prison officials wanted to segregate inmates by race (which the government had argued was necessary to reduce gang violence in prison), those decisions were to be subjected to "strict scrutiny" by the judiciary.³⁹⁶ Congress has also provided protection for prisoners to exercise their religious beliefs.³⁹⁷ And, of course, decades earlier the Court had, through *Miranda v. Arizona*, interposed another

391. *Id.* at 76–78. In contrast, another district judge had adopted the government's definitional predicates. *Id.* at 69 (citing *Gherebi v. Obama*, 609 F. Supp. 2d 43, 62–71 (D.D.C. 2009)).

392. See *supra* note 269 and accompanying text.

393. See generally Alec Stone Sweet & Jud Matthews, Proportionality Balancing and Global Constitutionalism, 47 *Colum. J. Transnat'l L.* 72 (2008); Vicki C. Jackson, Being Proportional About Proportionality, 21 *Const. Comment.* 803 (2004) (reviewing David M. Beatty, *The Ultimate Rule of Law* (2004)).

394. 463 U.S. 277, 279–81 (1983).

395. *Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958)). The legal question was whether a correctional employee could be liable for damages, which in turn required deciding whether he could reasonably be presumed to have known that such treatment was unconstitutional. See *supra* note 292. Larry Hope had taken a "nap during the morning bus ride to the chain gang's worksite" and after failing to be "prompt in responding to an order to get off the bus," and an exchange of "vulgar remarks" that "led to a wrestling match with a guard," Hope was subdued, required to take off his shirt, and hitched to the post for seven hours, during which time he was given no bathroom breaks and water only "once or twice." *Id.* at 734–35.

396. *Johnson v. California*, 543 U.S. 499, 499 (2005).

397. See Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (2006).

substantive constraint on police interrogations by excluding evidence obtained through coercion.³⁹⁸ All of these decisions insisted that certain constitutional norms override custodial authority, and all have generated debate about their wisdom and effectiveness.

But such rulings are now rare, offering another lesson—about the structural influences on judicial willingness to impose substantive limits on custodial decisionmaking. I have provided an overview of interactions over some sixty years among police, immigration, intelligence and prison officials, legislators, and the courts. Constitutional protections for detainees developed in the wake of World War II's revelations of totalizing government oppression and of equality movements seeking legal recognition of discrimination's harms. Federal and state judges responded by interpreting American constitutional precepts to impose constraints on custodians, thereby demonstrating the country's differences from its Cold War antagonists. Subsequently, the focus moved onto a host of other threats to which a "war on crime," a "war on drugs," and a "war on terror" (all accompanied by preventive and punitive confinement regimes) were seen as appropriate answers.³⁹⁹

As the currents shifted, the courts and Congress have often been co-venturers, either enabling detainees to pursue rights or building jurisdictional rules walling them off. From the 1960s through the 1980s, both the Court and the Congress shaped legal rules equipping prisoners with resources (such as the infusion provided by the Department of Justice under CRIPA) to contest aspects of their confinement. Race was a subtext (at times, directly acknowledged) of criminal justice and prison reform, just as the Cold War provided the negative example of a "police state."

But in 1987, in *McCleskey v. Kemp*, the Supreme Court refused to entertain statistical analyses that posed a significant challenge to the fairness of criminal sanctions.⁴⁰⁰ The defendant claimed that the imposition of the death penalty was racially discriminatory; he proffered studies showing that, when black defendants were charged with killing white victims, the defendants were more likely to be given capital sentences.⁴⁰¹ When

398. 384 U.S. 436 (1966).

399. For a discussion of the social movements that shaped those ideologies, see David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (2001); Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (2007); Tracey L. Meares, *Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 Ohio St. J. Crim. L. 105 (2005); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 Harv. L. Rev. 191, 202–07 (2008).

400. 481 U.S. 279 (1987).

401. *Id.* at 287. Warren McCleskey relied on a statistical study that, as described by Justice Powell's majority opinion, had reviewed 2,000 murder cases in Georgia in the 1970s and concluded, "black defendants, such as McCleskey, who kill white victims have the greatest likelihood of receiving the death penalty." *Id.* As the dissenters saw the data, defendants "charged with killing white victims . . . [were] 4.3 times as likely to be sentenced

rejecting that systemic attack in favor of demonstrable proof of discriminatory bias in an individual case, the majority explained its unwillingness to think about the broad impacts of sentences on various discrete populations. By way of justification, the majority said, “if we accept McCleskey’s claim . . . we could soon be faced with similar claims as to other types of penalty . . . [and] to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender.”⁴⁰² A few decades later, the Court rebuffed inquiries into sentences alleged to be disproportionately harsh. In 2003, the Court upheld state “three-strike laws,” even as such provisions left some individuals with life sentences after sequential convictions for minor legal infractions such as the theft of “four videotapes worth \$68.84.”⁴⁰³

The political and social gestalt of the various “wars on . . .” relied on anxieties and insecurities to justify ever-growing numbers of individuals confined and higher sentences, just as fear has animated decisions around 9/11. As detailed in Part III, by the mid-1990s, Congress curtailed court review for immigrants,⁴⁰⁴ further circumscribed access for regular prisoners by means of the PLRA,⁴⁰⁵ and limited access for habeas petitioners through the AEDPA.⁴⁰⁶ Congress was not inventing such re-

to death as defendants charged with killing blacks.” *Id.* at 321 (Brennan, J., dissenting). But the majority held that such data did not suffice, for a defendant had to show that the “decisionmakers in *his* case acted with discriminatory purpose.” *Id.* at 292 (majority opinion).

