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The Detainees' Dilemma: The Virtues and Vices of Advocacy Strategies in the War on Terror

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INTRODUCTION

For detainees in the war on terror, advocacy outside of court is often the main event.¹ Analysis of advocacy through the prism of Supreme Court decisions² resembles surveying

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1. See generally Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891 (2008) (discussing “alternative lawyering” that takes place largely outside the courtroom, or where litigation complements rather than dominates the overall social justice agenda); Stephen Ellmann, *Cause Lawyering in the Third World*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 349, 359 (Austin Sarat & Stuart Scheingold eds., 1998) (same); David Luban, *Lawfare and Legal Ethics in Guantánamo*, 60 STAN. L. REV. 1981, 2014-16 (2008) (discussing representation of ex-Guantanamo detainee David Hicks by Major Michael “Dan” Mori); Catherine Powell, *The Role of Transnational Norm Entrepreneurs in the U.S. “War on Terrorism,”* 5 THEORETICAL INQUIRIES L. 47 (2004) (discussing role of international human rights organizations).

2. See *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (striking down provisions of Military Commissions Act that purported to limit federal courts’ jurisdiction over writs of habeas corpus brought by detainees); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (holding that President Bush had exceeded his authority in unilaterally establishing military commissions); *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that statutory writ of habeas corpus extended to Guantanamo);

an iceberg based on what appears above the surface: the analyst will not understand the actual dimensions of the issue. To better assess the virtues and risks of lawyering for human rights, one must consider mobilization strategies devised by lawyers outside appellate courts' exalted realm. I call mobilization of this kind "crossover advocacy."

Crossover advocacy encompasses a vast repertoire, including advocacy with the media, foreign governments and their constituents, and international forums such as the United Nations and the Inter-American Commission on Human Rights.³ Crossover advocacy also includes scholarship by academic lawyers working for detainees,⁴ and damage suits against officials or entities after a detainee's release.⁵ In the fluid world of "law in action,"⁶

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (ruling that Congress' passage of the Authorization for the Use of Military Force (AUMF) resolution after September 11, 2001, allowed the executive to detain presumptive U citizen apprehended in Afghanistan subject to due process safeguards); *see also* Rumsfeld v. Padilla, 542 U.S. 426 (2004) (holding that district court lacked jurisdiction over habeas petition challenging detention of terror suspect where petition had not been filed in district of suspect's immediate custodian).

3. *See, e.g.*, Letter from Santiago A. Canton, Executive Secretary, Inter-Am. Comm'n on Human Rights, to Org. of Am. States (Aug. 20, 2008), [http://ccrjustice.org/files/08.08.20_IACHR_precautionary%20measures%20\(2\).pdf](http://ccrjustice.org/files/08.08.20_IACHR_precautionary%20measures%20(2).pdf) (requesting the U.S. government take measures to ensure that detainee is not subjected to abusive interrogation, or returned to Algeria, where he may face torture, and receive adequate medical care); *cf.* Cummings, *supra* note 1, at 1013 (noting range of venues in which advocates have appeared).

4. *See* Neal Kumar Katyal, Hamdan v. Rumsfeld: *The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65 (2006); Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013 (2008). For other important analyses of issues of lawyering, politics, and legal doctrine by academic advocates for detainees, *see* JOSEPH MARGULIES, *GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER* (2006); CLIVE STAFFORD SMITH, *EIGHT O'CLOCK FERRY TO THE WINDWARD SIDE* (2007); Muneer I. Ahmad, *Guantánamo is Here: The Military Commissions Act and Noncitizen Vulnerability*, 2007 U. CHI. LEGAL F. 1 (2007); Mark Denbeaux & Christa Boyd-Nafstad, *The Attorney-Client Relationship in Guantanamo Bay*, 30 FORDHAM INT'L L.J. 491 (2007); Jonathan Hafetz, *Habeas Corpus, Judicial Review, and Limits on Secrecy in Detentions at Guantánamo*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 127 (2006); Martha Rayner, *Roadblocks to Effective Representation of Uncharged, Indefinitely Imprisoned Clients at Guantánamo Bay Military Base*, 30 FORDHAM INT'L L.J. 485 (2007).

5. *See* Arar v. Ashcroft, 532 F.3d 157 (2d Cir. 2008) (denying relief); *see also* Complaint, Padilla v. Yoo, No. 08-0035 (N.D. Cal. Jan. 4, 2008), *available at* <http://jurist.law.pitt.edu/pdf/YooComplaint.pdf> [hereinafter Padilla Complaint]; *cf.* James Barron, *U.S. Appeals Court to Rehear Case of Deported Canadian*, N.Y. TIMES, Aug. 15, 2008, at B4 (reporting that Second Circuit will rehear case en banc). I include damage suits brought on behalf of detainees because they

crossover advocacy has played a more conspicuous role than the elite briefing and argument that inspires Supreme Court opinions.

Necessity drives much crossover advocacy. The Bush administration's buffeting of rule of law values⁷ has left

often are elements of a broader mobilization campaign in which success in court is doubtful, if not irrelevant. Scott Cummings calls this approach "tactical pluralism." See Cummings, *supra* note 1, at 897, 1013-15; Scott L. Cummings, *Law in the Labor Movement's Challenge to Wal-Mart: A Case Study of the Inglewood Site Fight*, 95 CAL. L. REV. 1927, 1932, 1979-91 (2007).

6. See Amnon Reichman, *The Dimensions of Law: Judicial Craft, Its Public Perception, and the Role of the Scholar*, 95 CAL. L. REV. 1619, 1622 n.11 (2007) (citing Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910)). See generally BRIAN Z. TAMANAHA, *REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF LAW* (1997) (contrasting conception of legal practices with legal doctrine).

7. Broadly speaking, there are three schools of thought on the Bush administration's measures in the war on terror, although as with any typology one could argue that there are more intra- than inter-group differences. One group of commentators argues for deference to presidential decisionmaking. See ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 275 (2007) (arguing that legal constraints on national security decision-making are usually counterproductive and institutionally flawed); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2101-02 (2005) (generally calling for judicial deference to executive decisions). Another group vigorously opposes most claims of presidential power, and stresses the roles of both Court and Congress. See DAVID COLE & JULES LOBEL, *LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR* (2007) (arguing for robust constraints on presidential authority); Diane Marie Amann, *Abu Ghraib*, 153 U. PA. L. REV. 2085 (2005) (same); cf. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008) (offering defense of heightened role for Congress and the courts, while conceding that presidents including Lincoln and Roosevelt have sometimes been wise to act unilaterally, at least where their actions were publicly disclosed and subject to subsequent legislative ratification). A third group seeks a middle way, calling for robust procedural safeguards but also acknowledging the need for flexibility within the political branches. See OREN GROSS & FIONNUALA NÍ AOLÁIN, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* 123-27 (2006) (arguing that the President may act unilaterally but must mark such actions as outside the legal system and submit actions for ex post facto ratification); Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008) (arguing that criminal and military models increasingly share common ground illustrated by the military model's move toward heightened procedural protections and criminal law's increasing use of amorphous substantive standards in conspiracy and related offenses); Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, in *THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY* 161 (Mark Tushnet ed., 2005)

lawyers with lemons, and the lawyers have responded by making lemonade. Viewed in this light, crossover advocacy is a resourceful adaptation to exigent circumstances. However, crossover advocacy also shares characteristics with other examples of legal change.

Scholars have frequently noticed that restrictions in one area of law or legal practice have consequences familiar to those who have played the game of “whack-a-mole.” Problems that the regulator has hoped to tamp down keep reappearing from another direction. Legal restrictions rarely succeed at shutting off all exits; instead, players restricted in one realm can often cross over into another, recreating the incursion that the restrictions sought to curb.⁸ For example, tort reform measures that have limited punitive damages often correlate with an increase in jury awards of compensatory damages.⁹ Similar dynamics occur in administrative,¹⁰ international,¹¹ constitutional,¹² and criminal law.¹³

(arguing for deference to the President when Congress concurs); Peter Margulies, *Judging Terror in the “Zone of Twilight”: Exigency, Institutional Equity, and Procedure After September 11*, 84 B.U. L. REV. 383 (2004) (arguing that the President should have authority to detain that is subject to due process and tailored to threats). Goldsmith’s presence in the first and third categories demonstrates both the fuzziness at the margins and the fluidity of the law in this area.

8. A path-breaking variant of this theme from the law and economics literature is the Coase Theorem, which posits that parties subject to certain legal restrictions will—assuming low transaction costs—contract their way around those legal rules. See Christine Jolls, *Behavioral Law and Economics* 4-5 (Yale Law Sch., Working Paper No. 130, 2006), available at <http://ssrn.com/abstract=959177>.

9. See Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. REV. 391, 429-37 (2005) (discussing “crossover effect”).

10. See Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 552-55 (2006) (arguing that judicial decisions that link deference to agency with degree of formality of administrative procedures may create unintended consequences, including agency policy positions in cases involving formal rulemaking that test limits of statutory text).

11. See Sonja B. Starr, *Rethinking “Effective Remedies”: Remedial Deterrence in International Courts*, 83 N.Y.U. L. REV. 693, 710-30 (2008) (discussing inflexible remedial rules that require complete relief once court finds violations of human rights lead tribunals to heighten procedural obstacles, such as harmless error rule).

However, this crossover effect is not an unalloyed good. Even when crossover effects allow advocates to resist misguided restrictions, they also create negative externalities. For example, lawyers seeking higher damage awards under a regime that caps noneconomic damages may be more likely to bring cases with clearly provable economic damages, thereby screening out cases involving disadvantaged groups who cannot show high earnings potential.¹⁴ Since lawyers' case selection decisions are largely unreviewable, the crossover effect here harms a cohort of prospective clients with meritorious claims.

This Article argues that crossover advocacy in the war on terror triggers a comparable dilemma.¹⁵ On the one hand, crossover advocacy has notable virtues. For example, it has enhanced the voices of detainees who without the lawyers would suffer in silence from indefinite detention and the legacy of coercive interrogation techniques. Crossover advocacy has also provided a crucial counterweight to the Bush administration's narrative depicting detainees as the

12. See Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 884-85 (1999) (arguing that over time courts will define rights such as right to nondiscriminatory public education or freedom from cruel and unusual punishment to avoid entangling themselves in unmanageable remedial regimes).

13. See Daniel Richman, *Decisions About Coercion: The Corporate Attorney-Client Privilege Waiver Problem*, 57 DEPAUL L. REV. 295, 317 (2008) (noting trade-offs in criminal law and procedure between heightened procedural protections that provide defendants with leverage and broader criminal prohibitions that tend to dissipate that leverage); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001) [hereinafter Stuntz, *The Pathological*] (arguing that adoption of exclusionary rule barring fruit of coercive interrogation prompted legislatures to revise criminal laws to target offenses like drug possession that were easy to prove without the need for a defendant's statements); William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 917-18 (1991) (arguing exclusionary rule alters constituency for warrants among law enforcement players, thereby altering law enforcement policies).

14. See Sharkey, *supra* note 9, at 489-90.

15. For a parallel argument on the overlapping risks of litigation and mobilization strategies, see Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 971-80 (2007). Cf. Robert O. Keohane, *Commentary on the Democratic Accountability of Non-Governmental Organizations*, 3 CHI. J. INT'L L. 477 (2002) (acknowledging that international mobilization campaigns also often are dominated by elite constituencies, and can hurt the interests of subordinated people with different priorities, such as indigenous people injured by Greenpeace's campaign against sealing).

“worst of the worst.”¹⁶ More concretely, while the Bush administration apparently conceived of Guantanamo as a law-free zone that would facilitate the incapacitation and interrogation of suspected terrorists, crossover advocacy has helped spur detainees’ release.¹⁷ Crossover advocacy has built coalitions between progressive lawyering organizations such as the Center for Constitutional Rights (CCR) and mainstream law firms.¹⁸ Indeed, concern for the rule of law in handling detainee cases has extended beyond the legal realm to the domain of politics.¹⁹ Nevertheless, as of early 2009, the government continues to detain individuals who pose no danger to the United States. Blame for this injustice should fall heavily on the shoulders of the Bush administration. However, the persistence of injustice also prompts questions about the efficacy of crossover advocacy.²⁰ Seeking answers to those questions is the principal focus of this Article.

Asking the right questions reveals that crossover advocacy has risks as well as virtues. Crossovers spawn opportunity costs and unintended consequences. Moreover, because of cognitive flaws, crossover advocates may fail to

16. Dahlia Lithwick, *The Imperial Presidency*, WASH. POST, Jan. 14, 2007, at B2 (quoting former Secretary of Defense Donald Rumsfeld).

17. Traditional legal advocacy has also played a significant role. See *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); see also *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008) (holding that government had not provided sufficient evidence in hearing below to justify continued detention of petitioner, an ethnic Uighur who fled persecution in his native China).

18. See Brendan M. Driscoll, Note, *The Guantanamo Protective Order*, 30 *FORDHAM INT’L L.J.* 873, 887-88 n.64 (2007) (noting efforts by Center for Constitutional Rights (CCR) to recruit pro bono counsel for detainees, including attorneys from major law firms).

19. Barack Obama, for example, incorporated into his stump speech a commitment to both close Guantanamo and ensure adequate judicial review of detainee claims for release. See Barack Obama, Rally at Rhode Island College, Mar. 1, 2008; see also *Protecting Our Liberty*, ST. PETERSBURG TIMES, Jan. 28, 2008, at 8A (noting that President Obama has urged the closing of Guantanamo during campaign).

20. For more pragmatic conceptions of public interest law that seek to avoid this quandary, see William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 *WM. & MARY L. REV.* 127, 170-81 (2004) (outlining more flexible approaches to defining community interests). Cf. Susan D. Carle, *Progressive Lawyering in Politically Depressing Times: Can New Models for Institutional Self-Reform Achieve More Effective Structural Change?*, 30 *HARV. J.L. & GENDER* 323, 325-30 (2007) (describing more collaborative models of advocacy).

appreciate these pitfalls. Crossover advocates, like other human beings, labor under a temporal discounting deficit. This flaw encourages individuals to unduly discount long-term costs, and inflate the value of short-term benefits.²¹ Second, crossover advocates share with other human beings a self-serving bias.²² This flaw encourages an asymmetric attribution of responsibility for problems to others. As a result of these biases, crossover advocates fail to grapple with three issues: asymmetries in accountability between traditional and crossover forums, conflicts of interest and role, and negative externalities that affect the public and undermine crossover advocates' causes.

First, consider asymmetric levels of accountability in crossover forums when compared with traditional judicial forums. At first blush, lower levels of accountability for advocates in crossover forums such as the media and international tribunals may seem liberating. However, lower levels of accountability in crossover forums can lead to undisciplined advocacy, opportunity costs for clients, and an echo-chamber effect in which preaching to the converted prevails. For example, crossover advocacy that uncritically pitches stories of innocence or detainee abuse can undermine the credibility of the advocate.²³ Moreover, the lure of crossover advocacy in exotic forums can detract from

21. See Christine Jolls et al., *A Behavioral Approach to Law and Economics*, in *BEHAVIORAL LAW AND ECONOMICS* 13, 46 (Cass R. Sunstein ed., 2000) (noting tendency to inappropriately discount future costs); David Laibson, *Golden Eggs and Hyperbolic Discounting*, 112 Q.J. ECON. 443, 445 (1997) (arguing that individuals use "commitment mechanisms" such as insurance policies or savings plans to compensate for tendency to unduly discount the future); George Loewenstein et al., *Projection Bias in Predicting Future Utility*, 118 Q.J. ECON. 1209 (2003) (analyzing flaws in discounting over time).

22. For discussions of self-serving bias and egocentrism in cognitive processing, see Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSP. 109 (1997); Boaz Keysar & Dale J. Barr, *Self-Anchoring in Conversation: Why Language Users Do Not Do What They "Should,"* in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 150, 152-56 (Thomas Gilovich et al. eds., 2002); Emily Pronin et al., *Understanding Misunderstanding: Social Psychological Perspectives*, in *HEURISTICS AND BIASES*, *supra*, at 636, 641-46.

23. See *Al-Ghizzawi v. Bush*, No. 05-2378, 2008 U.S. Dist. LEXIS 27988, at *4 (D.D.C. Apr. 8, 2008) (rebuking attorney for detainee).

traditional strategies that often benefit clients, such as persuading a detainee to cooperate with the government.²⁴

Second, conflicts of interest and roles can similarly impede deliberation and injure clients. An advocate seeking to highlight legitimate concerns about false positives among detainees may be tempted to issue an empirical study of the detainee population.²⁵ However, the advocate's stake in the matter may result in a study that fudges results. Similarly, academic advocates for detainees may take litigation stances that cast prior scholarly positions as arguments of convenience, or may decline to recognize litigation realities because of loyalty to pet theories. Academic lawyers anxious to highlight the Bush administration's abundant faults may also turn litigation into a vindictive venture that obscures more than it enlightens. As an example, consider the amorphous complaint drafted by the Yale National Litigation Project in a recent lawsuit against John Yoo.²⁶ The complaint, which archly asks for a dollar in damages for the Yale Project's clients, seeks to both score rhetorical points and secure justice. Sadly, it falls between two stools,

24. On cooperation generally, see Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69 (1995) (discussing cooperation), Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 33-42 (2003) [hereinafter Simons, *Retribution for Rats*] (asserting that cooperation can be a form of atonement, not merely a product of utilitarian calculus), Michael A. Simons, *Vicarious Snitching: Crime, Cooperation, and "Good Corporate Citizenship"*, 76 ST. JOHN'S L. REV. 979, 992-95 (2002) [hereinafter Simons, *Vicarious Snitching*] (analyzing cooperation of corporations as strategy for avoiding indictment), Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 614 (1999) (describing dynamics of cooperation, based on sentencing decisions of judges and other factors). Cf. Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 955, 959 (1999) (noting pattern of embellishment and outright misrepresentation among cooperators).

25. See MARK DENBEAUX & JOSHUA DENBEAUX, REPORT ON GUANTANAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA (2006), http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf [hereinafter DETAINEE STUDY].

26. Yoo, a Berkeley law professor, formerly served as an attorney at the Justice Department's elite Office of Legal Counsel, where he authored the justifiably infamous "torture memos." See Padilla Complaint, *supra* note 5, at 3; Stephen Gillers, *Legal Ethics: A Debate*, in *THE TORTURE DEBATE IN AMERICA* 236, 237-38 (Karen J. Greenberg ed., 2006); David Luban, *The Torture Lawyers of Washington*, in *LEGAL ETHICS AND HUMAN DIGNITY* 162, 176-80, 200-02 (2007); Peter Margulies, *True Believers at Law: National Security Agendas, the Regulation of Lawyers, and the Separation of Powers*, 68 MD. L. REV. 1 (2008).

by ignoring commitments to concreteness and consistency at the heart of the rule of law.

Third, crossover advocacy sometimes disregards the dynamic process of law reform, which yields externalities that can injure the public and advocates' allies. For example, unlimited expansion of aiding and abetting liability may boomerang, making it easier to target government lawyers like Yoo who provided outrageously poor legal advice, but also chilling prospective donors to international charities anxious about being sued for aiding terrorism. An adversary may also be able to exit a realm where the crossover advocate has inspired new regulation, and migrate to a domain less responsive to advocacy efforts. For example, critics of the Bush administration who urge the closure of Guantanamo may be in for a shock if the government responds by ramping up rendition, placing suspected terrorists in the custody of friendly governments,²⁷ or seeks to use bases more remote than Guantanamo for interrogation and detention. Finally, crossover advocates fail to reckon adequately with the possibility of backlash. Advocates' mobilization efforts may be most successful in mobilizing opponents. For example, advocates' invocation of international law can trigger a political dynamic that spurs Congress to modify international obligations.²⁸

To promote deliberation, this Article suggests a mobilization metric for crossover advocacy. This metric has three premises. First, legal change, including the change wrought by lawyers' adversaries, is endogenous to crossover advocacy. Therefore, crossover advocates must accept responsibility for such change, whether or not they intended it to occur. If mobilization efforts fade, falter, or boomerang through operation of the law of unintended consequences, crossover advocacy has not lived up to its billing. Second, cognitive biases such as the temporal discounting deficit are ubiquitous. To neutralize their effect, crossover advocates must expressly take into account the long-term costs of mobilization efforts. Third, the effectiveness of a given crossover forum or tactic varies at different points in the

27. See Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333 (2007).

28. Congress has this authority under the Constitution. See *Whitney v. Robertson*, 124 U.S. 190 (1888) (discussing "last in time" rule).

trajectory of legal change. Some tactics outlive their usefulness, requiring that the advocate revise her repertoire continually to keep pace with legal change.

With these premises in mind, the mobilization metric first considers three factors: the probability (P) of the innocence of the detainee; the treatment (T) of the detainee, focusing on the risk of unfair procedures; and the gravity (G) of the maximum sentence or harm that could be imposed. The metric weighs the value of this expression against the sum of two variables: opportunity costs (O) and the ease of an adversary's exit (E) from the sought-after reforms. When $P(T + G) > O + E$, a mobilization tactic is appropriate.

Like any model of the complexities of the behavior of legal actors, the mobilization metric is not a mechanical tool. Providing a numerical value for the variables in the metric is a function of craft and judgment, not science. However, deliberating about the content of each variable will enhance the advocate's ability to effectively represent clients in the many challenging forums outside of court.

The approach taken in this Article is new. While scholars have discussed what I call crossover advocacy in the detainee context,²⁹ no scholar writing about law and terrorism has systematically analyzed the risks and benefits of this approach to lawyering. Nor has scholarship assessed advocacy in nontraditional forums through the lens of crossover effects that also appear in tort, criminal, constitutional, and administrative law. Moreover, no scholar has modeled the variables that determine crossover advocacy's effectiveness. My hope is that the analysis in the Article will inform the efforts of both scholars and advocates to refine the advocate's role.

The Article is in six parts. Part I traces the evolution of lawyering and mobilization from Josiah Quincy II's defense of British soldiers accused in the Boston Massacre to the present, and outlines the challenges to conventional lawyering posed by the detention of suspected terrorists at Guantanamo. Part II first discusses crossover effects in torts, and then describes the repertoire of crossover advocacy, including contacts with the media and work with

29. See Cummings, *supra* note 1, at 1013; Katyal, *supra* note 4; Luban, *supra* note 1, at 2014-16; Martinez, *supra* note 4, at 1069-70.

other governments and transnational bodies. After a discussion of the virtues of crossover advocacy, including maximizing client voice, it turns to a general view of potential pitfalls, stemming from the temporal discounting deficit and self-serving bias. Part III traces risks to candor and costs for clients stemming from asymmetrical accountability in traditional advocacy and crossover venues. Part IV analyzes conflicts of interest and role, focusing on problems that arise when academics become detainee advocates, for example in the Yale Project's lawsuit against John Yoo. Part V discusses externalities that affect advocates' allies and the public through boomerang effects, exit, and backlash. Finally, Part VI explores core premises that should guide crossover advocates, including the endogeneity of changes to lawyers' mobilization efforts, the ubiquity of cognitive biases, and the need for strategic pivots to exploit legal transitions. To refine ex ante analysis of these risks, this Part sets out a mobilization metric and applies the metric to examples from the post-September 11 legal environment.

