

# The Pedagogy of Guantánamo

BAHER AZMY\*

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## I. INTRODUCTION

Representing a Guantánamo detainee is a terrible clinical case. Representing a Guantánamo detainee is a terrific clinical case. I had these thoughts alternatively, and often simultaneously, during the period of time that my Civil Rights and Constitutional Litigation Clinic at Seton Hall Law School represented Murat Kurnaz, a German-Turkish Guantánamo detainee, from July 2004 until his release to Germany in 2006.<sup>1</sup> At the time I took the case, the Supreme Court had recently decided *Rasul v. Bush*,<sup>2</sup> which promised detainees a statutory right<sup>3</sup> to file habeas corpus petitions challenging the legality of their detentions. In the month following *Rasul*, the Center for Constitutional Rights (CCR) alongside Shearman & Sterling and Joe Margulies, who were counsel for sets of detainees that had been before the Court in *Rasul*, and filed numerous “next friend” habeas

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1. See generally MURAT KURNAZ, FIVE YEARS OF MY LIFE: AN INNOCENT MAN IN GUANTÁNAMO (Jefferson Chase trans., 2008) (providing a compelling description of Murat’s ordeal in U.S. detention); Baher Azmy, *Executive Detention, Boumediene, and the New Common Law of Habeas*, 95 IOWA L. REV. 445 (2010) (discussing some of the significant legal proceedings related to Kurnaz’s case). For a discussion of evidence in his case demonstrating his innocence, see Carol D. Leonnig, *Panel Ignored Evidence on Detainee; U.S. Military Intelligence, German Authorities Found No Ties to Terrorists*, WASH. POST, Mar. 27, 2005, at A1 (quoting once-classified statements in Kurnaz’s classified file, demonstrating that both the U.S. military and his home German government recognize he had no connections to terrorist groups); see also Richard Bernstein, *One Muslim’s Odyssey to Guantánamo*, N.Y. TIMES, June 5, 2005, at A1 (describing conclusions of German officials that Kurnaz has no connections to terrorism or al Qaeda).

2. 542 U.S. 466 (2004).

3. See 28 U.S.C. § 2241(c) (2006).

petitions on behalf of detainees whose family members had contacted U.S. lawyers. CCR also solicited pro bono counsel to actively represent detainees in what we assumed would be full habeas corpus hearings in federal court. In July 2004, sixty-five detainees had filed post-*Rasul* petitions in the U.S. District Court for the District of Columbia, and they were grouped, comprehensibly, into categories based largely upon nationality.<sup>4</sup> At that time, major corporate law firms in New York, Washington, D.C., and Boston represented the majority of the detainees.

Two clinics—the International Human Rights Clinic at American University and my Civil Rights and Constitutional Litigation Clinic—represented one client each.<sup>5</sup> As I was considering, selfishly, how I could manage a case like this—with unknown dimensions, resources, and pressure—I was moderately relieved to see another team of experienced lawyers and, in particular, another clinic engaged in the litigation. But the American University Clinic styled itself as one focusing on international human rights and was taught by experienced and talented human rights lawyers Richard Wilson and Muneer Ahmad.<sup>6</sup> I did not then know much about human rights law or the laws of war, and I was worried that their presence would highlight my own inexperience. Nevertheless, on a personal level I was eager to join the team in this big fight. At that time, I had not yet contemplated to any significant degree how this litigation would function as a clinical teaching case. After having worked on Murat's case intensively for two years, and on other Guantánamo and human rights related issues thereafter, I now have a vastly improved, if still incomplete, perspective on Guantánamo as clinical pedagogy.

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4. For example, the law firm Wilmer Hale represented five Algerian residents of Bosnia; the law firm Dorsey & Whitney represented six Bahraini nationals; and Allen & Overy and Covington & Burling each represented multiple Yemeni detainees.

5. First Amended Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief, *Khadr v. Bush*, 587 F. Supp. 2d 225 (D.D.C. 2008) (No. 04-01136), 2004 WL 5378098; Supplemental Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief, *Khadr v. Bush*, 587 F. Supp. 2d 225 (D.D.C. 2008) (No. 04-01136), 2004 WL 5726605.

6. *International Human Rights Law Clinic*, AM. U. WASH. C. L., <http://www.wcl.american.edu/clinical/inter.cfm> (last visited Mar. 10, 2011).

What follows then are some of my general reflections about representing a Guantánamo detainee as part of a clinical project. These are in some respects unique to my own experience and in other respects similar to those of other clinicians who worked on Guantánamo cases.

Soon after the initial post-*Rasul* habeas petitions were filed, and lawyers ascertained identities of other detainees, numerous (and eventually hundreds) of habeas petitions were filed on behalf of Guantánamo detainees.<sup>7</sup> In addition to the hundreds of lawyers from firms of all sizes and from all regions, other clinics took on clients as well: Joe Margulies shifted his representation from his capacity as a private, public interest lawyer to that of a clinical law professor at the University of Chicago and later Northwestern University;<sup>8</sup> Martha Rayner and James Cohen at Fordham Law School commenced representation of multiple detainees in 2005;<sup>9</sup> Ramzi Kessam worked on habeas cases and military commissions cases, first as a Fellow at Fordham, then as a Fellow at Yale Law School, and now as a full

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7. See, e.g., *Hamlily v. Obama*, 616 F. Supp. 2d 63 (D.D.C. 2009); *Gherebi v. Obama*, 609 F. Supp. 2d 43 (D.D.C. 2009); *Sliti v. Bush*, 592 F. Supp. 2d 46 (D.D.C. 2008); *Al Rabiah v. United States*, 658 F. Supp. 2d 11 (D.D.C. 2009); *Mattan v. Obama*, 618 F. Supp. 2d 24 (D.D.C. 2009); *Al-Adahi v. Obama*, 596 F. Supp. 2d 111 (D.D.C. 2009); *Basardh v. Obama*, 612 F. Supp. 2d 30 (D.D.C. 2009); *Al Ginco v. Obama*, 626 F. Supp. 2d 123 (D.D.C. 2009); *Hammamy v. Obama*, 604 F. Supp. 2d 240 (D.D.C. 2009); *Al-Mutari v. United States*, 644 F. Supp. 2d 78 (D.D.C. 2009); see also *In re Guantánamo Bay Detainee Litig.*, No. 08-0442, 2008 WL 4858241 (D.D.C. Nov. 6, 2008) (establishing case management order to govern dozens of habeas cases to be adjudicated post-*Boumediene*).

8. In these capacities, Joe Margulies's clinic worked for one semester on the merits briefing for the Supreme Court in *Rasul*, then worked on a number of procedural issues that emerged in the early stages of post-*Rasul* habeas litigation, successfully obtaining the release of his Australian client, Mamdouh Habib. His clinic at Northwestern represented Mohammed Munaf and Shawki Omar, two U.S. citizens detained by American forces in Iraq, from initial habeas proceedings in district court all the way to the Supreme Court. See *Munaf v. Geren*, 553 U.S. 674 (2008). He now also represents, with me and others as co-counsel, detainee Abu Zubaydah in habeas proceedings in D.C. district court. Cf. *In re Petitioners Seeking Habeas Corpus Relief in Relation to Prior Dets. at Guantánamo Bay*, 700 F. Supp. 2d 119 (D.D.C. 2010) (litigating the habeas petitions of 105 detainees).

9. See Petitioner's Motion To Compel Respondents' Lawyer, The Dep't of Justice, to Comply with this Court's Protective Order and End its Practice of Barring Members of Petitioner's Counsel from Applying for Security Clearance at 2, *Ali-Kazimi v. Bush* (D.D.C. June 11, 2008) (No. 05-2386 (RBW)).

time clinical professor at City University of New York;<sup>10</sup> Kristine Huskey, who had worked on her first Guantánamo habeas cases as an associate at Shearman & Sterling, moved to American University Washington College of Law to work with Muneer Ahmad and Rick Wilson on Omar Kadhr's case and then to her own National Security Clinic at the University of Texas School of Law, where she represented several detainees.<sup>11</sup> Other clinics worked on issues related in scope, importance, and subject matter. Margaret Satterthwaite's International Human Rights Clinic at NYU School of Law worked on issues related to torture and extraordinary rendition.<sup>12</sup> Yale Law School's Post 9/11 Clinic, supervised by Michael Wishnie and Hope Metcalf, filed amicus briefs in numerous cases related to extra-judicial detentions in the U.S. Courts of Appeals and Supreme Court and brought habeas cases on behalf of foreign nationals detained by the United States in Bagram as well as actions for damages against John Ashcroft and John Yoo for post 9/11 policies.<sup>13</sup>

While working on Guantánamo and related cases, I learned that these clinics faced many of the same challenges and rewards, some of which I will share in this essay. But the very depth, complexity, and variation among the cases—not to mention the distinct procedural posture in which some of the cases arose—produced obstacles and

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10. *Ramzi Kessam*, CITY U. N.Y. SCH. L., <http://www.law.cuny.edu/faculty-staff/kassem.html> (last visited Mar. 14, 2011).

11. *E.g.*, *Rasul v. Bush*, 542 U.S. 466 (2004); *Khadr v. Bush*, 587 F. Supp. 2d (D.D.C. 2008); *Hamlily*, 616 F. Supp. 2d 63. While at Georgetown and Yale Universities, Neal Katyal challenged President Bush's 2001 Executive Order unilaterally establishing military commissions for Guantánamo detainees, resulting in the landmark ruling in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). He worked with numerous law students but not as part of a structured clinical course.

12. *Amnesty Int'l USA v. C.I.A.*, 728 F. Supp. 2d 479 (S.D.N.Y. 2010) (torture); *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (extraordinary rendition).

