August 15, 2008

Exporting Harshness: How the War on Crime Has Made the War on Terror Possible

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ABSTRACT

This Essay responds to a consensus that has formed among many opponents of the Bush administration’s prosecution of the war on terror. The consensus narrative goes like this: America has a long-standing commitment to human rights and due process, reflected in its domestic criminal justice system’s expansive protections. Since September 11, 2001, President Bush, Vice President Cheney, former Defense Secretary Rumsfeld, and their allies have dishonored this tradition.

It is too simple, I suggest, to assert that the Bush administration remade our justice system and betrayed American values. This Essay explores the ways in which our approach to the war on terror is an extension—sometimes a grotesque one—of what we do in the name of fighting the war on crime. By pursuing certain punitive policies domestically, I suggest, we have become desensitized to the harsh treatment of criminals. Revelations of abuse, therefore, are less likely to move us. In part for this reason, despite the mounting evidence regarding secret memos, inhumane prison conditions, coercive interrogations, and interference with defense lawyers, the Bush administration’s approach to the war on terror remains largely unchecked and unchanged.

I pursue this thesis by focusing on five specific areas in which our domestic criminal system has influenced how we fight the war on terror: 1) the scope of our prison complex, 2) prison conditions and prisoner abuse, 3) our harsh treatment of juveniles, 4) attacks on judicial authority, and 5) undermining the role of defense counsel. I conclude by suggesting that the very metaphor of war—whether on crime, drugs or terror—helps explain our enthusiasm for harsh tactics.
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I. Introduction

A consensus has begun to form among opponents of the Bush administration’s prosecution of the war on terror. The narrative goes like this: America has a longstanding commitment to human rights and due process, reflected in its domestic criminal justice system’s expansive protections. Since September 11, 2001, President Bush, Vice President Cheney, former Defense Secretary Rumsfeld, and their allies have dishonored this tradition.

Consider the argument of Neal Katyal, the lead civilian lawyer for Salim Hamdan, Osama bin Laden’s driver. Katyal describes meeting his client for the first time, and Hamdan asking him, “Why are you here?” Katyal responded:

The reason that I am here is because my parents came here from America with 8 dollars in their pockets . . . . They came to America for a simple reason . . . . They could land on its shores and they would be treated fairly and their children would be treated fairly. And when the president issued this military order, which said, “If you’re one of them, if you’re a green card holder,” as my parents were, “or you are a foreigner . . . you get the beat-up Chevy version of Justice. You get sent to Guantanamo. But if you’re an American citizen, accused of the most heinous crime imaginable, the detonation of a weapon of mass destruction, you get the Gold Standard. You get the American Civilian Trial.” I told him, “That’s why I was so offended. Because we haven’t ever had Us versus Them justice.”

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1 Professor of Law, Georgetown University. I appreciate the work of my excellent research assistants Kristina Joye, Jessica McCurdy, and Ryan Warren. I received valuable comments from Lama Abu-Odeh, Muneer Ahmad, Seema Ahmad, David Cole, Arthur Evenchik, Sara Feinberg, Laura Hankins, Neal Katyal, Mitt Regan, Mike Seidman, and Giovanna Shay.

2 Neal Katyal, Professor of National Security Law, Georgetown Univ. Law Ctr., Investiture and Inaugural Lecture at the Georgetown University Law Center: The Principled War on Terror (April 10, 2008); see also, Neal A. Katyal, Equality and the War on Terror, 59 STAN. L. REV. 1365, 1393 (2007).
In congressional testimony a year before, Katyal put the point even more plainly: under the administration’s proposed commissions for Guantanamo, “A United States citizen gets the Cadillac version of justice, the foreigner gets the beat-up Chevy version, a stripped-down Guantanamo trial.”

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

The truth is more complicated. While I share much of the criticism of how we have waged the war on terror, it is too simple (and ultimately too comforting) to assert that the Bush administration remade our justice system and betrayed our values. In this Essay, I seek to turn the argument on its head, and explore the ways in which our approach to the war on terror is an extension—sometimes a grotesque one—of what we do in the name of the war on crime. By pursuing certain policies and using particular rhetoric domestically, I suggest, we have rendered thinkable what would otherwise have been unthinkable. Moreover, as the world’s largest jailer, we are increasingly desensitized to the harsh treatment of criminals. We have come to accept the excesses as casualties of war—whether on crime, drugs, or terror. Revelations of abuse, therefore, are less likely to move us. In part for this reason, despite the mounting evidence regarding secret memos, inhumane prison conditions, coercive interrogations, and interference with defense lawyers, the Bush administration’s approach to the war on terror remains largely unchecked and unchanged.

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I will explore five specific areas in which our domestic criminal system has informed our approach to the war on terror: 1) the scope of our prison complex, 2) prison conditions and prisoner abuse, 3) our harsh treatment of juveniles, 4) attacks on judicial authority, and 5) undermining the role of defense counsel. Before turning to the details, I want to emphasize some of the ways in which my account is different from the prevailing views and preliminarily suggest why this additional perspective is essential.

Perhaps the most common explanation for why America has pursued such extreme measures in the current war on terror is what might be called the wartime overreaction theory. In this view, civil liberties always suffer in times of war. As Justice Brennan once put it:

There is considerably less to be proud about, and a good deal to be embarrassed about, when one reflects on the shabby treatment civil liberties have received in the United States during times of war and perceived threats to national security. . . . After each perceived security crisis ends, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven unable to prevent itself from repeating the error when the next crisis came along.  

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

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

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8 LICHTBLAU, supra note 5, at 23-24.
The wartime overreaction theory helps explain why Americans have accepted practices that have outraged much of the rest of the world. Foreigners might have the luxury to sympathize with the plight of those locked up in Guantanamo or Abu Ghraib or secret prisons. But America was attacked, and American sympathies will naturally lie with the victims of the September 11 bombings and making sure it does not happen again.

A closely related theory is what might be called the blame Bush and Rove theory. The argument here is that while war always leads to some level of overreaction, the fear generated by Sept. 11 has been stoked by the Bush administration to bully opponents and win support for various harsh measures. The administration successfully invoked the fear of "mushroom clouds" to win support, or at least acquiescence, for the invasion of Iraq. By the time it was clear there were no weapons of mass destruction, the Bush administration began warning of the risks of losing to terrorists in Iraq—the new "central front of the war on terror." The name bin Laden disappeared for awhile, only to remerge once reports surfaced of secret CIA prisons, torture and domestic spying.

In the words of 9/11 Commission Director Phillip Zelikow, the problem was that “fear and anxiety were exploited by zealots and fools.”