I. UNCONVENTIONAL ADVOCACY IN PUBLIC INTEREST LAW AND THE CHALLENGE OF GUANTANAMO

Advocacy to stop abuses at Guantanamo has emerged from a long-time dynamic in criminal defense and public interest law. One persistent strand of criminal defense strategy has sought to ignite public indignation over a purportedly unjust prosecution. In addition, public interest law has oscillated between a mode that favored elite litigation and a more eclectic mode that included organizing, deal-making, media relations, and political change.³⁰

30. For critiques of elite litigation as an exclusive strategy for enhancing empowerment, see GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VIEW OF PROGRESSIVE LAW PRACTICE* (1989), Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 *YALE L.J.* 2107 (1991), Peter Margulies, *Public Interest Lawyering and the Pragmatist Dilemma*, in *RENASCENT PRAGMATISM: STUDIES IN LAW AND SOCIAL SCIENCE* 220 (Alfonso Morales ed., Ashgate Press 2003), Peter Margulies, *The Mother with Poor Judgment and Other Tales of the Unexpected: A Civic Republican View of Difference and Clinical Legal Education*, 88 *NW. U. L. REV.* 695 (1994), Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 *N.Y.U. REV. L. & SOC. CHANGE* 535 (1987-1988) [hereinafter White, *Mobilization*], and Lucie E. White, *To Learn and Teach: Lessons from*

A. *Alternative Advocacy Strategies: An American History*

Criminal defense lawyers have long wrestled with the balance between advocacy in and out of court in representing unpopular clients.³¹ John Adams and his fellow patriot Josiah Quincy II represented the most unpopular defendants in colonial Massachusetts: the British soldiers accused of responsibility for the so-called "Boston Massacre."³² In the late 1800s and early 1900s, the legendary defense attorney Clarence Darrow used the media to dramatize the mistreatment of labor activists accused of crimes.³³ In the 1920s, the accused murderers Sacco and Vanzetti, whom many believed were targeted because of their anarchist sympathies, inspired a vigorous if ultimately unsuccessful press campaign to assert their innocence. Then-law-professor Felix Frankfurter not only wrote legal briefs for the two men, but also published articles and made speeches to assist their cause.³⁴

The use of community mobilization to complement courtroom advocacy has continued to the present day. In the 1960s, radical lawyers like William Kunstler used trials as engines for publicity, seeking to demonstrate the illegitimacy of the system.³⁵ In addition, death penalty

Driefontein on Lawyering and Power, 1988 WIS. L. REV. 699 [hereinafter White, *To Learn and Teach*]. Community economic development advocacy, because it is often transactional in nature, has developed a particularly rich literature on mobilization. See Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CAL. L. REV. 1879, 1905-06 (2007).

31. See generally Eric A. Posner, *Political Trials in Domestic and International Law*, 55 DUKE L.J. 75, 115-17 (2005) (discussing political defenses in trials of dissenters, extremists, and defendants accused of sedition).

32. See PORTRAIT OF A PATRIOT: THE MAJOR POLITICAL AND LEGAL PAPERS OF JOSIAH QUINCY JUNIOR 7, 21-27 (Daniel R. Coquillette & Neil Longley York eds., 2005).

33. See CLARENCE DARROW, *THE STORY OF MY LIFE* 180 (1996).

34. See FELIX FRANKFURTER, *THE CASE OF SACCO AND VANZETTI: A CRITICAL ANALYSIS FOR LAWYERS AND LAYMEN* 77-89 (1927).

35. See, e.g., Pnina Lahav, *Theater in the Courtroom: The Chicago Conspiracy Trial*, 16 CARDOZO STUD. L. & LITERATURE 381, 386-91 (2004) (analyzing how William Kunstler used trial of "Chicago 7" for alleged illegal acts committed in protests during 1968 Democratic Convention to seek to amplify causes of defendants and mobilize public opinion); cf. Peter Margulies, *The Virtues and Vices of Solidarity: Regulating the Roles of Lawyers for Clients Accused of Terrorist Activity*, 62 MD. L. REV. 173 (2003) (discussing radical lawyers' sense of solidarity with the ideological positions of their clients).

lawyers developed sophisticated strategies aimed at educating or influencing the jury pool in areas where a trial was pending, to either get an edge on the prosecution or counter the pervasive negative publicity that capital defendants often endure.³⁶ Feminist lawyers such as Elizabeth Schneider used publicity and legal scholarship to supplement courtroom advocacy on behalf of survivors of domestic violence who pleaded self-defense after killing their abusers.³⁷ Lawyers for movements that favored sanctuary for undocumented aliens and refugees from Central America or opposed United States military installations and weapons programs also created media campaigns designed to win public support.³⁸ Indeed, even the Mafia had a media wing—attorneys who defended alleged organized crime figures were aggressive in praising their clients and questioning the credibility of their client's accusers, sometimes to the point of enduring professional sanctions.³⁹

36. See Lee Hancock, *Putting It on the Line: Indictment Threatens Lawyer's Defense Career*, DALLAS MORNING NEWS, Jan. 24, 1993, at 39A (discussing death penalty attorney Millard Farmer's community-based strategy). See generally Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443 (1999) (discussing rationales and motivations for committed criminal defense work); Michael E. Tigar, *Voices Heard in Jury Argument: Litigation and the Law School Curriculum*, 9 REV. LITIG. 177, 179-83 (1990) (discussing his defense of a radical lawyer charged with perjury and making false statements to federal agents).

37. See Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 567-70 (1992) (discussing importance of mobilizing communities on issues of domestic violence); cf. Martha Minow, *Lawyering for Human Dignity*, 11 AM. U. J. GENDER SOC. POL'Y & L. 143, 153-57 (2002-03) (discussing difficulties of collaboration between lawyers and clients in social struggles).

38. See RICHARD L. ABEL, *POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID, 1980-1994*, at 10-11 (1995).

39. See Arnold H. Lubasch, *Jury Hears Gotti Discuss Organization on Tapes*, N.Y. TIMES, Feb. 18, 1992, at B3 (discussing late mob boss John Gotti's instructions on public relations to defense attorney Bruce Cutler); see also *United States v. Cutler*, 58 F.3d 825, 829-31 (2d Cir. 1995) (upholding finding of contempt for Cutler based on his repeated violations of a gag order); cf. Lonnie T. Brown, Jr., "May It Please the Camera, . . . I Mean the Court"—*An Intrajudicial Solution to an Extrajudicial Problem*, 39 GA. L. REV. 83 (2004) (proposing solution to problems of prejudicial pretrial publicity).

Lawyers for defendants accused of genocide or other crimes against humanity in international criminal trials sometimes address audiences outside the courtroom. They tend to focus in these mobilization efforts on legal issues concerning a tribunal's legitimacy, believing that more overtly political

Publicity and mobilization have been important because when public interest and civil liberties strategies have relied too much on courts, they have often fallen short. For example, the greatest legal battle in our country's history—the struggle to end segregation—contributed mightily to fulfilling the promise of constitutionalism; however, as Derrick Bell and others have pointed out, the model may have neglected the wishes of parents and communities whose primary focus was on greater resources for education.⁴⁰ Moreover, because the architects of the desegregation campaign could not muster the political, social, or legal strength to close exits available to white families who headed toward the suburbs, desegregation has often given way to resegregation.⁴¹

Teachers and theorists of public interest law have oscillated between a focus on traditional advocacy in court and an approach that stressed the larger community context. While law school clinics historically emphasized individual cases and lawyering tasks rooted in litigation, such as interviewing and counseling,⁴² teachers and

arguments may often play into the hands of their adversaries who have sufficient power to put defendants on trial and may also control access to the media. See Lonnie T. Brown, Jr., *Representing Saddam Hussein: The Importance of Being Ramsey Clark*, 42 GA. L. REV. 47 (2007); Jenia Iontcheva Turner, *Defense Perspectives on Law and Politics in International Criminal Trials*, 48 VA. J. INT'L L. 529, 573-74 (2008).

40. See Ashar, *supra* note 30; Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976). For an optimistic yet tempered view of Brown and its results, see David B. Wilkins, *Social Engineers or Corporate Tools: Brown v. Board of Education and the Conscience of the Black Corporate Bar*, in RACE, LAW, AND CULTURE: REFLECTIONS ON BROWN V. BOARD OF EDUCATION 139 (Austin Sarat ed., 1997). Cf. Alexandra D. Lahav, *The Law and Large Numbers: Preserving Adjudication in Complex Litigation*, 59 FLA. L. REV. 383, 393-98 (2007) (discussing collective litigation generally).

41. See *Milliken v. Bradley*, 433 U.S. 267 (1977).

42. See DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS* (2d ed. 2004); Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990). Some clinicians involved in this enterprise have also written insightfully on issues involving the representation of community interests. See Paul R. Tremblay, *Acting "A Very Moral Type of God": Triage Among Poor Clients*, 67 FORDHAM L. REV. 2475 (1999); Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L. REV. 1101 (1990); cf. Paul R. Tremblay, *The New Casuistry*, 12 GEO. J. LEGAL ETHICS 489 (1999) (discussing development of professional judgment based on experience).

theorists of public interest advocacy have recently stressed the importance of mobilizing communities.⁴³ On this view, litigation is merely one point on the mobilization continuum.

B. Guantanamo as Lawyering Challenge

Detainee advocates' efforts at mobilization stemmed not from ideology but from necessity.⁴⁴ The government turned to Guantanamo after September 11 as a location where it could detain, interrogate,⁴⁵ and try significant numbers of detainees outside the reach of American law.⁴⁶ After the

43. See Alfieri, *supra* note 30; White, *Mobilization*, *supra* note 30; see also Anthony V. Alfieri, (*Un*)covering Identity in Civil Rights and Poverty Law, 121 HARV. L. REV. 805, 817-31 (2008). On occasion, lawyers for powerful and affluent groups have used similar techniques on issues such as tort reform, arguing for measures that restrict juries, heighten standards for pleading, and limit access to lawyers. See CARL T. BOGUS, WHY LAWSUITS ARE GOOD FOR AMERICA (2001); Anthony V. Sebok, *Dispatches from the Tort Wars*, 85 TEX. L. REV. 1465, 1490-96 (2007) (book review) (discussing problems with tort reform advocates' portrayal of tort litigation plaintiffs' lawyers as promoting frivolous litigation). See generally Anthony Paik et al., *Lawyers of the Right: Networks and Organization*, 32 LAW & SOC. INQUIRY 883, 891-99 (2007) (discussing networks of conservative lawyers).

44. Unlike many earlier lawyers, such as William Kunstler, who resorted to mobilization as a tactic, few if any detainee advocates share the social or political goals of their clients. For example, some detainees may view violence as justifiable. The lawyers for detainees typically do not share this view. Rather, the lawyers seem motivated largely by a commitment to norms of justice and fairness in the legal system. See, e.g., Martinez, *supra* note 4.

45. See MARGULIES, *supra* note 4, at 132-34; JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS 182-98 (2008); PHILIPPE SANDS, TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES 122-30 (2008). The legal literature on torture and the war on terror is copious. See generally David Luban, *Unthinking the Ticking Bomb* 4-15 (Geo. Pub. L. Res. Paper No. 1154202), available at <http://ssrn.com/abstract=1154202> [hereinafter Luban, *Unthinking*] (discussing ticking bomb scenario which philosophers employ to analyze whether torture is ever justified). *But cf.* Alan Dershowitz, *Tortured Reasoning*, in TORTURE: A COLLECTION 271 (Sanford Levinson ed., 2004) (arguing that although torture is inherently wrong, government should initiate system of "torture warrants" to promote transparency in situations where torture is likely to be used). Evidence suggests that other professionals, including psychologists, participated in the design and supervision of these interrogations. See generally M. Gregg Bloche & Jonathan H. Marks, *When Doctors Go to War*, 352 NEW ENG. J. MED. 3 (2005); David Luban, *Torture and the Professions*, 26 CRIM. JUST. ETHICS, Summer/Fall 2007, at 2 [hereinafter Luban, *Torture*].

46. See generally CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY (2007). The

Supreme Court permitted detainees to file writs of habeas corpus,⁴⁷ the government resolved to limit any possible security risks posed by legal representation.⁴⁸ Restrictions were imposed, including requiring lawyers to submit their notes of client conversations for a government security check.

government had used Guantanamo in the past to seek to sort out refugees from Haiti, although these efforts had also engendered litigation. *Cf.* Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391 (1994) (discussing interplay of refugee law and foreign policy concerns); *cf.* Stacy Caplow, *"Deport All Students": Lessons Learned in an Xtreme Clinic*, 13 CLINICAL L. REV. 633 (2006) (reviewing GOLDSTEIN, *supra*); Richard J. Wilson, *Many Guantánamos: A Reflection on the Work of Human Rights Clinics*, 13 HUM. RTS. BRIEF 46 (2006) (reviewing GOLDSTEIN, *supra*). *See generally* BRANDT GOLDSTEIN, *STORMING THE COURT: HOW A BAND OF YALE LAW STUDENTS SUED THE PRESIDENT—AND WON* (2005); Michael Ratner, *How We Closed the Guantanamo HIV Camp: The Intersection of Politics and Litigation*, 11 HARV. HUM. RTS. J. 187 (1998); Victoria Clawson et al., *Essay, Litigating as Law Students: An Inside Look at Haitian Centers Council*, 103 YALE L.J. 2337 (1994).

The government has also engaged in a range of activities domestically, including various kinds of surveillance, some authorized by statute, and some not. *See, e.g.,* Linda E. Fisher, *Guilt by Expressive Association: Political Profiling, Surveillance, and the Privacy of Groups*, 46 ARIZ. L. REV. 621, 631 (2004) (discussing FBI investigation of organizations); Orin S. Kerr, *Internet Surveillance Law After the USA Patriot Act: The Big Brother That Isn't*, 97 NW. U. L. REV. 607 (2003) (arguing that Patriot Act provisions on surveillance extended, rather than radically altered, existing surveillance law); Richard Henry Seamon, *Domestic Surveillance for International Terrorists: Presidential Power and Fourth Amendment Limits*, 35 HASTINGS CONST. L.Q. 449 (2008) (analyzing interaction of separation of powers and Fourth Amendment concerns). Consideration of these topics is beyond the scope of this article.

47. *See Rasul v. Bush*, 542 U.S. 466 (2004); *cf. Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008), *cert. granted*, 129 S. Ct. 680 (2008) (holding that executive had authority to detain alien within the United States as enemy combatant, but that alien had right in habeas proceeding to procedural safeguards, including opportunity to seek exculpatory evidence and review adverse evidence). In the wake of the Supreme Court's decision in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), striking down the president's order on military commissions, Congress passed the Military Commissions Act (MCA) which expressly authorized the commissions while adding procedural safeguards. The MCA also barred judicial review (including habeas) outside of the procedure outlined in the MCA. *See* Military Commissions Act of 2006, Pub. L. No. 109-336, 120 Stat. 2600 (codified as amended at 10 U.S.C. ch. 47A); *cf. Jared A. Goldstein, Habeas Without Rights*, 2007 WIS. L. REV. 1165. In *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), the Supreme Court struck down the portions of the MCA that limited detainees' access to habeas corpus.

48. Many in the administration took a deeply cynical view of lawyers for the detainees, believing them to be part of a campaign of "lawfare" mounted by America's enemies. *See* Margulies, *supra* note 26.

While the government has filed charges before military commissions against a small number of detainees, it has relied principally on Combatant Status Review Tribunals (CSRTs) and Administrative Review Boards (ARBs) to determine detainees' status.⁴⁹ The CSRTs do not allow legal representation. They rarely provide a detainee with the evidence against him. They also typically do not allow a detainee to present evidence beyond the detainee's own testimony.⁵⁰ Forced to function without the procedural guarantees of the ordinary justice system, lawyers turned to other approaches.⁵¹

II. CROSSOVER LAWYERING: VENUES, VIRTUES, AND PROSPECTIVE PITFALLS

The crossover effect driven by lawyers' turn to mobilization has occurred in other areas of law. Plaintiffs' attorneys confronting caps on punitive or non-economic

49. See Mark Denbeaux & Joshua Denbeaux, *No-Hearing Hearings: CSRT: The Modern Habeas Corpus?*, available at http://law.shu.edu/news/final_no_hearing_hearings_report.pdf. (last visited Mar. 7, 2009). The government has used military commissions in only a handful of cases. For ease of reference, I use the term CSRT in the text to cover ARBs, as well, since the two are identical in material respects.

50. While the CSRTs overall are not a fair process, information from these proceedings now open to public scrutiny suggests that detainee statements before the tribunals include some indicia of reliability, and that the CSRTs were not quite the rubber stamp that detainee advocates have argued. The detainees did not have to appear before the CSRTs. Those that did appear usually chose to respond to the allegations against them. Many detainees denied the charges, indicating that their testimony was not coerced. See generally BENJAMIN WITTES, *LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR* 77 (2008). Detainee admissions in the course of their responses therefore provide useful data on detainees' backgrounds. *Id.* Moreover, CSRTs did find that a number of detainees—thirty-eight as of the end of 2007—had been erroneously classified by the government. *Id.* at 82.

51. Moreover, the previous administration used features of crossover lawyering to serve its own interests on law and terrorism issues. Former U.S. Attorney General John Ashcroft, for example, repeatedly made prejudicial public statements prior to and during trial in a Detroit case that eventually imploded because of prosecutorial misconduct. See *United States v. Koubriti*, 336 F. Supp. 2d 676 (E.D. Mich. 2004) (granting government's motion to dismiss count in indictment); *United States v. Koubriti*, 305 F. Supp. 2d 723, 725-27 (E.D. Mich. 2003) (discussing history of Ashcroft's public comments); cf. ERIC LICHTBLAU, *BUSH'S LAW: THE REMAKING OF AMERICAN JUSTICE IX-XV* (2008) (discussing *Koubriti* case).

damages like pain and suffering shifted tactics.⁵² This shift led to jury awards for compensatory or economic damages.⁵³ In adapting to the cap regime, lawyers leveraged jurors' holistic tendency to set damages based on their intuitive sense of equity and just deserts, rather than on a judge's legal instructions.⁵⁴

In the detainee context, lawyers dealt not only with restrictions in applicable law but also with the need to actually shift forums and audiences. For example, lawyers expanded their strategy to include not only the factfinder in a military commission but also officials in a detainee's country of origin, who could pressure the United States for the detainee's release.⁵⁵ The lawyers made arguments based on equity, fairness, and just deserts that appeared more difficult to assert in the commissions, and on occasion achieved positive results for clients.⁵⁶

A. *Varieties of Crossover Advocacy*

Prodded by necessity, lawyers for detainees have been resourceful in developing alternative strategies. These strategies mobilize constituencies that can bypass the Guantanamo procedural framework, and regain the initiative for committed advocates. I discuss the principal elements in this crossover advocacy repertoire below.

1. *Advocacy with Foreign Governments.* Perhaps the most effective technique of crossover lawyering is advocacy on a detainee's behalf with officials from his country of origin. This advocacy is most successful when the country of origin is an ally of the United States. Leveraging American

52. See Sharkey, *supra* note 9, at 430-41.

53. See *id.* at 429; cf. David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. REV. 256, 313-16 (1989) (arguing that despite limits on pain and suffering awards in wrongful death actions, jurors may have exercised discretion to set damages reflecting such factors).

54. See Sharkey, *supra* note 9, at 431. Substitution effects studied by economists encompass a related dynamic. Market factors encourage consumers to substitute one good for another. For example, the high price of gas may encourage more people to purchase bicycles. Cf. Tracey L. Meares et al., *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1174-75 (2004) (discussing substitution effects).

55. See Luban, *supra* note 1.

56. *Id.*

alliances involves a mix of media contacts, community education, and informal bargaining with public officials. A case in point here was the representation of the Australian David Hicks by Major Michael "Dan" Mori and civilian defense counsel Joshua Dratel. To execute the strategy, Mori traveled to Australia, building popular support there for Hicks' release.⁵⁷ Australian pressure on the United States government culminated in a plea deal and Hicks' release.

2. *Formal advocacy—International Forums and Domestic Tort Claims.* In addition to seeking the release of detainees, advocates have engaged in more formal advocacy in alternative forums on human rights violations. For example, advocates have sought damages for the extraordinary rendition of terrorism suspects. In *Arar v. Ashcroft*,⁵⁸ the plaintiff sought damages because of brutal treatment he suffered when the United States rendered him to Syria.⁵⁹ While even Secretary of State Condoleezza Rice has acknowledged flaws in the United States' handling of the case, Arar's lawsuit faces substantial legal barriers.⁶⁰

57. See *id.* at 2014-16; Ellen Yaroshefsky, *Zealous Lawyering Succeeds Against All Odds: Major Mori and the Legal Team for David Hicks at Guantanamo Bay*, ROGER WILLIAMS U. L. REV. (forthcoming 2008); Geoff Elliott, *Hicks's Ordeal 'Offends Principles of Justice'*, AUSTRALIAN, June 23, 2005, at 4. Mori risked retaliation for this tactic; the former Guantanamo chief prosecutor, Morris Davis, who has since resigned and become a critic of the Bush administration's approach, threatened Mori with contempt for terming the military commissions a "kangaroo court"—a description particularly effective in Australia. See Luban, *supra* note 1, at 2015.

Advocacy with the U.S. Congress contributed to victory in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). See JONATHAN MAHLER, *THE CHALLENGE: HAMDAN V. RUMSFELD AND THE RIGHT OVER PRESIDENTIAL POWER* 221-23 (2008) (describing how Professor Neal Katyal of Georgetown, lead counsel for detainee Salim Hamdan, helped shape text and legislative history of Detainee Treatment Act to increase chances that Supreme Court would hold that court-stripping provisions were not retroactive).

58. 532 F.3d 157, 162-63 (2d Cir. 2008).

59. See *id.* Subsequent investigations failed to uncover any ties between Arar and terrorists.

60. For one barrier, see *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971) (courts should dismiss suits against federal officials in the face of "special factors counseling hesitation," arguably including embarrassment to a detainee's country of origin flowing from revealing of its cooperation in the rendition effort). In addition, the state secrets doctrine may bar provision of information to the defense, or even result in dismissal of the case itself, if the court believes that the government cannot

Comparable barriers face a lawsuit recently filed by the Yale National Litigation Project on behalf of former detainee Jose Padilla against John Yoo, author of the "torture memos."⁶¹

In other cases not directly involving detainees but relevant to international human rights, advocates have sued corporations for aiding and abetting human rights abuses abroad. In one recent case, CCR and the Seattle University Law Clinic brought suit against the Caterpillar Corporation, alleging that the defendant had aided and abetted violations of international law stemming from Israel's home destruction policy in the occupied territories. The plaintiffs' theory was that Caterpillar had agreed to sell its equipment to the United States government for re-sale to Israel with notice that its equipment would be used to implement the home destruction policy.⁶²

In other cases, detainees seek relief in foreign and international venues. For example, CCR has sought to invoke universal jurisdiction to subject former Secretary of Defense Donald Rumsfeld to criminal prosecution in France

adequately defend itself without revealing sensitive information. See *United States v. Reynolds*, 345 U.S. 1, 7-11 (1953) (analyzing state secrets privilege); see also STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 1043 (4th ed. 2007) (noting that the sensitive information in the *Reynolds* case, which involved a bomber crash, concerned human error and poor maintenance); Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1300-14 (2007) (discussing ways of modifying the state secrets doctrine to promote fairness to parties suing government while still respecting security needs).

61. See Padilla Complaint, *supra* note 5. The government detained Padilla, a U.S. citizen formerly accused of plotting to assemble a bomb containing radioactive material, at a brig in South Carolina, before winning a conviction against Padilla on terrorist conspiracy charges. Cf. Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. § 2340-2340A (Aug. 1, 2002), in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 172, 172 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter Bybee Memo] (limiting advice to "conduct of interrogations outside of the United States"); Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., to William J. Haynes II, General Counsel of the Dep't of Defense, Military Interrogation of Alien Unlawful Combatants Held Outside the United States (Mar. 14, 2003) [hereinafter Yoo Memo], available at http://www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf.

62. *Corrie v. Caterpillar Inc.*, 503 F.3d 974 (9th Cir. 2007) (dismissing lawsuit on ground that political question doctrine deprived the court of subject matter jurisdiction).

and Germany for alleged war crimes.⁶³ Advocates also initiated proceedings before the Inter-American Commission on Human Rights⁶⁴ and the United Nations Committee on the Rights of the Child regarding a detainee at Guantanamo charged with a war crime allegedly committed while the detainee was fifteen years old.⁶⁵ Supplementing these efforts, advocates successfully sought disclosure of documents in Canadian courts regarding that client's interrogation.⁶⁶

63. *No Place to Hide: Filing Charges in France Against Rumsfeld*, CENTER FOR CONST. RTS. NEWSL., Winter 2007, at 3, available at http://www.ccrjustice.org/files/newsletters/CCR_Newsletter_winter07.pdf.

64. See ORGANIZATION OF AMERICAN STATES, ANNUAL REPORT OF THE IACHR (2006), available at <http://www.cidh.org/annualrep/2006eng/chap.3c.htm> (explaining that the IACHR was granted precautionary measures, including request that United States ensure that detainee, Omar Khadr, was not subjected to torture or cruel, inhumane, or degrading treatment, and that United States not seek to admit into evidence any statement obtained through such means).