13. *See, e.g.*, *Padilla v. Yoo*, 633 F. Supp. 2d 1005 (N.D. Cal. 2009) (*Bivens* action by former "enemy combatant" against Department of Justice attorney alleging attorney's responsibility for torture and abuse); *al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009), *cert. granted*, 131 S. Ct. 415 (2010) (*Bivens* action by individual against former Attorney General alleging unlawful detention by pretextual use of a material witness warrant); *Al Maqaleh v. Gates*, 620 F. Supp. 2d 51 (D.D.C. 2009) (habeas action on behalf of individuals detained by United States at Bagram Air Base).

opportunities.<sup>14</sup> This essay does not endeavor to catalogue the breadth of clinical experiences or classify the range of successes or failures; it merely seeks to offer some impressions about the arguably unique pedagogical challenges these cases presented and in so doing contribute to the emerging discussion about international clinical education that is the subject of the *Maryland Journal of International Law Symposium*, as well as to the broader development of clinical legal education.

This reflection proceeds in three short parts. First, I explain the ways in which representing a Guantánamo detainee is a terrible clinical case. Second, I consider why precisely the opposite is true. I then conclude with some observations about how these cases present interesting twists on old clinical-pedagogical themes. Mostly, I describe my own experiences but on occasion draw from reflections of clinical colleagues who also worked on these issues. I also share some recollections I solicited from former students who worked on a variety of aspects of the *Kurnaz* case.<sup>15</sup> While some independently acknowledged the pedagogical limitations, their strongly positive

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14. One critical distinction between the kinds of cases is the period of time in which client representation occurred. Crudely divided, there were pre-*Boumediene* cases (where the representation occurred prior to the Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008)) and post-*Boumediene* cases. Prior to *Boumediene*, the government took the position that *Rasul* only provided the district courts with jurisdiction over habeas cases absent any substantive rights that a court could otherwise vindicate. See Baher Azmy, *Rasul v. Bush and the Intra-Territorial Constitution*, 62 N.Y.U. ANN. SURV. AM. L. 369 (2007) (describing the early history of the *Rasul* litigation and the government's litigation position following *Rasul*). Thus, in this period, lawyers could visit with their clients in Guantánamo. While the parties were litigating over the substantive scope of detainees' habeas corpus rights in the court of appeals and while Congress slowed the pace of this litigation by twice attempting to effectively reverse *Rasul* and strip the federal courts of statutory jurisdiction to hear Guantánamo habeas cases, there were no full habeas hearings taking place. See Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, § 1005(e), 119 Stat. 2680, 2741 (2005); Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006); 28 U.S.C. § 2241(e) (2006). After the Supreme Court in *Boumediene* held that detainees had a constitutional right to challenge their detentions (and that, therefore, the jurisdiction stripping provisions enacted by Congress violated the Constitution's Suspension Clause), 553 U.S. at 792, cases proceeded as genuine habeas hearings that more closely resembled a traditional criminal case with discovery, motions, and bench trials on the facts. See Azmy, *supra* note 1.

15. *Kurnaz v. Bush*, Nos. 04-1135(ESH), 05-0392(ESH), 2005 WL 839542 (D.D.C. Apr. 12, 2005).

recollections ultimately mirrored what we hope for from any clinical case—a constructive learning experience. As such, their reflections ultimately confirm the enduring power and importance of clinical legal education.

## II. WHY REPRESENTING A GUANTÁNAMO DETAINEE IS A TERRIBLE CLINICAL CASE

There is, of course, a well-developed body of literature explaining the broad goals of clinical legal education. These goals include, among many others, teaching traditional lawyering skills such as problem solving, legal research, writing and analysis, counseling, negotiation and trial practice;<sup>16</sup> instilling habits of reflection and self-critique so as to encourage a continual career-long process of learning from experience;<sup>17</sup> and imparting broader lessons about structural or institutional obstacles impeding access to justice for the poor and marginalized, and the corresponding ethical responsibilities of public interest lawyers to acknowledge and fight to reform the justice system, for example, to engage in social justice lawyering.<sup>18</sup> Clinicians regularly debate whether or how to prioritize

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16. See generally A.B.A. SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM (1992) [hereinafter MACCRATE REPORT]; Robert Dinerstein, *Report of the Committee on the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 508, 512–17 (1992); William P. Quigley, *Introduction to Clinical Teaching for the New Clinical Law Professor: A View from the First Floor*, 28 AKRON L. REV. 463, 471–73 (1995). Anthony Amsterdam explains that clinical legal education aspires to teach more than just concrete legal skills; it imparts “methods of critical analysis, planning, and decision-making which are not themselves practical skills, but rather conceptual foundations for practical skills and for much else, just as case reading and doctrinal analysis are foundations for practical skills and for much else,” all of which are “no less conceptual or academically rigorous than case reading and doctrinal analysis.” Anthony G. Amsterdam, *Clinical Legal Education—A 21st Century Perspective*, 34 J. LEGAL EDUC. 612, 615–17 (1984).

17. Amsterdam, *supra* note 16; see also Kenneth R. Kreiling, *Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience Through Properly Structured Clinical Supervision*, 40 MD. L. REV. 284 (1981).

18. See Dinerstein, *supra* note 16, at 515 (recognizing that one of the primary teaching goals of most law school clinics is “imparting the obligation for service to indigent clients, information about how to engage in such representation and knowledge concerning the impact of the legal system on poor people”); see also

among these goals<sup>19</sup> and whether a particular clinical structure (i.e. general docket versus specialized) or a particular case dimension (i.e. large and complex versus narrower and discrete) are better to advance pedagogical goals.<sup>20</sup>

As an instructor of a general civil rights and constitutional litigation clinic, which takes on complex multi-semester federal litigation, I often struggle with the pedagogical limitations and challenges my chosen structure produces. I do not seek to enter these debates here, except to note (and explain later) that in some ways Guantánamo cases raise precisely the same pedagogical challenges that any complex, long-term litigation does; yet, at the same time, they can raise those challenges by a large order of magnitude. Specifically, Guantánamo cases—particularly ones like mine that never proceeded to a full habeas hearing—were in enormous tension with a foundational and instrumental clinical teaching goal: student ownership.

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Stephen Wizner, *Beyond Skills Training*, 7 CLINICAL L. REV. 327, 330 (2001) (arguing that clinical teachers have a particular obligation to teach “that law is something that can be, and therefore should be, used in the struggle for social justice”); Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37, 39 (1995) (arguing that law schools, and clinical programs in particular, must provide “opportunities for learning about the social setting which shapes the practice of law and issues of justice in the adoption and application of the law”); Jane Harris Aiken, *Striving to Teach “Justice, Fairness, and Morality,”* 4 CLINICAL L. REV. 1, 6 n.10 (1997)

If all I can do in law school is to teach students skills ungrounded in a sense of justice then at best there is no meaning to my work, and at worst, I am contributing to the distress in the world. I am sending more people into the community armed with legal training but without a sense of responsibility for others or for the delivery of justice in our society.

19. See Philip G. Schrag, *Constructing a Clinic*, 3 CLINICAL L. REV. 175 (1996) (recognizing that, in constructing a clinic, teachers may choose to prioritize certain goals over others based on their own values, expertise, and resources).

20. See, e.g., Nancy M. Maurer, *Handling Big Cases in Law School Clinics, or Lessons from My Clinic Sabbatical*, 9 CLINICAL L. REV. 879 (2003); Daniel S. Medwed, *Actual Innocents: Considerations in Selecting Cases for a New Innocence Project*, 81 NEB. L. REV. 1097 (2003); Frank Askin, *A Law School Where Students Don't Just Learn the Law; They Help Make the Law*, 51 RUTGERS L. REV. 855 (1999).

The primary way to achieve many of the aforementioned pedagogical goals of clinical instruction is to get students to take serious ownership over their cases. Clinicians, by and large, want students to meet, communicate, and ultimately empathize with clients who depend on the judgment and work of a student-lawyer; they also want students to take the lead, or at least meaningfully contribute to strategic decisions that will have a real impact on this person's life, and in so doing, credit that individual's values or preferences in a collaborative, client-centered decision-making process. This basic aspiration has a reciprocal and reinforcing relationship to core legal skills that clinics seek to impart, including factual investigation, developing case theories and narratives, and careful, competent, and thoughtful written and oral advocacy. If students care deeply about their case and client, then they can own any mistakes they may make on the client's behalf; through learning the real consequences of their mistakes, they will develop habits of the reflective, self-conscious, ethical lawyer mentioned above—in theory, anyway.

I learned quickly in working on Murat's case, however, that student ownership over the case, at least through conventional means, would initially appear to be an insurmountable task. Consider some obvious limitations. First, students could not meet the client; Murat was imprisoned two thousand miles away in a fully armed and guarded military base. Visiting was not only expensive and time consuming (it required flying to Fort Lauderdale and connecting to a three hour charter flight to the military base), but it was also forbidden to anyone who did not obtain a Secret-level security clearance.<sup>21</sup> As a result, students missed out on what is arguably *the* foundational lawyering experience: they could not interview or directly counsel the individual with whom they had an attorney-client relationship.<sup>22</sup> The students could not hear Murat's voice, shake his

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21. In the first few years of the Guantánamo litigation, the Justice Department took the position that students could not apply for a security clearance in order to visit with clients. My understanding is that they have since changed that position, though it would still require students to go through the time consuming process of applying for, and being approved for, such a clearance—a task that would be difficult to complete in under three months.

22. One student, who overall described her work on the case as a personally and professionally transformative experience, nevertheless observed that “the most challenging/regrettable part of the experience was not being able to meet the client and speak with him. It was disappointing to put all this hard work and effort into

hand, listen to his story, reassure, or counsel him. They were thus denied an interactive relationship that would facilitate comprehending his circumstances and seeing the problem through his eyes—that is, to experience empathy.<sup>23</sup> This is no small omission, considering the profoundly “othering” and dehumanizing process these clients had undergone in American media and politics. By the time we took the case, the Bush Administration had denounced all Guantánamo detainees as “enemy combatants,” and senior administration officials had characterized them as the “worst of the worst” or “among the most dangerous, best trained, vicious killers on the face of the earth.”<sup>24</sup>

I could certainly describe to my students my impressions of our client based on my visits and conversations with him, and attempt to articulate the apparent injustice of his brutal incarceration. But only by actually sitting across from Murat for hours—hearing about his ordeal, his family, his faith, absorbing his obvious warmth, delighting

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the case and then not be able to share that with the client directly.” E-mail from Victoria Cioppetini, former clinic student, to author (Jan. 16, 2011) (on file with author) [hereinafter Cioppetini].