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

I think there is some truth in each of the above explanations, and I offer my exporting harshness theory as a modification, not a rejection, of the others. Wartime overreaction has surely been part of the explanation for the past seven years. But that reasonable claim often shades into the more doubtful one that, to quote Lichtblau, our peacetime criminal justice system is a “Cadillac,” or “tilt[s] toward restraint over aggression.” Similarly, Blame Bush and Rove is only a partial explanation. Leaders who make bad decisions ought be held accountable, but in a country that holds elections, voters cannot avoid all responsibility for the actions of elected officials. As for enemy

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10 Id.
11 Id.
14 Id. at 229.
I agree with Cole that some of our most punitive tactics have been tried first on non-citizens. But there is a risk in advancing *enemy aliens* as the complete explanation. Unless we accompany the *enemy aliens* thesis with some account of our domestic criminal justice system’s harshness, it becomes too easy to take the Cadillac metaphor seriously.

So what to make of Katyal’s Cadillac? I offer my criticism reluctantly because I am sympathetic to the agenda of ensuring fair process for those detained by the United States’ government. In characterizing the domestic criminal justice system as he does, Katyal knows the Cadillac only appears shiny and new in comparison with the awful condition of justice in Guantanamo Bay. Moreover, he and others making similar claims are likely adopting a stance long familiar to human rights lawyers, civil rights advocates and critical race theorists. The strategy requires first appealing to what Americans believe their nation and its Constitution stand for, and then highlighting the distance between the promise and the reality lived by your client. Like Martin Luther King, Jr., the human rights lawyer is asking America to “be true to what you said on paper.” Of course, the advocate may be doing this armed with the same doubts that King had about whether the nation meant it.

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

To put the point another way, consider the words of Muneer Ahmad, who, like Katyal, is a law professor and Guantanamo defense attorney. Ahmad’s account of the bizarre world of Guantanamo Bay leads him to conclude that “the central cultural project of Guantanamo has been to normalize what is, on first inspection, extraordinarily aberrant.” For those who believe Guantanamo Bay is an irredeemable human rights violation, it is essential to demonstrate how aberrant it truly is. That is what Katyal achieves with the comparison between Cadillacs and Chevrolets. My discomfort comes

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17 Muneer Ahmad, Guantanamo is the Body 14 (April 1, 2008) (unpublished manuscript, on file with author).
from the fact that in contrasting the aberrant (Guantanamo) with the normal (domestic criminal justice system) we become blinded to the profound abnormality of our domestic criminal system, which we have come to call normal. One of my goals in this Essay is to counter this tendency, and to raise questions about our domestic criminal system by turning a mirror back on it.

There is one more reason to pay close attention to how the war on crime has helped make the war on terror possible. It is the only way to achieve change that sticks in how we fight the war on terror. In the months following the release of the Abu Ghraib abuse photos, many will remember the administration’s consistent position that this was the work of a few “bad apples,” and that neither the administration nor the chain of command bore any responsibility. Critics jumped on the notion that removing the bad apples would solve the problem. It was more systemic, more deeply-rooted, they argued. I think the critics were right then. Today, as disapproval of the Bush administration’s prosecution of the war on terror mounts, the bad apples explanation is resurgent. This time, however, the alleged bad apples are not low-level officers but Bush, Rumsfeld and Cheney themselves. While placing blame on the leaders gets closer to the truth than accusing front-line officials, there is one sense in which the bad apples explanation is still unsatisfying. It lets some people--We the People--off the hook. After all, it fails to ask what about our national culture caused our leaders to imagine such harsh tactics. Why did they think we would tolerate it? Why were they right? These questions matter because although the current administration is on its way out, unless we confront why they succeeded, many of the brutal tactics they adopted may survive their departure.

Before turning to the specifics of my argument, I want to offer two caveats. I will draw a number of analogies between tactics, practices and rhetoric adopted in the war on crime and those employed in the war on terror. I am not arguing, however, that there is a jot by jot parallel between how we have prosecuted the two wars. To the contrary, some enormous differences exist. Some of the most notable: secret prisons for terror suspects, indefinite detention without trial of the accused and the systematic use of physical brutality as a method of interrogation. While physical brutality to obtain confessions was used extensively through the mid-twentieth century, and occurs in individual cases still today, it is not currently widely practiced. Similarly, indefinite detention without trial and secret prisons are unknown to our criminal system.

Second, when I discuss conditions of confinement or right to counsel, for example, I am not asserting that our domestic prisons are as awful as Abu Ghraib or that we deny lawyers to suspects domestically in the same way that we have to those held at Guantanamo. My argument, I hope, is more nuanced. I am interested in exploring continuities in places where the prevailing wisdom has been to emphasize discontinuity. I want to understand why we as a nation have allowed certain things to go on in our name, even, in some cases, after the truth was fully revealed. To answer those questions
we must pay careful attention to what we do at home, to our own citizens, in our domestic criminal system.

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

Moreover, by placing our approach to the war on terror on a continuum with how we fight the war on crime I may help to normalize, or even justify, the egregious and inhumane. This is a tricky issue, similar to a divide that marks the debate over torture. To oversimplify, there are those who would treat torture as a categorically unique form of state violence, comparable only perhaps to genocide. Others situate torture on a continuum with other forms of state violence and coercion. Given what I have said so far, it is not surprising that my sympathies lie with those who put torture on a continuum. In my view, looking at torture as categorically different necessarily draws our attention away from other conversations that are worth having, such as what it means to live in a nation where prison rape and jokes about prison rape, are endemic and that allowed its leaders to launch a war of choice leading to the deaths of hundreds of thousands of Iraqi civilians. By analogy, I would argue that singling out our prosecution of the war on terror as categorically different runs a similar risk. It invites us to avoid more difficult conversations about our domestic war on crime.

II. The Scope of America’s Prison Complex

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19 *Id.*
20 See, e.g., *id.* at 258 (“creating a separate category for an intentionally narrow set of practices labeled and banned as ‘torture’ only functions to normalize and legitimate the remaining practices that are ‘non-torture.’”


The first thing to understand about the American prison system is its scope. We have the largest prison system in the world, by a wide margin. As Figure 1 indicates, we also have the highest incarceration rates.
Those numbers do not accurately reflect how much of an outlier the United States truly is. Figure 2 shows the same countries in the same order, reflecting from left to right those that incarcerate the most to the least. Figure 2 highlights the relative wealth of each nation, as measured by GDP per capita. The countries that, like the United States, incarcerate at relatively high rates, are all relatively poor countries, such as Belarus and South Africa. Relatively wealthy countries such as France and Italy all have low incarceration rates, and appear on the right hand side of the graph. This reflects what most criminologists would predict--wealthier countries are thought to be better equipped to make the human capital investments that allow for a reduced dependency on incarceration. This trend holds true across the board, except for one outlier. One of the world's wealthiest countries sits at the far left of the graph, reflecting high incarceration rates despite its relative wealth. That is the United States.
Figure 3 makes the same point in a slightly different way. The countries are again arranged in the same order, with the bars showing their relative incarceration rates. This time, however, the countries that have similar wealth levels as the U.S. are bolded dark. The others have lighter colored bars. Again, the countries with similar wealth levels as the U.S. all have dramatically lower incarceration rates than we do.
Perhaps I am making too much of our position atop the world’s incarceration leaderboard. My premise is that our reliance on incarceration is evidence of punitiveness, but arguably it simply reflects high crime rates. There is some truth to this. America’s relatively high rates of violent crime partially explain our large prison population. Although our overall crime rate is not especially high (most people are surprised to learn, for example, that Sydney, Australia, and London, England, both have higher burglary rates than New York City), homicide rates in the United States are three to five times higher than in most industrialized countries.  