402. *Id.* at 315–17 (majority opinion) (footnotes omitted).

403. *Lockyer v. Andrade*, 538 U.S. 63, 66 (2003). Leonadro Andrade had been arrested previously for minor thefts, and was admittedly addicted to drugs. *Id.* at 67. As a result of California’s sentencing provisions, he was sentenced to two consecutive twenty-five year terms. *Id.* at 68; see also *Ewing v. California*, 538 U.S. 11 (2003). There, as Justice Breyer’s dissent explained, the sentence amounted “to a real prison term of at least 25 years. The sentence-triggering criminal conduct consists of the theft of three golf clubs priced at a total of \$1,197.” *Id.* at 35 (Breyer, J., dissenting).

404. See, e.g., IIRIA of 1996, Pub. L. No. 104-208, § 342(a), 110 Stat. 3009, 3546–606 (codified in scattered sections of 8 & 18 U.S.C.) (limiting judicial review of orders of removal).

405. Pub. L. No. 104-134, § 803, 110 Stat. 1321, 1366–71 (1996) (codified at 42 U.S.C. § 1997e (2006)); see also *supra* notes 310–314 and accompanying text.

406. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 28 U.S.C.); see also *supra* note 167. See generally Giovanna Shay & Christopher Lasch, *Initiating a New Constitutional Dialogue: The Increased Importance Under AEDPA of Seeking Certiorari from Judgments of State Courts*, 50 *Wm. & Mary L. Rev.* 211, 221 (2008). AEDPA imposed various gatekeeping restrictions that barred “second or successive habeas corpus application[s].” 28 U.S.C. § 2244(b)(1) (2006). These provisions survived a Suspension Clause challenge in *Felker v. Turpin*, 518 U.S. 651, 662–64 (1996). As for the cases detailed in Figure 7, a few are high profile rulings on issues such as the lawfulness of race-related preemptory challenges and the obligations of states to enforce provisions of consular notice under the Vienna Convention. See *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 343 (2006) (consular notice); *Miller-El v. Dretke*, 545 U.S. 231, 234 (2005) (race-based preemptory challenges); *Medellín v. Dretke*, 544 U.S. 660, 664 (2005) (consular notice). Yet many more are about whether a petitioner has or has not missed deadlines, failed to raise claims, exhausted remedies properly, and the like. See,

strictions from whole cloth but rather patterning its work after judicially-crafted interpretations also limiting prisoner access.⁴⁰⁷ Further, the judiciary generally acceded to congressional restrictions on its authority over prisoners's claims⁴⁰⁸ rather than finding that some of the statutory constraints violated principles of separation of powers.⁴⁰⁹ The treatment of 9/11 detainees through the DTA of 2005⁴¹⁰ and the MCA of 2006,⁴¹¹ aiming to limit access to courts, is thus consistent with the barriers imposed for other detainees. What was unusual was the Court's refusal to defer to the constraints imposed.

Despite Justice Kennedy's moving comments in *Boumediene* about the role habeas plays in "affirming the duty and authority of the Judiciary to call the jailer to account,"⁴¹² the Court has repeatedly limited its own relationship to detainees,⁴¹³ both in cases contesting the factual predi-

e.g., *Lawrence v. Florida*, 549 U.S. 327, 329 (2007); *Day v. McDonough*, 547 U.S. 198, 201 (2006); *Kane v. Garcia Espitia*, 546 U.S. 9, 9 (2005); *Mayle v. Felix*, 545 U.S. 644, 648 (2005); *Johnson v. United States*, 544 U.S. 295, 298 (2005); *Rhines v. Weber*, 544 U.S. 269, 271–72 (2005).

407. Several of the restrictions on access that the Court had created through case law were codified in various ways by Congress in the PLRA or AEDPA. Those limitations include the rulings in *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) and in *Teague v. Lane*, 489 U.S. 288, 316 (1989). See generally Judith Resnik, Tiers, 57 S. Cal. L. Rev. 837, 886–87 (1984). The impact of the 1990s legislation is addressed in Liebman & Ryan, *supra* note 167, at 852–57; Mark Tushnet & Larry Yackle, Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act, 47 Duke L.J. 1, 10–11 (1997).

408. See, e.g., *Miller v. French*, 530 U.S. 327, 350 (2000).

409. Some provisions could be seen as posing "*Klein*" problems, after the 1871 decision in which the Court held that Congress could not direct the courts to find that a presidential pardon was proof of loyalty to the Confederacy. See *United States v. Klein*, 80 U.S. 128, 148 (1871), and discussion *supra* note 140. Further, some of the PLRA rules could have been read as undermining the finality of court judgments. See *supra* notes 315–317 and accompanying text. Both the AEDPA and the PLRA could also be viewed as undermining courts' ability to do independent factfinding relevant to constitutional questions. See Liebman & Ryan, *supra* note 167.

410. Pub. L. No. 109-148, § 1005(e)(1), 119 Stat. 2680, 2742 (2006) (codified at 42 U.S.C. § 2000dd-1); see also *supra* note 118.