23. Implicit in Steve Ellmann’s description of the importance of developing habits of empathy is an expectation that a lawyer will meet face-to-face with a client. He explains:

Empathic lawyering aspires to a vision of lawyers capable of overcoming their own limitations of perspective so as to see or feel the world as other persons do, despite the differences of race, gender, class, culture or simply identity that divide us from each other. The experiences and perspectives of the powerful, however, are not the same as those of the powerless. To cross the gap—and to be perceived by one’s client as having crossed it—the lawyer generally needs more than just intellectual curiosity. She needs some sympathetic identification with those from whom her experience may otherwise separate her.

Stephen Ellmann, *Empathy and Approval*, 43 HASTINGS L.J. 991, 1003 (1992).

24. Katharine Q. Seelye, *A Nation Challenged: Captives; Detainees Are Not P.O.W.’s, Cheney and Rumsfeld Declare*, N.Y. TIMES, Jan. 28, 2002, at A6 (discussing how Vice President Cheney referred to the detainees as “the worst of a very bad lot” and claimed “[t]hey are very dangerous. They are devoted to killing millions of Americans”); see Carol D. Leonnig & Julie Tate, *Some at Guantánamo Mark 5 Years in Limbo; Big Questions About Low-Profile Inmates*, WASH. POST, Jan. 16, 2007, at A1; see also Tim Golden & Don Van Natta, Jr., *The Reach of War; U.S. Said to Overstate Value of Guantánamo Detainees*, N.Y. TIMES, June 21, 2004, at A1 (noting that Joint Chiefs of Staff Chairman Richard Myers claimed most of the detainees “would gnaw hydraulic lines in the back of a C-17 to bring it down”).

in his sense of humor, shaking his hand to say hello, and embracing him to say goodbye—could one genuinely empathize with this client and commit, like so many Guantánamo habeas lawyers did, the enormous time, resources, and emotion necessary to represent the client.<sup>25</sup> Likewise, students could not experience all the sensory and emotional weight these detentions imposed on the client: the experience of being on an island prison in Guantánamo, with the surrounding apparatus of military might: chains, shackles, guns, and torture and interrogation rooms.<sup>26</sup> Young and sometimes sheltered, students benefit immeasurably from seeing clients in the clients' own challenging environments; it is an experiential learning process that causes students to reflect upon and assimilate such "disorienting moments."<sup>27</sup> Fighting for back wages for an indigent client or bail for your incarcerated client takes on a special urgency that mere invocation of the Fair Labor Standards Act or the Fifth Amendment never can when students actually see the home of an indigent client or the harsh conditions of a client's detention. This is especially true of a place like Guantánamo. Most Guantánamo lawyers have crystal clear—and deeply unsettling—memories of their first visits to that

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25. It was primarily because of my interpersonal experiences that we did form a core of our advocacy strategy—while court proceedings were stayed pending resolution of a myriad of appeals, we recognized that the best chance for Murat's release was to convince a reluctant German government to negotiate for his return. To do this, we tried to persuade the German public to demand action from their government. Through many dozens of media appearances, meetings with German NGOs and human rights organizations, I told stories about Murat and the injustices of Guantánamo, to humanize the former and villainize the latter. Whether this strategy contributed in some way to his ultimate release we cannot know, but the point is it derived quite naturally from the singular experience, denied to students, of meeting and empathizing with our client.

26. Joe Margulies emphasizes that this represents a critical distinction between a Guantánamo case and just another complex litigation. Professor Margulies also works on death penalty cases and believes that the opportunity for students to meet with their client, housed as he is on death row in Terre Haute, Indiana, is a crucial part of their clinical experience—and one notably absent from his clinical work on Guantánamo cases. Telephone Interview with Joseph Margulies, Clinical Professor of Law and Assistant Dir., MacArthur Justice Ctr., Northwestern Univ. Sch. of Law (Jan. 14, 2011).

27. See Quigley, *supra* note 18, at 52 (summarizing this learning process as one which involves at least three stages—the "disorienting experience," the "exploration and reflection," and the "reorientation"—and that, "upon reorientation, the learner's perspective is transformed in such a way that the previously disorienting experience is explained").

horrible place, and those memories no doubt sustained so many in their vigorous efforts to challenge the lawlessness in Guantánamo.<sup>28</sup>

A second, and related, limitation on students' ability to assume ownership over this Guantánamo case was their lack of access to full information. In response to each habeas petition, the Government did file an unclassified summary of the asserted factual basis for a petitioner's detention; yet much, and in some cases most, of the evidence against a detainee was kept classified.<sup>29</sup> As such, only security-cleared counsel could view it, and even then it could only be viewed at a "secure facility" outside of Washington, D.C.<sup>30</sup> Similarly, under rules counsel accepted as a condition to visiting clients, everything a Guantánamo detainee said to counsel was deemed presumptively classified and thus could not be discussed with nonsecurity-cleared counsel.<sup>31</sup> Notes of client meetings were sent

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28. See THE GUANTÁNAMO LAWYERS: INSIDE A PRISON OUTSIDE THE LAW (Mark P. Denbeaux & Jonathan Hafetz eds., 2009) [hereinafter THE GUANTÁNAMO LAWYERS] (collecting stories of Guantánamo habeas lawyers).

29. *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443, 451–52 (D.D.C. 2005), *vacated sub nom.* Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), *rev'd*, 553 U.S. 723 (2008), *vacated sub nom.* Al Odah v. United States, 282 F. App'x 844 (D.C. Cir. 2008), *vacated*, 282 F. App'x 844 (D.C. Cir. 2008)

Because every complete [factual return] contained classified information, respondents filed redacted, unclassified versions on the public record, submitted the full, classified versions for the Court's *in camera* review, and served on counsel for the petitioners with appropriate security clearances versions containing most of the classified information disclosed in the Court's copies but redacting some classified information that respondents alleged would not exculpate the detainees from their "enemy combatant" status.

30. *In re Guantánamo Detainee Cases*, 344 F. Supp. 2d 174, 178 (D.D.C. 2004) (requiring habeas counsel to obtain security clearances to view classified material and ordering government to establish "one appropriately approved secure area"). This security protocol has since been replaced with the Protective Order and Procedures for Counsel Access to Detainees at the U.S. Naval Base in Guantánamo Bay, Cuba. *In re Guantánamo Bay Detainee Litig. Cases*, No. 08-0442 (TFH), 2008 WL 4858241 (D.D.C. Nov. 6, 2008).

31. See *In re Guantánamo Detainee Cases*, 344 F. Supp. 2d at 187 ("Counsel is required to treat all information learned from a detainee, including any oral and written communications with a detainee, as classified information, unless and until the information is submitted to the privilege team and determined to be otherwise by the privilege team or by this Court or another court."); *id.* at 190 ("Counsel may not otherwise divulge classified information related to a detainee's case to anyone except those with the requisite security clearance and need to know using a secure means of communication.").

under seal from Guantánamo to the secure facility and were reviewed by a team of (neutral) Justice Department employees, who might thereafter deem some or all of the attorney-client notes unclassified.<sup>32</sup>

As such, students without security clearance had no access (or at least no immediate access) to much of their clients' version of events; they also could not see the bulk of the Government's evidence against the client. The limitations this posed on a student's ability to engage in core clinical practices like factual investigation and developing a theory of the case are self-evident.<sup>33</sup> Professor Martha Rayner describes the difficulties this limitation—unique, in her experience, to Guantánamo cases—posed:

In my clinic work I strive to place the student as fully in the shoes of a lawyer as possible. In a classic criminal defense clinic, this is very doable. This wasn't possible in Gtmo work. For example, only a very few students obtained clearance and traveled to Gtmo to meet with clients; most students never met their clients. And having some students cleared and others not created tensions at times—certain students couldn't have access to full information.<sup>34</sup>

Professor Rayner describes practices she adopted to mitigate these problems, such as committing herself “to taking copious notes during client meetings, so the later declassification process would allow students access to their clients' information.”<sup>35</sup> Because declassification could take weeks, this process (particularly in the context of an academic schedule) became especially frustrating for her, even though it represented only “one of many, many obstacles/inconvenience[s] that the representation brought on,”

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32. *See id.* at 184 (describing the privilege team as “comprised of one or more DoD attorneys and one or more intelligence or law enforcement personnel who have not taken part in, and, in the future, will not take part in, any domestic or foreign court, military commission or combatant status tribunal proceedings involving the detainee”); *id.* at 188–89 (describing process for submission of attorney notes and classification procedures).

33. *See* Keith A. Findley, *The Pedagogy of Innocence: Reflections on the Role of Innocence Projects in Clinical Legal Education*, 13 CLINICAL L. REV. 231, 240–41 (2006) (describing the importance of fact development in otherwise large scale innocence project clinics).

34. E-mail from Martha Rayner, Clinical Assoc. Professor of Law, Fordham Univ. Sch. of Law, to author (Jan. 5, 2011) (on file with author) [hereinafter Rayner].