65. See United States Diplomats, Opening Remarks Before United Nations Committee on the Rights of the Child 15-16, available at http://www2.ohchr.org/english/bodies/crc/docs/statements/48USAOpening_Statements.pdf; see also HUMAN RIGHTS WATCH, THE OMAR KHADR CASE: A TEENAGER IMPRISONED AT GUANTANAMO 1 (June 2007), available at <http://www.hrw.org/backgrounder/usa/us0607/us0607web.pdf> (asserting that no international tribunal has ever tried an individual for war crimes allegedly committed while the individual was under 18 years old, while acknowledging that "international law allows for the prosecution" of such individuals).

66. See *Minister of Justice v. Khadr*, [2008] 293 D.L.R. 629, 2008 SCC 28 (Can.); cf. *Mohamed v. Sec'y of State for Foreign and Commonwealth Affairs*, [2009] EWHC 152 (Admin.) (British court declined to disclose material detailing treatment of detainee because of concerns that disclosure would injure security ties with United States); *Mohamed v. Sec'y of State for Foreign and Commonwealth Affairs*, [2008] EWHC (Admin.) 2048 (Eng.) (holding that British government had to make available to detainee evidence that, inter alia, related to detainee's claim that he had been subjected to coercion while in custody in Pakistan and that the British government knew or should have known about the conditions of his custody when they questioned him); *R (In re Mohamed) v. Sec'y of State for Foreign and Commonwealth Affairs*, [2008] EWHC (Admin.) (Eng.), available at http://www.reprieve.org.uk/documents/2008_08_29MohamedUKJudgment2.pdf (noting that the United States had agreed to make evidence of Binyam's mistreatment available to official supervising military commissions, but that British government in refusing to make evidence directly available to Binyam's attorneys had failed to consider importance of expressing abhorrence at torture and cruel, inhuman, and degrading treatment).

3. *Media Relations and Stories of Innocence and Abuse.* Lawyers for detainees have also made extensive use of the media, including stories in papers and books about the innocence of particular detainees and the abuse they suffered,⁶⁷ and systemic studies about procedural problems at Guantanamo.⁶⁸ Stories of innocence have long been a central element in advocacy for individuals and groups detained by the state, including Sacco and Vanzetti,⁶⁹ convicted atom spies Ethel and Julius Rosenberg during the McCarthy era,⁷⁰ and the tens of thousands of Japanese-Americans detained during World War II.⁷¹ In some detainee cases after September 11, advocates have recounted horrendous tales of abuse.⁷² In other cases, lawyers have advanced claims of innocence on their client's behalf. These claims take two forms. One is a generic claim that virtually all detainees at Guantanamo are students, journalists, or relief workers scooped up by bounty hunters.⁷³ I call this generic claim the misadventure narrative.⁷⁴ Other innocence claims are more specific, telling stories that sometimes leave puzzling gaps⁷⁵ and sometimes offer clear and consistent details.⁷⁶

67. See *Ex-Terror Detainee Says U.S. Tortured Him*, CBS NEWS, Mar. 30, 2008, <http://www.cbsnews.com> (search for "Murat Kurnaz") (telling story of detainee Murat Kurnaz via his attorney, Professor Baher Azmy of Seton Hall Law School).

68. See Denbeaux & Denbeaux, *supra* note 49.

69. See FRANKFURTER, *supra* note 34.

70. See Andrew Koppelman, *Why Gay Legal History Matters*, 113 HARV. L. REV. 2035, 2040 (2000) (book review) (noting that Julius Rosenberg was almost certainly guilty of espionage, although his wife Ethel's guilt and the advantage, if any, that Rosenberg's conduct afforded the Soviet Union are still matters of vigorous debate).

71. See PETER IRONS, JUSTICE AT WAR 362 (1983).

72. See SMITH, *supra* note 4.

73. See Carol D. Leonnig, *Judges Question Lack of Prisoner Rights: Detainees in Cuba Want Ability to Fight 'Enemy Combatant' Claims in Court*, WASH. POST, Sept. 9, 2005, at A5 (explaining that Tom Wilner, a lawyer for Kuwaiti detainees, claimed that he told the U.S. government, "You've got the wrong guys . . . [t]hey were captured by mistake, turned over by bounty hunters.").

74. See *infra* notes 204-13 and accompanying text (pointing out empirical flaws in misadventure narrative).

75. See *id.* at 52-53 (describing in elliptical and evasive fashion client Binyam Mohamed's time in Pakistan); see also *infra* notes 158-62 and

4. *Advocacy on the Identity of the Legal Profession.* Another brand of crossover advocacy has addressed the role of the legal profession itself⁷⁷ in championing the rule of law after September 11. Government restrictions in previous moments of American history, including World War I and the Cold War, inspired approval or equivocation from the organized bar.⁷⁸ After September 11, the organized bar initially stayed on the sidelines, and death penalty lawyers like Clive Stafford Smith and Joseph Margulies—accustomed to working with clients with nothing to lose—took the lead, along with the Center for Constitutional Rights (CCR), which had long specialized in “political litigation” involving foreign policy. However, the past six years have seen increasing involvement by the ABA and by mainstream law firms, particularly in representing detainees who have been through CSRTs at Guantanamo and are seeking habeas relief in the federal courts.⁷⁹

CCR is now in significant part a mainstream organization, not a fringe one. Its resources have increased substantially, as has its staff. In contrast, legal advice associated with the Bush administration has moved to the fringe, as the organized bar critiqued positions that argued for unilateral presidential power and the propriety of

accompanying text (noting inconsistencies in attorney’s account of Binyam’s whereabouts).

76. See generally MURAT KURNAZ & HELMUT KUHN, *FIVE YEARS OF MY LIFE: AN INNOCENT MAN IN GUANTANAMO* (Jefferson Chase trans., Palgrave Macmillan 2008) (2007).

77. For a recent study arguing that the profession has become moribund, afflicted with formalistic routine instead of concern for substantive justice, see JEAN STEFANCIC & RICHARD DELGADO, *HOW LAWYERS LOSE THEIR WAY* 34 (2005). See also ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 128-34 (1993) (arguing that the legal profession is in decline because of atrophy of judgment and prudence).

78. For a history of bar discipline prompted of attorneys who opposed government national security measures, see James E. Moliterno, *Politically Motivated Bar Discipline*, 83 WASH. U. L.Q. 725, 736 (2005) (noting, inter alia, that the American Bar Association during the McCarthy Era recommended that state bars require lawyers to take a loyalty oath).

79. See Jim Edwards, *Former U.S. Judges Enter Fray Over Guantanamo Detentions: Gibbons, Orlofsky and Sarokin Argue for Right of Habeas Review*, N.J. L.J., Jan. 26, 2004, available at http://www.gibbonslaw.com/files/guantanamo_bay2.pdf (discussing involvement of former federal judges and Tom Wilner of Shearman & Sterling law firm, as well as NYU Law professor and longtime litigator against the death penalty Tony Amsterdam).

coercive interrogation.⁸⁰ The Yale Project's lawsuit against John Yoo⁸¹ is in some ways less about seeking relief for a client than it is advocacy directed at establishing that Yoo exceeded the role constraints that bind American lawyers.⁸²

Another more concrete battle involves the effort to define and structure the roles of defense counsel at Guantanamo and in other terrorism cases.⁸³ The National Association of Criminal Defense Counsel (NACDL) initially asserted that lawyers could not ethically represent detainees, because of government restrictions on the attorney-client relationship.⁸⁴ The NACDL has more recently argued that the Sixth Amendment's fair trial guarantee requires greater detainee access to classified information.⁸⁵

80. See SAVAGE, *supra* note 46, at 244-47 (discussing American Bar Association task force report criticizing Bush administration's unilateralist view of presidential power). Ironically, Jack Goldsmith, who as an academic had helped build the intellectual foundation for the Bush administration's disregard of international law, bridled at the unilateralist temperament of the administration's policies and as a Justice Department official withdrew overly broad legal opinions. See JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 71 (2007) (describing the displeasure at Goldsmith's decision expressed by David Addington, Vice President Cheney's counsel). Cf. ERIC LICHTBLAU, *BUSH'S LAW: THE REMAKING OF AMERICAN JUSTICE* 173-85 (2008) (discussing "palace revolt" of Goldsmith and other senior administration lawyers, including Attorney General John Ashcroft, over initial formulation of Terrorist Surveillance Program). *But see id.* at 58 (arguing that international law was often used by enemies as "lawfare" against America); Margulies, *supra* note 26 (discussing Goldsmith's role in developing, along with Yoo, intellectual predicate for much of the Bush administration's approach to international law).

81. See Padilla Complaint, *supra* note 5.

82. See *infra* notes 222-36 and accompanying text (critiquing pleadings in lawsuit).

83. See Margulies, *supra* note 35, at 174-75.

84. See Mary Cheh, *Should Lawyers Participate in Rigged Systems? The Case of the Military Commissions*, 1 J. NAT'L SECURITY L. & POL'Y 375 (2005). The NACDL, perhaps reacting to the possibility of enhanced procedural safeguards following the Supreme Court's expected decision in *Boumediene*, has recently revised its view, and announced a joint effort with the American Civil Liberties Union to provide representation to alleged senior Al Qaeda figures now at Guantanamo. See William Glaberson, *2 Groups to Help Defend Detainees at Guantanamo*, N.Y. TIMES, Apr. 4, 2008, at A16.

85. See Brief for Nat'l Ass'n of Criminal Def. Lawyers as Amicus Curiae Supporting Defendant/Appellant, *United States v. Moussaoui*, No. 06-4494, 2008 WL 594566 (4th Cir. Feb. 22, 2008).

Advocacy in and out of court has also centered on the role of lawyers from the Judge Advocate General (JAG) Corps in representing detainees. The Pentagon has assigned a JAG lawyer to each Guantanamo detainee. Binyam Mohamed, a detainee facing a military commission hearing in early 2006, told his JAG lawyer, Lt. Col. Yvonne Bradley, that he did not wish to be represented by a lawyer from the military. Bradley in turn was uncomfortable with the set-up of the JAG defense office for detainees, where she worked in cubicles near lawyers for other clients whose interests, she argued, were adverse to those of Binyam.⁸⁶ Binyam's defense team, which also included civilian counsel, secured expert affidavits stating that Bradley's representation of Binyam constituted a conflict of interest.⁸⁷ After a confrontation between Bradley and a military judge in open court, the commission case against Binyam was adjourned.⁸⁸

Other professions have also seen the emergence of advocacy campaigns seeking to curb participation in Bush administration counter-terrorist activities. Psychologists may well have used information obtained through treatment of detainees to assist interrogation. Psychiatrists may have been involved as well in designing interrogation regimes, including those that relied on techniques of humiliation and protracted discomfort, disorientation, isolation, and sleep deprivation. See Luban, *Torture*, *supra* note 45, at 60-63; Letter to Sharon Brehm, President of the American Psychological Association (June 6, 2007), http://psychoanalystsopposewar.org/blog/wp-content/uploads/2007/06/openletter_tosharonbrehmfinalnp.pdf; see also Benedict Carey, *Psychologists Clash on Aiding Interrogations*, N.Y. TIMES, Aug. 16, 2008, at A1. Anthropologists have not assisted in interrogations at Guantanamo, but have assisted U.S. forces in Afghanistan, contributing knowledge of local customs. See Luban, *Torture*, *supra* note 45, at 63. University institutes, such as Harvard's Carr Center, have hired fellows who are members of the military. See Patricia Cohen, *Scholars and the Military Share a Foxhole, Uneasily*, N.Y. TIMES, Dec. 22, 2007, at B9. Advocates, including entities such as the American Psychological Association and Physicians for Human Rights, have called for limiting the participation of professionals in some of this work. See Leonard S. Rubenstein, *First, Do No Harm: Health Professionals and Guantánamo*, 37 SETON HALL L. REV. 733, 746-47 (2007).

86. See Luban, *supra* note 1, at 2007.

87. *Id.* at 2008.

88. Plea negotiations also have occurred. See Raymond Bonner, *U.S. and Britain at Odds Over Guantánamo Inmate*, N.Y. TIMES, Apr. 2, 2008, at A16; *infra* notes 148-51 and accompanying text (discussing tactics of Binyam's current civilian counsel in generating publicity on behalf of his client); *infra* notes 182-88 and accompanying text (discussing merits of conflict of interest claim). In February 2009 the United States released Binyam to British authorities, who freed him after a short period of questioning. See Richard Norton-Taylor & Ian Cobain, *Mohamed's Long Walk to Freedom as Debate Rages*, GUARDIAN, Feb. 25, 2009, at 6, available at

B. *The Virtues of Crossover Advocacy*

Crossover advocacy has virtues that benefit both clients and the legal system. It can maximize client voice, enhance clients' negotiation posture, and gain time when traditional advocacy has led to a dead end. It also strengthens advocates' institutional resources and promotes transparency and procedural fairness. These virtues are addressed in the following subsection.

1. *Maximizing Client Voice.* Crossover advocacy can give voice to the voiceless. The government has separated detainees from the outside world, impairing their ability to communicate with friends and family. The detainees have little voice in the time and nature of their own detention, which is itself psychologically damaging. Crossover advocacy can amplify this voice.⁸⁹ For example, law professor Baher Azmy disclosed the specific and concrete allegations of mistreatment made by his client Murat Kurnaz.⁹⁰ Azmy's aggressive advocacy in the media and his strategy of mobilizing the German public to press for Kurnaz' release allowed his client to participate vicariously in the burgeoning international debate about conditions at the camp. It also paved the way for his client's eventual release from Guantanamo.

The virtues of voice also apply to other crossover tactics. Hunger strikes, for example, allow detainees to seize the initiative and play a role in shaping the agenda. On a more

<http://www.guardian.co.uk/world/2009/feb/25/guantanamo-binyam-mohamed-torture>.

89. The advocate's expression of empathy with the detained client on a human level is a neglected element of representation. See SANDS, *supra* note 45, at 158-62 (describing representation of detainee Mohammed al-Qahtani by attorney Gita Gutierrez, formerly of CCR); cf. Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999 (2007) (discussing lawyering issues arising because of differences of language and culture with clients); Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 33 (2001) (acknowledging collaboration with Jean Koh Peters, a clinical professor at Yale, in developing teaching module on lawyering across cultures); Peter Margulies, *Re-Framing Empathy in Clinical Legal Education*, 5 CLINICAL L. REV. 605 (1999) (addressing issues of cultural difference); Margulies, *supra* note 35, at 174 (describing conception of "affective solidarity" with client, as opposed to solidarity with ideological or operational client goals).

90. See Baher Azmy, *Epilogue to KURNAZ & KUHN*, *supra* note 76, at 239-55.

abstract level, so do proceedings in international forums such as the Inter-American Commission on Human Rights. The same virtue applies to symbolic advocacy, such as on-the-record statements in military commission proceedings that convey the client's sense of absurdity, desperation, and injustice.

2. *Enhancing Clients' Options and Negotiating Posture.*

Crossover advocacy also has instrumental advantages—attributes that increase the chances of a favorable outcome for the client. Crossover advocacy adds to the portfolio that an attorney can use to secure the detainee's release. Since the situation is fluid, any tactic may create synergies among officials, organizations, and lines of argument that brighten the prospects for release.

For example, advocacy with an international human rights organization like the rapporteur for a United Nations committee might yield the name of a sympathetic State Department official, or a contact in the consulate of the detainee's country of origin. Crossover advocacy, even when it fails to show concrete results, can provide talking points that enrich such informal contacts. These talking points can promote a climate more favorable to the detainee.

Similarly, advocacy for an American political candidate, reflected in strategies such as the e-mail list "Habeas Lawyers for Obama," may open another window. Obama included the restoration of habeas and the closing of Guantanamo in his stump speech. If he can deliver on his promises,⁹¹ that result will be at least as effective as any court decision.

Crossover advocacy can also strengthen a party's negotiation posture. Consider here the stance of the NACDL that it was unethical for criminal defense lawyers to participate in the military commission proceedings at Guantanamo. This posture was helpful in securing greater

91. Cf. Ratner, *supra* note 46, at 200-04 (noting political cross-currents that complicated Clinton Administration's decisions about Haitians with HIV detained at Guantanamo in the early 1990s); *infra* notes 251-53 and accompanying text (noting that closure of Guantanamo will not be a solution if the government outsources its detention of terror suspects to friendly governments around the world). Shortly after assuming office, President Obama issued an executive order providing for the closure of Guantanamo in a year's time. See Scott Shane, *Obama Orders Secret Prisons and Detention Camps Closed*, N.Y. TIMES, Jan. 23, 2009, at A1.

leeway for at least one noted criminal defense lawyer, Joshua Dratel, in fashioning a more user-friendly set of rules governing attorney-client relationships.⁹²

Intraprofessional advocacy was also helpful in gaining time. For example, consider the conflict of interest allegations made by Lt. Col. Yvonne Bradley in early 2006 regarding her representation of detainee Binyam Mohamed.⁹³ The conflict of interest claim, while not a strong argument on the merits,⁹⁴ was a colorable tactic that gained Binyam a valuable reprieve. Shortly after the adjournment, the Supreme Court handed down its decision in *Hamdan v. Rumsfeld* holding that the president lacked authority to convene a tribunal without additional procedural protections.⁹⁵

3. *Strengthening Advocacy Identity and Institutions.* Crossover advocacy also allows groups to make statements about themselves and others. For example, advocates for the detainees are making a statement about the importance of fairness, equality, and checks and balances. Attorneys representing detainees, including death penalty lawyers like Joseph Margulies and Clive Stafford Smith and \$800 per hour partners from major firms, are making a statement about the values that bind them together in a common profession.

92. See Cheh, *supra* note 84, at 397.

93. See *supra* notes 86-88 and accompanying text.

94. The difficulty on the merits arises because there is no concrete evidence that other JAG lawyers represented individuals whose interests conflicted with Binyam's. See generally *United States v. Schwarz*, 283 F.3d 76, 90-91 (2d Cir. 2002) (discussing standard for disqualification of defense lawyer based on conflict of interest). Binyam has been linked with detainees who were not at Guantanamo at that time—Jose Padilla, a U.S. citizen never detained at Guantanamo, and Abu Zubaydah, and Khalid Shaikh Mohammed (KSM), “high-value” detainees moved to Guantanamo months after Binyam's hearing. See SMITH, *supra* note 4, at 69 (discussing government's allegation of link between Binyam and Padilla); Bonner, *supra* note 88 (reporting that government has asserted links between Binyam, Zubaydah, and KSM). Currently, KSM is asserting that he wishes to represent himself. If he gets his wish, no conflict will arise with Binyam's representation by a military lawyer. Meanwhile, whatever the merits of Bradley's conflict of interest claim in 2006, she continues to represent Binyam. See *R (B. Mohamed) v. Foreign Sec'y*, [2008] EWHC (Admin.) 2048, [54], [126] (Eng.) (discussing Bradley's involvement).

95. See 548 U.S. 557 (2006).

Crossover advocacy can both affirm an organization's ongoing commitment to change and nurture habits that keep the group on the cutting edge. For a group like CCR, for example, work seemingly on the fringe like filing lawsuits against foreign officials for committing torture helped keep the group honest. In a legal world where donors and others can continually exert pressure for a group to join the mainstream, a commitment to advocacy outside conventional forums was a self-binding mechanism that shielded the group from cooptation. CCR's pioneering work on enforcing global human rights through the Alien Tort Statute also sent a message that foreign affairs were not immune from the rule of law. This rejection of artificial distinctions between the domestic and international spheres was central to the Guantanamo advocacy efforts after September 11.

4. *Promoting Transparency and Procedural Integrity.*

Crossover advocacy can also enhance the integrity and transparency of legal processes. Consider here the effort of the defense lawyers in *Hamdan* to disqualify Brigadier General Thomas Hartmann, who served as Legal Adviser to the "Convening Authority" of the Guantanamo military commissions. In this successful effort, the defense lawyers cited evidence that Hartmann had failed to act impartially in his role. An article published on the Harper's Magazine website questioned Hartmann's independence, asserting that he had manifested a public bias in favor of conviction. The military judge who granted the defense motion to disqualify Hartmann from participating in further commission proceedings concerning Hamdan cited this piece,⁹⁶ and further noted that the former chief prosecutor at Guantanamo, Morris Davis, had testified that Hartmann had demanded that Davis select "sexy" cases for

96. See *United States v. Hamdan*, D-026 (Military Comm'n, May 9, 2008) at 6 (motion to dismiss (unlawful influence), Allred, J.), available at <http://www.nimj.org/documents/Hamdan%20Hartmann%20Ruling.pdf> (citing Scott Horton, *The Great Guantánamo Puppet Theater*, HARPER'S MAG., Feb. 21, 2008, available at <http://harpers.org/archive/2008/02/hbc-90002460>). Military Judge Allred also cited Hartmann's publicly aligning himself with the prosecution and his "nanomanagement" of the prosecutor's office as demonstrating his lack of independence. *Id.* at 11.

prosecution, the better to improve the administration's image in an election year.⁹⁷

Regardless of the ultimate decision in Hamdan's case,⁹⁸ reducing the pressure to bring media-friendly cases and limiting the ties between the Commission's overseers and compromised administration officials enhanced the integrity and transparency of the military commission system. Seeking Hartmann's disqualification allowed the military judge to take one tentative and provisional step to restore the commission's claim to compliance with the rule of law.⁹⁹

C. *Potential Pitfalls of Crossover Advocacy*

Unfortunately, there is no free lunch. Along with virtues, crossover advocacy faces potential pitfalls. These pitfalls reflect the nature of crossover effects and the pervasive role of cognitive bias. I outline these issues briefly here, and offer a couple of cautionary tales from crossover advocacy's history.¹⁰⁰

1. *Crossover Effects and Unintended Consequences.* Crossover effects inevitably trigger unintended consequences. Consider again the effect produced by caps on tort damages. Even though juries often award higher damages for uncapped categories such as compensatory damages and economic loss, caps trigger negative externalities. Lawyers seeking the benefits of the crossover effect in tort litigation are more likely to take on "safe" cases where a victim's injuries are severe and easy to prove, and

97. *United States v. Hamdan*, D-026 (Military Comm'n) at 11.

98. See William Glaberson, *Panel Sentences Bin Laden Driver to a Short Term*, N.Y. TIMES, Aug. 8, 2008, at A1 (reporting that Hamdan was convicted of material support of Al Qaeda after a trial in the summer of 2008, and received a sentence of five-and-one-half years including time served); *Yemen Releases Former bin Laden Driver From Jail*, N.Y. TIMES, Jan. 12, 2009, at A9 (reporting that Hamdan was released from custody in Yemen after his departure from Guantanamo). On possible opportunity costs of seeking Hartmann's disqualification, see Dan Ephron, *A Plea Deal Vanishes*, NEWSWEEK, May 19, 2008, at 5 (reporting that Hartman's disqualification may have delayed plea negotiations in Hamdan's case).

99. A comparable process occurred in South Africa. See ABEL, *supra* note 38; STEPHEN ELLMANN, *IN A TIME OF TROUBLE: LAW AND LIBERTY IN SOUTH AFRICA'S STATE OF EMERGENCY* (1992).

100. The following three Sections address these risks in greater depth. See *infra* notes 99-124 and accompanying text.

avoid cases involving disadvantaged groups where proof of economic harm is more difficult.¹⁰¹

Crossover phenomena in other areas of regulation yield similarly mixed results. For example, consider the differential in sentencing that for years governed the prosecution of crack versus powder cocaine. Commentators have argued that this sentencing differential triggered a substitution effect: Increased penalties for trafficking in crack encouraged wrongdoers to turn to another relatively less regulated commodity, such as heroin.¹⁰²

Crossover effects can also occur in the interplay between substantive and procedural rules. Consider here the effect of legal rules that expand liability for human rights violations in international forums. Confronted with substantive rules that appear to create an absolute entitlement to wide-ranging remedies upon a finding of a violation, judges often appear to hedge in the realm of procedure, devising rules that limit the scope of the tribunal's authority.¹⁰³ The same hedging may occur when a forum lacks procedural obstacles to keep out claims. In this situation, an *absence* of procedural obstacles inspires judges to recreate the effects of procedural barriers in the substantive realm, yielding substantive results that are ambiguous or equivocal.¹⁰⁴

The modern interplay of criminal law and criminal procedure has featured the same dynamic. In the area of criminal procedure, lawyers asked the courts to expand remedies against intrusive searches and coerced interrogation. However, as the courts sought to curb law enforcement overreaching through the exclusionary rule, they also triggered a political backlash exploited by conservatives. This dynamic led to substantial broadening of substantive offenses, including the laws criminalizing

101. See Sharkey, *supra* note 9, at 489-90.

102. See Meares et al., *supra* note 54, at 1176. As this example demonstrates, the crossover effects created by asymmetries in accountability can harm the public. Analogous adverse consequences plague crossover advocacy. See *infra* notes 117-19 and accompanying text (discussing risks of crossover advocacy).