But that does not explain all, or most, of America’s prison expansion. To understand why, we must first compare domestic trends in crime and incarceration over the past 40 years. See Figure 4. Incarceration rates were largely steady for most of American history; between 1940 and 1970 for example, the nation averaged about 110 inmates per 100,000 people. The increase began in 1973 and has continued an upward trajectory since.  

![Incarceration Rates of Sentenced Inmates Per 100,000 (1940-2005)](image)

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23 Mauer, supra note 21, at 18.
The initial increase coincided with a rise in crime, but even as crime has declined for almost fifteen years straight we continue to send more and more people to prison every year. Indeed, by 2005, the nation’s violent crime rate had declined to 1978 levels, yet the incarceration rate was almost twice what it had been in 1978.

If more crime does not explain the growing prison population, what does? The short answer is this: our criminal system has become more punitive since President Nixon first launched the war on crime in the early 1970s. Specifically, three things have happened: 1) more drug offenders are arrested today, 2) a higher percentage of those arrested for all crimes (including drug crimes) are sent to prison as their punishment, and 3) those sent to prison are sentenced to longer terms.

During the 1980s and 1990s America adopted progressively harsher drug laws and invested increasing resources into policing drugs. The rhetoric from this era was often quite extreme, with the Los Angeles police chief telling Congress that “casual drug users should be taken out and shot,” and Republican congressmen contemplating the death penalty for drug dealers. During these two decades, the arrest rates for drug offenses increased 300% percent. Because self-report studies show drug use declining between 1979 and 2000, most criminologists attribute the increase in arrests to stepped-

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25 The overall crime rate had declined even further, to 1970 levels. Mauer, supra note 21, at 95.
28 House Speaker Gingrich threatened that if “you import commercial quantities of drugs in the United States for the purpose of destroying our children, we will kill you.” Newt Gingrich, Speaker of the House, Remarks Before the Republican National Committee (July 15, 1995).
up law enforcement, rather than increased drug use.\textsuperscript{29} In addition to more arrests, an increasing percentage of those arrested during this time received prison sentences, and prison sentences grew longer.\textsuperscript{30}

A similar--and in some ways simpler--tale can be told for overall crime rates. Violent crimes decreased throughout the 1990s. But the chance that an arrest would result in prison time more than doubled, and the length of the average prison sentence increased about sixty percent. These increases meant that the incarceration rate for violent crime almost tripled, despite the decline in violence.\textsuperscript{31} A regression analysis by criminologists Alfred Blumstein and Allen Beck reinforces the conclusion that it has been our crime policy choices, not crime rates, that explain our expanding prisons. According to Blumstein and Beck, fifty-three percent of the increased prison population between 1980 and 2001 can be explained by the increased likelihood that an arrest will lead to a prison sentence, and forty-seven percent by the increased length of the average sentence.\textsuperscript{32}

International comparisons also show that America’s sentencing policy is punitive in comparison with much of the rest of the world. Burglars, for example, receive an average sentence in the U.S. that is more than three times as long as the average Canadian sentence and more than twice as long as the average sentence in Britain.\textsuperscript{33} The story is the same for drug offenses. In the United States possession of five grams of crack cocaine carries a mandatory five years in prison, while the same offender in Britain would receive a sentence of less than six months.\textsuperscript{34}

Whether American laws accurately reflect the attitudes of the public is a complicated question. Every year in my criminal procedure class I show \textit{Snitch}, a film about our nation’s drug laws and the role of informant testimony. The documentary ends with the story of Clarence Aaron, a twenty-year-old man from Mobile, Alabama, who is tried for driving some friends and drugs between Louisiana and Alabama. Because of conspiracy laws, Aaron can be punished for all the drugs that were part of the conspiracy (even if he did not know the precise amount), and because of informant testimony, he can be convicted based on the word of one of the other people in the car, even though no drugs were recovered. Aaron, who had no prior run ins with the law, was found guilty, and the movie ends with the filmmakers asking one of the jurors how much time he thought Aaron should have received. With the camera focused on Aaron sitting in his

\textsuperscript{29} \textit{Bruce Western, Punishment and Inequality} 47 (2006).
\textsuperscript{30} \textit{Id.} at 45.
\textsuperscript{31} \textit{Id.} at 43-44.
\textsuperscript{32} Alfred Blumstein & Allen J. Beck, \textit{Reentry as a Transient State between Liberty and Recommitment, in Prisoner Reentry and Crime in America} (Jeremy Travis and Christy Visher eds., 2005).
\textsuperscript{33} Mauer, \textit{supra} note 21, at 35.
cell, the viewer hears the juror say “oh, I don’t know, a few years I guess.” When the filmmaker tells the juror that Aaron had received three life sentences, the juror is visibly dismayed. We are left with the scene of Aaron sitting in the cell he will occupy for the rest of his life, as the juror says, with sorrow, “oh, no, that don’t seem right.”

While *Snitch* presents a compelling example of a case where many observers will share the juror’s shock upon learning the penalty for violating the law, there is also evidence to suggest that Americans have, by international standards, especially punitive views regarding criminal punishment. For example, in one international survey respondents were asked to identify the appropriate penalty in a case involving a twenty-one-year-old second-time burglar who had stolen a television set. Fifty-six percent of Americans questioned chose prison, compared with an international average of thirty-four percent.

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

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

Civil rights advocates in the United States have shown a similar inclination to seek solutions in criminal prosecution, despite the toll that our nation’s high incarceration rates have taken on the black community. Consider the debate that erupted in response to the aggressive criminal prosecution of black teens in Jena, Louisiana, for fighting with

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35 *Snitch* (PBS Video 1990).
white schoolmates. Even as the protestors demanded that the prosecutors drop or reduce the charges against the black teens, they simultaneously called for the Department of Justice bring more criminal prosecutions against whites for hate crimes.\textsuperscript{38} Rep. Artur Davis complained that the Department of Justice had charged only twenty-two people with hate crimes in 2006 compared with seventy six people ten years earlier.\textsuperscript{39} And when a prosecutor testified before a congressional panel that federal law did not allow for the prosecution of juveniles for the crime of hanging a noose over a tree, he was roundly booed by a room of mostly African-American protesters.\textsuperscript{40}

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

III. Prison Conditions and Prisoner Abuse

Prison conditions matter. This might seem so obvious as to be banal, but I don’t think so. American lawyers have overwhelmingly focused their attention on the time from initial suspicion to final judgment (conviction or acquittal), and developed an extensive jurisprudence governing these stages of the process. Indeed, this period is what most are thinking of when they laud the protections built into the American criminal system. This is the basis for Katyal’s Cadillac. But how we treat suspects while they await trial and convicts after judgment has received much less notice.\textsuperscript{41} It is ignored in the criminal curricula of our law schools, and many American criminal lawyers likely cannot cite a Supreme Court case dealing with conditions of confinement.