35. *Id.*

distinguishing Guantánamo from other big litigation matters she sometimes undertakes.<sup>36</sup>

By no means did this prevent students from working with the limited public facts made available by the Government, or from investigating facts on their own. Some embraced and appreciated the challenge, precisely because the process of learning the facts in Guantánamo cases was distinct from other legal clinics.<sup>37</sup> Often there was enough information in the public record to allow students to develop a compelling narrative;<sup>38</sup> student-lawyers also could develop persuasive narratives independent of the full factual record, for example, by criticizing procedural irregularities associated with the Government's limited tribunal process, the prevalence of torture and

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36. *Id.* Others have observed the challenges that complex litigation poses to clinical methodology. See Medwed, *supra* note 20, at 1140 (concluding that the size and complexity of innocence project cases make it difficult to take ownership of cases and that such cases “are often intricate, protracted and politically sensitive, suggesting that faculty intervention, either actual or potential, to some extent may be an omnipresent cloud over student autonomy”). I agree with Professor Rayner that the Guantánamo cases added layers of complexity and uncertainty that substantially exacerbated the already serious challenges associated with complex federal or international litigation.

37. According to a former student,

One of the things I loved most about the case, however, was the high profile nature of it and the complex legal issues involved. I really enjoyed crafting new legal arguments (as opposed to re-using old arguments in a new context) and really thinking through the different theories. Participating in that level of the legal analysis was so rewarding. It was a very academic way of approaching litigation work, which I greatly enjoyed.

Cioppetini, *supra* note 22.

38. One notable example of this comes from Joe Margulies's clinic at Northwestern. His clinic represents Abu Zubaydah, a detainee who had been in secret CIA custody for years prior to his transfer to Guantánamo, in Mr. Zubaydah's post-*Boumediene* habeas proceedings. Because Mr. Zubaydah was such a high profile detainee—among other things, he was the very target of the Bush Administration “Torture Memos”—an enormous amount had been written about him in the public record. Thus, even though Mr. Zubaydah's habeas file was classified at the highest level of secrecy, students had a great deal with which to work. Among the strategic goals the clinic pursued was changing the public perception of Mr. Zubaydah as a high level al Qaeda operative—a goal they largely achieved. See, e.g., Peter Finn & Joby Warrick, *Detainee's Harsh Treatment Foiled No Plots: Waterboarding, Rough Interrogation of Abu Zubaida Produced False Leads, Officials Say*, WASH. POST, Mar. 29, 2009, at A1.

abuse, and the importance of elementary due process and the rule of law.

A third significant limitation on the students' ability to take ownership of the case was that they were largely unable to appear in court. More specifically, their ability to engage in direct oral or written advocacy in a court of law was restricted in a number of ways. First, early on in the litigation, the original thirteen sets of habeas petitions filed immediately after the *Rasul* decision were consolidated in order to resolve legal questions common to all petitions.<sup>39</sup> That left thirteen sets of counsel to draft and file one set of briefs on some of the major threshold questions presented in the cases and led to a process that decidedly did not accommodate students' schedules, capacity, or authority. After more cases were filed, distinct legal and factual issues did emerge among the petitions which permitted independent, client-specific filings.<sup>40</sup> Still, the legal issues in these cases were immensely complex—unprecedented and dazzlingly confusing even to experienced lawyers. Among the myriad questions counsel grappled with were the following: Does the Due Process Clause extend extraterritorially? What were the common law procedural and substantive guarantees of habeas corpus preserved by the adoption of the Suspension Clause in 1789? What treaty and human rights obligations bound the United States, and were they enforceable in U.S. courts? What is “international humanitarian law,” and how can it be applied to captures and detentions of this kind? What is the substantive scope of the Executive's detention power during a time of conflict, measured against domestic and international law? What are the statutory or regulatory limits on the Executive's authority to classify certain documents?<sup>41</sup>

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39. *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443, 451 (D.D.C. 2005). Two of the thirteen sets were then disaggregated from the original consolidation by the judge who had been originally assigned those petitions. *See Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005).

40. For example, my students worked thoroughly on researching, drafting, and filing briefs in support of a motion filed before the district court. This motion was for a preliminary injunction requiring the Defense Department to give advance notice to counsel and the court prior to transferring a detainee out of Guantánamo and thus out of the jurisdiction of the court.

41. *See, e.g.*, Petitioners' Brief on the Merits at 9–10, *Rasul v. Bush*, 542 U.S. 466 (2004) (No. 03-334), 2004 WL 162758 (arguing that the Due Process Clause

These were enormously challenging conceptual and intellectual questions when they were presented in the litigation leading up to and following *Boumediene*.<sup>42</sup> But there was a more cosmic challenge: presented with an actual case of a real person in Guantánamo, we had to ask, what do we actually do? For this, there was simply no precedent. And, as hard as a landlord-tenant case or misdemeanor criminal case can be, at least there is law to which students may look for guidance.<sup>43</sup>

Professor Anthony Amsterdam teaches that a distinctive form of reasoning taught in the clinical setting involves “ends-means thinking.”<sup>44</sup> This is a form of strategic thinking that reasons backwards: it begins with a set of objectives, sketches out all of the routes to them, and determines the first steps to take only after considering where they may lead, as well as the relative advantages and disadvantages attending them.<sup>45</sup> As a part of this process, Professor Amsterdam explains, a student engages in “hypothesis

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extends extraterritorially); *id.* at 11–16 (describing the common law history of the habeas statute); *id.* at 21–23 (describing arguments made regarding the Suspension Clause); *id.* at 24–29 (arguing that treaty and human rights obligations bind the U.S.); *see generally id.* (attacking the scope of the Executive’s detention power during a time of conflict); Opening Brief for the Guantánamo Detainees at 14–25, *Al Odah v. United States*, 559 F.3d 539 (D.C. Cir. 2009) (Nos. 05-5117–05-5127), 2008 WL 4449292, at \*30 (arguing for limits on the Executive’s ability to classify certain documents).

42. *See, e.g.*, *Rasul v. Bush*, 542 U.S. 466, 484 (2004) (holding that federal courts have jurisdiction to hear habeas petitions filed on behalf of Guantánamo detainees); *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (holding that U.S. citizens must receive a meaningful opportunity to challenge basis for detention under the Due Process Clause); *Hamdan v. Rumsfeld*, 548 U.S. 557, 629 (2006) (finding that Geneva Conventions apply to detainees); *Boumediene v. Bush*, 553 U.S. 723, 794–95 (2008) (holding that detainees have a constitutional right to habeas); *Al Odah v. United States*, 559 F.3d 539, 544–46 (D.C. Cir. 2009) (discussing the Executive’s ability to classify documents forming the factual basis for detentions).

43. As Professor Rayner explains, “Gtmo is also different because the source of law was so diverse and in most instances extremely unformed. Even though complex litigation can involve cutting edge legal issues (as can simple litigation for that matter), the ‘law of Gtmo’ had to be constructed almost from scratch. Traditional sources of guidance for students, e.g. texts, treatises, law review articles, [and] case law had yet to be written.” Rayner, *supra* note 34.

44. Amsterdam, *supra* note 16, at 614.

45. *Id.* (describing “ends-means thinking” as “the process by which one starts with a factual situation presenting a problem or an opportunity and figures out the ways in which the problem might be solved or the opportunity might be realized”).

formulation and testing in information acquisition,” and “decision-making in situations where options involve differing and often uncertain degrees of risks and promises of different sorts.”<sup>46</sup> But if we began with the goal of “getting our client a hearing” or “getting our client out of Guantánamo,” brainstorming with students about steps to undertake toward that goal, and hypothesizing advantages or disadvantages of that approach, was exceedingly challenging absent any templates.

Professor Rayner highlights this as one of the great challenges of the pre-*Boumediene* casework:

While clinic students often operate under great uncertainty and this is in fact one of the challenges of clinic work, I, as the experienced practitioner, operate under far less uncertainty. But this wasn't true as to the work on behalf of our clients at Gtmo. We all operated under great uncertainty. As in any representation, the need for decision making was vast, but the information base, templates, structures and experience to make good judgments were sorely lacking or non-existent. For example, in the spring of 2007, a trip to Yemen was being organized by Tina Foster, then at CCR. Should we travel to Yemen to meet with our clients' families, [and] conduct investigations? Was this a good use of resources? What could we accomplish there? Was there any value in doing press work in Yemen? Were press efforts best applied domestically or internationally? What is our message?<sup>47</sup>

Professor Rayner explains that basic litigation decisions were “equally difficult.”<sup>48</sup> For example, “should we file a [Detainee Treatment Act] case?”<sup>49</sup> Should we file a complaint with the Inter-

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46. *Id.*

47. Rayner, *supra* note 34.

48. *Id.*

49. Under the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, div. A, tit. X, § 1005(e), 119 Stat. 2739, 2741 (2005) (current version at 28 U.S.C. § 2241 (2006)), *invalidated by* *Boumediene v. Bush*, 553 U.S. 723 (2008), Congress purported to strip the federal courts of jurisdiction to hear Guantánamo habeas petitions, but provided an alternative—and exceedingly limited—means to review “enemy combatant” designations by the military. DTA § 1005(a)–(e), § 2241 (setting out review procedures); *id.* § 1005(e), § 2241(e)(1) (stripping jurisdiction). While we awaited decisions in the court of appeals and Supreme Court on the legality of the DTA, litigants had to balance imponderable considerations: Might the infinitesimal possibility of relief under the DTA be worth

American Commission on behalf of one client's daughter (students spent many hours drafting this petition, which we ultimately did not file)?"<sup>50</sup> Professor Rayner observes that "[t]his was a far cry from deciding whether to move to suppress physical evidence seized from a client's person—wherein the pros and cons could be ascertained and measured quite accurately."<sup>51</sup>

As Professor Rayner and other clinical professors acknowledge, the foregoing limitations have been mediated somewhat by the Supreme Court's 2008 decision in *Boumediene*.<sup>52</sup> As a result of that decision, rendered four years after *Rasul*, detainees have a clear entitlement to pursue their habeas hearings in federal district court in D.C.<sup>53</sup> Though the law is still far from settled, a template for litigating these cases has been developing, including a governing case management order, provisions for discovery, burdens of proof, and substantive standards of law.<sup>54</sup> Dozens of cases have gone through a full-merits hearing, and detainees have prevailed in those hearings in a large majority of cases.<sup>55</sup> Professor Rayner distinguishes the pre-*Boumediene* challenges previously described from these proceedings

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pursuing? If detainees do pursue such claims, does it weaken the broader strategic goal of demonstrating to the federal courts that the DTA remedy is an inadequate and undesirable substitute for habeas corpus—and thus does not save the DTA's jurisdiction-stripping provisions from constitutional infirmity? The latter is the position ultimately vindicated at the Supreme Court in *Boumediene*, so all's well that ends well; but, in the meanwhile, these were magnificently complicated strategic quandaries.