103. See Starr, *supra* note 11.

104. See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 247, available at <http://www.icj-cij.org/docket/files/95/7495.pdf> (considering when states may use nuclear weapons).

drug possession in which Fifth Amendment rights posed less of an obstacle to prosecution.¹⁰⁵

Commentary has also discerned a potentially harmful role for crossover effects in administrative law. A scholar recently engendered controversy by arguing that the Supreme Court's greater deference to administrative agency decisions accompanied by formal rulemaking procedures¹⁰⁶ distorts the substance of agency positions.¹⁰⁷ This view takes as a premise that formal procedures are more costly for the agency. Once an agency decides to make the investment in more costly formal procedures, the agency will also be more inclined to push the substantive envelope.¹⁰⁸ In this way, the agency will recoup through the courts' substantive deference the costs the agency incurs through greater procedural formality. According to the theory, the crossover effect's net result will therefore be more judicial deference for substantive agency positions that show *less* respect for statutory text and purpose.

2. *Cognitive Biases and Crossover Effects.* Crossover effects occur because changes in one realm are not independent of other domains, but instead are endogenous to changes elsewhere.¹⁰⁹ Actors in the legal system seeking to manage change must reckon with the endogeneity of changes across legal domains. However, cognitive biases obstruct such an assessment. The two central flaws that impede this task are the temporal discounting deficit and self-serving bias. I address each in turn.

105. See JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 29 (2007); Lawrence M. Solan, *Statutory Inflation and Institutional Choice*, 44 WM. & MARY L. REV. 2209, 2236-60 (2003) (discussing factors that broaden the scope of criminal liability under federal statutes); William J. Stuntz, *The Pathological*, *supra* note 13.

106. See *United States v. Mead Corp.*, 533 U.S. 218 (2001).

107. See Stephenson, *supra* note 10, at 552-55; see also Emerson Tiller & Frank B. Cross, *Modeling Agency/Court Interaction*, 121 HARV. L. REV. 13, 14-16 (2007), available at http://www.harvardlawreview.org/forum/issues/120/dec06/tiller_cross.pdf (discussing strategic substitution theory).

108. See Stephenson, *supra* note 10, at 555.

109. See Tiller & Cross, *supra* note 107, at 14 (criticizing view that agency rulemaking is "fixed and exogenous," as opposed to responding to signals and incentives from judges and other actors).

Lawyers, like other human beings, tend to overweigh short-term benefits and underestimate long-term costs.¹¹⁰ Some discounting of future effects is always appropriate, because of the present value of goods currently enjoyed. However, human beings discount the future *more* than a rational actor should. As a result, people frequently seek short-term benefits and downplay long-term risks. Common examples include savings rates, which are typically lower than they should be given appropriate intertemporal choices,¹¹¹ and addiction rates, which are higher than appropriate intertemporal discounting would recommend.¹¹²

Self-serving bias often exacerbates the problems caused by the temporal discounting deficit. People tend to exaggerate their own responsibility for successes, and underestimate their own control over failures.¹¹³ Consistent with this self-serving bias, people tend to value traits that they believe they possess, and discount the utility of traits possessed by others.¹¹⁴ People also tend not to plan effectively, overweighing factors like convenience that serve

110. See Shane Frederick et al., *Time Discounting and Time Preference: A Critical Review*, in *TIME AND DECISION: ECONOMIC AND PSYCHOLOGICAL PERSPECTIVES ON INTERTEMPORAL CHOICE* 13, 33 (George Loewenstein et al., eds., 2003); Jolls et al., *supra* note 21, at 46; Laibson, *supra* note 21; George Loewenstein & Drazen Prelec, *Anomalies in Intertemporal Choice: Evidence and an Interpretation*, 107 Q. J. ECON. 573 (1992) (surveying phenomenon); Loewenstein et al., *Projection Bias*, *supra* note 21; Ted O'Donoghue & Matthew Rabin, *Doing It Now or Later*, 89 AM. ECON. REV. 103 (1999) (discussing "present-biased preferences"); Fritz L. Laux & Richard M. Peck, *Economic Perspectives on Addiction: Hyperbolic Discounting and Internalities* 4, 7-9 (Nov. 1, 2007) (unpublished manuscript), available at <http://ssrn.com/abstract=1077613> (discussing intertemporal anomalies in context of addiction); see also Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 1029 (2008), available at <http://www.pennumbra.com/issues/pdfs/156-4/Posner.pdf> (asserting that governmental institutions such as the courts, executive, and Congress have a limited "time horizon" that fails to capture harms to future generations).

111. See Laibson, *supra* note 21.

112. See Laux & Peck, *supra* note 110.

113. For discussions of self-serving bias and egocentrism in cognitive processing, see Babcock & Loewenstein, *supra* note 22, Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 161 (2004), Keysar & Barr, *supra* note 22; Pronin et al., *supra* note 22.

114. See David Dunning et al., *Ambiguity and Self-Evaluation: The Role of Idiosyncratic Trait Definitions in Self-Serving Assessments of Ability*, in *HEURISTICS AND BIASES*, *supra* note 22, at 324, 332-33.

short-term interests, and underestimating potential obstacles.¹¹⁵ In a related phenomenon, people planning a project consider internal features of the specific project, but ignore or discount crucial base-rate information about comparable projects, including their own track record for project completion.¹¹⁶

The interaction of crossover effects and cognitive biases creates a perfect storm of problems for advocates. Advocates will tend to underestimate crossover effects that harm their client in the long-term, and overestimate those that help clients in the short-term. Advocates who seek to cross over from one role to another, such as moving from scholar to advocate, will also systematically discount the incidence and extent of role conflicts.

3. *Crossover Effects and Cautionary Tales.* Evidence of this unhealthy alliance of crossover effects and cognitive biases appears even in early narratives of American lawyering. Consider again the example of Josiah Quincy, who along with John Adams distinguished himself by successfully defending British soldiers prosecuted for their role in the Boston Massacre. A related case handled by Quincy in this same period provides a less sanguine perspective. Quincy argued self-defense on behalf of an informer for the British who killed a member of an angry assemblage of patriots surrounding his home.¹¹⁷ However, after his client's conviction, Quincy wrote a pamphlet under a pseudonym condemning the judge in the case for protecting the defendant from a lynch mob. Quincy, the patriotic pamphleteer, also apparently agitated for the death penalty for his own client.¹¹⁸ There is no evidence that Quincy was troubled by this conflict of roles between

115. See Roger Buehler et al., *Inside the Planning Fallacy: The Causes and Consequences of Optimistic Time Predictions*, in *HEURISTICS AND BIASES*, *supra* note 22, at 251-52 (discussing overconfidence in predictions of project completion).

116. See *id.* at 253-55. Here, as elsewhere, how people identify a relevant data set and frame available data is crucial. See also Richard W. Painter, *Lawyers' Rules, Auditors' Rules, and the Psychology of Concealment*, 84 *MINN. L. REV.* 1399, 1413-18 (2000) (discussing how prospective gains and losses affect decision-making).

117. See *PORTRAIT OF A PATRIOT*, *supra* note 32, at 24.

118. The informer was ultimately allowed to leave the colony. *Id.* at 25.

diligent courtroom advocate and anonymous agitator against his client's interests.

For a more recent cautionary tale of crossover lawyering, consider the example of radical lawyer Lynne Stewart.¹¹⁹ Stewart displayed a commendable human concern for the well-being of a client, Sheik Abdel-Rahman (the so-called "blind Sheik"), who was spending life in a federal prison after a conviction on terrorism charges.¹²⁰ Perhaps moved unduly by the short-term need to secure the release of the sheik, whose legal appeals had been exhausted, Stewart turned to crossover advocacy. After extended consultation with her imprisoned client and his associates which Stewart concealed from prison authorities,¹²¹ she publicly announced that the Sheik was abandoning his support for a cease-fire his group had agreed to because of public revulsion over an earlier terrorist attack.¹²² Stewart apparently hoped that the threat of violence from the Sheik's supporters would prompt his release.¹²³ In indulging this hope, she failed to consider that the lawyer's role does not generally include purveying threats of violence. Stewart was ultimately convicted of conspiracy to assist terrorist activity,¹²⁴ and the government

119. See Margulies, *supra* note 35, at 174.

120. See *id.* at 183-88; see also United States v. Rahman, 189 F.3d 88 (2d Cir. 1999).

121. Stewart had earlier signed an affirmation (the attorney's equivalent of an affidavit signed under oath) agreeing not to communicate with her client about plans for future violence.

122. See United States v. Sattar, 395 F. Supp. 2d 79 (S.D.N.Y. 2005) (declining to set aside conviction); see also Douglas Jehl, *Islamic Militants Taunt Cairo, Demanding Break With Israel*, N.Y. TIMES, Nov. 21, 1997 [PAGE] (group claiming responsibility for attack that claimed lives of seventy tourists in Luxor, Egypt, sought release of Sheik Abdel Rahman, and volunteered that it might halt terror operations "for a while").

123. See Sattar, 395 F. Supp. 2d at 98 (discussing Stewart, when informed of a terrorist group in the Philippines that took hostages and offered to free them in exchange for the Sheik's release, responding "Good for them").

124. See Julia Preston, *Lawyer is Guilty of Aiding Terrorists*, N.Y. TIMES, Feb. 11, 2005, at A1. In Stewart's case, as with other criminal defendants, the issue of appropriate sentencing is distinct from the issue of culpability. See Julia Preston, *Sheik's Lawyer, Facing 30 Years, Gets 28 Months, to Dismay of U.S.*, N.Y. TIMES, Oct. 17, 2006, at A1. Legal academics and others with a range of views on Stewart's conviction wrote to the judge urging moderation in Stewart's sentencing, because of her long history of capable criminal defense work and the chilling effect a harsh sentence might have on the defense bar. See Letter from

imposed even tighter restrictions on her former client the Sheik. Stewart and her client thus became casualties of crossover advocacy, led astray by the seductive ease of informing the media about the Sheik's new cease-fire position and Stewart's inability to look beyond the short-term gratification that this announcement produced.

This cautionary tale demonstrates that crossover advocacy has risks as well as benefits. Cognitive biases and the dynamics of crossover effects make three issues salient. First, asymmetries in accountability between traditional judicial forums and crossover venues such as the media cause risks. Lower levels of accountability in crossover forums can lead to reckless advocacy, opportunity costs for clients, and an echo-chamber effect in which preaching to the converted prevails. Second, crossover advocacy prompts conflicts of interest and roles that can injure clients and undermine qualities of candor and deliberation that are essential for both lawyers and legal scholars. Third, crossover advocacy imposes negative externalities on the public and the future interests of persons similarly situated to clients. The next three sections of the article discuss these issues in depth.

III. ASYMMETRICAL ACCOUNTABILITY MECHANISMS, OR THE ADVOCATE'S TEMPTATION

Lawyers who do their work in the media or in international forums are not subject to the constraints that bind lawyers in United States courts. This absence of constraints produces asymmetries in accountability. The accountability gap allows lawyers to overestimate short-term benefits and unduly discount long-term costs of crossover strategies for their clients.

In court, lawyers confront a constellation of rules that promote candor and fairness. For example, courts and lawyers must refrain from *ex parte* contacts.¹²⁵ Lawyers must also be candid with the tribunal, and refrain from

Peter Margulies, et al., to Judge John G. Uoeti (July 26, 2005) (on file with author).

125. See MODEL RULES OF PROF'L CONDUCT R. 4.2 (2009) (prohibiting *ex parte* contacts between lawyer and client represented by another attorney). *But cf.* Susan B. Martyn, *Accidental Clients*, 33 HOFSTRA L. REV. 913, 916 (2005).

misrepresenting material facts.¹²⁶ Lawyers in court must also avoid prejudicial public statements about matters at issue in litigation.¹²⁷

Courts, too, are accountable actors, bound by rules that promote fairness and transparency. Ex parte contacts are forbidden.¹²⁸ Typically, the public and the media can view briefs, read opinions, and attend court sessions.¹²⁹ When courts avoid deciding a matter on the merits, they give reasons that the public, the bar, and interested commentators can critique.¹³⁰ In explaining their decisions, courts face no artificial limits on the length of their analysis.¹³¹ Moreover, courts have safeguards against forum-shopping, including rules on venue, jurisdiction, and random assignment. These rules prevent parties from manipulating the system to find a sympathetic decisionmaker.

A crossover forum such as the media lacks these constraints on lawyers. On an institutional level, the content of media coverage often hinges on the novelty of the story and the accessibility of sources. Outlets for journalism typically must survive in an increasingly competitive marketplace, where novelty attracts eyeballs and advertising. If a story counters expectations or departs from the norm, the media will feature it more prominently.¹³²

126. See MODEL RULES OF PROF'L CONDUCT R. 3.3 (2009).

127. See MODEL RULES OF PROF'L CONDUCT R. 3.6 (2009); see also Brown, *supra* note 39.

128. See *Arnold v. Lebel*, 941 A.2d 813 (R.I. 2007).

129. While recent developments in the war on terror have strained this commitment to transparency, tribunals have reaffirmed its core attributes. Even at Guantanamo, transcripts are available of many proceedings, including CSRTs and ARBs. See WITTES, *supra* note 50.

130. When parties settle, however, they sometimes seek to keep their agreements confidential. See Minna J. Kotkin, *Secrecy in Context: The Shadowy Life of Civil Rights Litigation*, 81 CHI.-KENT L. REV. 571 (2006) (critiquing confidentiality provisions in employment discrimination settlements).

131. Although some weary readers might wish that judges limited themselves. See *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (noting combined opinions run over four-hundred pages in Lexis pagination).

132. See BRUCE HOFFMAN, *INSIDE TERRORISM* 138-40 (1998); Sendhil Mullainathan & Andrei Shleifer, *Media Bias* 7-8 (Dep't of Econ., Mass. Inst. Of Tech., Working Paper No. 0233; Inst. for Econ. Reseach, Harvard Univ., Inst. Research Working Paper No. 1981, 2002), available at <http://ssrn.com/abstract=335800> (contrasting ideological and institutional theories of media

Man bites dog will always receive more attention than dog bites man. A decision upholding the government's view may seem like a dreary reversion to the mean, unlike the compelling alternative story of the government's defeat.¹³³

The lack of transparency in the media's relationship with sources compounds the distortion of the man bites dog imperative. A source's contacts with journalists are often ex parte, lacking notice to and input from adversaries.¹³⁴ While the other side's absence is often convenient for a source with an agenda, it removes an important check. All other things being equal, journalists give more play to the perspective of players who talk to them, as opposed to players whose media interaction is constrained by rules limiting disclosure

bias). The account in the text outlines institutional factors that skew media coverage. This institutional account does not rely on claims that the media follows a narrow political or ideological agenda. See RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 248 (1999) (noting media's aggressive investigation of President Clinton). Moreover, any institutional account must also acknowledge the profoundly important role that the press plays in a democracy, particularly in situations where the government has an incentive to conceal evidence of its own overreaching. See generally Stephen I. Vladeck, *The Espionage Act and National Security Whistleblowing After Garcetti*, 57 AM. U. L. REV. 1531, 1546 (2008) (discussing importance of transparency in government and role of media in promoting that objective).

133. See Thomas Kunkel, *What You Don't Know: The Bush Administration's Penchant for Secrecy*, 28 AM. JOURNALISM REV. 4 (2006) (describing "man bites dog" and attendant novelty as a significant factor in news coverage); Peter Levine, *Journalism and Democracy: Does it Matter How Well the Press Covers Iraq?*, 93 NAT'L CIVIC REV. 16 (2004) (noting government officials' ability to spin news through manipulation of relationships with journalists; noting also that press can overreact to spin and unduly discount information or perspective provided by government officials); Jay Rosen, *Bush to Press: "You're Assuming That You Represent the Public. I Don't Accept That"*, [SOURCE], [DATE], available at http://journalism.nyu.edu/pubzone/weblogs/pressthink2004/04/25/bush_muscle.html (stating that "the president has his scripted points, the reporters theirs—and neither will move off the script"). For a discussion of Bush administration attempts to manage news and retaliate against journalists they view as antagonistic, such as the Washington Post's Dan Milbank, see Ken Auletta, *Fortress Bush: How the White House Keeps the Press Under Control*, NEW YORKER, Jan. 19, 2004, at 52-65.

134. See Michael C. Jensen, *Toward a Theory of the Press*, in ECONOMICS AND SOCIAL INSTITUTIONS: INSIGHTS FROM THE CONFERENCES ON ANALYSIS AND IDEOLOGY 15 (Karl Brunner ed., 1979). While journalistic norms require that a reporter seek comment from the targets of allegations, this norm is more amorphous than the strict prohibition on ex parte contacts in an adjudicative forum.

of trade secrets or national security information.¹³⁵ In addition, the media does not constrain forum-shopping by sources, since such rules would also constrain journalistic competition.¹³⁶ Three of these factors—*ex parte* conversations, reliance on accessible sources, and the absence of constraints on forum-shopping—also encourage an echo chamber dynamic, in which participants preach to the converted and pay insufficient attention to the long-term costs of their strategies.

A. Accountability and Pretrial Publicity

To illustrate the consequences of this asymmetry in accountability between judicial and crossover forums, consider first the rule on refraining from prejudicial pretrial publicity.¹³⁷ Limits on pretrial publicity ensure that a party's claims receive their full ventilation in a transparent forum—the courtroom—where the other side can test them through cross-examination.¹³⁸ In a criminal case, pretrial publicity rules assist both the prosecution and the defense in obtaining a fair trial.

However, the rules against pretrial publicity have a more subtle rationale that seeks to protect *clients* against the consequences of reckless advocacy in the court of public opinion. Advocacy in the court of public opinion is subject to the temporal discounting deficit. Crossover advocates active in that sphere risk incurring long-term costs as they scramble for short-term tactical gains. The ethics rules, like any constitutional mechanism, seek to align the parties' incentives appropriately and correct the lawyers' imbalance in perspective.

135. Of course, players such as government officials often break these rules, through strategic leaks. See Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233 (2008).

136. Cf. Mullainathan & Shleifer, *supra* note 132 (discussing effects of competition in journalism).

137. See MODEL RULES OF PROF'L CONDUCT R. 3.6 (2009); cf. *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991) (discussing pretrial publicity rules in First Amendment context).

138. See Judith L. Maute, "In Pursuit of Justice" in High Profile Criminal Matters, 79 FORDHAM L. REV. 1745, 1756-57 (2002).

The client-protective rationale for anti-publicity rules recognizes that narratives have opportunity costs.¹³⁹ Statements made in advance of trial or in an opening can lock defense counsel into a strategy that seems less than optimal as the trial proceeds. For example, a seasoned defense attorney may elect to rest without putting on a case if the prosecution's case is weak. However, if the defense attorney has announced an elaborate theory of the case in the media or in her opening statement, the jury may expect the lawyer to follow through. The factfinder's disappointment at the lack of follow-up may seal the client's fate. The rule against pretrial publicity flags these opportunity costs for the lawyer, realigning short- and long-term perspectives.

Lawyers who believe that, regardless of publicity, they must ultimately deliver in court what they promise in public will have a different incentive structure than those who believe that media coverage is a substitute for litigation success. Consider the elaborate conspiracy theory spun by lawyers for Omar Khadr, a Canadian national whose parents apparently sent him to Afghanistan when he was 13 years old, and who when he was almost 16 allegedly threw a grenade at a United States army medic under circumstances that might constitute a war crime.¹⁴⁰ Khadr's

139. One example from the courtroom itself derives from the opening statement of defense attorney Marvyn Kornberg in the trial of a New York police officer on charges that the officer shoved a broom handle up the rectum of suspect Abner Louima. Trying to defend his client in this high-profile case, Kornberg told the jury that the injuries that Louima had received had been caused instead by consensual sex. See Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925, 930-31 (2000). Kornberg failed to produce evidence supporting his claim. This failure to follow up may have contributed to his client's conviction. In other settings, clear factual statements made by attorneys in the course of judicial proceedings are binding. See *Childs v. Franco*, 563 F. Supp. 290, 292 (E.D. Pa. 1983). Statements out of court by the attorney will typically not bind the client as a legal matter. However, they may prejudice the client in other more insidious ways, by affecting jury pool perceptions.

140. See MICHELLE SHEPHARD, *GUANTANAMO'S CHILD: THE UNTOLD STORY OF OMAR KHADR* 2-4 (2008); Sean Fine, *A Most Peculiar Young Offender: Omar Khadr Should be Dealt with Here in Canada, as a Juvenile Who Was Involved in Terrorism*, GLOBE & MAIL, Mar. 22, 2008, at A19; Adam Zigorin, *Growing Up at Guantanamo*, TIME, June 5, 2006, at 16. Under international law, this determination could hinge on Khadr's compliance with Common Article 4 of the Geneva Convention, governing lawful combat, which considers whether he wore a uniform, carried arms openly, fought in a unit with a fixed command

lawyers, JAG lawyer William Kuebler and reserve officer Rebecca Snyder, have asserted without any proof that American soldiers including Khadr's alleged victim participated in a conspiracy to kill wounded and incapacitated inhabitants of a suspected Al Qaeda compound. According to Khadr's current lawyers, Khadr's alleged victim, Christopher Speer, was actually not a medic at all, but simply another participant in the plot, killed by friendly fire as the conspiracy went awry.¹⁴¹

In ordinary criminal practice, it would almost surely violate *Model Rule* 3.6 to publicly announce in advance of trial this kind of specific story.¹⁴² Indeed, spreading the story impinges on both the procedural integrity and cognitive bias-correcting rationales for the rule. Since anyone can announce a theory, but the adversarial testing only comes at trial, there is no immediate cost to making such pronouncements. Instead of focusing attention and deliberation on the trial, where rules of evidence ensure reliability, the pretrial dissemination of conspiracy stories places a premium on the receipt of media attention, with no assurance of accuracy.¹⁴³

structure, or killed civilians. See *infra* note 173 (discussing factual and legal issues in Khadr's case).

141. Posting of Marni Soupcoff to National Post, <http://network.nationalpost.com/np/blogs/fullcomment/archive/2008/03/25/lt-cmdr-william-c-kuebler-and-rebecca-s-snyder-the-truth-about-child-soldier-omar-khadr.aspx> (Mar. 25, 2008, 19:35 EST).

142. The military justice system includes comparable ethical provisions for attorneys. See, e.g., 32 C.F.R. § 776.45(a)(1) (2000) (barring extrajudicial statements with a "substantial likelihood of materially prejudicing an adjudicative proceeding or an official review process"); cf. Seth R. Deam, *Does Labeling the System "Unfair" Threaten Fairness? Trial Publicity Rules for Defense Attorneys in Military Commissions*, 19 GEO. J. LEGAL ETHICS 663, 668-70 (2006). The rules against prejudicial pretrial publicity apply to facts at issue in a specific adjudication, not to questions of law concerning the fairness of the tribunal. Accordingly, the rules should permit comments like those of Major Dan Mori in his representation of detainee David Hicks that question the legality of the commission system.

143. The shot-gun approach of Khadr's current lawyers is particularly troubling because of one glaring substantive flaw in the conspiracy theory: Khadr's survival. If soldiers were engaged in a conspiracy to cover up killing Speer or enemy wounded, it makes little sense that they would have permitted Khadr to survive. Cf. SHEPHARD, *supra* note 140, at 89-90 (discussing Khadr's extensive shrapnel wounds and doctor's efforts to treat him). Leaving no witnesses would have been the best way of effectuating the conspiracy's goals.