411. Pub. L. 109-366, § 7(a)(1), 120 Stat. 2600, 2635–36 (2006) (codified in scattered sections of 10 U.S.C. and at 42 U.S.C. § 2000dd-0); see also *supra* note 118. The 2006 MCA also purported to limit the ability of 9/11 detainees to bring condition claims. See § 7(a)(2), 120 Stat. at 2636. Following *Boumediene*'s habeas ruling, the 2009 MCA, in contrast, omitted this provision.

412. *Boumediene v. Bush*, 128 S. Ct. 2229, 2247 (2008).

413. Indeed, Justice Kennedy's decision for the Court in *Boumediene* repeatedly trumpeted its own limits, as it underscored the special and unique status of habeas corpus as a remedy and the differences between 9/11 detainees and prisoners seeking postconviction habeas. See, e.g., *id.* at 2263–66. "AEDPA applies . . . to federal, postconviction review after criminal proceedings in state court have taken place. As of this point, cases discussing the implementation of that statute give little helpful instruction (save perhaps by contrast) for the instant cases, where no trial has been held." *Id.* at 2264. "The two leading cases addressing habeas substitutes, *Swain v. Pressley*, 430 U.S. 372 (1977), and *United States v. Hayman*, 342 U.S. 205 (1952), likewise provide little guidance here. The statutes at issue were attempts to streamline habeas corpus relief, not to cut it back."

cates for detention and in those challenging the conditions of confinement. As a result, *Iqbal*—rather than *Boumediene*—provides more insight into the contemporary Court’s relationship with its sibling branches’ authority over detention; the self-imposed constraints in *Iqbal*, produced through a mix of equitable doctrines, statutory construction, and constitutional interpretation, parallel current doctrine governing most detainees.

Cases in the 2009 term fit the *Iqbal* paradigm. Illustrative is the ruling on William Osborne’s request for access to “physical evidence that, if tested, [would] conclusively establish” whether he committed a heinous crime.⁴¹⁴ The Court ruled, 5-4, that states had no obligation under the Due Process Clause to provide samples of DNA. More generally, prisoners (and others) seeking structural reform of institutions are faced with court-created doctrines and legislative injunctions limiting judicial power to redress violations of federal law.⁴¹⁵ And under *Iqbal* and other opinions, prisoners requesting monetary compensation face doctrines expanding prosecutorial and prison officials’ authority as well as governmental immunities.⁴¹⁶

Again, comparisons across decades are in order. In the 1970s, Henry Monaghan argued there should be a special role for federal courts in enforcing federal rights, at times through a willingness to look over the shoulder of state court judges and to decide, anew, constitutionally relevant facts.⁴¹⁷ But by the late 1990s, judicial interpretations of congressional strictures in habeas had insulated state court determinations of both fact and law from federal habeas oversight. For example, a federal judicial determination of a state court error on a defendant’s federal con-

Id. Thereafter, a panel of the D.C. Circuit read *Boumediene* as not addressing “the *content of the law*” governing detention nor “disturb[ing]” precedents limiting “the extraterritorial reach of any constitutional provisions, other than the Suspension Clause.” *Rasul v. Myers*, 563 F.3d 527, 529 (D.C. Cir. 2009), cert. denied, No. 09-227 (U.S. Dec. 14, 2009) (denying relief for “four British nationals” alleging mistreatment while detained at Guantánamo and seeking redress under Alien Tort Statute, Religious Freedom Restoration Act, Geneva Convention, and through implied causes of action under the Constitution).

414. Dist. Att’y’s Office for the Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2331 (2009) (Stevens, J., dissenting).

415. See, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 126, 132–33 (1995); *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 393 (1992); see also *Horne v. Flores*, 129 S. Ct. 2579, 2593–95 (2009). See generally Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 Ind. L.J. 223 (2003).

416. See, e.g., *Van de Kamp v. Goldstein*, 129 S. Ct. 855, 858–59 (2009). That decision concluded that a district attorney and chief deputy district attorney were entitled to absolute prosecutorial immunity in a suit alleging various supervisory failings, including the “failure to establish an information system containing potential impeachment material about informants.” *Id.*; see also *Pearson v. Callahan*, 129 S. Ct. 808, 816–18 (2009) (authorizing district judges to reach question of qualified immunity before determining whether asserted constitutional right was “clearly established”).

417. See Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1364 (1973); see also Monaghan, *Hart & Wechsler*, *supra* note 14, at 894–95; Monaghan, *Supreme Court Review*, *supra* note 238, at 1964.

stitutional rights is not sufficient grounds for habeas relief; federal judges must find that state courts were *unreasonably* erroneous.⁴¹⁸ Often, the Court has explained the limited access afforded to federal courts for state prisoners in terms of the need to protect the finality of state decisions in a federal system.⁴¹⁹ Moreover, in several decisions, the Court has used its authority to override lower court judges who had mined records and concluded the remedies were needed—vividly etched when a majority of five ruled that a habeas petitioner, relying on a judge’s permission to file papers a few days late, was nonetheless time-barred.⁴²⁰

This integrated jurisprudence underscores that *Boumediene*, along with some of the immigration decisions at the appellate and Supreme Court levels, are rare instances in which oversight has been provided for detainees with little prospect of trial or those facing deportation.⁴²¹ Yet even those remedies do not entail structural interventions taking aim at the violence in detention. These cases can thus be understood, as Stephen Vladeck has argued, to fit within a small line of decisions in which the Court protected its own prerogatives against incursions from sibling branches,⁴²² rather than as an embrace of a distinct obligation to interpret the Constitution as responsive to detainees dependent on the state.