Those awaiting trial or serving sentences see the world quite differently. The disjuncture between what the lawyer and the client think is important is made manifest at the lawyer’s first meeting with an incarcerated client who is pending appeal. I will never forget my first such visit, arriving at Lorton Prison in Virginia, armed with the trial transcript, preparing to discuss what claims might be pressed upon the appellate court. My client interrupted me a few minutes into the discussion to say, “Mr. Forman, I hear that, but I need to be moved to a different unit. I’m in here with all these young dudes,

\textsuperscript{38} \textit{Al Sharpton Pleads for Tougher Hate Crimes Law in Wake of Jena 6}, FOX NEWS, October 16, 2007; see also Barack Obama’s Plan on Strengthening Civil Rights Enforcement, \url{http://www.barackobama.com/issues/civilrights/#hate-crimes} (calling for stronger hate crime legislation).

\textsuperscript{39} \textit{Hate Crimes and Race-Related Violence: Hearing Before the H. Comm. on the Judiciary}, 110th Cong. (2007).

\textsuperscript{40} Interview with Seema Ahmad, Georgetown Immigration Law Journal, in Wash., D.C. (Oct. 14, 2007).

\textsuperscript{41} Anthony Kennedy, Associate Justice, Supreme Court of the U.S., Speech at the American Bar Association Annual Meeting (Aug. 9, 2003).
and they are too wild.” He went on to describe the violence of the place, the stabbings, shankings and general mayhem caused by inmates and guards alike. He was serving a long sentence and his main goal was to get to a part of the facility with older, and to his mind calmer, fellow lifers. My legal claims could wait.

Some terror suspects see the world the same way. When Salim Hamdan finally had his day before a Guantanamo tribunal, after years of being held without trial, what did he want to discuss with the judge first? His housing situation. He took the stand and described the details of his life to the military commissioners. “Camp Echo is like a graveyard where you place a dead person in a tomb,” he said. At Camp 6 “you can only see the soldiers. And, of course, I was never able to see the sun.” He complained that the cells were small, and that his few permitted possessions—toothbrush, blanket, and towel—were sometimes seized. His most serious objection was that he had been placed in Camp 5, which, revealingly, is among the Guantanamo units that most resemble an American supermax prison. He had previously been housed in Camp 4, which he preferred because there detainees could eat and pray together. According to Hamdan’s lawyers, their client “can barely discuss any subject other than his wish to get back to Camp 4.” If they cannot get him out of Camp 5, he tells them, “I don’t need you. Why are you my lawyer?”

Hamdan’s plea to get out of the American-style supermax unit highlights a key feature of the international debate over the war on terror since September 11, 2001. While human rights lawyers and Europeans have reacted negatively to severe conditions of confinement (Guantanamo) and prisoner abuse (Abu Ghraib), Americans have seen it differently. The conditions of Guantanamo have been largely ignored domestically. The prisoner abuse scandal at Abu Ghraib followed the traditional pattern—a burst of outrage and eventual punishment of low-level officials, followed by a return to normalcy. Both of those responses, I suggest, were predictable, given the harsh criminal justice complex we have constructed to fight the war on crime. Highly restrictive supermax facilities and episodic prisoner abuse no longer scandalize the American public.

In the section that follows, I separate the discussion of prison conditions into three categories. First, I discuss supermax facilities domestically and on Guantanamo Bay, pointing out the similarities. Second, I discuss what I call degradation policy—these are polices or practices in American prisons that are designed to undermine the dignity of the prisoner. This category, which focuses on officially sanctioned policy, makes clear that prison officials have wide berth to develop policies that dehumanize. But even with such latitude, individual or groups of guards and officials do cross the line. Therefore, the third category is what we might think of as episodic abuse by rogue guards.

Amnesty International recently publicized conditions at Guantanamo Bay by constructing a mock Guantanamo jail cell on the mall. The problem? America already has 20,000 similar cells for domestic prisoners.\footnote{Joseph Petrocelli, \textit{All the Bad Apples in One Barrel}, OFFICER, October 18, 2006.} In an American supermax prison, cells range from seventy-seven to eighty-seven square feet. Inmates are locked in these cells for twenty-three hours a day and are allowed to exercise in an area about the size of two small cars for the remaining hour. The walls surrounding this small exercise area are twenty feet high and the top is covered by a metal grate. No exercise equipment is allowed. Each inmate is issued an orange jumpsuit, a t-shirt, boxers, and shorts. They are typically allowed to have papers and books, and in some prisons they have TVs on which they may watch prison-approved educational and religious programs.\footnote{Laura Sullivan, \textit{At Pelican Bay Prison, A Life in Solitary}, NPR, July 26, 2006, http://www.npr.org/templates/story/story.php?storyId=5584254.} As with all their possessions, these may be taken away by guards. Prisoners who break any rules are punished and humiliated in a variety of ways. Those that refuse to eat, for example, may be fed “food bricks” made up of a combination of all the day’s food.\footnote{SASHA ABRAMSKY, \textit{HARD TIME BLUES} 227 (2002).} Dogs, originally used for drug detection, are now employed to control inmates. In a training video developed by the Arizona Department of Corrections, officers are taught how to use dogs to drag inmates out of their cells in a manner that makes the infamous dog photos from Abu Ghraib look mild.\footnote{Arizona Department of Corrections Training Video, http://hrw.org/campaigns/us/2006/prisons1006/index.htm.} These extreme conditions of isolation can cause several psychological problems for inmates, and have been condemned internationally.\footnote{Mustafa v. United States, No. 2443259, 70 (DC Divisional Court filed June 20, 2008) (“[W]e too are troubled about what we have read about the conditions in some of the Supermax prisons in the United States. . . . [C]onfinement for years and years in what effectively amounts to isolation may well be held to be, if not torture, then ill treatment which contravenes Article III.”)}