Even absent short-term risk, however, conspiracy theories like Kuebler's can harm a defendant. If the case goes to trial, Kuebler's touting of the conspiracy theory will create problems for his client. Suppose that Kuebler decides not to present the theory at trial, but that the presiding judge is aware of the prior publicity. The judge will conclude that Kuebler did not act responsibly in spreading the story.¹⁴⁴ While one hopes that the judge will still be impartial in presiding over the proceeding, judicial perceptions of counsel's trustworthiness inevitably affect handling of a case. Moreover, the jury in a court martial or military commission is composed, not of the peers of the accused, but of military officers. Officers can be a talkative bunch, and it would not be surprising if some of the officers had become familiar with Kuebler's public charges. Here, too, if Kuebler does not follow through at trial, the jurors will draw their own conclusion about the claims and defenses that Kuebler saw fit to advance.¹⁴⁵

In a system in which crossover advocacy triggered accountability similar to that found in courts, Kuebler would get unambiguous feedback from the media that floating conspiracy theories is a risky endeavor. Unfortunately, the media's institutional attributes impede this feedback. For example, a journalist who covers Guantanamo for a prominent newspaper failed to address the conspiracy theory in the course of a laudatory front-page

144. However, Kuebler would not be subject to the heightened obligation of candor found in rule 3.3 of the *Model Rules of Professional Conduct*, because he did not make these charges before a tribunal. Kuebler would only be subject to the weaker standard of honesty set out in rule 8.4. See MODEL RULES OF PROF'L CONDUCT R. 3.3, 8.4 (2009).

One could argue that the far-flung nature of much of the media advocacy efforts for detainees, which in Khadr's case focused mainly on Canada, also reduces the likelihood that either the judge or the military judge will in fact be aware of the publicity. In that event, the publicity is not actually prejudicial. However, in a world where anyone with a computer can readily pull up communications from a country half-way around the world, this view seems naive. One could also argue that the military judge can impose restrictions on pretrial publicity similar to restrictions a civilian court could impose. However, a blanket restriction might unduly chill the lawyer's willingness to criticize the legal sufficiency of the commissions. A more targeted restriction might be reactive, fashioned by the judge only *after* the lawyer made prejudicial public statements.

145. Voir dire can minimize prejudice, but not extinguish it.

piece about Kuebler.¹⁴⁶ The piece instead stressed the man bites dog aspect of a military lawyer taking on the military commissions at Guantanamo. The article alluded vaguely to Kuebler's "incendiary" charges¹⁴⁷ but otherwise failed to examine Kuebler's allegations. Diligent journalism in this case would have required scrutiny of Kuebler's theory and supporting evidence. Unfortunately, the man bites dog imperative carried the day.

The resulting article provided Kuebler with the positive feedback of a front-page story in a prestigious publication. However, it failed to offer the context that the reader needed to evaluate Kuebler's tactics. This accountability deficit will encourage Kuebler to continue to circulate his conspiracy theory to accommodating journalists, tying Kuebler's hapless client to a conspiracy theory that may be impossible to prove at trial.

For an even more clear-cut case in which an attorney's propensity to play to the media may prejudice a detainee/client, consider recent remarks by Clive Stafford Smith that his client Binyam Mohamed might make false statements in an allocution to reach a favorable plea bargain.¹⁴⁸ In correspondence with the British Foreign Office that Smith provided to a reporter, Smith asserted that if necessary Binyam would plead guilty to "being the Pope."¹⁴⁹ Sarcasm has its place in legal representation, particularly given the tragic absurdity of Guantanamo.¹⁵⁰ However, even the most committed lawyer/ironist should recognize that public mockery of a client's credibility in plea

146. See William Glaberson, *An Unlikely Antagonist in the Detainee's Corner*, N.Y. TIMES, June 19, 2008, at A1. While the specific episode discussed in the text illustrates the risks of crossover advocacy, reporting on Guantanamo has often been balanced and informative in the face of major obstacles. See William Glaberson & Margot Williams, *Next President Will Face Test on Detainees*, N.Y. TIMES, Nov. 3, 2008, at A1 (discussing complexities of releasing Guantanamo detainees where evidence points to their involvement with Al Qaeda or the Taliban).

147. See Glaberson, *supra* note 146, at A23. The article usefully provides the correct pronunciation of Kuebler's name (it's the same as the cookie).

148. See Bonner, *supra* note 88, at A16.

149. *Id.*

150. See SMITH, *supra* note 4, at 15 (describing the solicitude shown for reptiles by Guantanamo personnel, who brake for iguanas).

negotiations will likely raise the government's price in the deal.¹⁵¹

B. *Crossing Over and the Risk to Candor*

Asymmetrical accountability also triggers tensions with the lawyer's duty of candor. Framing the narratives that fuel mobilization tempts the lawyer to omit material facts that undermine the story. The legal ethics rules impose a less rigorous standard on public statements than they do on statements before a tribunal.¹⁵² Nevertheless, one can argue that a lawyer should not misrepresent matters with the public. First, her professional status as an intermediary between public and private interests implicitly warrants some level of candor and fair dealing. Second, a lack of candor undermines the capacity for reflection. People who are not candid with others may also suppress inconvenient facts in internal deliberation. However, because of the self-serving bias, people tend to underestimate the likelihood of succumbing to this dangerous habit. Third, lack of candor may be sound strategy in the short-term, but, like excessive pretrial publicity, it may unduly discount long-term costs to clients.

151. See generally Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117 (1998) (discussing how defense proffers to prosecutors to reach plea bargains have largely replaced actual trials). Dan Mori, the JAG lawyer representing Australian David Hicks, seemed to understand this point. He and civilian lawyer Joshua Dratel used media attention as leverage, and then pivoted to direct negotiations with the official running the military commissions to secure a favorable deal for Hicks. See Luban, *supra* note 1, at 2014-17; Yaroshefsky, *supra* note 57.

152. Compare MODEL RULES OF PROF'L CONDUCT R. 3.3 (2009 (imposing affirmative duty of candor with the tribunal), *with id.*, R. 8.4 (prohibiting dishonesty, which is generally interpreted to require proof of fraud or perjury). As an illustration of the weak normative content of rule 8.4, consider that the American Bar Association (ABA) has declined to find dishonesty when a lawyer receiving an electronic document from an adversary mines the document for "metadata," i.e., confidential information electronically embedded in the document about comments on prior drafts and the like. The ABA merely requires that the recipient inform the sender. See *id.*, R. 4.4(b). For discussion of this issue, see David Hricik, *Mining for Embedded Data: Is It Ethical to Take Intentional Advantage of Other People's Failures?*, 8 *N.C. J.L. & TECH.* 231, 245-47 (2007) (arguing for more robust duties); cf. Andrew M. Perlman, *Untangling Ethics Theory from Attorney Conduct Rules: The Case of Inadvertent Disclosures*, 13 *GEO. MASON L. REV.* 767, 813-16 (2006) (analyzing issues and suggesting that lawyer should have obligation to refrain from reading the document but need not notify sender, unless lawyers agree otherwise).

Lack of candor emerges in two kinds of narratives told by crossover advocates. One is the generic misadventure narrative used by lawyers to explain the presence of detainees at Guantanamo as a group. I address the empirical flaws in the misadventure narrative in a subsequent section of the Article.¹⁵³ Here, I discuss the lack of candor evident in specific claims of mistreatment or innocence made on a client's behalf.¹⁵⁴

In the most disturbing case, lack of candor in the media spilled over into the courtroom. Candace Gorman, a solo practitioner from Chicago, charged in the media that Guantanamo doctors had given her client AIDS.¹⁵⁵ In court, the clear weight of evidence forced Gorman to acknowledge that she could not support this and other charges.¹⁵⁶ After her court appearance, Gorman made her claims to a columnist, who printed them without mentioning the court's adverse findings.¹⁵⁷

153. See *infra* notes 202-13 and accompanying text.

154. I do not claim that detainee lawyers as a group are less candid than other attorneys. Indeed, my overall view is that the Guantanamo defense bar illustrates the American legal profession's commitment to justice. However, the cases I mention demonstrate a lack of candor that is both problematic in itself and indicative of the tensions caused by asymmetric accountability mechanisms.

155. See H. Candace Gorman, *The Hippocratic Oath Dies in Gitmo*, Feb. 26, 2008, http://www.inthesetimes.com/article/3540/the_hippocratic_oath_dies_in_gitmo (repeating insinuation while backing off express charge); see also Andy Worthington, *Horror at Guantanamo: Libyan Detainee Infected with AIDS*, Jan. 1, 2008, <http://www.andyworthington.co.uk/2008/01/31/horror-at-guantanamo-libyan-detainee-infected-with-aids/> (reporting Gorman's claim).

156. See *Al-Ghizzawi v. Bush*, No. 05-2378 (JDB), 2008 U.S. Dist. Lexis 27988, at *4-5 (D.D.C. April 8, 2008). The court also appeared skeptical about the letter-writing campaign repeating these charges that Gorman had initiated. *Id.* at *3 n.1.

157. See Nicholas D. Kristof, Op-Ed., *A Prison of Shame, and It's Our's*, N.Y. TIMES, May 4, 2008, at WK13. Gorman also acted as a source for another reporter on a story where she claimed that because of her Guantanamo work the government was conducting illegal surveillance of her garden-variety criminal defense clients in Chicago. See William Glaberson, *Lawyers for Guantanamo Inmates Accuse U.S. of Eavesdropping*, N.Y. TIMES, May 7, 2008, at A18. Gorman's claim here seems to reflect the same lack of professional distance that skewed her advocacy about her client's medical charges. Cf. KRONMAN, *supra* note 77, at 128-34 (discussing lawyer's need for balance between empathy and detachment). The surveillance story also failed to mention the *Al-Ghizzawi* Court's observation about Gorman's lack of credibility. A court subsequently granted summary judgment to the government in a lawsuit that included Gorman's claims. See *Wilner v. NSA*, No. 07-CIU-3883 (DLC), 2008 U.S. Dist.

An episode of this kind illustrates the temporal discounting deficit that afflicts some crossover lawyering. Gorman traded a short-term gain in publicity for long-term costs to credibility. The court surely became aware that Gorman seemed to draw the wrong lesson from the court's rebuke. Gorman's lack of credibility made her less effective as an advocate on her client's behalf.

Lack of candor can emerge in claims of detainee innocence, as well. In writing about the Binyam Mohamed case, Clive Stafford Smith asserted that a "friend" in London offered Binyam the "use" of the friend's passport while Binyam was in Pakistan.¹⁵⁸ Binyam claims that his own passport had been stolen.¹⁵⁹ However, Smith failed to note that Binyam's "use" of the passport entailed removing the passport holder's picture and substituting his own.¹⁶⁰ Binyam's creative work with travel documents matched the tactics of suspected terrorists who wished to cover up their stay in Al Qaeda facilities.¹⁶¹ In fact, Binyam admitted in a CSRT hearing in 2004 that he had received paramilitary training at an Al Qaeda camp, including instruction in

LEXIS 48750, at *11 (S.D.N.Y. June 25, 2008) (relying on point of law without findings on contested facts).

158. See SMITH, *supra* note 4, at 52-53.

159. *Id.* at 52.

160. See *id.* at 53; see also *B. Mohamed v. Foreign Sec'y*, 2008 EWHC (Admin) 2048 [11] (Eng.). The obliging "friend" that Smith described was apparently a "criminal" who was expert in document fraud. *Id.* at para. 49. Smith also sought to finesse facts about Binyam's immigration status in his initial interaction with Bonner. Bonner reported that Mohamed "acquired legal residency" in Britain. Bonner, *supra* note 88, at A16; cf. Raymond Bonner, *Forever Guantanamo*, N.Y. REV. BOOKS, April 17, 2008, at 54 (in review of SMITH, *supra* note 4, Bonner states that Binyam "became a British resident"). However, this is not the case. Smith claimed that before Binyam left for Pakistan in 2001, Britain had permitted him to remain while he pressed an asylum claim filed in 1994. See SMITH, *supra* note 4, at 51. Smith did not disclose that the government had rejected Binyam's asylum claim. See *B. Mohamed*, 2008 EWHC 2048, at [7]. Actually obtaining legal resident status would have required a comprehensive background check that Binyam has never had to undergo. Smith also neglected to disclose that Binyam's college training included the study of engineering and electrical work. Cf. SMITH, *supra* note 4, at 51 (claiming only that Binyam had failed most of his college courses), with *B. Mohamed*, 2008 EWHC 2048, at [7] (offering specific information about his college study).

161. See John Crewdson et al., *Evidence Emerges of a Broader 9/11 Conspiracy in Germany*, CHI. TRIBUNE, Feb. 26, 2003, at 1 (discussing Al Qaeda suspect's use of stolen passport).

forging official documents.¹⁶² This portion of the client's story does not appear in Smith's accounts.

C. *International Forums and Opportunity Costs*

Other crossover forums, including international bodies and domestic courts considering certain human rights claims, also display differences in process, structure, and proof that generate litigation less geared to concrete adjudication than typical proceedings in United States courts. First, international human rights litigation is often *ex parte* as a practical matter. Frequently, opposite parties do not respond, and claims proceed uncontested.¹⁶³ Admittedly, declining to appear is the party's choice. Nevertheless, conducting *ex parte* litigation can instill lax habits in the advocate, who lacks the accountability imposed by a vigorous adversarial contest.

International bodies are also not bound by Article III constraints that discipline decisionmaking in United States courts. International forums are not governed by the political question doctrine, which deters federal courts from deciding matters characterized by a dearth of judicially manageable standards or a textual commitment of authority to another branch.¹⁶⁴ Moreover, international tribunals

162. See Raymond Bonner, *British Judge Sets Hearing on Evidence for Detainee*, N.Y. TIMES, June 6, 2008, at A16; cf. B. Mohamed, 2008 EWHC 2048, at [19], [87] (British court that viewed classified evidence and ordered government to turn over information to detainee also noted that Binyam had apparently worked on detonators for explosive devices for Al Qaeda and found that officials were "right to conclude that [Binyam] was a person of great potential significance and a serious potential threat to the national security of the United Kingdom"). Smith argues that the CSRT testimony was the product of coercion, although he concedes that Binyam was not subject to coercion after his arrival at Guantanamo in May, 2004. B. Mohamed, 2008 EWHC 2048, at [102].

Here, as in Al-Ghizzawi's case, it is useful to separate claims of innocence from claims of abuse. Substantial evidence supports Binyam's claim that he endured coercive conditions after his apprehension in 2002. See *id.* at para. 74, 87; Bonner, *supra* note 162.

163. See GOLDSTEIN, *supra* note 46, at 34 (noting that in much human rights litigation defendants "didn't show up in court").

164. See *Baker v. Carr*, 369 U.S. 186, 217 (1962); see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725-26 (2004) (stating because, *inter alia*, of Article III concerns that bar federal courts from "aggressive" creation of common law, norms enforced under ATS, 28 U.S.C. section 1350 (2005), should be "specific, universal, and obligatory"); Curtis A. Bradley et al., *Sosa*, *Customary*

render advisory opinions which Article III precludes.¹⁶⁵ American presidents of both political parties have argued that these opinions seek to resolve questions that are “vague and abstract,”¹⁶⁶ lacking the concreteness that should mark questions submitted to a tribunal.

As with media interaction, such asymmetries in accountability turn into traps for crossover advocates. While international forums frequently have a low threshold for commencing litigation that entices advocates, this low threshold can make them reluctant to issue an effective remedy. An international tribunal may encounter profound difficulties in enforcing a judgment against the wishes of a sovereign government.¹⁶⁷ In some situations, such as those raising federalism concerns, a sovereign state’s own law may hinder enforcement.¹⁶⁸ In other settings, the effectiveness of international forums is hostage to an internal crossover dynamic that trades off procedural expansiveness and substantive caution. On this view,

International Law, and the Continuing Relevance of Erie, 120 HARV. L. REV. 869, 902-07 (2007) (analyzing Court’s decision in *Sosa* in light of limits on federal judicial power expressed in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)). *But see* Jenny S. Martinez, *Towards an International Legal System*, 56 STAN. L. REV. 429, 501-02 (2003) (arguing that political question doctrine is not an obstacle to treaty that would agree to submit matters to international bodies for decision, at least if domestic courts retained some discretion on enforcement). Federalism is also an important constraint in the United States legal system that may bar enforcement of judgments in international forums. *See* *Medellin v. Texas*, 128 S. Ct. 1346 (2008) (holding that decision of International Court of Justice that would override state procedural default rules in collateral review of criminal convictions is not directly enforceable).

165. *See Baker*, 369 U.S. at 217; *cf. Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (1996), available at <http://www.icj-cij.org/docket/files/95/7495.pdf> (undertaking to decide when states may use nuclear weapons).

166. *See Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. at 236 (quoting U.S. legal representative as arguing that “[t]he question [of propriety of threat or use of nuclear weapons addresses] complex issues which are the subject of consideration among interested States and within other bodies of the United Nations which have an express mandate to address these matters”). My concern here is not with international law, per se, which provides core norms that warrant respect, but with the vagaries of procedure in international forums.

167. *See Boumediene*, 128 S. Ct. at 2250 (asserting that “prudential concerns” often lead a tribunal to avoid intrusion into the affairs of another sovereign nation).

168. *See Medellin*, 128 S. Ct. at .

adjudicative authority is a scarce resource, which decisionmakers will ration regardless of the procedural regime.¹⁶⁹ Following this dynamic, international forums compensate for low thresholds for initiating litigation by rendering ambiguous or inconclusive decisions on the merits. For example, in a case considering the legality of the use of nuclear weapons, the International Court of Justice issued an advisory opinion that laboriously recited the complexities of the question to justify a decision that resolved absolutely nothing.¹⁷⁰

The net result of advocates' engagement in international forums may thus be another example of cognitive bias in temporal discounting. Advocates make a big splash at the commencement of a proceeding, and then endure an extended anti-climax as adjudication labors to an uncertain conclusion. This anti-climax generates opportunity costs for clients, measured in fruitless expenditure of resources and the neglect of less glamorous but more effective tactics such as a detainee's cooperation with the government.

As a cautionary tale of international forums and opportunity costs, consider again the case of Canadian national Omar Khadr, who was fifteen years old when he allegedly threw a grenade at a United States army medic in Afghanistan. Khadr's lawyers have explored two transnational forums. First, they sought relief from allegedly abusive conditions of interrogation before the Inter-American Commission on Human Rights (IACHR). Second, they sought relief both before the United Nations Committee on the Rights of the Child (CRC) and Khadr's military commission based on the argument that Khadr was a child soldier who cannot be detained or tried for war crimes committed while he was under 18.

Unfortunately, each of these gambits has been predictably unproductive. The IACHR strategy resulted in an announcement of "precautionary measures" that had no

169. See Levinson, *supra* note 12; Starr, *supra* note 11; cf. Posner & Vermeule, *Constitutional Showdowns*, *supra* note 110, at 1047 (discussing this concept in context of constitutional law).

170. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. at 263 ("[T]he Court . . . cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence.").

practical effect on Khadr's detention.¹⁷¹ The child soldier strategy has been similarly unsuccessful. Advocates rested their argument on the Optional Protocol to the Convention on the Rights of the Child.¹⁷² However, the Optional Protocol, which governs the conduct of countries that use child soldiers, does not bar prosecution of minors for war crimes.¹⁷³ Moreover, Khadr falls well outside the profile of the young combatants the Optional Protocol was enacted to protect. For the months prior to the events giving rise to the charges against him, Khadr was clearly free from coercion; his father, who had indoctrinated him into Al Qaeda ideology, was not even traveling with the family, and Khadr was often the only male in the group after September 11 as family members fled from anti-Taliban forces, including Canadian troops.¹⁷⁴ Nor was Khadr an Afghan national, forced by more powerful actors in his native land to enlist. As Canadian nationals, he and his family had traveled thousands of miles to assist Al Qaeda's inner circle.¹⁷⁵ Indeed, as a Canadian national, Khadr could have surrendered at any time to the Canadian forces that formed part of the alliance seeking to dislodge Al Qaeda and the Taliban. Whether or not Khadr is guilty of a war crime, the child soldier argument always seemed like an attempt to fit

171. See ANNUAL REPORT OF THE IACHR 2006, *supra* note 64. A judge had already ruled in 2005 that Khadr's conditions as of that time did not warrant entry of an injunction barring further interrogation, regardless of abuse that may have occurred earlier. See *O.K. v. Bush*, 377 F. Supp. 2d 102 (D.D.C. 2005).

172. See Int'l Comm. of the Red Cross, *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, May 25, 2000, <http://www.icrc.org/ihl.nsf/FULL/595?OpenDocument> [hereinafter *Optional Protocol*]; cf. Suzanne Farley, Comment, *Juvenile Enemy Combatants and the Juvenile Death Penalty in U.S. Military Commissions*, 47 SANTA CLARA L. REV. 829 (2007).

173. See HUMAN RIGHTS WATCH, *supra* note 65 (acknowledging that international law permits the prosecution of minors for war crimes). Khadr's lawyers need not invoke the conspiracy theory discussed in the text to mount a factual defense. A recently unearthed military document indicates that another individual was alive at the compound when the American soldier came on the scene. This individual, who was killed by American fire shortly thereafter, could also conceivably have thrown the grenade that cost Sgt. Speer his life. See SHEPHARD, *supra* note 140, at 224-25. The military document makes Kuebler's pushing of the conspiracy theory gratuitous, as well as unsupported by evidence.

174. See SHEPHARD, *supra* note 140, at 81-82.

175. *Id.* at 75-80 (discussing Khadr family's sheltering of the family Dr. Ayman Zawahiri, Al Qaeda's second-in-command, in the months after September 11).

stubborn facts into a category that would not accommodate them.

The time-consuming commitment to these futile strategies may have generated significant opportunity costs. One possible opportunity cost here was neglect of a traditional criminal defense strategy: cooperation. Cooperating with the government helps the detainee for two reasons: first, it leverages a useful bargaining tool possessed by the detainee: information. Second, cooperation bonds the detainee to the government, demonstrating that the cooperating defendant has both ethical and practical incentives to avoid back-sliding into terrorist activity.¹⁷⁶ We may never know whether Khadr would have considered this option, or whether Khadr's attorneys made such a proffer to the government. However, it is sobering to compare the meager results yielded by the lawyers' international turn with the superior track record of detainees who chose to plead and/or cooperate, including David Hicks, who was transferred to Australian custody immediately after his deal and released by Australian authorities months later, and Salim Hamdan, whose cooperation clearly figured in the 5 ½ year sentence (including 5 years of time served) that he recently received after being convicted in a military tribunal of assisting Al Qaeda.¹⁷⁷ Indeed, Abdurahman, one of Khadr's brothers, also cooperated, and received substantially better treatment as a result.¹⁷⁸ Moreover, Omar may have been able to offer information about his other brother Abdullah, whom the United States had charged with assisting terrorism and was seeking to extradite from Canada.¹⁷⁹ The forays into international forums of Khadr's lawyers seem quixotic in comparison.

Of course, sometimes inconvenient facts, obstinate clients, and an unreceptive government make quixotic ventures the defense lawyer's lot. Khadr's lawyers¹⁸⁰

176. See Richman, *supra* note 24; Simons, *supra* note 24.

177. See Glaberson, *Panel Sentences Bin Laden Driver to Short Term*, *supra* note 98.

178. See SHEPHARD, *supra* note 140, at 141-44.

179. See *id.* at 211.

180. I should disclose that Khadr's former lawyers, Muneer Ahmad and Rick Wilson of American University's Washington College of Law, are friends, and that Ahmad participated in a conference I helped coordinate last year on law and terrorism.

deserve praise if they pulled out all the stops to sell both their client and the government on a package deal that leveraged concern for their client's youth with a proffer of cooperation. While the legal and political case for child soldier status was not strong enough on its own, it was plausible to think that it may have moved the government in combination with an offer to cooperate. Lawyers who resort to the international gambit should be willing to aggressively counsel the client to sign off on such a package. If they fail to do so, they should expect that a client like Khadr will become disillusioned with representation once the brass bands of international tribunals fade.¹⁸¹

D. Summary

In sum, asymmetrical accountability mechanisms can be a siren song for advocates. They make crossover venues such as media interaction and international forums appealing in the short term. In the longer term, however, the lack of both discipline for advocates and concrete results for clients can render crossover advocacy either futile or counterproductive.

IV. CONFLICTS OF INTEREST, ROLE, AND RHETORIC

In addition to costs prompted by asymmetrical accountability mechanisms, crossover lawyering is plagued by conflicts of interest, role, and rhetoric. No legal system is immune from such tensions. However, crossover advocacy may be particularly susceptible. As with the asymmetrical accountability mechanisms discussed above, such conflicts yield costs to clients, the learned professions, and the public interest.