50. Rayner, *supra* note 34.

51. *Id.* In addition, unlike most clinical cases, where the client, subject matter, and tribunal are in reasonable proximity to the law school, these cases were global in scope. All cases were consolidated in Washington, D.C., requiring travel for hearings from any law school not located in the nation's capital. The "secure facility" housing classified information was also located in D.C. The clients of course, were in Guantánamo, thousands of miles and thousands of dollars away—a considerable obstacle even for those students who were eventually able to get security clearance. Factual investigation, developing critical relationships with family members, and the important work of advocacy in the client's home country, all had to happen abroad. For my client's case, this required frequent trips to Germany—not insurmountable, but still too expensive for our Clinic to take students. For others, this required travel to the Middle East.

52. 553 U.S. 723 (2008).

53. *Id.* at 794–95.

54. I have called this development "The New Common Law of Habeas." See Azmy, *supra* note 1, at 450.

55. *See id.* at 499.

because “now the work is somewhat more traditional and straightforward. For our clients the avenues of relief have narrowed considerably and each path is essentially litigation[,] albeit in an unusual context.”<sup>56</sup> Kristine Huskey at the University of Texas School of Law and Ramzi Kessam at the City University of New York School of Law continue to represent detainees as a part of this process.<sup>57</sup> Joe Margulies also recognizes that the post-*Boumediene* process, albeit still challenging, looks more like traditional litigation.<sup>58</sup> As part of this process, he has been able to work successfully with students on many levels. Margulies and his students came to strategic conclusions about how to approach Mr. Zubaydah’s case, recognizing that discovery of certain crucial information was in their client’s best strategic interests.<sup>59</sup> Thereafter, his students were active in studying a growing corpus of published opinions by judges, hearing habeas cases on substantive and procedural questions, and participating in drafting memorandums of law related to the scope of discovery, spoliation of evidence, and the Governments’ substantive detention authority.<sup>60</sup> What was initially very strange is gradually becoming familiar.

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56. Rayner, *supra* note 34.

57. See Kristine A Huskey, U. TEX. AUSTIN SCH. L., <http://www.utexas.edu/law/faculty/profile.php?id=huskeyka#> (last visited Feb. 15, 2011) (noting that Professor Huskey is the Acting Director of the National Security Clinic, which represents Guantánamo detainees); *National Security Clinic*, U. TEX. AUSTIN SCH. L., <http://www.utexas.edu/law/clinics/nationalsecurity/> (last visited Feb. 15, 2011) (describing the work of the Clinic, including work on behalf of Guantánamo detainees); *Ramzi Kassem*, *supra* note 10 (noting that Professor Kassem directs the Immigrant and Refugee Rights Clinic (IRRC), which represents Guantánamo detainees); *Immigrant and Refugee Rights*, CITY U. N.Y. SCH. L., <http://www.law.cuny.edu/clinics/clinicalofferings/ImmigrantandRefugee/nationalsecurity.html> (last visited Feb. 15, 2011) (noting that the IRRC represents individuals detained under policies “arising out of government policies in the aftermath of September 11”).

58. Telephone Interview with Joseph Margulies, *supra* note 26.

59. *Id.*

60. *Id.* Indeed, as part of Professor Margulies’s clinic, students analyzed all district court and court of appeals decisions governing the Guantánamo cases and created a database (or a rough digest along the lines of a case reporter) analyzing the numerous propositions of law emerging from those cases. See *Roderick MacArthur Justice Center*, NW. L. BLUHM LEGAL CLINIC, <http://www.law.northwestern.edu/macarthur/guantanamo/caselistings/> (last visited Feb. 11, 2011).

### III. WHY REPRESENTING A GUANTÁNAMO DETAINEE IS A TERRIFIC CLINICAL CASE

Clinicians recognize that, beyond teaching “lawyering skills,” they seek to subtly impart broader lessons about our system of justice—its limitations, structural and implicit biases, and frequent reluctance to accommodate poor or marginalized persons.<sup>61</sup> One can learn this in a traditional doctrinal class, of course, assuming a professor or casebook raises those issues. But where the client’s rubber meets the law’s road—where the collateral consequences from a client’s prior criminal conviction, or the predatory lending behavior of lenders against the poor, or the skepticism some juries will have toward some minority groups in some places—clinics provide an incomparable context in which to communicate such lessons.

In a way, Guantánamo raised the greatest *meta*-lesson of all for a law student: what does the term “Rule of Law” actually mean? In the traditional law school curriculum, the phrase lurks in the background; it is a banal concept undergirding uniform procedural rules, property rules, structural and rights-based constitutional law, and the like. The proposition has its roots in Constitutional Law, particularly in the landmark case *Marbury v. Madison*.<sup>62</sup> Chief Justice Marshall leaves us with some foundational principles: “[T]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection” and “the [G]overnment of the United States has been emphatically termed a government of laws and not of men.”<sup>63</sup> These are important principles, to be sure, signifying that a government official’s high status does not exempt her from the obligation to answer for the wrongs she committed.<sup>64</sup> But especially because these principles appear at this level of high abstraction, and are considered so

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61. *See supra* notes 16–18 and accompanying text.

62. 5 U.S. (1 Cranch) 137 (1803).

63. *Id.* at 163.

64. Justice Robert Jackson’s elegant exposition of this principle in the *Steel Seizure* case also makes it into the first year constitutional law canon. “These [principles] signify about all there is of the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules.” *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring).

foundational to our self-identity, they are taken as a given. In the law school setting, this country's commitment to the Rule of Law is not controversial and is rarely tested.

But Guantánamo forced us—especially clinical students—to consider what happens in the absence of the Rule of Law, and not just in foreign nations like Haiti, Mali, or Myanmar, but on U.S. soil. In Guantánamo, President George W. Bush claimed unreviewable authority in his capacity as Commander-in-Chief of the Army and Navy to detain indefinitely any person, apprehended anywhere in the world, under criteria established in secret and outside the traditional constraints of U.S. or international law designed to limit Executive authority.<sup>65</sup> In the absence of transparent or neutral rules, President Bush exercised complete discretion—sometimes arbitrary, often incoherent—to detain, release, or bargain over human beings in his custody.<sup>66</sup> In the absence of collateral review of decisions, the President employed discretion and unilateral will.<sup>67</sup> In the absence of law, the President and military were free to employ fear, intimidation, and ultimately, violence.<sup>68</sup> It was a lesson not lost on many educated observers.

Clinical students working on the detainee cases got to see in small, incremental—and in their view, ultimately outrageous—ways

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65. See, e.g., Brief for the Respondents at 36, *Rasul v. Bush*, 542 U.S. 466 (2004) (No. 03-334) (arguing that courts do not have authority to review Executive determinations as “[t]he President, in his capacity as Commander in Chief, has conclusively determined that Guantánamo detainees . . . are not entitled to prisoner-of-war status under the Geneva Conventions”); Alan W. Clarke, *De-cloaking Torture: Boumediene and the Military Commissions Act*, 11 SAN DIEGO INT’L L.J. 59, 110 (2009) (describing how the President has “unilateral and unreviewable power to establish interrogation methods”); Joseph Landau, *Muscular Procedure: Conditional Deference in the Executive Detention Cases*, 84 WASH. L. REV. 661, 691 (2009) (describing how the government argued, but courts later rejected, arguments that the Executive had unlimited, unreviewable discretion to determine who to detain because the Judiciary was obligated to take facts pled by the government as true).

66. See Eugene Robinson, *Viewpoints: Rumsfeld Will Tell You What to Think About the War; Silly Me. Americans Just Aren’t Smart Enough to Think About Such Things*, BUFF. NEWS, Nov. 5, 2006; Rosa Brooks, *That’s the GOP’s Big Gun?*, L.A. TIMES, July 7, 2006; Clarke, *supra* note 65.

67. See Clarke, *supra* note 65.

68. *Id.*; see generally JOE MARGULIES, *GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER* (2006).

how discretion, will, and violence coalesced into monstrous injustice.<sup>69</sup>

The clinic students saw leaked government documents and witness statements evidencing brutal, dehumanizing, and desperate interrogation techniques. Such techniques, students learned, were not merely an aspect of arbitrary human cruelty. They were part of a systematic program, approved at high levels of government, designed to exert full control over this group of persons and reduce them to base “animal-like instincts”—a totalitarianism writ small.<sup>70</sup> By producing a state of “learned helplessness,” detainees would lose all hope of resistance or release and become entirely dependent upon their interrogators.<sup>71</sup> At the same time, clinic students saw the profound value that law, and lawyers, could provide. If, as astute observers have explained, Guantánamo’s *sine qua non* was the denial of hope (in order to force detainees to succumb to interrogation),<sup>72</sup> then law and lawyers provided an important antidote. Instead of talking exclusively to interrogators who demanded answers in order to implicate and further detain them, detainees could now hear

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69. For compelling accounts of the myriad absurdities, injustices, and excesses in Guantánamo, see CLIVE STAFFORD SMITH, *EIGHT O’CLOCK FERRY TO THE WINDWARD SIDE: SEEKING JUSTICE IN GUANTÁNAMO BAY* (2007); STEVEN T. WAX, *KAFKA COMES TO AMERICA: FIGHTING FOR JUSTICE IN THE WAR ON TERROR* (2008); MAHVISH RUKHSANA KHAN, *MY GUANTÁNAMO DIARY: THE DETAINEES AND THE STORIES THEY TOLD ME* (2008); KRISTINE HUSKEY, *JUSTICE AT GUANTÁNAMO: ONE WOMAN’S ODYSSEY AND HER CRUSADE FOR JUSTICE* (2009); MARGULIES, *supra* note 68.