Some of the units at Guantanamo Bay are almost identical in structure to domestic supermax units, with similar rules consigning prisoners to their cells for twenty-two to twenty-three hours a day. The similarity is intentional, as the military hired U.S. prison contractors who used the precise blueprints from their domestic prisons in constructing the Guantanamo cells.\footnote{Locked Up Alone: \textit{Detention Conditions and Mental Health at Guantanamo}, HUMAN RIGHTS WATCH, June 2008, at 9.} Some restrictions at Guantanamo are even more severe, such as prohibitions on phone calls and visits. As with inmates in supermax facilities domestically, the few items that prisoners are allowed to have can be taken away for the slightest infraction.\footnote{\textit{Id.}}

Many American prisoners who are not in supermax facilities also face degradation on a regular basis. A few examples: Phoenix Sheriff Arpaio prides himself
on dressing his inmates in pink and housing them in tents in 110 degree heat.\footnote{Joe Arpaio, America’s Toughest Sheriff: How We Can Win the War Against Crime (1996); Joe Arpaio, Joe’s Law: America’s Toughest Sheriff Takes on Illegal Immigration, Drugs, and Everything Else That Threatens America (2008).} He also has publicized the return of the chain gang, which he employs for drunk drivers.\footnote{Arpaio, Joe’s Law: America’s Toughest Sheriff, supra note 50.} Lexington, North Carolina Sheriff Gerald Hege painted the inside of his jail bright pink and makes a practice of referring to prisoners in his jail as “scumbags,” both to their faces and when meeting with constituents.\footnote{Alan Elsner, Gates of Injustice (2004).}

Some officers go further. At Pelican Bay State Prison in California, inmates were subjected to the use of fetal restraints, locked naked in outdoor cages, and chained to toilets. Still others had their skin peeled off after being bathed in boiling water.\footnote{James D. Maynard, Comment, One Case for an Independent Federal Judiciary: Prison Reform Litigation Spurs Structural Change in California, 37 McGehee L. Rev. 419, 420 (2006).} Other prisoners have also been forced to strip naked in front of other inmates and guards, given unnecessary body cavity searches, and forced to display themselves to other inmates.\footnote{Bob Herbert, America’s Abu Ghraibs, N.Y. Times, May 31, 2004, at A17.} In Dooly State Prison in Georgia, a guard even required an inmate to tap dance naked before giving him a body cavity search.\footnote{Id. at 14.} Prisoners are at constant risk of sexual assault.\footnote{Stop Prisoner Rape, In The Shadows: Sexual Violence in U.S. Detention Facilities, Report to the U.N. Committee Against Torture (2006).} By one estimate, in the last twenty years over one million prisoners have been raped in United States facilities.\footnote{Benjamin Whitmer, Torture Chambers and Rape Booms, 6 Centennial Rev. 171, 186 (2006).}

America has so many prisons, and they are each so large, that it is easy to lose sight of the scope of the abuse. Consider that just last month, a federal investigation concluded that the conditions in Chicago’s Cook County jail violated the constitutional rights of its detainees.\footnote{U.S. Department of Justice, Civil Rights Division, Cook County Jail 3 (July 11, 2008).} The report detailed numerous instances of physical abuse, inadequate health care, and unsanitary living conditions. Inmates were beaten by guards, for no reason or as punishment for breaking rules. One inmate, after being accused of planting contraband, was beaten by multiple officers while lying handcuffed on the floor. The guards fractured his jaw, forcing him to undergo multiple surgeries and eat through a straw.\footnote{Id. at 14.}

The Dept. of Justice investigation into the Cook County jail rated barely one day’s story in the press. But to understand the relative scale of this scandal, consider that the daily population of the jail is approximately 9,800 inmates, with nearly 100,000 people
passing through yearly.\(^6^0\) This means the equivalent of the entire prison population of Germany (81,176), England (74,452), Italy (56,574) Spain (56,140), or France (55,382) is subjected to these inhumane conditions each year.\(^6^1\)

It is not just our prisoners that are exposed to these conditions. Prison guards too are socialized and trained in these harsh environments, and sometimes they then export brutal tactics to the world via the war on terror. The story of Charles Graner highlights this dynamic. Graner achieved infamy as the ringleader of the abuse at Abu Ghraib and was sentenced for ten years in prison for his role. But before Graner got to Abu Ghraib he was a domestic prison guard and a Marine. Graner served in the Marines in the 1980s and early 1990s; upon returning home he sought employment in southwestern Pennsylvania. He was ultimately hired as a prison guard at the State Correctional Institute at Greene, where he benefited from a program that gave preference to former military officers seeking prison guard positions. In 1998, SCI Greene was rocked by a massive prisoner abuse scandal that led to changes in the prison administration and the firing of some guards. Graner was not fired, however, and when the wars in Iraq and Afghanistan began, he was reactivated by the military. His prison guard experience led him to being placed in a position of authority at Abu Ghraib, and his abuse of that power led ultimately to his downfall and eventual conviction.\(^6^2\)

Reports of prisoner abuse during the prosecution of the war on terror, must be understood against the backdrop of this constant drumbeat of domestic prisoner abuse stories. We have allowed this sort of degradation and humiliation to become normal, acceptable, even inevitable. It has become the cost of doing business, a necessary incident to running such a large prison system full of incorrigibles. As investigative journalist Sasha Abramsky found when he talked to the residents of the Pennsylvania town home to SCI Greene, even an enormous prison scandal involving allegations of ritual abuse by guards had little impact on the area’s free population, many of whom worked at the facility.\(^6^3\) “I do not remember people talking about it, no” county commissioner Pamela Synder told Abramsky. “The concerns here are the concerns that truly affect people’s daily lives: it’s jobs, it’s health care, it’s quality of life.”\(^6^4\)

Not only is prison abuse familiar to Americans, so is the rhetoric justifying it. In the war on terror, as in the war on crime, a common tactic is to label the victims as deserving of abuse. When the first individuals arrived at Guantanamo, before one person had been tried, President Bush defended our treatment of them on the grounds that they

\(^{60}\) Id. at 3.
\(^{63}\) Id. at 3.
\(^{64}\) Id. at 4.
were “killers,” and later proclaimed “[t]he only thing I know for certain is that these are bad people . . . .” Vice-President Cheney said they were “the worst of a very bad lot” who were “devoted to killing millions of Americans.” After the Abu Ghraib photos were released, Oklahoma Republican James Inhofe said he was “more outraged by the outrage than . . . by the treatment” of the detainees. Despite reports that up to 90 percent of the Abu Ghraib detainees were there by mistake, Inhofe argued that “these prisoners, you know, they’re not there for traffic violations. If they’re in Cell Block 1-A or 1-B, these prisoners, they’re murderers, they’re terrorists, they’re insurgents. Many of them probably have American blood on their hands, and we’re so concerned with the treatment of these individuals.”