Yet a puzzle emerges about the structural influences shaping the recent procedural preclusions for detainees and the capacious protections for custodial officials. The expansion of criminal defendant rights in the 1960s and 1970s was accompanied by concerns about race discrimination and a felt need to mark the United States as attentive to human dignity. One could argue that similar conditions prevail today, in that attention is

418. See *Waddington v. Sarausad*, 129 S. Ct. 823, 831 (2009); *Williams v. Taylor*, 529 U.S. 362, 398–99 (2000) (interpreting 28 U.S.C. § 2254(d)–(e) (2000)). This approach puts federal judges in an unpleasant relationship with their state court colleagues, who are subjected to analyses of whether they not only erred, but also made mistakes on federal law that competent judges ought to have avoided.

419. The Court has repeatedly described aspects of AEDPA as reflecting “principles of comity, finality, and federalism.” *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (quoting *Williams v. Taylor*, 529 U.S. 420, 436 (2000)); see also *Day v. McDonough*, 547 U.S. 198, 208–09 (2006). See generally Larry W. Yackle, A Primer on the New Habeas Corpus Statute, 44 *Buff. L. Rev.* 381, 381–82 (1996); Larry W. Yackle, State Convicts and Federal Courts: Reopening the Habeas Corpus Debate, 91 *Cornell L. Rev.* 541, 547 (2006).

420. *Bowles v. Russell*, 551 U.S. 205, 207–08 (2007).

421. See, e.g., *Boumediene v. Bush*, 128 S. Ct. 2229, 2241–42 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557, 569–71 (2006); *INS v. St. Cyr*, 533 U.S. 289, 293 (2001). In the last few years, the Court has also interpreted procedural requirements to enable various immigration petitioners to be heard. See *Nken v. Holder*, 129 S. Ct. 1749, 1754 (2009); *Negusie v. Holder*, 129 S. Ct. 1159, 1162 (2009); see also *Dada v. Mukasey*, 128 S. Ct. 2307, 2319–20 (2008). Of course, a few cases related to postconviction challenges have also resulted in remedial opportunities or relief. See, e.g., *Jimenez v. Quarterman*, 129 S. Ct. 681, 686–87 (2009).

422. Stephen I. Vladeck, *Boumediene’s Quiet Theory: Access to Courts and the Separation of Powers*, 84 *Notre Dame L. Rev.* 2107, 2146 (2009). Vladeck argued that access to courts should be grounded on a theory of separations of powers as well as on First Amendment and Due Process predicates.

turning to the racialized composition of detention populations (one in nine black men between the ages of twenty and thirty-four are behind bars⁴²³), the expenses of and excesses of confinement, the frequently inadequate lawyering prior to conviction, and the risk of erroneous imposition of the death penalty. Indeed, evidence of horrific violence in prisons prompted Congress to enact the Prison Rape Elimination Act of 2003, calling for efforts to reduce sexual assaults, albeit without authorizing litigation rights.⁴²⁴

Once again, 9/11 responses provide insights into the lack of responsiveness to these stark figures. As discussed at the outset, in January of 2009, President Obama called for the closing of Guantánamo. Yet some ten months thereafter, more than 200 people, including several found by federal judges to be detained without evidence of wrongdoing, remained in detention on the base. Stateside, institutions of total confinement—supermaxes—are plentiful, providing secure facilities, arguably “worse” than conditions at Guantánamo.⁴²⁵ Yet, as discussed, Congress has enacted bills aiming to make it difficult to bring the (relatively) small number of remaining detainees onshore, even if locked down; the compromise measure regulates the transfers by imposing notification requirements and justifications such as bringing detainees to trial in the United States.⁴²⁶

The popular demonization of the 9/11 detainees helps to explain the unwillingness of legal actors to open up debate on the substantive rules that justify both the fact and duration of detention—before trial or after conviction, under state or federal regimes.⁴²⁷ Jurisdictional barriers have proven politically palatable. For example, although in 2001 the

423. Pew, *One in 100*, *supra* note 163, at 6. Those demographics are not unique to the United States, albeit they are more acute in the United States. See Nicola Lacey, *Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies* (Cambridge Univ. Press 2008) (2006) (the Hamlyn Lecture).

424. See Pub. L. No. 108-79, 117 Stat. 972 (codified at 42 U.S.C. §§ 15601–609 (2006)).

425. See Peter Finn, *Detainees Face Severe Conditions if Moved to U.S.*, *Wash. Post*, Oct. 4, 2009, at A6. That article detailed conditions at the federal supermax, Administrative Maximum Facility, in Florence, Colorado, where people are “sealed off for 23 hours a day in cells with four-inch-wide windows and concrete furniture,” and if “they behave,” they are allowed “an hour’s exercise each day in a tiny yard, . . . alone.” *Id.*

426. See *supra* notes 87–91 and accompanying text. On October 1, 2009, the House passed a nonbinding resolution to block all transfers into the United States. 155 Cong. Rec. 10,413 (daily ed. Oct. 1, 2009). The negotiation between the House and Senate resulted in the regulated transfers. See Peter Finn, *Key Democrats Would Let Guantanamo Detainees Be Tried in U.S.*, *Wash. Post*, Oct 8, 2009, at A7. On October 28, the President signed two laws containing almost identical language barring release into the United States and imposing conditions on transfer. Department of Homeland Security Appropriations Act of 2010, Pub. L. No. 111-83, § 552, 123 Stat. 2142, 2177–79 (2009); National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1041, 123 Stat. 2190, 2454–55 (2009); see also *supra* notes 91 & 140.