70. See Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005).

71. Scott Shane & Mark Mazzetti, *In Adopting Harsh Tactics, No Inquiry Into Past Use*, N.Y. TIMES, Apr. 21 2009, at A1 (describing how learned “helplessness would make someone more dependent, less defiant and more compliant,” and how that idea formed a key principle in the government’s interrogation techniques); Scott Horton, *Six Questions for Jane Mayer, Author of The Dark Side*, HARPER’S MAG., July 2008, available at <http://www.harpers.org/archive/2008/07/hbc-90003234> (describing how “learned helplessness” would “erode a prisoner’s resistance to being interrogated and foster total dependency upon an interrogator”).

72. See MARGULIES, *supra* note 68, at 29–35 (describing Army Field Manual and KUBARK interrogation methods and noting that virtually every aspect of the Administration’s detention policy, and everything it has done at Guantánamo, has been shaped by this uncompromising vision of intelligence gathering); see also *id.* at 36–39 (describing how these techniques were used on Guantánamo detainees in the “ideal interrogation chamber” designed to “open the greatest window of psychological vulnerability”).

counsel say, “I’m on your side, I promise. Tell me your story, let me tell others, let me help you.” The students I worked with were deeply moved by this exposition of the lawyer’s role.

Students saw numerous procedural obstacles imposed by the U.S. Department of Defense in order to limit our client’s access to justice and to undermine efforts of habeas counsel.<sup>73</sup> They learned that when detainees at Guantánamo were not meeting with their habeas counsel, military interrogators would tell them the law could not help them (“You are in a place where there is no law; we are the law,” was a frequent interrogator’s refrain)<sup>74</sup> or to make their point more sinister and pathetic, taunt detainees with “evidence” that their habeas counsel were Jews—suggesting Jewish lawyers, as opposed to their Gentile interrogators, were the true enemy.<sup>75</sup> Students saw the Government attempting to limit the number of security clearances to habeas counsel, and thus the number of their opposing counsel on a matter before a court of law, in a self-serving manner that would give government lawyers an obvious litigation advantage.<sup>76</sup> Students

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73. See, e.g., Gaillard T. Hunt, *Bibles Prohibited*, in THE GUANTÁNAMO LAWYERS, *supra* note 28, at 118, 118–19 (describing how military officials refused to allow a lawyer to send a bible to a client through a chaplain); Clive Stafford Smith, *Underwear*, in THE GUANTÁNAMO LAWYERS, *supra* note 28, at 126, 126–30 (recounting how the government accused a lawyer of attempting to smuggle in non-prison issue undergarments); David H. Remes, *Calculated Inefficiencies*, in THE GUANTÁNAMO LAWYERS, *supra* note 28, at 137, 137 (describing the “logistical restrictions on lawyers’ access to clients at Guantánamo”); Chuck Patterson, *Bureaucratic Bullshit*, in THE GUANTÁNAMO LAWYERS, *supra* note 28, at 141, 141 (describing “the perfect storm of bureaucratic bullshit” between “the DOJ, DOD, the CIA, and the armed services, overseen by a micromanaging White House”).

74. David Cole, *There is No Law*, NATION, Mar. 6, 2007, available at <http://www.thenation.com/print/article/there-no-law>.

75. Neil A. Lewis, *Reporter’s Notebook: At Guantánamo, Refueling with Java and Windmills*, N.Y. TIMES, Mar. 7, 2005, at A1 (quoting comment made to Thomas Wilner’s Guantánamo client by interrogator, “How could you trust a Jewish lawyer? Don’t you know that Jews have betrayed Muslims throughout the years?”).

76. See, e.g., Patterson, *supra* note 73, at 141–42 (describing how a top-secret cleared former Marine could not obtain the requisite clearance necessary to visit Guantánamo for more than two years); Amal Bouhabib, *Loyalty*, in THE GUANTÁNAMO LAWYERS, *supra* note 28, at 142, 143–44 (describing the difficulties a dual-citizen law student had in obtaining a security clearance); Yasmin Zainulbhai, *Zoom Out for a Broader Look: An Unclassified Tale*, in THE GUANTÁNAMO LAWYERS, *supra* note 28, at 145, 145 (noting that the government at one time barred law students from applying for security clearance).

reviewed a menacing letter from Department of Justice counsel suggesting that by making public information the Government itself deemed “unclassified” (albeit accidentally), I had exhibited a “failure to act circumspectly” in this area of national security, and threatened serious consequences.<sup>77</sup> This produced considerable anxiety at first, but after a while, we realized that we had done nothing wrong—these bullying tactics seemed increasingly desperate, and the force of law seemed increasingly to be on our side.

One episode that students particularly enjoyed involved the Government’s refusal to permit me to send a German-English dictionary to my client to help him understand attorney-client correspondence and pleadings in his case. According to Government counsel, this 4x4 inch dictionary was a security risk because it could potentially be used as a deadly weapon and could permit detainees to translate—and perhaps decode—conversations by interrogators. As my students asked rhetorically, with some consternation, “[W]ere interrogators spilling top secret information in front of detainees?” “Didn’t DOJ counsel know that Murat was already fluent in spoken—if not written—English and thus could have been already well into the process of cracking the Guantánamo code?” Students perceived this, at best, as petty bureaucratic nonsense, and at worst, a reflection of broader, sinister attempts to frustrate our client’s access to counsel and the legal process.

Student saw pointless over-classification of documents including portions of an important written opinion by a federal district judge.<sup>78</sup>

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77. Letter from Terry Henry, Senior Trial Counsel, Dep’t of Justice, to author (Mar. 5, 2005) (on file with author).

78. *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443, 451–52 (D.D.C. 2005), *vacated sub nom.* *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *rev’d*, 553 U.S. 723 (2008), *vacated sub nom.* *Al Odah v. United States*, 282 F. App’x. 844 (D.C. Cir. 2008), *vacated*, 282 F. App’x. 844 (D.C. Cir. 2008). Among the statements in the opinion the government fought to keep classified, but which it was eventually forced to disclose, were descriptions that exonerated Murat, including: “CITF [Criminal Investigative Task Force] is not aware of evidence that Kurnaz was or is a member of al-Qaeda. CITF is not aware of any evidence that Kurnaz may have aided or abetted, or conspired to commit acts of terrorism.” The Germans confirmed that this detainee had no connections to an al-Qaeda cell in Germany. Even worse, the government attempted to keep classified the Judge’s simple observation that there was exculpatory evidence in Murat’s file that the government ignored. *See* Carol D. Leonnig, *Evidence Of Innocence Rejected at Guantánamo*, WASH. POST, Dec. 5, 2007, at A1 (discussing that there

Some of these documents were later made public through Freedom of Information Act (FOIA) litigation which revealed that redactions insisted upon by the Government did nothing more than completely exonerate our client and, accordingly, embarrass the Government.<sup>79</sup> The students learned that in the absence of law and judicial process, secrecy and control often reign.

On substantive grounds as well, the students saw the legal position of the Government finally laid bare. Students learned that the key declassified charge against our client was that a friend of his had “carried out a suicide bombing” in Germany two years into Murat’s detention in Guantánamo.<sup>80</sup> Putting aside the remarkable proposition of “law” that one could be detained indefinitely based on the unknown acts of another person thousands of miles away, it was factually absurd; for as students assisted in discovering, the suicide bomber was actually alive and well in Germany and under no such suspicion of wrong-doing. Students were at first confused, then outraged that the system could tolerate such injustice. As one student recently remarked, one aspect of her experience that was

[E]ye-opening was watching (and experiencing) the [G]overnment’s attempt at substantiating its claims. For me, it was very strange and disconcerting to see the weakness of the [G]overnment and its poor attempts at trying to cover its mistakes. I remember always thinking if the [G]overnment is going to such great lengths to maintain Kurnaz’s “guilt”

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was “conflicting exculpatory evidence in at least three separate documents”). These statements, and a trove of other exculpatory documents, were later revealed following the filing of a Freedom of Information Act request and complaint—and extensive briefing —on which Clinic students and summer research assistants worked. *See id.*; *see also 60 Minutes: Nightmare at Guantánamo Bay* (CBS News television broadcast Mar. 31, 2008), available at <http://www.cbsnews.com/video/watch/?id=3980799n> (describing recently declassified exculpatory documents in Murat Kurnaz’s case).

79. *See* Memorandum of Law in Support of Defendant’s Motion for Summary Judgment at 6–7, *Azmy v. Dep’t of Def.*, 562 F. Supp. 2d 590 (S.D.N.Y. 2008) (No. 06 Civ. 15340 (JSR)) (noting that the government produced documents in response to a FOIA request); DEP’T OF DEF., OARDEC/SER: 0215, REVIEW OF COMBAT STATUS REVIEW TRIBUNAL FOR DETAINEE ISN #061 (2004), available at [http://law.shu.edu/publications/ResearchCenters/upload/kurnaz\\_prod\\_part\\_one.pdf](http://law.shu.edu/publications/ResearchCenters/upload/kurnaz_prod_part_one.pdf) (presenting the unredacted versions of CSRT returns; redacted version on file with author).

80. *See, e.g.,* Bernstein, *supra* note 1.

(even though it was so obvious he was innocent) what else are they trying to keep undercover?<sup>81</sup>

And for some students, they saw themselves participating in a fundamental enterprise. As another student recalls:

For me, and I suspect my fellow clinical students, the clinic took place in sort of surreal, heightened-reality. It seemed to be the ultimate test case of whether we live in a world where the rule of law rei[g]ns supreme, or whether law was in fact a pretext which those in power could disregard or bend at their own convenience.<sup>82</sup>

Students also attended the first post-*Rasul* oral argument in the district court.<sup>83</sup> In that hearing, the students heard the Government assert that the President had authority to detain a “little old lady from Switzerland” who had mistakenly sent money to the Taliban under the misimpression it was an Afghan orphanage.<sup>84</sup> The students, like nearly everyone else in the courtroom, audibly gasped. These were among the thousands of absurd propositions that populated the jurisprudence of Guantánamo and which generated a healthy concern about—and skepticism over—the breadth of the Government’s claims.<sup>85</sup> At some point, students supplemented their outrage with laughter at the absurdity; I remember thinking around that time, if we

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81. Cioppetini, *supra* note 22.