This tactic has roots in our domestic war on crime, where popular law enforcement officers defend harsh prison conditions on the grounds that the inmates in his jail are “killers,” and “the worst of the worst.” As Sheriff Arpaio writes in America’s Toughest Sheriff: How We Can Win the War on Crime, “[t]he reality is stark. Either the good guys will prevail and restore some sense of decency and honor and respect to our society, or the bad guys will come out on top and destroy everything we hold dear . . . Win or lose. Right or wrong. Good guys versus bad guys. Sometimes life is that straightforward.”

Arpaio uses language mirroring that of Bush, Cheney and Rumsfeld. But Arpaio’s play is even more audacious. Because he is running a jail. Which means it houses two categories of prisoners: 1) those who are awaiting trial and therefore are presumed innocent, and 2) people serving less than one-year sentences. Those serving longer than one-year sentences are held in state run prisons. So those left in Arpaio’s jail are serving time for fraud, forgery, drug possession, theft and assault. Not the hardened killers and rapists he invokes to justify this sort of degradation. That said, if an American sheriff can sell voters on the value of degrading domestic criminals by disposing of the presumption of innocence, there is every reason to think the Bush administration would succeed with a similar tactic in the fearful months after September 11.

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66 Richard Cheney, Vice President, U.S., The Vice President Appears on Fox News Sunday (January 27, 2002).
67 Interview by CNN with James Inhofe, Senator, Okla., Officials Clash on Blame for Iraq Abuse; Beheading Avenges Prisoner Abuse, Killers Say (May 11, 2004).
70 Abramsky, supra note 45.
71 ARPAIO, AMERICA’S TOUGHEST SHERIFF, supra note 51, at xxi-xxii.
IV. Harsh Treatment of Juveniles

Much of the world was shocked to learn juveniles were being held in Guantanamo Bay. The U.N.’s High Commissioner for Human Rights recently estimated that the United States has detained 2,500 juveniles as enemy combatants in various locations around the world since 2002. In the United States, this revelation caused barely a stir. Indeed, the government’s response has been to re-define juvenile. Omar Khadr, for example, was fifteen at the time he was picked up and taken to Guantanamo. Despite this, the military has re-defined him as an adult because he is currently an adult, even if he was a juvenile at the time of his alleged crimes. But Americans have not objected to this legal sleight of hand because we have become accustomed to exposing juveniles to the full harshness of our adult penal system. One example of how much of an outlier we are in this regard: in the entire world there are 2,237 people serving life without parole sentences for crimes they committed as juveniles. All but twelve of them are in the U.S.

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

Juveniles who remain in juvenile facilities often do not escape the brutal treatment described in the previous section. The original mandates of care and rehabilitation have frequently been replaced, in policy or practice, by a punitive emphasis. In Florida, for example, a fourteen-year-old boy was recently admitted into a state-run boot camp after stealing his grandmother’s car. Shortly after his arrival, he fell down complaining of shortness of breath during a forced run around the boot camp’s track. In response, more than seven guards descended upon him, and were captured roughing him up as he lay helpless on the ground. Eventually the boy was strapped to a gurney and taken to the

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76 For an exhaustive account of conditions of confinement in juvenile facilities, see Douglas E. Abrams, Reforming Juvenile Delinquency to Enhance Rehabilitation, Personal Accountability and Public Safety, 84 OR. L. REV. 1001, 1012-13 (2005).
hospital, where he was pronounced dead. In Texas, in the past few years, at least thirteen youths in state custody were sexually molested by state employees, while officials kept the reports secret. In Louisiana, guards created a game they called “Friday Night Fights,” and entertained themselves by watching kids pummel each other.

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

Echoing the arguments made in the context of the war on crime, defenders of holding juveniles in the war on terror argue that the teens have committed adult-like crimes and should be treated accordingly. As the Chairman of the Joint Chiefs of Staff said when asked about juveniles in Guantanamo, “despite their age these are very, very dangerous people. They may be juveniles but they’re not on a little-league team anywhere; they’re on a major-league team, and it’s a terrorist team.” This same reasoning has been the dominant response to Omar Khadr’s interrogation video released recently by his lawyers. Khadr was fifteen when he was seized and sixteen when he was interrogated, and his lawyers have made clear their hope that the circumstances (which include his age, intense questioning, pleading and crying by Khadr, and references to previous physical abuse) will gain public sympathy. One of them, Nathan Whitling, said he was “pleading in the court of public opinion.”

Perhaps the video will have an impact in Canada, where Khadr is a citizen, and the Canadian government might in turn pressure the U.S. government. But in America, where intense interrogations of juveniles are the norm, teenage status has long failed to move a public accustomed to treating teenage suspects as adults. In place of sympathy,

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81 Abramsky, supra note 45, at 220.

82 Ted Conover, In the Land of Guantanamo, N.Y. TIMES MAG., June 29, 2003, at 40.

our likely national impulse is summed up by the Retired Special Forces soldier who told the Washington Post, “That’s not just a sixteen-year-old boy snapped up off the streets. This is a demonstrated, hardened killer who is not happy with his new perspective on life, which is that he’s going to be spending a long, long time in U.S. custody.”

V. The Decline of Judicial Authority

From the war on crime’s launch in the early 1970s, judges have come under sustained attack as insufficiently committed to the contest. The critiques have taken a variety of forms. Judges have been criticized as arbitrary, irrational, idiosyncratic, elitist, and susceptible to being duped by clever defense lawyers or sympathetic defendants. They have been charged with spinning a “procedural web” designed “to prevent criminals from falling into the may of the prison system.” At the heart of this web is the exclusionary rule, which allows criminals to go free when judges find that police have violated the Constitution. When defendants are found guilty, critics say, judges too often impose light sentences that fail to protect the community. Florida Senator Paula Hawkins put the point plainly during debates over drug crime legislation in the 1980s: “All too many of our judges still avail themselves of the wide sentencing discretion allowed them under these watered down laws to let major drug dealers off with a tap on the wrist even after conviction.” Finally, say the critics, too many trial judges fail to control their courtrooms, especially in high-profile cases; the appeals process is even worse, as the court system allows litigious defendants to delay the inevitable, wasting precious resources and denying finality to victims.