427. See Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 *Yale L.J.* 1035, 1065–67 (1977).

Supreme Court declined to reject *Miranda* outright,⁴²⁸ its reach has been limited through Supreme Court doctrine and police practices,⁴²⁹ and in 2009, Congress concluded it had no purchase in offshore interrogations of “enemy belligerents.”⁴³⁰

The sense of vulnerability captured by the various “war” terminologies is one basis on which to explain the strictures of contemporary detention law. Another kind of vulnerability is at work that affects the jurisprudence—a fear of “foreign” influences undermining United States legal precepts, resulting in jurisprudential insularity. As detailed above, in earlier decades, “the foreign” sometimes stood as a negative exemplar prompting descriptions of “American” democratic precepts that refused to condone custodial practices identified with despotic regimes. Occasionally, courts also referred to other nations or transnational precepts as providing positive guidance or as relevant sources.

Given the transnational nature of the threats themselves (as border-crossing is itself criminalized and as migrants are conflated with terrorists), and given the overlap in legal regimes aiming to justify detention, this arena of law would seem to invite transnational judicial exchanges. Not only do many countries grapple with terror, many (like the United States) have responded by detaining individuals preventively. Around the world,⁴³¹ countries authorize incapacitation for “public protection” based on an array of grounds—illegal migration, sexual predatory behavior, heinous criminal actions, terrorist threats—that undermine the presumption that it is conviction and punishment that is required for incarceration.⁴³² One could marshal elements of legal re-

428. See *Texas v. Cobb*, 532 U.S. 162, 171 (2001).

429. See, e.g., *Montejo v. Louisiana*, 129 S. Ct. 2079, 2091 (2009). That decision overturned *Michigan v. Jackson*, 475 U.S. 625 (1985), and concluded that the fact that a defendant is represented by counsel does not bar the police from initiating interrogations and requesting cooperation. See also Weisselberg, Mourning *Miranda*, supra note 221, at 1592. Pending before the Court this term is a case that will require examination of the reach of *Edwards v. Arizona*, 451 U.S. 477 (1981), which held that once an accused has invoked a right to counsel for interrogation, that person cannot be subjected to questioning without counsel present. See *Shatzer v. Maryland*, 954 A.2d 1118, 1130–31 (Md. 2008), cert. granted, 129 S. Ct. 1043 (2009).

430. The National Defense Authorization Act for Fiscal Year 2010 prevents the *Miranda* rule from applying to individuals detained “outside the United States as an enemy belligerent and . . . in the custody or under the effective control of the Department of Defense” unless so ordered by a court. Pub. L. No. 111-84, § 1040, 123 Stat. 2190, 2454 (2009) (“No *Miranda* warnings for Al Qaeda Terrorists.”); see also infra notes 445–456.

431. Cole, Preventive Detention, supra note 93, at 694–95. See generally Stella Burch Elias, Rethinking “Preventive Detention” from a Comparative Perspective: Three Frameworks for Detaining Terrorist Suspects, 41 Colum. Hum. Rts. L. Rev. 99 (2009).

432. See, e.g., *A. & Others v. United Kingdom*, App. No. 3455/55 (Eur. Ct. H.R. Feb. 19, 2009), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=847470&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (on file with the *Columbia Law Review*); *Al-Kateb v. Godwin* (2004) 219 C.L.R. 562, ¶ 45 (Austl.), available at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2004/37.html> (on file with the *Columbia Law Review*); CC

gimes from many countries to support some of the 9/11 responses, including a frank embrace of preventive detention. But the domestic judgments on 9/11 habeas, on asylum detention, on supermax, and on prison conditions do not entail reflections on how other jurisdictions have dealt with these problems.

Thus, 9/11 jurisprudence reveals the constitutional gestalt of the era in which it sits, as it developed when efforts to chill references in United States constitutional discourse to “foreign law” were ascendant.⁴³³ When writing in 2005 for the majority that held the death penalty for juveniles violative of the Eighth Amendment, Justice Kennedy mentioned international and comparative law. His comments drew a sharp rebuke from Justice Scalia,⁴³⁴ committed to damping down such analyses.⁴³⁵ Further, when nominated for the Supreme Court, each of the three newest justices—Chief Justice Roberts, Justice Alito, and Justice Sotomayor—were questioned about their views on “foreign law,” and each explained their reasons for not resorting to foreign law. Justice Alito explained: “We have our own law, we have our own traditions, we have our own precedents, and we should look to that in interpreting our Constitution.”⁴³⁶ Thus, the transnational literature addressed to supermax, solitary confinement,

decision no. 2008-562DC, Feb. 21, 2008, ¶ 10, available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/a2008562dc.pdf (on file with the *Columbia Law Review*) (declaring certain provisions of the Act pertaining to postsentence preventive detention and diminished criminal responsibility due to mental deficiency unconstitutional); Sec’y of State for Justice v. James [2009] UKHL 22, 2009 2 W.L.R. 1149 (U.K.); see also Judith Resnik & Brenda Hale, *The Law of Detention*, in *Global Constitutionalism: Constitutional Administration I-1, I-1* (Robert Post ed., 2009).