82. E-mail from Arthur Owens, former clinic student, to author (Feb. 6, 2010) (on file with author) [hereinafter Owens].

83. Neil A. Lewis, *Fate of Guantánamo Detainees is Debated in Federal Court*, N.Y. TIMES, Dec. 2, 2004, at A36 (reporting on Dec. 1, 2004 hearing before D.C. District Judge Green).

84. *Id.* (reporting the exchange between Judge Green and senior Department of Justice attorneys).

85. As one student perceptively recalls in considering another broad government legal position:

The other thing that struck me about the *Kurnaz* case was the sheer breadth of the government’s “mosaic theory.” While many of the government’s arguments challenged my preconceptions about Gitmo, this theory confirmed my skepticism. The idea that any piece of information, no matter how innocuous, should be protected from disclosure because it *might* be combined with some other information in some damaging way shocked me. In short, I found it difficult to accept that the American government felt the right to hide any and all information about itself from its own citizens—which is what this argument amounted to.

E-mail from Jared LeFevre, former clinic student, to author (Jan. 23, 2011) (on file with author).

can laugh, we can win. Law and reason were ascendant over rage and despondency, and the students did have a keen eye for some of the deeper absurdities and hypocrisy of Guantánamo.

#### IV. SOME INTERESTING GUANTÁNAMO TWISTS ON TRADITIONAL CLINICAL PROBLEMS

In addition to the very basic tension identified above—between the limits on the students' experiences and the richness of that limited experience—work on Guantánamo cases presented some interesting twists on age-old clinical teaching problems. To take just a few:

##### A. *Student Skepticism Toward a Client*

Clinical teachers are well aware of the problem of the skeptical student. “Should we be representing this criminal defendant when we know he’s guilty or, even worse, when he beat up his defenseless girlfriend?” “I’m worried that our foreclosure client knew full well she couldn’t afford this loan; should we reward her opportunism?” “I don’t believe our asylum client’s story about his persecution abroad; it seems like everything he’s been saying has been inconsistent, and I don’t want to spoil my reputation before the bar.” If clinical teachers have appropriate time and patience, these will present genuine teaching opportunities, as part of the clinical learning process is to work through these assumptions.

Interestingly, I encountered no similar reluctance in representing a Guantánamo detainee. One obvious reason was that students self-selected my clinic with a predisposition in favor of the cause. But there may be other explanations worth considering. Perhaps because no process was in place where we were outside the traditional narratives and tropes of the adversary process, students did not face the same reluctance or inner conflict. We were in fact arguing for the *possibility* of creating those narrative tensions down the line; at one level, we were arguing for this case to be treated like any other case. If the client was, indeed, a terrorist or war criminal, would we not at least need a legitimate forum—habeas or a criminal trial—to demonstrate it, and then, for those so inclined, mete out the harshest punishment possible? At a seemingly irrefutable level of abstraction,

the client was a principle of law, not just a human being.<sup>86</sup> Since *Boumediene* and the development of a genuine, adversarial habeas process, perhaps clinical programs actually involved in the defense of a client face some of the “what-if-he-is-guilty?” trepidation; but even now, because of consistent infirmities and broader challenges to ensure the process is robust in practice, it appears that this is still not the case.

Even among students whose personal politics generally aligned with the then-existing Administration, this experience taught them that law is different from politics, and lawyers have a duty to represent individuals accused of acts they find personally distasteful.<sup>87</sup>

B. *The Role of Lawyers and the Legal System: An Inversion of the Narrative of Power*

As mentioned earlier, clinical instructors often use real cases to highlight the broader systemic deficiencies, biases, and limitations of our justice system—whether in the criminal, civil, or immigration context.<sup>88</sup> The justice system cannot be “fixed,” but we do what we can at the margins, and that too, is important. But in the Guantánamo

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86. Which is not to say there were not important reasons for students to aggressively take the side of our client, whose personal and legal story students found deeply compelling. Some of those reasons included the extraordinary non-legal aspects of his detention: no one, the argument would go, should be tortured; no one should be denied any contact with family; no one should be gratuitously humiliated, sexually or religiously. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 & cmts. j., l., m. (1987).

87. As one student explained:

I remember struggling a bit with the idea of working on the case because it seemed to be at odds with my personal politics and my beliefs at that time that the war on terror should be drastic and intense. I also remember coming to a realization very early on—being reassured by your comfort in doing this work—that it was a valuable experience to a developing lawyer to work on protecting the rights of someone or something and putting aside personal doubts. The clinic experience helped me understand that every accused person or unpopular/maligned defendant is entitled to zealous representation within the bounds of ethics.

E-mail from Patrick Gilmartin, former clinic student, to author (Jan. 25, 2011) (on file with author).

88. See *supra* note 18 and accompanying text.

context, the “system” actually acted as a long, lost hero.<sup>89</sup> Our fighting principle was that our “system” of justice—and habeas corpus—works; in fact, it has worked since King John proclaimed the Magna Carta law at Runnymede,<sup>90</sup> since Chief Justice John Marshall eulogized the writ of habeas corpus,<sup>91</sup> and since the Supreme Court chastised President Lincoln for applying military tribunals to citizens.<sup>92</sup> It was not that the principles to manage the Guantánamo crisis did not exist, but rather they had seemingly been abandoned.

At the same time, students felt part of something short-of a movement. I say “short-of a movement” because social movements—at least the iconic kinds—typically convince society that fundamental change of the status quo is required.<sup>93</sup> Iconic movement activists or lawyers are almost always outsiders pushing for social change.<sup>94</sup> By contrast, the detainee lawyers were, by and large, institutionally conservative—from large corporate law firms, major universities, and

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89. Certainly, at a higher level of abstraction, one could argue that, in light of historical incidents like Japanese internment, the Chinese Exclusion Act, and Supreme Court doctrine there are even deeper systemic forces—embedded in American constitutional tradition or national character—pushing us to an institution like Guantánamo. *See, e.g.*, *Korematsu v. United States*, 323 U.S. 214 (1944); *Ex parte Quirin*, 317 U.S. 1 (1942); *In re Yamashita v. Styer*, 327 U.S. 1 (1946).

90. *See* *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 218–19 (1953) (Jackson, J., dissenting) (“Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land. The judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint.”).

91. *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93–101 (1807).

92. *See Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 34 (1866) (“[M]ilitary tribunals for civilians, or non-military persons, whether in war or peace, are inconsistent with the liberty of the citizen, and can have no place in constitutional government.”).

93. *See, e.g.*, David A. Super, *In Egypt, Treading the Path of Civil Rights*, BALTIMORE SUN, Feb. 14, 2011, at 11A.

94. Eli Wald, *Foreword: The Great Recession and the Legal Profession*, 78 FORDHAM L. REV. 2051, 2054 (2010) (“New Deal lawyers were mostly outsiders, a ‘coalition of minorities—social ethnic, regional, and intellectual,’ who flocked to Washington D.C. ‘with their hair ablaze’ seeking social change for the people . . . .”) (footnotes omitted); Tomiko Brown-Nagin, *Elites, Social Movements and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1445 (2005) (“[E]lite-dominated interest group litigation and progressive social movements aimed at accomplishing fundamental change are distinct and largely incompatible phenomena.”); Michael E. Parrish, *The Great Depression, The New Deal, and the American Legal Order*, 59 WASH. L. REV. 723, 747 (1984) (“ . . . New Deal lawyers did share one trait—they were usually outsiders.”).

the like.<sup>95</sup> They were not seeking a radical transformation of the status quo; they were, at least in their minds, seeking a return to the status quo.<sup>96</sup> The American Bar Association,<sup>97</sup> English Parliamentarians,<sup>98</sup> retired generals<sup>99</sup> and judges,<sup>100</sup> and a lion of the civil rights establishment, Fred Korematsu,<sup>101</sup> were all on our side. One student recalls fondly seeing the profession operating in accordance with its highest ideals:

Any practicing attorney would appreciate, there are moments of comp[li]ete anger and frustration where a rational person would begin to question why they would

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95. See, e.g., Stacy Sullivan, *The Minutes of the Guantánamo Bay Bar Association*, N.Y. MAG., June 26, 2006, at 44, available at <http://nymag.com/news/features/17337/> (describing the experiences of lawyers from blue-chip law firms like Dorsey & Whitney, Covington & Burling, and Allen & Overy); Carlyn Kolker, *Justice at Bay: Ten Months After a Supreme Court Ruling Almost Nothing Has Changed*, AM. LAW., May 2005 (describing the coalition of lawyers as “a distinguished assembly” of “big-firm partners and associates, law professors, [and] solo practitioners . . .”).

96. See Kolker, *supra* note 95 (“Lawyers . . . have devoted thousands of hours to tussling over basic rights: the right to counsel, the right to see a doctor or read a magazine.”).

97. See, e.g., Brief for the American Bar Association as Amicus Curiae Supporting Petitioners, *Hamdi v. Rumsfeld*, 524 U.S. 507 (2004) (No. 03-6696), 2004 WL 354187.

98. See Brief of 175 Members of Both Houses of the Parliament of the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Petitioners, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-343, 03-334), 2004 WL 96766.

99. See Brief Amicus Curiae of Retired Military Officers in Support of Petitioners, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343), 2004 WL 99346; see also Brief for the National Institute of Military Justice as Amicus Curiae in Support of Petitioners, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343), 2004 WL 96758; Brief of Former American Prisoners of War as Amici Curiae in Support of Petitioners, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343), 2003 WL 22490571.