Attacking judges as unduly sympathetic to criminals started on the right side of the political spectrum but has become more wide-spread over time. Bill Clinton’s tough on crime strategy included appointing an overwhelming number of former federal prosecutors as judges, avoiding controversial appointments, and, in one instance, criticizing his own appointee for excluding evidence in a drug case. More recently, presumptive Democratic nominee Barack Obama criticized the Supreme Court for ruling that the death penalty could not apply to child rape cases. The drumbeat of criticism

85 JONATHON SIMON, GOVERNING THROUGH CRIME 129 (2007).
87 Id. at 85.
90 “Comprehensive reform of the habeas corpus rules to prevent convicted criminals from exploiting the system, with more frivolous appeals, more unnecessary delays, and yes, more grief for the victims of crime and their families.” 109 CONG. REC. S2678 (Feb. 15, 2005) (statement of Sen. Dole)
has one consistent theme: judges cannot be counted on to protect us from society’s thugs. Judges are “behind each of the most perverse failures of today’s justice system,” argues John DiIulio, and innocent, law-abiding citizens pay the price.93

Consistent with this criticism, over the past forty years legislatures have steadily reduced judges’ authority in criminal cases. They have used a variety of mechanisms to do this: Congress has cut back on habeas corpus review by limiting prisoners’ ability to challenge their convictions and conditions of confinement.94 Judges have also lost sentencing authority. In 1980, there were only two states with sentencing guidelines; by 2000, there were seventeen.95 In 1980 no states had three-strikes-laws, requiring life sentences for certain categories of repeat offenders; by 2000 twenty-four states and the federal government did.96 During the same time period mandatory minimum sentences for many categories of crime proliferated around the country, and the majority of states moved to abolish parole.97

The George W. Bush administration has been particularly suspicious of judges. The administration pushed for the “Feeney amendment,” which further reduced judges’ already limited ability to sentence below the sentencing guidelines range.98 Shortly thereafter, Attorney General John Ashcroft directed all federal prosecutors to report any judicial departures below the guidelines range that had not been approved by the government. This memorandum was widely criticized, including by Chief Justice William Rehnquist.99

As these examples make clear, in the war on crime, the legislative and executive branches moved jointly to expand their own authority at the expense of the judiciary. Sometimes the seizure was direct. By enacting mandatory minimums, for example, the other branches determined what the minimum sentence would be for particular crimes, taking away a judge’s ability to decide based on the specifics of the case. Often the power shifted indirectly. Mandatory minimums and sentencing guidelines, for example, have given tremendous additional power to prosecutors, who can set the terms of the entire case based on what charges to file and whether and how to plea bargain.100

95 Western, supra note 29, at 65.
96 Id.
97 Id.
98 Mauer, supra note 21, at 89.
100 As a former prosecutor explained, “the Guidelines make the US attorney the most powerful person in the courtroom.” DORIS MARIE PROVINE, UNEQUAL UNDER LAW 124 (2007).
Judges from across the political spectrum have spoken out against these changes, but to little avail.\textsuperscript{101} For critics, judges’ own excessive leniency explains why they lost authority. As Max Boot argues, “The common complaint is that the guidelines, especially mandatory minimums, take away judges’ discretion and turn them into sentencing cyborgs. Precisely. That’s the point. And it’s worked.”\textsuperscript{102}

This is the backdrop to the Bush administration’s decisions about how to handle those captured in the war on terror. The first moves to limit judicial authority came from the executive branch, in the form of President Bush’s November 13, 2001, order establishing that military commissions, not civilian courts, would handle the trials of alleged terrorists and that the defendants would not have access to habeas corpus.\textsuperscript{103} After the Supreme Court held that the executive could not do this on its own, the administration was forced to seek legislative approval. Congress validated the limitation on judicial power by passing the Military Commissions Act of 2006, which set rules for the military commissions system and prevented domestic courts from reviewing the commission rulings.\textsuperscript{104}

Some of the arguments for restricting access to federal courts for alleged terrorists were specific to that context, including concerns that domestic courts were not equipped to handle national security secrets.\textsuperscript{105} Others built directly off of the critiques advanced in the war on crime. If judges cannot be trusted to limit grandstanding defense attorneys and a sensationalist media in high-profile domestic criminal cases, said critics, “the excesses of the modern U.S. criminal justice system” will ensure that a major terrorist trial will inevitably turn into a circus.\textsuperscript{106} Opponents of federal court involvement in terrorism trials made a similar point about the exclusionary rule. Allowing judicial application of the exclusionary rule in terrorism trials, they said, would mean that “the killer who goes free will later detonate a ‘suitcase’ nuclear weapon in mid-Manhattan or L.A.”\textsuperscript{107} As for habeas corpus, to authorize it for terrorists would subject the federal courts to the same parade of horribles invoked to justify limiting access in the domestic context. Prisoners, they argued, would abuse the system by filing frivolous claims. Using language similar to that employed when Congress restricted domestic prisoner’s access to the courts,\textsuperscript{108} South Carolina Senator Lindsey Graham argued that Guantanamo detainees

\textsuperscript{102} Boot, \textit{supra} note 86, at 53.
\textsuperscript{104} Military commissions Act of 2006, 10 USC 948 (a) (2006).
\textsuperscript{105} T\textit{errorists on Trial}, T\textit{HE W\textit{ALL S\textit{T. J.}, Nov. 16, 2001, at A12.
}\textsuperscript{106} \textit{Id.}
\textsuperscript{108} Senator Hatch argued that domestic habeas legislation was needed to “stop the frivolous appeals that have been driving people nuts throughout this country and subjecting victims and families of victims to
have used the habeas writ to “sue our own military for everything imaginable: the quality of the food, DVD access, not enough exercise, judge-supervised interrogation.”

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

VI. Undermining Defense Counsel

Guantanamo defense attorney Clive Stafford Smith has described the obstacles the government has placed in the way of defense lawyers in terrorism cases. Initially the administration outright denied counsel to terror suspects; more recently, the government has employed a range of tactics to prevent defense lawyers from doing their jobs, from the mundane (limiting a lawyer’s ability to meet with her client) to the more inventive (having military personnel telling Guantanamo prisoners that their lawyers are Jewish, defenders of Israel, or homosexual). Lawyers representing those locked up in the war on terror have been accused of waging “lawfare,” the “growing use of international law claims, usually factually or legally meritless, as a tool of war.”

As I reflect on such blatant attacks on the right to counsel, my mind retreats to the first criminal case I ever worked on. The summer after graduating law school, I assisted an experienced death penalty lawyer on a habeas case. Our client had been charged, more than a decade earlier, with murder in the course of a robbery of a Utah electronics store. The local judge decided to appoint as the defense attorney a young man who had just graduated from law school and had never tried a criminal case. Perhaps our client would have been convicted and sentenced to death anyway, but his fate was surely sealed when, in one of the most complicated types of cases known to our criminal law, he was given a lawyer who had never filed a single criminal motion.

Our client’s situation was more typical than I knew at the time. Since about three-quarters of felony defendants are poor enough to receive a state-funded lawyer, criminal

110 Simon, supra note 85, at 129 (2007).
defense for the poor is, for practical purposes, American criminal defense. And while it is rare to see the type of government interference that Smith and others describe at Guantanamo Bay, the State has devised other methods to ensure criminal defendants receive a lawyer in name only. The principal one is to limit funding available to contract attorneys and public defender offices. On the whole, the United States spends about a third per capita what England does on its indigent defense system. In individual states the situation is often far worse. In Indiana, for example, lawyers can bill $150 for a misdemeanor case and $1,250 for a felony, and that statute has not changed for a quarter of a century. A New Orleans public defender reported defending more than 400 clients in the first seven months of the year, during which time he pled more than 130 clients at arraignment and had a serious felony scheduled for trial every single day. As a result of similar stories, the Louisiana court held that lawyers in New Orleans were presumed to be ineffective, though the court backed down after the legislature refused to increase funding.