433. See Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 Harv. L. Rev. 109 (2005) [hereinafter Jackson, *Constitutional Comparisons*]; Judith Resnik, *Law as Affiliation: “Foreign” Law, Democratic Federalism, and the Sovereignty of the Nation-State*, 6 Int’l J. Const. L. 33, 39 (2008).

434. Justice Scalia’s dissent in *Roper v. Simmons* objected to references made in Justice Kennedy’s majority opinion to punishment practices outside the United States and to international conventions. 543 U.S. 551, 622–28 (2005) (Scalia, J., dissenting). See generally Jackson, *Constitutional Comparisons*, supra note 433; Jeremy Waldron, *Comment, Foreign Law and the Modern Ius Gentium*, 119 Harv. L. Rev. 129 (2005).

435. See, e.g., Ruth Bader Ginsburg, “A Decent Respect to the Opinions of [Human]kind”: The Value of a Comparative Perspective in Constitutional Adjudication, 26 St. Louis U. Pub. L. Rev. 187 (2007); A Conversation Between U.S. Supreme Court Justices: The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer, 3 Int’l J. Const. L. 519 (Norman Dorsen moderator, 2005). See generally Vicki C. Jackson, *Constitutional Engagement in a Transnational Era* 194–95 (2009).

436. See Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 370, 471 (2006); see also Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 200–01 (2005); Transcript of the Sotomayor Confirmation Hearings 88, 89, at http://epic.org/privacy/sotomayor/sotomayor_transcript.pdf (last visited Dec. 26, 2010) (on file with the *Columbia Law Review*) (July 14, 2009 and July 15, 2009, exchanges with Senators Schumer and Coburn).

and to prison conditions has not been explored in the Supreme Court's discussions.

E. "Self-Regulating Official Behavior": *Tiers of Authority in the Federation*

This integration of 9/11 law with federal court jurisprudence on jails, prisons, and immigrant detention facilities invites reflections on the silences and lacunae. Jenny Martinez described "process as avoidance"⁴³⁷ in the context of 9/11 decisions. Those are not the only cases in which the Supreme Court has had difficulty in responding directly to the question of what rules ought to apply when the state has total control over human beings. Even when faced with detailed descriptions of human subjugation and of evidence that ought to produce uncertainty about the legitimacy of ongoing detentions, the Court has repeatedly insulated the federal judiciary from addressing the merits to decide when an individual is wrongfully convicted or detained in intolerable conditions.

Yet, in the face of legislative approval reflecting popular support that, in 2005 and 2006, closed off all redress for 9/11 detainees, a majority of jurists have, in fact, insisted at least upon open processes to afford protection for liberty.⁴³⁸ Just as some jurists refused total executive authority during prior wars, their contemporary counterparts have done so again. The 9/11 habeas cases represent, movingly, the utility of providing structural insulation for judges, protected from many forms of political retribution. What 9/11 litigation has demonstrated is the value of a central tenet of the federal courts canon—judicial independence. An amalgam of executive and legislative decisions produced Guantánamo, as well as the prisons, jails, and "residential centers" in Ohio, California, New York, Arizona, and the hundreds of facilities for the detention of immigrants.⁴³⁹ Those political processes continue to churn out fear and anger at persons perceived to be threats, exemplified in 2009 by congressional efforts to cut 9/11 detainees off from transfers to mainland prisons, supermaxes included.⁴⁴⁰

Nonetheless, independent judges have spoken to detainees as rights-holders. Such decisions are examples of what Henry Monaghan argued to be a critical facet of Article III decisionmaking—the "independent"

437. Martinez, *supra* note 26, at 1017–18.

438. The idea that law—personified through judicial decisionmaking—must be "present," even in times of terrorism and war, is argued by the then President of the Israeli Supreme Court. See Aharon Barak, Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy, 116 Harv. L. Rev. 19, 151–52 (2002).

439. As the *Coleman* three-judge court noted, the "massive 750% increase in the California prison population since the mid-1970s is the result of political decisions made over three decades, including the shift to inflexible determinate sentencing and the passage of harsh mandatory minimum and three-strikes laws," as well as the failure to provide resources to match the incarceration rate. *Coleman v. Schwarzenegger* (*Coleman II*), Nos. CIV S-90-0520 & C01-1351, 2009 WL 2430820, at *115 (E.D. Cal. & N.D. Cal. Aug. 4, 2009).

440. See *supra* notes 425–426 and accompanying text.

review of constitutional facts. While defining that arena remains slippery, Monaghan has repeatedly insisted that the vitality of a role for the Supreme Court resides within its delineation of “constitutional facts” about which it (and lower court judges) will not defer in favor of rulings by administrative agencies or state courts.⁴⁴¹

But 9/11 ought to prompt a reconceptualization of the roles that state officials could play. The development of constitutional rights for criminal defendants and prisoners came through litigation against state officials—the Arizona police holding Ernesto Miranda in the 1960s, and the prison officers of Arkansas and Ohio whipping William King Jackson in the 1970s, and sending Charles Austin to supermax in 2005. The habeas cases brought by Guantánamo detainees and by individuals held in immigration detention bring federal custodians into focus and confound a narrative that posited that misbehavior was based in the states.