A. Conflicts of Interest

Crossover advocacy can trigger conflicts of interest that undermine the lawyer's loyalty to a client. *Model Rule 1.7*

181. Khadr ultimately fired his American civilian lawyers, Ahmad and Wilson, although this result may well have stemmed as much from the burdens imposed by Guantanamo authorities on detainees visited by lawyers as it did from the lack of progress in his case. See SHEPHARD, *supra* note 140, at 175-76 (noting how detainees were taken from their cells in shackles to meet their attorneys).

regulates conflicts that occur when the lawyer's ability to represent a client is "materially limited" by obligations to others.¹⁸² Conflicts of interest increase when lawyers face financial or ideological temptations to ignore divided loyalties.

Consider a criminal defense lawyer paid by the alleged kingpin of an organized crime syndicate to represent a "soldier" in the group. The lawyer may have an incentive to counsel the client to avoid "flipping" on the kingpin, who after all pays the lawyer's bills.¹⁸³ In politically charged cases, the lawyer eager to cultivate a high profile or control strategy may also ignore potential conflicts of interest.¹⁸⁴

Crossover advocacy can yield the worst of both worlds: conflicts generated when the lawyer is retained or paid by someone other than the client, and exacerbated because of the high-profile nature of the representation. The possibility of conflicts can be especially greater when lawyers from the detainee's country of origin become involved. These lawyers may have a primary loyalty to those who brought them into the case—often the detainee's family—and not to the best interests of the detainee.

182. See MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2009). Lawyers faced with conflicts must determine if they can represent the client with appropriate vigor. If the answer is "yes," the lawyer must procure the client's informed consent. Lawyers who do not seek or secure the client's consent, or who confront a conflict too stark to be waivable, must withdraw.

183. See *United States v. Schwarz*, 283 F.3d 76 (2d Cir. 2002) (disqualifying defense counsel who represented both individual police officer charged with mistreating a suspect in custody, whose best defense involved accusing another police officer of responsibility for acts alleged, and police officers' union, which had interest in avoiding charges against other officers); Bruce A. Green, "Through a Glass, Darkly": How the Court Sees Motions to Disqualify Criminal Defense Lawyers, 89 COLUM. L. REV. 1201, 1227 n.116 (1989); Peter Margulies, *Lawyers' Independence and Collective Illegality in Government and Corporate Misconduct, Terrorism, and Organized Crime*, 58 RUTGERS L. REV. 939, 962 (2006); Richman, *supra* note 24; Simons, *Retribution for Rats*, *supra* note 24; Simons, *Vicarious Snitching*, *supra* note 24; Weinstein, *supra* note 24.

184. See *United States v. Abdel Rahman*, 861 F. Supp. 266, 270-78 (S.D.N.Y. 1994) (describing conflicts of interest caused by radical lawyer William Kunstler's background of representing multiple defendants accused in terrorism trial). *But see* Margulies, *supra* note 183, at 965-66 (criticizing decision in *Abdel Rahman* on grounds that defendant's view that Kunstler was uniquely suited to represent him at trial was reasonable and should have outweighed conflicts cited by court).

Here, as elsewhere, the Omar Khadr case is instructive. Khadr's family has a deep background of collaboration with Osama bin Laden and Al Qaeda higher ups, documented amply even in sources sympathetic to Omar Khadr.¹⁸⁵ Moreover, one of Khadr's brothers is fighting extradition to the United States, where he is charged with providing material support to Al Qaeda.¹⁸⁶ One of Khadr's Canadian lawyers, Dennis Edney, represents Omar's brother.¹⁸⁷ Omar's military lawyer, William Kuebler, views Edney as having a conflict of interest, particularly since Omar might be able to secure a deal by flipping on his brother. That Khadr might not ultimately wish to do this is irrelevant. The conflict of interest arises because Edney cannot even *raise the possibility* without violating his duty of loyalty to Abdullah.¹⁸⁸ Edney cannot therefore fulfill his duty to provide Omar with independent advice.

B. *Conflicts of role*

Crossover advocacy can also breed conflicts of role. In some cases, disputes among separate counsel for a client can fragment representation, and displace authority to hire and fire lawyers usually held by the client. In other cases, advocates who have day-jobs as academics are caught between the disinterested analysis required in scholarly endeavors and the ubiquitous pressure on advocates to score points for a client or cause. Each kind of role conflict sacrifices crucial values on the altar of expedience.

1. *Conflicts Between Counsel.* Conflicts among counsel that are endemic to any representation can become more bitter in the detainee representation context because of the interaction of the two factors cited above: the high-profile

185. See SHEPHARD, *supra* note 140, at 61 (noting that in 1996 Omar Khadr's father and his wife "were delighted bin Laden and his followers were back in Afghanistan" and soon moved to a spot near bin Laden's compound, making regular trips there).

186. *Id.* at 207.

187. *Id.* at 211.

188. See *United States v. Schwarz*, 283 F.3d 76 (2d Cir. 2002). *But see Williams v. Meachum*, 948 F.2d 863 (2d Cir. 1991) (holding that a defendant could waive conflict of interest created because his lawyer also represented another individual who would be identified if current client mounted a "look-alike" defense).

nature of the representation and the inaccessibility of clients. Advocates have even more incentive to fight amongst themselves, without the client being able to serve as an effective referee.¹⁸⁹ In cross-over advocacy, the high-profile nature of the cases can promote such conflicts.

In Omar Khadr's case, for example, when Lt. Cmdr. Kuebler went to Canada and met with leaders of the opposition parties, Khadr's Canadian lawyer Edney resented Kuebler's referring to himself as "lead counsel." In response, Edney linked Kuebler and the Bush administration, complaining, "Here we have Canadian politicians choosing to speak to an American military lawyer who is not Omar's chosen lawyer . . . and who was appointed by the same U.S. authority that gave us Guantanamo and all its horrors."¹⁹⁰ Edney's jibe was particularly jarring because of Kuebler's demonstrated eagerness to offend the sensibilities of United States officials.¹⁹¹ However, when high-profile advocacy with the press and politicians is the lawyer's stock-in-trade, such conflicts among counsel are far more difficult to avoid.

As problematic as Edney's conduct may be, Kuebler's response was equally disturbing. On the occasion of this professional spat, Kuebler used the leverage that the military commission gives to JAG lawyers to bar Edney from seeing Khadr.¹⁹² Kuebler had no authority under the state ethical rules that govern lawyers to make this call. Generally, the client controls choice of counsel.¹⁹³ When conflicts vitiate the client's choice, the court will be the arbiter—not the lawyer's co-counsel. A defense lawyer should not assume a prerogative that rightfully belongs to his client and to the court. Here, again, however, the

189. Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 18 (2005) (noting importance of consultation with client).

190. See SHEPHARD, *supra* note 140, at 217.

191. See *supra* notes 141-47 and accompanying text (discussing Kuebler's circulation of conspiracy theory involving Khadr's alleged victim).

192. See SHEPHARD, *supra* note 140, at 217-18.

193. See *Wheat v. United States*, 486 U.S. 153, 158-59 (1988) (acknowledging importance of client's prerogative, while holding that court may intervene to prevent irreconcilable conflicts of interest that would undermine effective defense). *But cf.* Green, *supra* note 183 (arguing that Court in *Wheat* was too willing to second-guess client's choice).

inaccessibility of clients and the high profile of cases presents temptations that are difficult to avoid.

2. *Conflicts Between the Roles of Scholar and Advocate.* Conflicts of role are also troublesome for advocates who double as scholars. Scholars have an obligation to address competing positions and explain facts that appear to contradict their thesis. A scholar should be “disinterested and [advocate for] what she genuinely believes to be the best answer to the question.”¹⁹⁴ Litigators—even public interest litigators for whom pecuniary gain is manifestly not the guiding objective—pursue strategic calculation to maximize a client’s advantage.¹⁹⁵ A litigator is not required to, and indeed may be prohibited from, arguing her “best view” of the law in a case when such an argument would harm her client.

However, this contrast of ideal types masks a countervailing tension in practice. While openness to differing arguments is a scholarly virtue,¹⁹⁶ academics may lock themselves into a theory that fails to take opposing considerations into account.¹⁹⁷ After all, nothing spoils a good theory more than messy facts. Lawyers, in contrast, must be open to changing their theory of the case, if change would help their client.¹⁹⁸ The result can be a double dose of

194. See William Simon, *The Market for Bad Legal Advice: Academic Professional Responsibility Consulting as an Example*, 60 STAN. L. REV. 1555, 1576 (2008). While this subsection points out tensions between the roles of scholar and advocate, I recognize that academics serve a profoundly valuable function in public interest law, and should be commended for both work on behalf of a party and work for amici curiae. History is replete with illustrations, including Felix Frankfurter’s advocacy for the labor movement and Sacco and Vanzetti, and Anthony Amsterdam’s legal work opposing the death penalty and on the Guantanamo cases. Amsterdam and others mentioned here, including clinical law professors such as Muneer Ahmad, Mark Denbeaux, Joe Margulies, Martha Rayner, and Rick Wilson, and doctrinal faculty such as Neal Katyal and Jenny Martinez, have served capably, although tensions in role are in my view evident in the work of some of those mentioned.

195. See Simon, *supra* note 194, at 1576.

196. *Id.* (noting that academics should practice “openness and the continuous exchange of views among different perspectives” and embrace the premise that “willingness to reconsider one’s views [is] . . . a sign of self-confidence and integrity”).

197. See Margulies, *supra* note 26.

198. Of course, this commitment to change on a client’s behalf is sometimes honored more in the breach, particularly for cause lawyers who lack commitment to individual clients. See Deborah L. Rhode, *Class Conflicts in*

role confusion for academics who litigate.¹⁹⁹ The academic lawyer may permit her advocacy of a legal position to spill over into scholarly work, muting the discussion of opposing arguments necessary for scholarly analysis. On the other hand, the scholar committed to a theory may shirk the advocate's obligation to temper any theory when the client's interests so dictate.

a. *Role Conflicts and the Temptations of Agenda-Driven Empiricism.* Role conflicts also undermine detainee advocates' empirical work. Two detainee advocates whose legal work has been exemplary have crossed over into the realm of empiricism, authoring a study of detainee characteristics²⁰⁰ that seeks to impeach the outlandish claims made by the Bush administration that detainees uniformly represent the "worst of the worst."²⁰¹ In response, the study pushes the misadventure narrative, arguing that most detainees were in the wrong place at the wrong time. Unfortunately, the authors' selective use of statistics and sources fails standards for objective empirical work. These flaws also undermine the authors' advocacy position.

The detainee study's flaws have their roots in a latent conflict in advocates' rhetoric. Detainee advocates have rightly criticized the CSRTs at Guantanamo for a lack of procedural safeguards.²⁰² For the most part, the

Class Actions, 34 STAN. L. REV. 1183 (1982). Academic lawyers sometimes fit into this category.

199. See Simon, *supra* note 194, at 1576.

200. See DETAINEE STUDY, *supra* note 25.

201. See Lithwick, *supra* note 16.

202. As the previous subsection dealing with Hamdan's case demonstrates, I follow the lead of a number of courts in distinguishing between three forums: the pre-MCA military commissions, post-MCA military commissions, and CSRTs. Compare *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (holding that Congress could not preclude habeas corpus petitions for detainees because CSRTs did not have procedural safeguards that would allow them to serve as an adequate substitute for habeas), and *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (holding that President Bush lacked authority to unilaterally establish military commissions), with *Hamdan v. Gates*, 565 F. Supp. 2d 130, 132-33, 137 (D.D.C. 2008) (holding that military commissions authorized by Congress under Military Commissions Act had sufficient procedural safeguards to warrant abstention from federal court intervention). Courts have held that the first and third forums lack basic procedural guarantees. In contrast, courts have permitted proceedings in the second forum—post-MCA military commissions—to proceed subject to judicial review, in part because these proceedings possess

misadventure narrative fits well with the detainee lawyers' quest for more rigorous processes. Moreover, despite the hyperbole of the Bush administration, the misadventure story is often accurate. On occasion, however, events challenge this convenient dovetailing of innocence and process rhetoric.

In one recent case, a released Kuwaiti detainee named Abdallah Salih al-Ajmi who had earlier fought with the Taliban blew himself up in northern Iraq in a suicide bombing that killed members of Iraq's security forces.²⁰³ Of course, false negatives are inevitable in any process where adjudication is fair. However, a subtle but striking conflict in rhetoric emerged in the rationalization offered by the suicide bomber's former lawyer, Tom Wilner. Wilner impliedly conceded ground on innocence, since the "wrong place at the wrong time" narrative did not fit well for a suicide bomber.²⁰⁴ Denied ready use of the misadventure story, Wilner relied on the process narrative, arguing that more robust procedural safeguards would have caught false negatives, as well as false positives.²⁰⁵ While this point has an intuitive appeal, its merits turn on the implicit

indicia of fundamental fairness such as the right to procure and present exculpatory evidence.

203. See Josh White, *Ex-Guantanamo Detainee Joined Iraq Suicide Attack*, WASH. POST, May 8, 2008, at A18.

204. Wilner did capture some of the irrationality of release decisions, which can be capricious, leading to "innocent people being held unfairly and not-so-innocent people going home." *Id.* Wilner also argued that al-Ajmi's treatment at Guantanamo, which included altercations with guards, may have played a role in his post-release conduct. *Id.* However, al-Ajmi's move from Kuwait to Afghanistan to join the Taliban prior to his detention indicates he may have been predisposed to take such action.

205. *Id.* While al-Ajmi can appropriately be classified as a false negative, the government's claims of substantial recidivism among released detainees may well be exaggerated. See MARK DENBEAUX ET AL., THE MEANING OF "BATTLEFIELD": AN ANALYSIS OF THE GOVERNMENT'S REPRESENTATIONS OF "BATTLEFIELD" CAPTURE AND "RECIDIVISM" OF THE GUANTANAMO DETAINEES, available at http://law.shu.edu/news/meaning_of_battlefield_final_121007.pdf (last visited Aug. 27, 2008) (arguing that the government's list of recidivists covers not only released detainees who have allegedly engaged in violence but also those like the Uighurs, who are Chinese nationals (and ethnic Turks) re-settled in Albania). The re-settled Uighurs have merely criticized the United States, which should not land them on a list of recidivists.) *Id.* at 5, 9-10. However, even the authors of the study, which predates the al-Ajmi episode, concede that some recidivists have surfaced. *Id.* at 11-13.

recognition that the misadventure narrative is sometimes too good to be true.

Indeed, a careful look at the results of the detainee advocates' principal study together with the results of a more neutral empirical examination of tribunal transcripts²⁰⁶ illustrates the advocates' dilemma. The neutral study demonstrates that in a significant portion of the CSRT and ARB cases, undisputed evidence undercuts the misadventure narrative. Specifically, in about one-third of the cases where CSRTs found that detainees remained dangerous, detainees either admitted their involvement in Al Qaeda, the Taliban, or other terrorist groups in detailed statements, or else admitted facts indicating that they had committed hostile acts or had participated in Taliban or Al Qaeda facilities such as safehouses and training camps.²⁰⁷ In one case, for example, a detainee testified to the CSRT that he went to Afghanistan to fight with the Taliban in compliance with a fatwah from a Saudi cleric.²⁰⁸ While one might argue that this person was at best a foot-soldier whom it would be safe to release, the example of Wilner's client who engaged in a suicide bombing after release should give one pause.²⁰⁹

In contrast, although the rhetoric of the detainee advocates' study stresses the misadventure narrative,²¹⁰ the study's results illustrate the limitations of that claim. For example, the study's authors lead off their findings with the announcement that the government has charged that only eight percent of detainees were Al Qaeda fighters.²¹¹ It then

206. See WITTES, *supra* note 50.

207. *Id.* at 86-87.

208. *Id.* at 89.

209. Moreover, whatever the prudential factors favoring release, it seems absolutely clear that the Afghan government would have been able under the Geneva Convention to hold this detainee as a prisoner of war pending a resolution of the ongoing conflict with the Taliban. *Id.* at 92.

210. See DETAINEE STUDY, *supra* note 25, at 2.

211. *Id.* The authors have produced a valuable work on the procedural limitations of the CSRTs. See DENBEAUX & DENBEAUX, *supra* note 49. The CSRT study addresses procedural fairness, an area where lawyers tend to have greater expertise. The value of the CSRT study therefore does not hinge on quantitative analysis of the evidence against detainees, where the authors' Detainee Study runs into trouble. Similarly, the authors' study of the government's recidivism claims, see DENBEAUX ET AL., *supra* note 205, focuses on

informs the reader that of the *remaining number* of detainees, eighteen percent had no affiliation with either Al Qaeda or the Taliban. This rhetorical frame²¹² seems to favor the misadventure narrative, but flipping the percentages tells a different story: According to the government, fully *eighty-two percent* of the remaining detainees had ties to Al Qaeda or the Taliban.²¹³

The rest of the authors' discussion of detainees' Taliban involvement oscillates between non sequitur and selective sourcing. Instead of focusing as the more neutral study does on the details of the detainees' admissions, the advocates casually observe that the detainees "seem to be people not responsible for actually running the country."²¹⁴ Even if the advocates provided empirical backing for that claim, however, this observation would be beside the point. While the United States has a compelling interest in apprehending senior Al Qaeda and Taliban leadership, effective antiterrorism policy requires deterring operatives further down the food chain.²¹⁵

anecdotes and concedes the government's case on a number of examples. Moreover, its most convincing counter-example rests on a group of released detainees, the Uighurs, whose grievance lies with the Chinese government and who therefore are not a reliable placeholder for the vast majority of Guantanamo detainees. *See supra* note 205 (discussing the Uighurs); *cf.* Parhat v. Gates, 532 F.3d 834, 842 (D.C. Cir. 2008) (finding that the government has not met its burden under the Military Commissions Act of demonstrating that Uighurs still detained at Guantanamo have hostile intentions toward the United States).

The Uighurs's plight demonstrates the difficulties that will confront a new administration intent on emptying Guantanamo. The government concedes that the Uighurs have a legitimate fear of persecution or torture if they are returned to China. However, other countries are reluctant to accept them. United States efforts have resulted in placement of a number of detainees in Albania, but this arrangement has been far from optimal. *See* Jonathan Finer, *After Guantanamo, An Empty Freedom; Ethnic Uighurs Frustrated in Albania*, WASH. POST, Oct. 17, 2007, at A13 (describing Uighurs's discontent with delays in reunion with family members and other factors).

212. *See* Painter, *supra* note 116, at 1413-18 (noting how framing effects distort deliberation and analysis).

213. This number rises to 83.5% if one includes the eight percent of total detainees whom the government charges were Al Qaeda fighters. *See* DETAINEE STUDY, *supra* note 25, at 2.

214. *Id.* at 16.

215. *See* Linde v. Arab Bank PLC, 384 F. Supp. 2d 571, 583 (E.D.N.Y. 2005) (noting that Congress, in passing the Anti-Terrorism Act (ATA), 18 U.S.C. §§ 2331-38 (2006), which provides for civil liability for those who commit terrorist

The authors also manipulate secondary sources and data samples in asserting that “many” of the accused Taliban detainees were conscripts.²¹⁶ To analyze the conscription issue accurately, one must consider two groups: Afghans and foreign fighters. The secondary source the authors cite acknowledges that the Taliban drafted numbers of Afghans.²¹⁷ However, the authors fail to disclose that the same source *on the same page* indicates that the Taliban also utilized large numbers of foreign fighters.²¹⁸ Since non-Afghani Taliban members are unlikely to be conscripts, the authors’ conscription point simply does not apply to this group. Indeed, according to data available to but not cited by the authors, the “many” Taliban conscripts they claim amount to a mere thirteen individuals out of the scores of admitted Taliban members who have been detained at Guantanamo.²¹⁹

The authors’ non sequiturs and selective sourcing stem from the temporal discounting deficit that plagues crossover advocates. In seeking to rebut administration officials’ extreme claims, the advocates have carved out an unsustainable position of their own. The ubiquitous pie charts that populate the advocates’ study may impress readers in the short run.²²⁰ However, public and elite

acts, enacted the ATA as a civil remedy designed to impose liability “at any point along the causal chain of terrorism” including the provision of financial and other assistance) (citing S. REP. NO. 102-342, at 26 (1992) (Leg. Hist.)), available at 1992 WL 187372.

216. See DETAINEE STUDY, *supra* note 25, at 16.

217. See AHMED RASHID, TALIBAN: MILITANT ISLAM, OIL, AND FUNDAMENTALISM IN CENTRAL ASIA 100 (2000), cited in DETAINEE STUDY, *supra* note 25, at 16.

218. See *id.* at 100; *cf. id.* at 133-40 (discussing foreign fighters in Taliban); Milton Bearden, *Graveyard of Empires: Afghanistan’s Treacherous Peaks*, in HOW DID THIS HAPPEN? TERRORISM AND THE NEW WAR 83, 92-93 (James F. Hoge, Jr. & Gideon Rose eds., 2001); Thomas Hegghammer, *Terrorist Recruitment and Radicalization in Saudi Arabia*, 8 MIDDLE EAST POL’Y 38, 39 (Winter 2006); Lawrence Wright, *The Man Behind Bin Laden: How an Egyptian Doctor Became a Master of Terror*, NEW YORKER, Sept. 16, 2002, at 56 (discussing background of Al Qaeda leadership and recruits);

219. See WITTES, *supra* note 50, at 86.

220. Indeed, the pie charts and misleading statistics of the detainee advocates’ study may mask some common ground, as the study’s authors admit in passing that the government has reliable evidence for “some of the detainees.” DETAINEE STUDY, *supra* note 25, at 15.

opinion will eventually tire of this gamesmanship, eroding support for robust procedures which all should agree are crucial. Crossing over from advocacy to empirical work, the detainee advocates have failed at both.²²¹

The authors' most recent report also cites copious statistics on detainee releases while offering a highly selective view of the facts. See MARK DENBEAUX, JOSHUA DENBEAUX & R. DAVID GRATZ, *PROFILES OF RELEASED GUANTANAMO DETAINEES: THE GOVERNMENT'S STORY THEN AND NOW* (2008), http://law.shu.edu/center_policyresearch/reports/detainees_then_and_now_final.pdf [hereinafter *PROFILES STUDY*]. The authors note correctly that the government's release of detainees from Guantanamo does not appear to correlate with the nature of the detainees' alleged involvement with Al Qaeda. See *id.* at 2. The authors assert that the government makes release decisions based on the nationality of the detainees. *Id.* at 19-26. However, this assertion obscures far more than it enlightens. Delays in release have been most significant for three countries: China, Algeria, and Yemen. See *id.* at 23-25. The authors do not disclose that these delays stem from two factors: (1) the government's compliance with the provisions of the Convention Against Torture, G.A. Res. 39/46, at 197, art. 1, U.N. GAOR, 39th Sess., 97th plen. mtg., U.N. Doc. A/39/51 (Dec. 10 1984) [hereinafter *CAT*], and (2) the Yemeni government's poor track record in detaining convicted terrorists. The government has declined to repatriate any Chinese nationals and many Algerian nationals because of concerns that the detainees risk torture upon their return to their country of origin. See *Belbacha v. Bush*, 520 F.3d 452, 454 (D.C. Cir. 2008) (noting Algerian detainee's fear of torture); Del Quentin Wilber, *Chinese Detainees' Release is Blocked; Justice Dept. Seeks More Time for Appeal*, WASH. POST, Oct. 9, 2008, at A3 (noting Chinese detainees' fear of torture). Yemen's government, which has tried to mediate between the demand of the United States for vigorous counterterrorism measures and the support for terrorists among key constituencies that keep the government in power, has repeatedly permitted terrorists to escape from confinement. See Robert F. Worth, *Wanted by F.B.I., but Walking Out of a Yemen Hearing*, N.Y. TIMES, Mar. 1, 2008, at A3 (noting convicted terrorist's casual exit from court hearing because of arrangement with Yemeni government). The new administration will have to deal with these complex factors, but the authors of the study provide no help, preferring to play a game of "gotcha" with outgoing Bush officials.