The result of these burdens is, in some cases, clients who plead guilty without ever meeting their attorney. An American Bar Association Report found over 10,000 defendants had pled guilty to misdemeanor charges in Riverside County, California, without having consulted a lawyer. In a Louisiana parish, the public defender never met over 80% of his clients outside of court. The fact that many poor defendants do not have lawyers is one of the reasons for the high rate of guilty pleas. Nothing concentrates the mind around the benefits of a guilty plea like hearing the prosecutor answer “ready for trial” when the judge calls your case and looking over to realize that your lawyer has never met you and barely knows your name.

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

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113 DEBORAH L. RHODE, ACCESS TO COUNSEL 11 (2005).
116 Id. at 9.
118 Bright v. Peart, 621 So. 2d 780 (La. 1993).
119 Id., supra note 117, at 18.
120 Id. at 16.
121 Approximately 90% of criminal cases are resolved with guilty pleas. Rhode, supra note 113, at 4.
attack from an unsympathetic legislature, which began cutting its budget. The future of the office is now in doubt.\textsuperscript{122}

The inadequacies I have sketched are now well known. Reams of reports have been issued.\textsuperscript{123} Books have been written. Highly publicized stories of defendants being sentenced to death while their attorneys literally slept in court have circulated.\textsuperscript{124} The overwhelmed public defender who wants to plead out the client she does not know or care about is a fixture of popular culture. Our harshness toward the accused and his lawyer has become part of us, and we meet stories of Guantanamo detainees denied access to counsel with a collective shrug.

At best a shrug. The last piece of the story about how we view defense counsel in the war on terror and the war on crime concerns the aggressive anti-defense lawyer rhetoric which has come to mark our culture. During the 1990s federal funding for capital defense lawyers was largely eliminated.\textsuperscript{125} During that time, public defense programs were criticized in the \textit{Wall Street Journal} as “taking money away from law-abiding, hardworking taxpayers and then giving it to the likes of convicted felons, delinquent fathers, illegal aliens, and even drug dealers.”\textsuperscript{126}

Individual defense attorneys have faced attack for their work as well. In the 2005 Virginia gubernatorial race, candidate Tim Kaine faced attack ads for his work as a defense attorney earlier in his career. One notorious ad featured a visibly emotional parent chastising Kaine for "voluntarily represent[ing] the person who murdered my son." The grieving parent then alleged, "Tim Kaine says that Adolf Hitler doesn't qualify for the death penalty." By humanizing those accused of monstrous acts, the reasoning goes, defense lawyers are themselves monsters. Deval Patrick received similar treatment during his run for Massachusetts Governor. While in private practice, Patrick had worked on the appeal of a man sentenced to death for killing a police officer. Patrick’s opponent ran an ad asking, “While lawyers have a right to defend admitted cop killers, do we really want one as our governor?”\textsuperscript{127}

\begin{thebibliography}{9}
\bibitem{126} 142 CONG. REC. 18,626 (1996) (statement of Rep. Taylor); see also Deborah M. Weissman, \textit{Law as Largess: Shifting Paradigms of Law for the Poor}, 44 WM AND MARY L. REV. 737, 761-68 (detailing Congressional attacks on indigent defense funding).\textm
\bibitem{127} DeWayne Wickham, \textit{In Boston, the Smell of a Dirty Trick}, USA TODAY, Oct. 17, 2006, at 19A.
\end{thebibliography}
This context helps to make some sense of Pentagon official Charles D. Stimson’s infamous attack on the pro-bono efforts of elite American law firms in defending detainees in the war on terror. According to Stimson, “when corporate C.E.O.’s see that those firms are representing the very terrorists who hit their bottom line back in 2001, those C.E.O.’s are going to make those law firms choose between representing terrorists or representing reputable firms.” Stimson was not alone. A year before Stimson’s attacks, Deroy Murdock of the National Review was already impugning the efforts of the Guantanamo habeas lawyers. Murdock ends with a call to arms designed to highlight the lunacy of providing adequate defense counsel: "So, join Al Qaeda, fall into allied hands, land in Guantanamo, and top-flight U.S. lawyers will fight for your freedom while the Great Satan's captains of industry unwittingly underwrite your legal expenses. Only in America." Debra Burlingame, co-founder of the victim-advocacy group 9-11 Families for a Safe & Strong America, strikes a similar theme. “Lawyers can literally get us killed,” she says. Lawyers who “subvert the truth and transform the Constitution into a lethal weapon in the hands of our enemies” are waging a “legal and PR offensive against the United States.”

VII. Conclusion: The War Metaphor

Throughout this Essay I have attempted to show how, in some important ways, 9-11 did not change everything. In comparing the war on terror with our domestic war on crime, I hope to raise questions about how we have prosecuted both. There is one final analogy that is worth our consideration, one which might help explain all the others. It concerns the very metaphor of war. The fact that the fight against terrorism is a war has been an essential part of the justification for punitive measures. Indeed, defenders of harshness have explicitly contrasted the war on terror with domestic law enforcement, arguing that the former requires a sterner response. For example, in arguing that alleged terrorists should not have access to civilian courts, the Wall Street Journal argued, “This is war, not a car theft in Chevy Chase.”

But the Journal’s juxtaposition of terrorism with car thefts is as misleading as it is clever. To suggest that our domestic criminal system is designed to respond to car thefts hides the reality that advocates for a harsher American criminal system have hardly relied on car thefts to make their case. Like the advocates of harsh tactics in the war on terror, domestic crime warriors have also claimed to be combatting a new breed of violence that is uniquely threatening and will only be contained with an iron-fisted response. In arguing for harsh laws against drug users and drug dealers in the 1970s, for example,

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130 Id.
New York Governor Nelson Rockefeller said: “The crime, the muggings, the robberies, the murders associated with addiction continue to spread a reign of terror. Whole neighborhoods have been as effectively destroyed by addicts as by an invading army.”

A generation later, California Governor Pete Wilson echoed Rockefeller’s characterization of domestic crime as form of terrorism, calling on the state legislature to create a set of laws for juvenile criminals that are “as unforgiving as the terrorism that’s been inflicted on innocent victims for too long now.” The harshness of our domestic criminal justice system reflects the enemy it has been designed to combat, and that enemy is not Chevy Chase car thieves but rather Rockefeller’s and Wilson’s “invading army” of criminals who inflict “terrorism” on the rest of us.

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

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

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133 Abramsky, supra note 45, at 220.
134 Lichtblau, supra note 5, at 25.