This frame reveals that custodial excesses know no jurisdictional bounds, inviting both renewed focus on the constitutional rights of detainees and active participation from an array of government actors, ranging from state judges to executive officials. The last few decades have brought attention to state courts as a font of constitutional jurisprudence that can be more rights-protective than federal precepts.⁴⁴² Further, state judges have written about the role played by their courts in the application of transnational human rights.⁴⁴³ Yet federal court doctrine has either continued to presume that national constitutional law is intrusive (rather than a useful supplement) or overridden state courts that have extended protections to criminal defendants beyond what the United States Constitution has been interpreted to require.⁴⁴⁴

The rise of federal detention and the revelations of its failings offer the opportunity to rework legal regimes to recognize robust roles for

441. Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 263–76 (1985); Monaghan, *Supreme Court Review*, *supra* note 238, at 1925–26 (2003).

442. See Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. Rev. L. & Soc. Change 359, 361 (2006); Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 Harv. L. Rev. 1147, 1148 (1993). This commentary has not focused on detainees. Further, reported state-based case law on prisoners’ rights often refers to federal interpretations. See, e.g., *Stolte v. Cummings*, 70 P.3d 695 (Kans. App. 2003) (holding lack of personal hygiene products not violative of Eighth Amendment or state provisions); *Cordova v. LeMaster*, 96 P.3d 778 (N.M. 2004) (identifying spousal visitation rights, under both Eighth and Fourteenth Amendments and state counterparts).

443. See, e.g., Shirley S. Abrahamson & Michael J. Fischer, *All the World’s a Courtroom: Judging in the New Millenium*, 26 Hofstra L. Rev. 273, 273 (1997); Margaret H. Marshall, “Wise Parents Do Not Hesitate to Learn from their Children”: Interpreting State Constitutions in an Age of Global Jurisprudence, 79 N.Y.U. L. Rev. 1633, 1655 (2004); Resnik, *Law’s Migration*, *supra* note 244, at 1627–33.

444. See, e.g., *Pennsylvania v. Labron*, 518 U.S. 938, 940–41 (1996); *Arizona v. Evans*, 514 U.S. 1, 4 (1995); *Michigan v. Long*, 463 U.S. 1032, 1051 (1983). See generally Edward A. Purcell, Jr., *The Story of Michigan v. Long: Supreme Court Review and the Workings of American Federalism*, in *Federal Courts Stories*, *supra* note 11, at 115, 115–39.

state courts and legislators to address the substantive law of detention and custody. Further, just as Congress in the 1980s invited the Department of Justice to play an active role in reforming conditions of confinement in state institutions, Congress could fund the National Center for State Courts and the State Justice Institute to support interstate initiatives on custodial reforms. Moreover, states—lacking the ability to print money to fund deficits—bear the brunt of pressures resulting from over-incarceration. The expense and futility have moved some officials to argue for alternatives to incarceration.

If 9/11 makes plain the importance of the role to be played by judges of all jurisdictions, another lesson of the integration of the 9/11 jurisprudence with that of criminal and immigration detention is about the limits of their interventions. Return to the history resulting in *Miranda*. A decade earlier, Jerome Hall had examined the problems of custodial interrogations and warned against judicial rules of evidence because, he thought, they could “widen[] the gap between law and police practices.”⁴⁴⁵ Rather than indirect means of dealing with “serious abuses,” Hall argued for the imposition of liability on harmdoers, coupled with “discipline and better training of the police.”⁴⁴⁶

Thereafter, the Court in *Miranda* crafted the kind of rule that Hall thought would be too indirect. To protect against coercive interrogations, the police were obliged to inform defendants of their right to remain silent; the price for noncompliance was exclusion of the evidence. Henry Monaghan read that remedy as constitutional common law, “a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions,” and hence “subject to amendment, modification, or even reversal by Congress.”⁴⁴⁷ But in the 1990s, Chief Justice Rehnquist, writing for the Court in *Dickerson v. United States*, appeared to give the Court’s formulation constitutional status when refusing to permit a statutory cut-back that Congress had enacted soon after *Miranda* to limit it.⁴⁴⁸ The Court enshrined its own authority to set the parameters of investigatory interrogations in the narrow circumstances to which *Miranda* now applies, the “use of unwarned statements . . . in the prosecution’s case in chief.”⁴⁴⁹

445. Hall, *supra* note 225, at 176.

446. *Id.*

447. See Monaghan, *Constitutional Common Law*, *supra* note 42, at 2–3. He had argued that the case had not established “immutable constitutional status” for warnings, which were a “famous gloss on the privilege against self-incrimination.” Rather, the Court had subsequently “stressed its willingness to accept alternatives” as long as they would achieve the underlying goal. *Id.* at 20.

448. *Dickerson v. United States*, 530 U.S. 428, 438–39 (2000).

449. *Id.* at 443–44. As noted above, pending before the Court are questions about when interrogations can occur without counsel. In 1981, in *Edwards v. Arizona*, the Court held that “[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only

Hall's warning about the gaps between legal command and practice have been substantiated in the recent literature about *Miranda's* effects.⁴⁵⁰ In a 2008 article, Charles Weisselberg examined the post-*Miranda* rulings constraining its import and the police manuals developed in response to the Supreme Court interrogation case law.⁴⁵¹ What Weisselberg found was that police training materials gave instructions on how to undercut the effects of the warnings. Further, suspects often had little education, rendering them unable to understand whatever warnings were given.⁴⁵² John Parry has also detailed studies reporting that "most suspects waive their rights."⁴⁵³ As the title of Weisselberg's article—"Mourning *Miranda*"—suggests, he regretted his conclusion that the reshaping and implementation of the *Miranda* rule had failed to secure protection for individuals at risk of coercion, and had failed to enhance the efficacy of policing efforts.⁴⁵⁴ Weisselberg concluded that a system of "ineffective warnings and waivers is worse than no such system at all,"⁴⁵⁵ he recommended instead that executive branch officials (including the police) and legislators prohibit certain forms of deceptive questioning.⁴⁵⁶

that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." 451 U.S. 477, 484 (1981). In 2009, the interpretation of that rule is before the Court. See *Shatzer v. Maryland*, 954 A.2d 1118, 1130–31 (Md. 2008), cert. granted, 129 S. Ct. 1043 (2009); *supra* note 432.