221. Of course, the detainee advocates are neither the first nor the last to attempt to use faulty empiricism for advocacy objectives. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) (establishing standards for admission of scientific evidence); see also Margaret A. Berger & Lawrence M. Solan, *What's the Law to Do?: The Uneasy Relationship Between Science and Law: An Essay and Introduction*, 73 BROOK. L. REV. 847, 852-54 (2008) (discussing pervasiveness of methodological problems in empirical and scientific work generated by advocacy efforts).

Role conflicts have also afflicted scholars who served as advocates for detainees before the Supreme Court. For example, Jenny Martinez of Stanford, who represented Jose Padilla before the Supreme Court, has recently argued that the Court engaged in a troubling form of avoidance by declining to hear Padilla's habeas petition because it had been filed in a court lacking jurisdiction over Padilla's immediate custodian. See *Rumsfeld v. Padilla*, 542 U.S. 426

b. *Using Litigation to Settle Ideological Scores: The Lawsuit Against John Yoo.* Role conflicts are even more evident in the lawsuit against John Yoo in which the Yale Project represents Jose Padilla. The lawsuit seeks to impose tort liability on Yoo, a Berkeley law professor who as a

(2004); see also *Carbo v. United States*, 364 U.S. 611, 617 (1961) (announcing immediate custodian rule); cf. Martinez, *supra* note 4, at 1035-39 (criticizing Court). Padilla's lawyers, faced with the challenge of contesting the detention without clear statutory authorization of an American citizen, understandably preferred litigating in the Second Circuit, where Padilla was initially detained, to the more conservative Fourth Circuit, where Padilla was detained for much of the time. Martinez criticized the Court's decision on habeas jurisdiction without acknowledging that Padilla's lawyers could have readily addressed the procedural issue by litigating the case in the Fourth Circuit. This strategy would have ensured that the Supreme Court consider the substantive issues that Padilla had raised. Moreover, Martinez's article failed to cite the Court's earlier decision in *Carbo*, which should have been a red flag for Padilla's lawyers that litigating the procedural issue would ensnare their client in a procedural thicket.

In another recent example, Neal Katyal of Georgetown undermined arguments based on the "passive virtues" that he had successfully made to the Supreme Court in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (holding that President Bush lacked authority to unilaterally establish military commissions). Cf. Katyal, *supra* note 4, at 92-93; Alexander M. Bickel, *Foreword to The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40 (1961). But see Posner & Vermeule, *supra* note 110, at 1041-43 (suggesting that passive virtues may be overrated, at least when showdown now will minimize decision costs later). In the summer of 2008, Katyal sought an injunction against Hamdan's pending military commission trial. He did so even though Congress had addressed the lack of specific authorization and procedural safeguards that had led Katyal to label the military commissions unilaterally authorized by President Bush as a "dangerous experiment" frowned on by Bickelian prudence. See Petition for Certiorari at 30, *Hamdan*, [hereinafter Cert. Petition], available at http://www.law.georgetown.edu/faculty/nkk/documents/8-7-05_Cert_Petition.nk11.pdf. The district court denied the request for an injunction. See *Hamdan v. Gates*, 565 F. Supp. 2d 130, 132-33, 137 (D.D.C. 2008) (concluding that "Article III judges do not have a monopoly on justice, or on constitutional learning," after noting that the military commissions authorized by Congress requires that the accused be present for his hearing, permits the accused to obtain and present exculpatory evidence, and includes three levels of appellate review, including review by the D.C. Circuit and the Supreme Court); see also William Glaberson, *Terror Trial Nears End As Defense Rests Case*, N.Y. TIMES, Aug. 2, 2008, at A9 (reporting that Hamdan in his trial was able to offer exculpatory evidence, including statements from Al Qaeda higher-ups like Khalid Shaikh Mohamed (KSM) suggesting that Hamdan was a low-level player in the organization); Glaberson, *supra* note 98 (reporting that jury sentenced Hamdan to five-and-one-half years including time served, which could result in Hamdan's release in months). After the changes noted by the court in *Hamdan v. Gates*, 565 F. Supp. at 132-33, the passive virtues argument stressed in Katyal's scholarship evaporated, leaving strategic calculation as the basis for his request.

government lawyer offered infamous and substantively shaky legal advice on interrogation of terror suspects.²²² According to the complaint, by providing legal advice, Yoo was responsible for harsh treatment that Padilla experienced while in detention. Viewed broadly, the Yale Project's advocacy is an acknowledgment that law schools have a significant role to play in educating students about the shortcomings of Yoo's work. However, performing that role requires a commitment to the virtues of consistency, clarity, and concreteness. Sadly, the Yale Project's pleadings display none of these attributes.

The Yale Project's pleadings seek to force-fit Yoo's problematic legal opinion into facts that the opinion, for all of its severe flaws, does not contemplate or address. Yoo's opinion makes indefensible arguments about the scope of presidential authority, and also employs strained analogies to irrelevant sources of authority. However, it includes one hard limitation: geography. Yoo's advice, issued under the name of then Assistant Attorney General Jay Bybee, discussed only treatment of detainees *outside* the United States.²²³ The government at all times detained Padilla *within* the United States. The Yale Project's pleadings fail to recognize that Yoo's advice therefore excludes Padilla by its terms.

Second, the Yale Project pleadings actually undercut the core criticism of the Bybee Memo as a legal fig-leaf providing cover for abusive interrogations. To serve this purpose, the legal opinion must clearly authorize all of the measures that officials ordering the interrogations sought to implement.²²⁴ However, the Yale Project's pleadings do not

222. See FREDERICK A.O. SCHWARZ, JR. & AZIZ Z. HUQ, UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR 187-99 (2007); Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT'L SEC. L. & POL'Y 455 (2005); Gillers, *supra* note 26; George C. Harris, *The Rule of Law and the War on Terror: The Professional Responsibilities of Executive Branch Lawyers in the Wake of 9/11*, 1 J. NAT'L SEC. L. & POL'Y 409 (2005); Luban, *supra* note 26; Margulies, *supra* note 26; W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 80-85 (2005); W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167 (2005).

223. See Bybee Memo, *supra* note 61 (limiting advice to "conduct of interrogations outside of the United States"). A more recent memo by Yoo contained the same territorial limitation. See Yoo Memo, *supra* note 61.

224. An ambiguous or equivocal opinion suggests the need for caution, and therefore does not provide a safe harbor for aggressive tactics.

allege this congruency between legal advice and conduct. Indeed, deconstructing the pleadings' amorphous syntax yields a conclusion that cuts against Yoo's liability. The pleadings contend that the harm suffered by Padilla while in detention flowed from "a deliberate unwritten understanding"²²⁵ and a "climate"²²⁶ "fostered by the promulgation of [Yoo's] memoranda."²²⁷ Common sense suggests that a supposedly authoritative opinion that merely "foster[s]" an "unwritten understanding" is not very authoritative at all, and therefore fails abjectly as a fig-leaf. Ironically, the internal inconsistencies and amorphous language of the Yale Project's pleadings appear to let Yoo off the hook.

In another non sequitur, the Yale Project's pleadings claim that Yoo should be liable for use of the few techniques that his narrow advice clearly bars. The pleadings allege that Yoo authorized or at least "fostered" "imminent" threats to Padilla's life and health, as well as the life and health of Padilla's family.²²⁸ We have already discussed how the amorphous connotation of the term "fostered" actually undercuts the complaint's theory of liability regarding Yoo's legal advice.²²⁹ However, the complaint cannot use a more concrete term to tie imminent death threats against Padilla to Yoo, since Yoo's advice clearly prohibited such threats.²³⁰

225. See Padilla Complaint, *supra* note 5, at para. 63.

226. *Id.* at para. 104.

227. *Id.* at para. 63. The Yale Project filed an amended complaint on Padilla's behalf in June 2008 that echoes these problems. See Padilla v. Yoo, First Amended Complaint, No. 3:08-cv-00035-JSW (N.D. Cal. 2008) [hereinafter Amended Complaint] (copy on file with the author). The amended complaint omitted the charge that Yoo "fostered" a "climate." However, it included claims that Yoo's memos "encouraged aggressive interrogation," see Amended Complaint para. 32, and gave a "green light" to such tactics. *Id.* at para. 47. These terms are as vague as the language they replaced.

228. Padilla Complaint, *supra* note 5, at para. 57.

229. See *supra* notes 225-27 and accompanying text.

230. See Bybee Memo, *supra* note 61, at 182 (citing 18 U.S.C. § 2340(2)(C) (2000) and advising that threats of "imminent death" are expressly prohibited). Yoo did provide interrogators with some room on this point, since he authorized threats that were hypothetical and contingent, "referring vaguely to things that might happen in the future." *Id.* However, the Padilla Complaint did not allege that interrogators made threats of this kind to Padilla. It alleges only "imminent" threats, which Yoo clearly advised were illegal.

Yoo's opinion also clearly barred threats the interrogators allegedly made to cut Padilla with a knife and pour alcohol into the wounds.²³¹ Yoo pegged the definition of torture to harm that would constitute an emergency medical condition requiring a hospital to provide treatment.²³² While commentators have rightly criticized the narrowness of Yoo's definition and his strained analogy to health care statutes,²³³ a knife wound would clearly meet even this painfully circumscribed standard. Here, too, the complaint undermines the theory of liability that it purports to advance.

If one looks beyond the surface of the Yale Project's pleadings, however, one finds a more ominous iteration of the temporal discounting deficit. The complaint's drafters understand the objections made above, which is why they alleged that Yoo's advice merely "fostered" the conduct alleged. In the short run, claiming that Yoo fostered harm to detainees patches over fatal flaws in the complaint. A longer-term perspective, however, reveals deeper problems with the complaint's lack of concreteness.²³⁴

Yoo also opined that the interrogator needed to make threats or commit other harm with the specific intent to cause pain to the subject. Bybee Memo, *supra* note 61, at 174-75. However, Yoo noted that a jury can consider context, including the probability that the detainee will experience pain, as evidence of specific intent. *Id.* at 175 ("[A]s a matter of practice in the federal criminal justice system it is highly unlikely that a jury would acquit in such a situation. Where a defendant holds an unreasonable belief, he will confront the problem of proving to a jury that he actually held that belief."). Yoo's March 2003 opinion contains virtually identical language. See Yoo Memo, *supra* note 61, at 30 ("[S]pecific intent . . . can be inferred from the factual circumstances."). Because of this caveat, Yoo's advice on specific intent also could not have served as a fig leaf for interrogators.

231. See Padilla Complaint, *supra* note 5, at para. 50(b).

232. See Bybee Memo, *supra* note 6, at 176 (citing 8 U.S.C. § 1369 (2000); 42 U.S.C. § 1395w-22 (2000)).

233. See Clark, *supra* note 222; Margulies, *supra* note 26; cf. Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931, 1975-76 (2008) (arguing that the manifest failings of Yoo's legal advice did not stem from eagerness to please superiors or failure to take a moral stand, but rather from Yoo's misguided zeal to create a new legal approach for dealing with genuine threats).

234. The one dollar of damages sought by Padilla highlights the lack of concreteness in the complaint, instilling the impression that the lawsuit is more about proving a point than about either compensation or deterrence.

Lawyers in a democracy should question attempts to tie legal liability to vague claims that individuals have “fostered” adverse consequences. American history is replete with amorphous doctrines—such as the now discredited “bad tendency” test for limiting speech²³⁵—that allowed government to target individuals. Given Yoo’s poor legal advice, it may seem fitting in the short term to apply such an indefinite standard to him. Courts repudiated the “bad tendency” test precisely because what seems convenient or fitting in the short term can have dangerous long-term effects. At the very least, the Yale Project drafters had an obligation to deliberate about the trade-offs reflected in their pleadings. Unfortunately, the fuzzy language and logic of the complaint offer abundant evidence of deliberation’s absence.²³⁶

V. NEGATIVE EXTERNALITIES AND THE UNINTENDED CONSEQUENCES OF CROSSOVER ADVOCACY

Crossover advocacy also can entail a failure to adequately address the complexities of legal transitions. Players in legal disputes form a fluid environment in which unpredictable consequences abound.²³⁷ Crossover advocacy can boomerang, as legal innovations designed to help clients are transformed and adopted by opponents. Advocacy efforts can also result in an adversary’s exit to a more receptive realm where advocates have less leverage. In addition, crossover advocacy can trigger a backlash which hurts the cause that advocates are promoting.

235. GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 171 (2004) (discussing courts’ rationale for upholding government targeting of dissenters after America’s involvement in World War I) (citing *Shaffer v. United States*, 255 F. 886, 887-89 (9th Cir. 1919)).

236. The Yale Project has done other exemplary work, including filing an amicus brief arguing for limits on the government’s ability to detain people within the United States. See *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008).

237. See GOLDSTEIN, *supra* note 46, at 195 (describing then-President-elect Clinton’s about-face on Haitian refugees).

A. *Substantive Boomerang Effects*

Boomerang effects are a fixture of the advocacy landscape. Once advocates introduce a theory, they lose control over its use. The theory becomes a weapon that opponents can wield against the advocates' cause or allies.

As a case in point, consider the argument for formal racial equality made by the NAACP lawyers who brought the landmark desegregation cases of the twentieth century. In arguing against the evil of de jure segregation, these advocates insisted that the Constitution was "color-blind."²³⁸ Civil rights leaders like the Rev. Martin Luther King, Jr. refined the concept, envisioning a world where people would be judged by the "content of their character," not their race. While this powerful rhetoric accomplished much, it also opened up a line of attack for opponents of affirmative action to exploit.

One example from the terrorism context is the use of theories of aiding and abetting liability for damage actions. Plaintiffs advanced a theory of aiding and abetting liability in extraordinary rendition cases, where plaintiffs have alleged that they were delivered to foreign countries for the purpose of torture.²³⁹ Aiding and abetting liability is also an important plaintiffs' argument in the lawsuit against John Yoo. The theory has also figured in other human rights contexts, for example, in cases alleging that corporations doing business abroad should be answerable under the Alien Tort Statute (ATS).²⁴⁰ In some cases, this kind of litigation will discover an actionable pattern of collusion between a despotic government and corporations that use

238. Rachel F. Moran, *Loving and the Legacy of Unintended Consequences*, 2007 WIS. L. REV. 239, 261-64 (arguing that rhetoric of landmark civil rights decisions allowed courts to decline to remedy social, political, and economic harms, which courts viewed as "color-blind," i.e., not based on race).

239. See *Arar v. Ashcroft*, 532 F.3d 157, 199 (2d Cir. 2008) (Sack, J., concurring in part and dissenting in part) (repeating appellant's allegation that United States officials aided and abetted alleged torture committed by Syrian authorities by rendering him to Syria).

240. See *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007). Victims of terrorist attacks have also sought to invoke theories of aiding and abetting liability to secure compensation for harm and promote deterrence of future attacks. See *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685 (7th Cir. 2008) (recognizing aiding and abetting liability). The author was co-counsel for amicus curiae Families of September 11 Victims in *Boim*.

government muscle to maintain abusive labor practices. In other cases, however, a corporation may simply be doing business in a generic manner, without affirmatively colluding with the regime. Liability in the latter case can have unintended consequences.

A legal standard that dictated liability in the second situation may harm others, such as Muslim Americans who have unwittingly contributed to groups that the government later claims are allied with terrorist organizations.²⁴¹ Where an individual has knowingly provided assistance to a group such as Hamas with an ongoing commitment to violence, such liability is appropriate. However, an expansive standard could trigger liability, even where there was no evidence that defendants aided terrorist acts, their assistance was de minimis, and the contribution was remote in time from the harm alleged.

Crossover advocacy may also boomerang by unduly limiting the options of future presidents who seek to achieve goals rightly praised by progressives. A future president may wish to intervene to stop genocide in the Sudan or elsewhere.²⁴² However, even given that some curbs on the president are necessary and desirable, an unduly rigid regime could preclude such action.²⁴³ Arguments used against the president in one administration are then available for use against another president with very different goals: John Yoo was a vigorous critic of President Clinton's participation in the NATO intervention in Kosovo, pronouncing it a product of presidential fiat.²⁴⁴ Similarly,

241. See Nina J. Crimm, *High Alert: The Government's War on the Financing of Terrorism and Its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy*, 45 WM. & MARY L. REV. 1341 (2004) (discussing policy consequences of antiterror legislation).

242. See James Rainey, *Time to Make Candidates Answer on Iraq*, L.A. TIMES, June 26, 2008, at A21 (describing views of Senator Obama and Democrats).

243. See Margulies, *supra* note 26 (analyzing separation of powers in context of intervention to stop genocide).

244. Admittedly, Yoo's critique is an idiosyncratic hybrid of his enthusiasm for presidential power and his disdain for international institutions. According to Yoo, President Clinton could have intervened in Kosovo under virtually any circumstances *except* those that reflected his view that placing American troops within NATO's multinational command was the most effective path for military action. John C. Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 U. PA. L. REV. 1673, 1709-14 (2000).

while the Bush administration's missteps have highlighted the importance of transparency, sometimes secrecy is crucial in national security legal advice.²⁴⁵ President Obama has continued the practice of the Bush administration in authorizing military strikes in Pakistan.²⁴⁶ A president deciding on such a course might wish to obtain a legal opinion supporting the legality of such a move, which would ordinarily trigger concern about the use of unjustified force against a sovereign state, compliance with the War Powers Resolution, or the limits of presidential power. The necessity to disclose such legal advice would, needless to say, compromise the mission and preclude achievement of the objective.²⁴⁷ While advocates should guard against government overreaching, they should also recognize that a fresh attack on the United States would grant new purchase to discredited Bush administration policies.

Crossover advocates' targeting of Yoo and other administration officials also threatens political polarization, of the kind that was routine during the era of the Independent Counsel statute.²⁴⁸ Prosecuting senior officials for war crimes might trigger prosecutions of political officials of the other party in a subsequent administration. The imperatives of partisan payback might squeeze out any hope of bipartisan problem-solving.

A legal regime dominated by payback could also be more volatile and less transparent. Officials concerned about legal exposure might freeze out agencies like the Office of Legal Counsel that leave a paper trail.²⁴⁹ Officials

245. See, e.g., Kathleen Clark, *Government Lawyers and Confidentiality Norms*, 85 WASH. U. L. REV. 1033 (2007) (analyzing issues).

246. Karen DeYoung & Joby Warrick, *Drone Attacks Inside Pakistan Will Continue, CIA Chief Says; Panetta Call Strikes 'Successful' at Disrupting Insurgents*, WASH. POST, Feb. 26, 2009, at A10.

247. See William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 679-81 (2003); cf. Karen DeYoung & Joby Warrick, *supra* note 246.

248. See Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 589-94 (2005).

249. The potential for freeze-out is a weakness of proposals to make the Office of Legal Counsel a free-standing quasi-judicial entity. See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2336-40 (2006) (advancing proposal); cf. Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV.

might also engage in more satellite crimes such as obstruction and perjury to cover up wrongdoing. At the same time, reduced access to legal advice might encourage inappropriately aggressive policy initiatives. The net result could be more recklessness accompanied by less disclosure.

B. *The Adversary's Exit*

Crossover advocacy is also ineffective when advocates fail to recognize that officials subjected to heightened constraints in one realm can resume their activities elsewhere. Ronald Coase observed this phenomenon decades ago, when he noted that parties inhibited by legal rules could contract their way around the rules, as long as transaction costs were low.²⁵⁰ More recently, attempts to make institutions such as psychiatric hospitals more humane have encountered unforeseen complications, as governments reacted by dumping patients on the streets or shifting institutional populations to other settings, such as jails and prisons.²⁵¹

Exit is a pervasive but often overlooked concern in the war on terror. For example, shutting down Guantanamo means little if the government is able to move future detainees to Bagram Air Base, the island of Diego Garcia, or other sites where accountability is more elusive.²⁵² Professional or liability rules that forbid psychologists from participating in any interrogations of war on terror detainees lose significance if the government can use in-house interrogators who have fewer scruples and no commitment to transparency.²⁵³ If state legal ethics regulators became unduly intrusive in seeking to discipline errant federal government lawyers, the federal government might ultimately set up its own licensure provisions and

865, 896-909 (2007) (criticizing Katyal's suggestion, while acknowledging importance of other less formal methods for ensuring deliberation within executive branch).

250. Jolls, *supra* note 8, at 4-5.

251. See Peter Margulies, *The New Class Action Jurisprudence and Public Interest Law*, 25 N.Y.U. REV. L. & SOC. CHANGE 487, 515 (1999).

252. See RICHARD POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 59 (2006).

253. See Carey, *supra* note 85.

have its lawyers opt out of state systems, as the Supremacy Clause would most likely allow the government to do.²⁵⁴

C. Backlash

Crossover advocacy involving international or foreign forums can also spark mobilization for opposing forces with greater power. Advocacy fails if addressing one problem creates an even more formidable obstacle. Unfortunately, here, as elsewhere, the temporal discounting deficit plays a substantial role, encouraging advocates to overweigh immediate success and underestimate the consequences of backlash.

To illustrate how a predictable response by the political branches can make matters worse for those similarly situated to clients, consider the 1990s Haitian HIV litigation involving Guantanamo. In part because the lawsuit brought by the Center for Constitutional Rights (CCR) and the Yale Human Rights Clinic raised the profile of Haitian refugees and immigrants with HIV, the political branches took two momentous steps. First, Congress expressly wrote into the Immigration and Nationality Act (INA) an exclusion for people with HIV.²⁵⁵ Second, the executive branch expanded its policy of interdicting vessels carrying Haitians on the high seas, and summarily returning passengers to Haiti.²⁵⁶ Although precursors to these policies had been in place at the beginning of the lawsuit, action by Congress and the president made the policies far more pervasive.²⁵⁷ The publicity generated by

254. See Nancy J. Moore, *Intra-Professional Warfare Between Prosecutors and Defense Attorneys: A Plea for an End to the Current Hostilities*, 53 U. PITT. L. REV. 515 (1992) (warning that state ethics regulation can unduly chill prosecutors, or even prompt federal exit from realm of state professional regulation).

255. 8 U.S.C. § 1182(a)(1)(A)(i) (2006). A waiver is available for this provision, but the waiver is limited in its reach. § 1182(g)(1) (providing for waiver for close relatives of United States citizens or lawful permanent residents); see also April Thompson, *The Immigration HIV Exclusion: An Ineffective Means for Promoting Public Health in a Global Age*, 5 HOUS. J. HEALTH L. & POL'Y 145, 155-58 (2005).

256. The Supreme Court upheld the interdiction policy in *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993).

257. The HIV immigration exclusion, for example, had been regulatory, not statutory, before the lawsuit. It had also been in relative desuetude, without provisions for automatic HIV testing, which the government started after

the lawyers in the case helped to free the detainees, but also galvanized an adverse political response with significant long-term adverse effects for prospective immigrants with HIV and refugees. Unfortunately, the self-serving bias impeded advocates' ability to appreciate that their own well-intentioned efforts had contributed to these adverse consequences. As another example, consider recent efforts by CCR to initiate legal proceedings against former Defense Secretary Rumsfeld and others through the invocation of universal jurisdiction in France and Germany.²⁵⁸ The argument for such efforts is that they create accountability for senior officials who made decisions that violated rights and hurt America's reputation. The downside of such efforts, however, is that they have a counter-productive effect on mobilization domestically. An effective transition from the monolithic approach of the post-9/11 period requires a consensus between different political factions. Recourse to universal jurisdiction will not further a consensus of this kind. Indeed, recourse to universal jurisdiction and international forums too often discounts the importance of domestic political participation. Federalism, for example, is a powerful political force domestically that also carries weight in the American legal system, but receives far less recognition in international forums.²⁵⁹

Congress enacted the statutory exclusion. See Thompson, *supra* note 255, at 155-58.

258. See Center for Constitutional Rights, *supra* note 63; cf. Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 GEO. L.J. 1057, 1107-08 (2004) (arguing for democratic legitimacy of universal jurisdiction, but acknowledging difficulties caused, *inter alia*, by lack of accountability of nongovernmental organizations).