100. See Brief of Amici Curiae, Hon. Nathaniel R. Jones et al. in Support of Petitioners, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343), 2004 WL 73259; see also Brief Amici Curiae of Former U.S. Government Officials in Support of Petitioners, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343), 2004 WL 96757 (brief of former high-level government officials in support of detainees); Brief of Diego C. Asencio et al. as Amici Curiae in Support of the Petitioners, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343), 2004 WL 96760 (brief on behalf of retired diplomats in support of detainees).

101. Brief of Amicus Curiae Fred Korematsu in Support of Petitioners, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343), 2004 WL 103832.

choose to continue with such a profession. However fleeting, when I am faced with such a circumstance, I try to recall the experiences and practitioners that uphold the values of the profession, and without a doubt, the Gitmo Clinic is one such experience that comes to mind. That is probably all a law student could ask for from a clinic experience.<sup>102</sup>

### C. *Creative Social Justice Lawyering*

For the entire period of our representation—between *Rasul* in 2004 and *Boumediene* in 2006—habeas petitions were not proceeding to hearings on the merits.<sup>103</sup> Following *Rasul*, and after some early promise of meaningful habeas review, Congress twice attempted to strip federal court jurisdiction over Guantánamo habeas cases (once in the Detainee Treatment Act of 2005,<sup>104</sup> which was deemed non-retroactive and thus inapplicable by *Hamdan v. Rumsfeld*,<sup>105</sup> and again in the Military Commissions Act of 2006,<sup>106</sup> deemed unconstitutional in *Boumediene v. Bush*).<sup>107</sup> While we were litigating these abstract legal questions in a coordinated way in the D.C. Circuit and Supreme Court, the initial promise of *Rasul* faded. Thus, lest we seem worthless to our clients, we had to do something. Students were pressed to be creative.

With habeas proceedings at a standstill, we concluded that to get Murat home, we would need to try to convince his home Government of Germany to negotiate for his return. This presented interesting opportunities for advocacy in atypical forums. Students drafted press packets for domestic and German media. They produced comprehensive briefing books for diplomats, highlighting Murat's credible claims of innocence, the brutal conditions of his confinement

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102. Owens, *supra* note 82.

103. See Azmy, *supra* note 1, at 456, 499 (noting that *Rasul* “did not decide the merits of any habeas petition” and that *Boumediene* “set in motion a process . . . by which the detainees can challenge the sufficiency of their detentions”).

104. Pub. L. No. 109-148, div. A, tit. X, § 1005, 119 Stat. 2680, 2742 (2005) (codified as 28 U.S.C. § 2241(e)(1)–(2)), *invalidated by* *Boumediene v. Bush*, 553 U.S. 723 (2008).

105. 548 U.S. 557, 575–76 (2006).

106. Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635–36 (2006) (codified as 28 U.S.C. § 2241(e)(1)–(2)), *invalidated by* *Boumediene v. Bush*, 553 U.S. 723 (2008).

107. 553 U.S. 723, 792 (2008).

and interrogation, and the need for diplomatic intervention.<sup>108</sup> Each set of materials required thinking seriously about storytelling for different audiences. Students also made important contributions to our factual investigation, to the extent it was possible at this preliminary stage. For example, the Government claimed that our client's association with a religious missionary group in Pakistan, Tablighi Jama'at, rendered him an enemy combatant.<sup>109</sup> We knew nothing of this group, so students did extensive research on religion and politics in Pakistan and drafted a document convincingly demonstrating that this group is avowedly peaceful and rejects politics and violence associated with other extremist organizations in Pakistan.<sup>110</sup> Along with several expert affidavits, we submitted these findings in a brief<sup>111</sup> submitted on our client's behalf as part of an (ultimately toothless) administrative review process in Guantánamo,<sup>112</sup> and I understand that this work has been relied upon

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108. *The Unlawful Detention of Murat Kurnaz*, Briefing Book to German Consul in Washington, D.C. (Mar. 2005) (on file with author).

109. DEP'T OF DEF., SUMMARY OF EVIDENCE FOR COMBATANT STATUS REVIEW TRIBUNAL: KARNAZ [SIC], MURAT (Sept. 22, 2004), at 76, available at [http://www.dod.mil/pubs/foi/detainees/csrt\\_arb/000001-000100.pdf](http://www.dod.mil/pubs/foi/detainees/csrt_arb/000001-000100.pdf); see also *The Guantánamo Docket*, N.Y. TIMES, Mar. 24, 2011, available at <http://projects.nytimes.com/guantanamo>.

110. Submission of Detainee Murat Kurnaz to the Administrative Review Board for the Office of Administrative Review of the Detention of Enemy Combatants 11–17 (Feb. 1, 2005) (on file with author) [hereinafter Kurnaz Submission].

111. See Letter from Qamar-ul Huda, Professor of Islamic Studies & Comparative Religion, to author (Jan. 7, 2005), available at [http://www.dod.mil/pubs/foi/detainees/csrt\\_arb/ARB\\_Transcript\\_Set\\_5\\_200000-20254.pdf](http://www.dod.mil/pubs/foi/detainees/csrt_arb/ARB_Transcript_Set_5_200000-20254.pdf) (regarding Tablighi Jama'at's peaceful activities); Letter from Barbara D. Metcalf, Dir., Ctr. for S. Asian Studies, Univ. of Mich. Ann Arbor, to author, available at [http://www.dod.mil/pubs/foi/detainees/csrt\\_arb/ARB\\_Transcript\\_Set\\_5\\_200000-20254.pdf](http://www.dod.mil/pubs/foi/detainees/csrt_arb/ARB_Transcript_Set_5_200000-20254.pdf); Letter from Jamal J. Elias, Professor of Religion, Amherst Coll., to author (Dec. 13, 2004), available at [http://www.dod.mil/pubs/foi/detainees/csrt\\_arb/ARB\\_Transcript\\_Set\\_5\\_200000-20254.pdf](http://www.dod.mil/pubs/foi/detainees/csrt_arb/ARB_Transcript_Set_5_200000-20254.pdf); see also Kurnaz Submission, *supra* note 110.

112. In addition to Combatant Status Review Tribunals, the Department of Defense initiated what it called Administrative Review Board (ARB) hearings, which it analogized to a parole hearing. Unlike in the CSRTs, ARB hearings permitted submissions on the detainees' behalf by their counsel. The hearings were designed to ascertain whether there are factors suggesting a detainee is no longer a threat to the United States or whether there are other factors in favor of continued detention. See Memorandum from Department of Defense Designated Civilian Official Gordon England, Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantánamo Bay, Cuba (Sept. 14,

by subsequent detainees also charged by the military with connections to this religious group.<sup>113</sup> Students worked on motions that could be briefed largely without reference to classified materials, such as a motion to prohibit the military from transferring our client out of the court's jurisdiction without advance notice.<sup>114</sup>

Students also pursued collateral litigation to help with the substance of the case such as FOIA litigation to obtain medical records and to declassify evidence of Murat's innocence.<sup>115</sup> Other clinics in this time period also developed strategies to meaningfully involve students. For example, American University's International Human Rights Clinic, directed by Richard Wilson, developed international law arguments challenging the treatment and detention of Omar Khadr, a juvenile, which they asserted in both domestic and international law forums.<sup>116</sup>

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2004), *available at* <http://www.defense.gov/news/Sep2004/d20040914adminreview.pdf> [hereinafter DOD Memo]. In connection with this process, students were involved in preparing arguments about why our client's association with Tablighi Jama'at is not probative of any dangerousness and in preparing statements from experts and family members in an unsuccessful attempt to persuade the military to release him.

113. *See* DOD Memo, *supra* note 112, at enclosure (3)1 (describing the ARB process as an "annual review to determine the need to continue to detain enemy combatants," during the War on Terror using "all reasonably available and relevant information," and empowering the Board to "make . . . recommendation[s]" for release, transfer, or continued detention). A recent article summarizes the ARB process:

The ARBs consisted of three military officers who reviewed "reasonably available and relevant information" regarding a detainee to determine whether he should be released, transferred to another nation for imprisonment or conditional release, or remain at Guantánamo. The ARBs provided even fewer procedural protections than the CSRTs: the detainee and his nonlawyer "Assisting Military Officer" were permitted only to see the nonclassified information relied upon by the Board, and the detainee was not allowed to call any witnesses.

*See* Paul Diller, *Habeas and (Non-)Delegation*, 77 U. CHI. L. REV. 585, 621 (2010).

114. *Kurnaz v. Bush*, No. 04-1135, 2005 WL 839542, at \*1 (D.D.C. Apr. 12, 2005) (ordering Department of Defense to give advance notice to Petitioner's counsel before transferring Petitioner out of Guantánamo to a third country).

115. *See, e.g., Azmy v. Dep't of Def.*, 562 F. Supp. 2d 590, 605-06 (S.D.N.Y. 2008) (adjudicating validity of exemptions claimed in response to FOIA request seeking documents about Murat Kurnaz's detention and interrogation).

116. Richard J. Wilson, *A Long, Strange Trip: Guantánamo and the Scarcity of International Law* 3 (Am. Univ. Wash. Coll. of Law, Working Paper, Jan. 1, 2009),

Thus, in addition to applying traditional legal skills—storytelling, factual investigation, and written advocacy—this period of representation, when the courts were largely closed off, exposed students to a variety of non-litigation forms of social justice advocacy. It also highlighted the importance of strategic collaboration with a range of other institutions, lawyers, and activists in pursuit of law reform.

#### V. CONCLUSION

My ambivalence about Guantánamo as a clinical teaching tool remains, though I do take heart in the positive recollections my former students recently shared with me. In addition to exposure to traditional pedagogical goals of clinics, students appear to have been shocked, inspired, and angered; their eyes were opened wide, and they left each semester with a feeling that, despite high and unjust obstacles, we did all we could for our client and our cause. Perhaps there is nothing else we can ask.