450. See, e.g., Weisselberg, Mourning *Miranda*, *supra* note 221, at 1590–92.

451. Weisselberg reviewed the police training manuals for more than forty departments in California (with 75,000 sworn police officers, making it the largest of the states) as well as federal materials. Weisselberg, Mourning *Miranda*, *supra* note 221, at 1523–24. He also analyzed how the Court has itself eroded *Miranda's* protections by characterizing the purpose of the rule as protecting rights in a criminal trial against self-incrimination, rather than as rights about non-coercive interrogations. Moreover, even then, certain lines of questioning, such as impeachment, are permissible. *Id.* at 1523; see, e.g., *Montejo v. Louisiana*, 129 S. Ct. 2079, 2086–88 (2009); *Missouri v. Seiberg*, 542 U.S. 600, 607–08 (2004); *Chavez v. Martinez*, 538 U.S. 760, 772–79 (2003). For example, the "physical fruits of the suspect's unwarned but voluntary statements" are admissible. See *United States v. Patane*, 542 U.S. 630, 634 (2004). That plurality decision by Justice Thomas stated that "a mere failure to give *Miranda* warnings does not, by itself, violate" constitutional rights—it was the use at trial that constituted the violation. *Id.* at 641. "It follows that police do not violate a suspect's constitutional rights . . . by negligent or even deliberate failures to provide the suspect with the full panoply of warnings prescribed by *Miranda*." *Id.* This approach has prompted Peter Brooks to characterize the discussion as "the evisceration of *Miranda*." See Peter Brooks, Speech, Silence, the Body, *in* Speech and Silence in American Law 190, 197 (Austin Sarat, ed., forthcoming 2010) (on file with the *Columbia Law Review*).

452. See Weisselberg, Mourning *Miranda*, *supra* note 221 at 1565–68. One study "found that . . . disabled subjects understood only about 20 of the critical words comprising the *Miranda* vocabulary, compared with the non-disabled subjects who understood 83% of the words." *Id.* at 1570.

453. Parry, *supra* note 218, at 1019.

454. Weisselberg argued, reluctantly, that the "forty-year experiment in reforming police practices" had not been able to solve the problems "endemic in police interrogation." Weisselberg, Mourning *Miranda*, *supra* note 221, at 1599–600.

455. *Id.* at 1596.

456. *Id.* at 1596–600.

Those recommendations echo Hall's 1953 commentary and what 9/11 teaches: that frontline decisionmakers—those drafting guidelines for investigations as well those implementing them—play key roles. The post-*Miranda* case law demonstrates the judicial reluctance to engage in a sustained effort to regulate custodial interrogations and that, even when judges try to intervene, they are deeply reliant on the behavior and choices of other actors.

In the painful sequence of events encapsulated through the shorthand of 9/11, those frontline actors have been pivotal. Civilian government lawyers wrote the Torture Memos, and lawyers (often those serving in the military) protested the failure of fairness at the CSRTs. Some judges and Justices have sought to bar any form of redress, and others have insisted on information and accountings. Yet the sum of the post-9/11 cases provides stark evidence about why Article III judges—the exemplars of independent jurists—can never be enough. This small (and sometimes weary) band of judges operate on the fringe, even when they speak up to bemoan the failures of both the process and the substance of the decisions of other, lower tier actors. Henry Monaghan made a parallel point in the context of analyzing *Miranda*—that judges were, in their traditional function, appropriately “protecting individual rights” by “providing guidance to primary actors (law enforcement personnel)” in terms that were “sufficiently specific”⁴⁵⁷ to generate “self-regulating official behavior.”⁴⁵⁸

Courts sit at a distance from individuals denoted “criminal,” “alien,” or “terrorist.” Given the aspiration that these individuals be treated as “persons” protected by law, implementation rests with intelligence officials, police officers, immigration authorities, lawyers, and decisionmakers operating at the lowest tiers of the systems that apprehend and confine such persons. The jurisprudence of 9/11 serves as a reminder of the specific attributes that make Article III judges admirable—their independent decisional authority and their obligations to treat all disputants equally, both of which are protected and monitored through public observation. The argument here is the need to export those qualities to settings where decisionmakers—whether called judge or not—hold the power to determine the liberty of others. The aspirations for decent treatment of individuals subject to the power of the state run deep inside American law. Those precepts are invoked as guiding principles by both lawyers and non-lawyers during eras when efforts are made to reform the practices of confinement. As this review of the constitutional law of detention makes painfully clear, if American law is to cherish human dignity, it will be because more than life-tenured judges make it do so.

457. Monaghan, *Constitutional Common Law*, *supra* note 42, at 20, 23, 26.

458. *Id.* at 26.

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