259. See *Medellin v. Texas*, 128 S. Ct. 1346 (2008). *But see* Ingrid Brunk Wuerth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered*, 106 MICH. L. REV. 61, 73-82 (2007) (arguing for more robust role for international law in informing judicial decisions and constraining political branches). See generally John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1226-28 (2007) (arguing that canon requiring that courts construe statutes to avoid violations of international law imports norms with less legitimacy and guarantees of "quality" than decisions by president). In general, I would favor a more robust rule for international law than the limited view outlined by McGinnis. My concern here is largely with the practical and political consequences of recourse to international forums when courts permit Congress and (to a lesser degree) the states to act contrary to international law. See *Whitney v. Robertson*, 124 U.S. 190 (1888) (holding that Congress is free under "last-in-time" rule to modify United States obligations under international law, as it could modify effect of previously enacted statute); cf. William S. Dodge,

Using these forums to try Americans will not encourage political participation aimed at a progressive consensus; indeed, such measures will encourage a domestic political backlash. Asserting universal jurisdiction in foreign tribunals will often set up an “us versus them” dialectic that will discredit forces for change at home.²⁶⁰ It may also encourage officials to stay in power, rather than retire gracefully, thus making for more volatile legal and political processes and rockier transitions.²⁶¹

Finally, crossover advocates seeking accountability for United States officials from another sovereign’s tribunals may underestimate the ability and inclination of Congress to reject international obligations.²⁶² Congress has this power under the last-in-time rule.²⁶³ Legislative measures would create grave obstacles to adjudication in foreign tribunals.²⁶⁴ Even more seriously, a political backlash could target international law remedies currently available in American courts.²⁶⁵ Unfortunately, even the most able

Customary International Law and the Question of Legitimacy, 120 HARV. L. REV. 19, 25-27 (2007) (discussing doctrine).

Advocates’ disdain for federalism concerns may also trigger greater *recognition* of federalism in international forums, which may erect barriers for litigants to minimize the need to impose otherwise intrusive relief on states. See Starr, *supra* note 11. This may be a positive trend for the development of international law. However, from the crossover advocate’s perspective, international forums’ recognition of federalism is yet another boomerang effect. See, e.g., *Loewen Group, Inc. v. United States*, 42 I.L.M. 811 (ICSID 2003) (holding that Canadian corporate defendant seeking remedy in international trade tribunal for American state court jury verdict that appeared to violate international law was required to exhaust remedies within United States legal system).

260. Cf. Steven Pinker, *The Moral Instinct*, N.Y. TIMES, Jan. 13, 2008, Magazine at 32 (leading theorist of psychology of language asserts that most people seem to view as “repugnant” the act of saying “something bad about your nation (which you don’t believe) . . . in a foreign nation”). While sincerity in the speaker may ease this repugnance, it may not eliminate a negative reaction.

261. See MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 133-36 (2007); cf. Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 2015 (2004) (discussing risks to democracy posed by undue reliance on international forums and norms).

262. See *Whitney v. Robertson*, 124 U.S. 190 (1888).

263. See *id.* at 194.

264. For example, action by Congress could frustrate investigation, discovery, and compulsory process to procure witness’ testimony at trial.

265. These include remedies under the Alien Tort Statute (ATS) that have provided accountability for human rights violators around the globe. The

crossover advocates sometimes fail to appreciate that mobilization is a two-way street: advocates who sharpen their mobilization game inspire adversaries to do the same.²⁶⁶

VI. MAKING SENSE OF CROSSOVER ADVOCACY: TOWARD A MOBILIZATION METRIC

The discussion of crossover advocacy's virtues and vices demonstrates that this brand of advocacy is both promising and perilous. At its best, crossover advocacy enhances the voices of clients and seizes the initiative from overreaching government officials. In displaying these attributes, it compensates for the diminution in access to court that often accompanies national security crises such as September 11. However, the advocate's migration from the judicial realm to the eclectic world of crossover forums can also reduce lawyer accountability, foment conflicts of interest and role, and unleash a hail of adverse externalities. This section suggests a mobilization metric to better govern the lawyer's tactical choices.

A. General Principles

As a prelude to presenting this metric, I advance three premises: first, the foreseeable consequences of mobilization, including the responses of adversaries and third parties, are endogenous to the decisions of crossover advocates. Second, crossover advocates are prone to error in

possibility of backlash is one concern about the litigation in *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007), where the plaintiffs sought to impose liability on a corporation that sold earth-moving machinery to the U.S. government for shipment to Israel. While some of the machinery was apparently used in the course of destroying the homes of suspected Palestinian terrorists, much of it presumably was used for a wide range of uncontroversial construction projects. Liability under the ATS should hinge on a more active partnership between the defendant and a government pursuing unjust policies. If the court had not dismissed the lawsuit on procedural grounds, Congress would have been forced to act to preserve the political branches' control over the content of aid packages to other nations—a core foreign policy concern.

266. See GOLDSTEIN, *supra* note 46, at 129 (describing the indignation of long-time CCR director Michael Ratner upon learning that advocates' efforts to regulate asylum procedures for Haitians detained at Guantanamo in the early 1990s had led to policy of interdicting refugees at sea and repatriating them, an action the Supreme Court upheld in *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993)).

assessing those consequences because of asymmetric accountability and the temporal discounting deficit. Third, to cope with the risk of error, the crossover advocate's tactics must continually evolve, allowing the advocate to exploit new opportunities. The next subsection explores these premises in greater depth. The following subsection advances a mobilization metric to help ensure advocates' fidelity to the premises stated.

1. *Lawyers and the Endogenous Consequences of Mobilization.* The lawyer embarking on mobilization must consider all of the potential consequences, both intended and unintended. To facilitate such deliberation, the advocate should analyze *ex ante* how a lawyer's move aligns incentives for adversaries.

When externalities like boomerang effects, exit, and backlash are foreseeable, the crossover advocate must tailor her decisions accordingly. For example, the advocate pressing for the closure of Guantanamo should have a Plan B if the government seeks to place more suspected terrorists in the custody of foreign governments that are less accessible to United States justice and public opinion. The crossover advocate must also appreciate that her efforts at mobilization may crystallize opposition, as occurred with the HIV exclusion and the government's interdiction policy in reaction to the Haitian refugee concerning Guantanamo litigation in the early 1990s. While the advocate does not bear sole responsibility for such adverse developments, she cannot afford to view the government's responses as exogenous to her strategic decisions.²⁶⁷

2. *The Ubiquity of Cognitive Bias.* Once the lawyer accepts responsibility for consequences, she must still neutralize the cognitive errors that plague deliberation. Countering the temporal discounting deficit should head the crossover advocate's internal agenda. In court, the constellation of rules acts as a backstop for the advocate.

267. This does not mean that the lawyer's default position should be relying on traditional advocacy or doing nothing. Obviously, these choices have opportunity costs, as well. However, the lawyer should strive to identify net costs from each course of action. Cf. Roger C. Park & Michael J. Saks, *Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn*, 47 B.C. L. REV. 949, 992 (2006) (discussing Bayes's Theorem and assessments of probability for different scenarios).

Because of asymmetrical accountability mechanisms, the crossover advocate is on her own. However, the lack of rules in crossover venues may tempt the advocate to emulate Icarus, flying too high without recognizing that a hard landing is closer than it appears. Consider here how Clive Stafford Smith seized the chance to critique conditions at Guantanamo by telling a reporter that his client would do anything for release, including pleading guilty to being the pope.²⁶⁸ Only later—if at all—did Smith appreciate that his attempt at sarcasm may have prejudiced his client's efforts for a plea bargain. A commitment to ferreting out short- and long-term consequences is one corrective for the crossover advocate's susceptibility to cognitive miscues.

3. *Crossover Lawyering and Coping with Transitions.* A lawyer who corrects for cognitive miscues is also better situated to consider the need for evolving tactics that exploit transitions. At strategic pivot points, once-successful tactics yield diminishing returns. Nevertheless, opportunities arise to consolidate gains or hedge against further deterioration in a legal position. For example, in the Haitian Guantanamo litigation, while many of the Yale law students were focusing on rarefied legal arguments, Michael Ratner and student Michael Wishnie hammered out agreements with the government regarding re-settlement of pregnant and severely ill detainees in the United States.²⁶⁹ This work was far from glamorous, but it helped clients in severe need receive the treatment and services they required. Recognizing these pivot points is crucial, since opportunities are elusive and attention spent on modes of advocacy that have outlived their usefulness generates opportunity costs for clients.

B. *The Mobilization Metric*

Honoring the above principles is easier with a model or symbolic terminology that isolates variables the lawyer should consider.²⁷⁰ I call the formula advanced in this

268. Bonner, *supra* note 88.

269. See GOLDSTEIN, *supra* note 46, at 172-75.

270. For other examples of modeling on lawyering and related issues, see Peter Tillers, *Webs of Things in the Mind: A New Science of Evidence*, 87 MICH. L. REV. 1225, 1229 (1989) (reviewing DAVID SCHUM, *EVIDENCE AND INFERENCE FOR THE INTELLIGENCE ANALYST* (1987)) (discussing Bayesian probability theory

subsection a mobilization metric. The metric seeks to overcome cognitive biases such as the temporal discounting deficit, honing lawyers' choices about the rewards and risks of crossover advocacy. There is a great deal of play in the joints in these calculations. Nevertheless, focusing on the values of these variables and how they interact helps to guide deliberation about phenomena that the crossover advocate must address.

1. *Crossover Variables and the Mobilization Metric.* The mobilization metric considered covers the entire range of the crossover advocacy repertoire. It includes advocacy in the media and in international forums. It also encompasses lawsuits that function as cogs in broader campaigns such as the lawsuit against Caterpillar, Inc.²⁷¹ and actions seeking damages for extraordinary rendition.²⁷² In addition, it covers efforts to assert universal jurisdiction in the courts of other sovereign nations, such as CCR's attempts to initiate proceedings in Germany and France against Donald Rumsfeld.

One side of the formula considers three factors: first, the probability of the innocence of the detainee (P); second, the treatment of the detainee, including both subjection to physical coercion and the risk of unfair procedures (T); and, third, the gravity of the maximum sentence that could be imposed or other harm to the client (G). The other side of the formula considers the opportunity value (O) of

and evidence law, author describes numbers and symbols as "special kind of grammar or language" aimed at enhancing understanding and analysis of problems, but not requiring quantitative approach to validate this language). Cf. Richard R.W. Brooks & Warren F. Schwartz, *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine*, 58 STAN. L. REV. 381 (2005) (modeling approach to remedies); Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1599-1602 (2004) (critiquing formula's assumption). *But see* Ronald J. Allen & Brian Leiter, *Naturalized Epistemology and the Law of Evidence*, 87 VA. L. REV. 1491, 1507-08 (2001) (expressing skepticism about use of Bayes's Theorem as a technique for evaluating the reliability of evidence, based on the subjective calculations inherent in application of the theorem); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

271. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007).

272. *See Arar v. Ashcroft*, 532 F.3d 157 (2d Cir. 2008).

mobilization²⁷³ and the ease of an adversary's exit (E) from attempted reforms.²⁷⁴

Under the mobilization metric, crossover advocacy is appropriate where $P(T + G) > O + E$.

2. *The Mobilization Metric in Practice.* Like advocacy strategies, formulas can appear deceptively plausible in the abstract. However, implementing the formula is the only reliable test of its usefulness. I apply the mobilization metric to several examples in the following subsections.

a. *Opportunity Costs and Omar Khadr's Case.* To see how the metric plays out, consider the case of Omar Khadr. Let us assume that Khadr, who was apprehended in battle by United States forces, is not a false positive—a relief worker or journalist who was merely in the wrong place at the wrong time. We'll stipulate to a P value of .5 for Khadr. Let's assign T a value of 1, since Khadr may not have faced treatment as outrageous as other detainees, and one court declined to find that he had been abused,²⁷⁵ but evidence suggests that his treatment was clearly poor at some point and the procedures in place pre-*Hamdan* for adjudicating his case before the military commission were unfair. Let's assign G a value of 2, at least as of the time that Khadr faced the death penalty. At that juncture, our calculus for the left side of the formula would be $.5(1 + 2) = 1.5$.

On the other side of the equation, we have an O value of 1, for efforts in international forums that might distract the

273. Opportunity costs can include an adversary's diminished willingness to negotiate when the advocate fails to practice candor, as well as boomerang effects, such as the possibility that unconstrained standards of aiding and abetting liability applied to human rights violators will adversely affect international charitable organizations that must operate in countries controlled by despotic governments. However, O can also include a *gain* in opportunities to further the advocate's cause, such as opportunities to refine the advocacy organization's expertise and signal its long-term commitment to addressing a problem. For purposes of the metric, O's valuation in this latter case would be negative. See *infra* notes 281-82 and accompanying text.

274. Exit would include the government's use of foreign nations to detain suspected terrorists if Guantanamo were closed, or United States diplomatic or litigation efforts to scuttle other nations' assertion of universal jurisdiction. Exit would also encompass action by the Congress to modify United States compliance with international law under the last in time rule or amend statutes such as the Alien Tort Statute that provide a remedy for human rights violations.

275. *O.K. v. Bush*, 377 F. Supp. 2d 102 (D.D.C. 2005).

advocate from more promising traditional tactics, including proffers of cooperation and expressions of remorse.²⁷⁶ E would be zero, since the government's only exit here would be returning Khadr to Canada, which would make him better off.²⁷⁷ If the lawyer avoided conspiracy theories but advocated for her client in international forums, as Khadr's first lawyers did, then the metric would yield the following result: $.5(1 + 2) [1.5] > 1$. Under the metric, crossover advocacy involving international forums would be appropriate. Indeed such advocacy was successful, at least in taking the death penalty off the table.

To see how a mobilization metric indicates a pivot point when circumstances change, consider the revised situation in Khadr's case after the death penalty was out of the picture. Here, P is still .5. T is still 1. However, with the removal of the death penalty from the equation, now G is also 1. Under our rubric, $.5(1 + 1) = 1$. Here, the lawyer must also consider the opportunity cost ($O = 1$) of placing all her eggs in the basket of international advocacy, and neglecting the cooperation option. At this juncture, since $.5(1 + 1) [1] = 1$, $P(T + G)$ is *not* greater than $O + E$. The lawyer should be prepared to give her client the bad news that the international law forums have outlived their usefulness, unless the client sweetens the deal with a proffer of cooperation.

b. *Suing Yoo*. As another illustration of how the metric works, consider the Yale Project's representation of Jose Padilla in his lawsuit against John Yoo. P would reflect that Padilla had been convicted of terrorism charges in federal court at the time of the lawsuit's filing, but that the conviction was based on attending a terrorist training camp, not on seeking to build a radiation-filled (or "dirty") bomb, as the government claimed when it first detained Padilla. This would put P at .5, the halfway point between clear

276. The O value would be 2 for more aggressive tactics, such as the unsupported accusations of a conspiracy to kill civilians made by Khadr's current lawyer William Kuebler. These accusations could generate ill will in the tribunal, and could even pave the way for the advocate's replacement.

277. In cases where detainees fear torture or persecution in their native countries if the United States tires of detaining them at Guantanamo, advocates must argue for the government's compliance with international obligations such as those under the Convention against Torture, *see* CAT, *supra* note 220, or must seek an injunction against their repatriation pending resolution of their habeas claim. *See, e.g.,* Belbacha v. Bush, 520 F.3d 452, 458-59 (D.C. Cir. 2008).

guilt on the original charges ($P = 0$) and innocence ($P = 1$). The government had subjected Padilla to unfair procedures by asserting the unreviewable authority to detain him, so $T = 1$. However, Padilla was no longer being detained as an enemy combatant, and his sentence was 15 years—far less than the life sentence possible under federal law, which the government had requested. In light of these trade-offs, $G = .5$. To fill in the left side of the formula, $.5(1 + .5) = .75$.

In contrast, opportunity and exit costs for the Padilla lawsuit are significant. Because the Yale Project lawyers had to resort to weasel words like “fostered” to describe the Bybee Memo’s role, their pleadings lacked the concreteness that courts require. The result of attempting to use the courts without this predicate of concreteness is either public indifference or backlash. In light of these concerns, $O = 1$.

Exit costs of the lawsuit against Yoo also affect the right side of the ledger. Liability of a government legal adviser could have a chilling effect, deterring not merely irresponsible advice but capable counsel on sensitive matters such as targeted killings of Al-Qaeda higher-ups.²⁷⁸ Concern over liability could also lead future policymakers to simply by-pass the Office of Legal Counsel, concentrating advice functions in the White House where lawyers have even less independence. In light of these concerns, $E = 1$, for a total of 2 on the right side.²⁷⁹ Since $.75 < 2$, mobilization of this kind is inappropriate. Rather than resorting to litigation, advocates should turn to other forums such as congressional hearings to push for more careful tailoring of executive branch action and greater transparency for legal opinions justifying executive authority.

c. *Mobilizing Against Rendition.* One would reach a different result, however, in the case of damage suits on behalf of victims of extraordinary rendition such as Maher Arar. Here, Arar was demonstrably innocent, as we can

278. See *supra* notes 243-48 and accompanying text.

279. One could argue that this harm is an externality that harms the public interest, not the client. However, the lawyer may consider the public interest in her deliberations on tactics. See Peter Margulies, “Who Are You to Tell Me That?": Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients, 68 N.C. L. REV. 213 (1990); Zacharias & Green, *supra* note 189; cf. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2009) (recommending that lawyer provide client with advice on a range of concerns, including social, moral, and political factors).

surmise from Secretary of State's admission that mistakes were made.²⁸⁰ So $P = 1$. Arar was subject to unfair procedures throughout his ordeal, including interference with his right to counsel, a summary removal hearing, and the United States' acceptance of assurances from Syria, a country that the State Department has labeled a serial human rights violator. So $T = 1$, as well. At the same time, the torture that Arar was subject to in Syria was horrendous, so $G = 1$. On the left side of the formula, $1(1 + 1) = 2$.

On the right side of the formula, the risk of exit is negligible. If advocates can persuade the United States government to think twice before engaging in extraordinary rendition, the government will have to detain and interrogate suspected terrorists through avenues that yield *greater* accountability.²⁸¹ So $E = \text{zero}$.²⁸² Moreover, opportunity costs here are negative. Litigation complements other efforts to ensure accountability, such as congressional hearings. Indeed, Secretary of State Rice's statement of regret for the episode occurred only after judicial and legislative hearings triggered by the *Arar* lawsuit. The only chilling effect possible is a greater reluctance to seek or believe assurances from serious human rights violators, such as Syria. Because this result makes all detainees better off and because of the strong synergies between litigation and political efforts here, $O = -2$. So the right side of the equation is $0 + -2 = -2$. Since $2 > -2$, pursuing the lawsuit is an appropriate crossover tactic, whatever the plaintiff's chances of actually prevailing in a judicial forum.

280. Scott Shane, *On Torture, 2 Messages and a High Political Cost*, N.Y. TIMES, Oct. 30, 2007, at A18 (noting that the Secretary of State told a House hearing that the government had "mishandled" the *Arar* case).

281. Such choices would include detention in the United States, a post-*Boumediene* Guantanamo with heightened access to federal court, or a detainee's country of origin where friends and family can exert more leverage on the detainee's behalf.

282. Yale's National Litigation Project therefore acted appropriately in filing a lawsuit against a company that had allegedly been complicit in the rendition of a Guantanamo detainee. See *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128 (N.D. Cal. 2008) (dismissing lawsuit on state secrets grounds). The same analysis would apply to cases brought in foreign courts seeking evidence that a detainee had been subjected to coercion. See *Mohamed v. Sec'y of State*, (2008) EWHC (Q.B.) 2048 (Eng.).

d. *The Metric and Advocacy Strategy.* The metric's highlighting of exit effects suggests that mobilization campaigns must be selective. For example, attempts to exercise universal jurisdiction over administration officials in foreign tribunals fail to address the counter-mobilization problem. Opposition to universal jurisdiction could prompt exit by the political branches, expressed in diplomatic and legislative efforts to narrow remedies. However, political pressure for repeal or amendment of legislation like the Military Commissions Act that curbs remedies under international law is clearly appropriate.²⁸³ In addition, advocates should press for reform of rules like the state secrets doctrine,²⁸⁴ which allows the government to withhold information and sometimes obtain dismissal of a lawsuit challenging alleged overreaching. Political mobilization to achieve these goals will make exit from accountability more difficult for the government, and lower the opportunity costs of advocacy.

CONCLUSION

Concern about the human rights consequences of the war on terror has underlined the need for crossover tactics. The mobilization that crossover advocacy seeks to promote is not new; indeed, it dates back at least to the lawyering of John Adams and Josiah Quincy in the colonial era. In each generation since then, lawyers have responded to limits on legal remedies with mobilization efforts outside of traditional venues. The plight of detainees is but the latest occasion.

Crossover advocacy illustrates a dynamic that occurs in every fluid regulatory regime. Coase theorized decades ago that parties subject to legal standards they found to be inefficient would contract out of those standards. Similarly,

283. See Peter Margulies, *The Military Commissions Act, Coerced Confessions, and the Role of the Courts*, 25 CRIM. JUST. ETHICS 2 (2006); cf. Stephen Ellmann, *The "Rule of Law" and the Military Commission*, 51 N.Y.L. SCH. L. REV. 760, 765-70 (2007) (analyzing role of courts in reviewing military commission procedures and rulings); David A. Martin, *Judicial Review and the Military Commissions Act: On Striking the Right Balance*, 101 AM. J. INT'L L. 344, 354-62 (2007) (recommending a prudential approach that where possible interprets the Military Commissions Act in light of principles of constitutional and international law).

284. See Chesney, *supra* note 60.

when legislatures enact tort reform measures that limit certain kinds of damages, a crossover effect occurs in which juries award more money in the categories of damages that the legislature has not regulated.

However, the crossover phenomenon is not always costless. Lawyers in a tort reform jurisdiction turn down cases that lack provable pecuniary damages. When the state regulates crack cocaine more strictly, scholars have surmised that traffickers turn to heroin. If international forums require complete relief for a victim of human rights violations, these same forums may hedge their bets by erecting procedural obstacles to prosecution of a claim. Crossover advocacy manifests analogous strengths and weaknesses.

The virtues of crossover advocacy are clear. In a range of venues, including media interaction, advocacy with foreign governments, damage suits, and appearances in international forums, advocates can amplify the voices of detainee clients and build more effective advocacy institutions. Crossover advocacy can also enhance the integrity and transparency of legal regimes affecting detainees, and clients' negotiating posture. However, crossover advocates are also susceptible to pervasive cognitive flaws, such as the temporal discounting deficit, which leads to an underweighting of long-term costs, and self-serving bias, which impedes advocates' insight about their own responsibility for adverse impacts of their mobilization campaigns.

These cognitive flaws create three classes of adverse crossover effects. First, clients suffer opportunity costs when the asymmetric accountability of crossover venues prompts lawyers to overinvest in certain mobilization strategies. For example, the media's quest for novelty and cultivation of *ex parte* contacts tempts lawyers to sacrifice candor and judgment in spinning stories of detainee innocence and abuse. Second, crossover advocates experience conflicts of interest and role. For example, the Yale Project's lawsuit against John Yoo abandoned the virtues of concreteness and consistency in its pursuit of payback for Yoo's poor legal advice on interrogation methods. Third, crossover advocacy can cause negative externalities, including boomerang effects that injure advocates' causes and allies, government exit into less transparent domains, and backlash that limits remedies. For example, advocates pressing for the closure of Guantanamo fail to consider that this step may increase use

of even less transparent methods such as extraordinary rendition of terrorism suspects.

It is tempting to attribute these risks of crossover advocacy to the excesses of the Bush administration. If administration officials had taken care from the beginning to comply with domestic and international law on the detention, interrogation, and trial of suspected terrorists, lawyers would have been able to go to court, instead of being obliged to seek alternative forums. On this view, the missteps of crossover advocates have the same origin as a long line of assaults on lawyers' integrity launched by the administration since September 11, including the skewed advice in the torture memos, the firing of United States Attorneys, and the use of political litmus tests for civil service positions.

While this perspective is tempting, it is in the final analysis irrelevant. Crossover lawyering never surfaces in a perfect legal system. It invariably emerges as a response to real or perceived government excesses, from the Boston Massacre to the present. The task for lawyers is to mobilize the forces of change without ceding the initiative to adversaries.

The mobilization metric aims to ease the crossover advocate's dilemma. It begins with three premises: advocates' responsibility for changes wrought by mobilization efforts, the ubiquity of cognitive biases, and the importance of pivoting to new tactics to cope with legal transitions. Building on these premises, the mobilization metric integrates variables such as opportunity costs and the adversary's ease of exit. By refining the quality of deliberation, the metric reduces adverse crossover effects and helps ensure maximum gains for both clients and the public interest.

