

Fordham Law School

FLASH: The Fordham Law Archive of Scholarship and History

Faculty Scholarship

2011

Lawyering in a Vacuum

James A. Cohen

jcohen@law.fordham.edu

Follow this and additional works at: https://ir.lawnet.fordham.edu/faculty_scholarship



Part of the [Legal Profession Commons](#)

Recommended Citation

James A. Cohen, *Lawyering in a Vacuum*, 41 Seton Hall L. Rev. 1427 (2011)

Available at: https://ir.lawnet.fordham.edu/faculty_scholarship/989

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

Lawyering in a Vacuum

James A. Cohen^{*}

I. INTRODUCTION¹

I became particularly interested in the lawyering challenges facing lawyers when dealing with clients who are detainees held at the United States' military base in Guantánamo Bay, Cuba,² in 2006 when two colleagues³ and I began representing several of the men detained there.⁴ This Essay is an attempt to identify the challenges faced by the lawyers who have volunteered to represent detainees, and an effort to offer some modest suggestions for improving the representation of similar clients.

In 2007, I was one of the first lawyers to visit Camp 6 at the detention camp in Guantánamo Bay. The military had just opened Camp 6, a new prison in the high security prison facility.⁵ Cells comprised of floor-to-ceiling solid metal walls with no windows except for

^{*} Associate Professor of Law at Fordham University School of Law. Professor Cohen teaches Professional Responsibility, Psychology and the Law, and the Federal Litigation Clinic. Special thanks to Katherine Kikes, Kelsey Ripper, Kevin Wakefield, and Amanda Zifchak.

¹ Writing about representing detainees at Guantánamo is very much an exercise in shooting at a moving target. Though the target is not especially fast moving, it is moving fast enough to make what one says at one moment accurate and yet not completely accurate at the next moment.

² The Bush administration chose the base at Guantánamo because it was believed to be outside the jurisdiction of the U.S. judicial system. See ANDY WORTHINGTON, *THE GUANTÁNAMO FILES: THE STORIES OF THE 774 DETAINEES IN AMERICA'S ILLEGAL PRISON* xii (2007).

³ Along with my colleagues Professor Martha Rayner, who also teaches at Fordham University School of Law, and Ramzi Kassem, who now teaches at CUNY School of Law, we began representing four men held at the military camp in Guantánamo Bay, Cuba.

⁴ Once the detainees arrived at Guantánamo, lawyers lead by those at the Center for Constitutional Rights (CCR) asserted that the detainees had rights including the right to counsel. See Peter Margulies, *The Detainees Dilemma: The Virtues and Vices of Advocacy Strategies in the War on Terror*, 57 *BUFF. L. REV.* 347, 369 (2009). Much litigation began and still continues. Thus far, at a minimum and possibly only for the time being, the litigation has resulted in the detainees being allowed to have counsel.

⁵ James A. Cohen, *Cleared Men, Harsh Facility; Camp 6 at Guantanamo*, 29 *NAT. L.J.* 22, 22 (2007).

a strip of glass looking out on to the prison corridor. For twenty-two hours a day, detainees were kept in these blocks with no human contact or exposure to natural light. For the remaining two hours of the day, the guards transferred the detainees in shackles and hoods to a twelve-by-nine-foot barbed wire pen where they received their only human interaction from other detainees in adjoining pens, save for the heavily censored mail sent by their families and letters from their lawyers. Because solitary confinement was the norm, any extra discipline was administered in the form of a diet of bread and raisins for three days, bread alone for thirty days, confiscation of the detainees' undershirts, the cutting of their beards, or confiscation of their Qurans.

The conditions were oppressive and punitive—more oppressive than the conditions in a maximum-security prison in the United States—though nearly twenty-five percent of Guantánamo's inhabitants had essentially been declared to no longer be dangerous to the United States or the Coalition, to no longer be intelligence assets, and were awaiting repatriation to their home country.⁶ In fact, of the several hundred men imprisoned at Guantánamo, only ten were charged under the first military commission system, which was invalidated by the Supreme Court, and only three of the sixty to eighty men whom the government claimed it was going to charge had their cases resolved.⁷ That left over 200 men in the harshest prison known to the United States without any clear indication as to whether they would even be charged.⁸

On March 7, 2011, four years after my visit, President Obama authorized the indefinite detention of enemy combatants,⁹ legitimizing

⁶ *Id.*

⁷ Devon Chaffee, *Military Commissions Revived: Persisting Problems of Perception*, 9 U.N.H. L. REV. 237, 237–38 (2011).

⁸ Now there are about 171 detainees at Guantánamo, which includes approximately forty-five to fifty detainees whom the government has determined it will not charge, but whom it will keep in custody indefinitely. *The Guantánamo Docket: A History of the Detainee Population*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo> (last updated Sept. 12, 2011) [hereinafter *The Detainees*]. As of June 2011, there is a new prosecutor in charge of the Military Commission process. It is the first time that a general has been in charge and the expectation is that he was put in charge to accelerate prosecutions. Peter Finn, *Pentagon Names New Guantánamo Prosecutor*, WASH. POST (June 23, 2011), http://www.washingtonpost.com/national/national-security/pentagon-names-new-guantanamoprosecutor/2011/06/23/AGlp73hH_story.html.

⁹ See Peter Finn & Anne E. Kornblut, *Obama Allows Indefinite Detention*, WASH. POST, Mar. 8, 2011, at A1.

2011]

LAWYERING IN A VACUUM

1429

a policy that denies detainees traditional due process rights but still allows them legal representation.¹⁰ The story of lawyering for clients at Guantánamo has evolved in many ways between 2006 and the summer of 2011. The law has changed from explicitly stating that the detainees have very minimal rights under the Military Commissions Act of 2006,¹¹ to U.S. Supreme Court decisions permitting detainees to file for writs of habeas corpus,¹² to the Military Commission Act of 2009,¹³ which bars the use of coerced statements as evidence.

Relationships with clients have evolved as well. At the beginning, “humanity” was the only common ground. Given the lack of legal progress, some clients have given up and refuse to see their lawyers, while some others have established a meaningful attorney-client relationship. Others are in between. For the attorney presented with the unprecedented task of representing these clients, the government’s interests necessarily conflict with the detainee’s interest. Often, the lawyer’s usual practices are stymied by an uncooperative administration, rejected by the client, and scorned by members of the American public and military, who see representation of enemy combatants as an act of disloyalty.¹⁴ The legal community faces the quandary of defending accused terrorists without the traditional features of the American criminal justice system or even the expectation of justice, as if participating in a different legal system entirely. With little support and almost no direction, the detainee advocate is lawyering in a vacuum.

II. BACKGROUND

A. *My Experience*

I have simultaneously taught and practiced law full-time for the past three decades. My teaching and practice overlap considerably because the majority of my teaching time is spent representing, with my students, clients charged with federal crimes. We represent the client from arrest until the conclusion of the case, which includes ne-

¹⁰ See William Glaberson, *Many Detainees at Guantánamo Rebuff Lawyers*, N.Y. TIMES, May 5, 2007, at A1 (describing the difficulties of legal representation).

¹¹ Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.).

¹² See *Boumediene v. Bush*, 553 U.S. 723 (2008).

¹³ 10 U.S.C. §§ 948a–950t (Supp. III 2009).

¹⁴ See, e.g., John Heilprin, *Views on Detainee Representation Draw Fire*, WASH. POST, Jan. 14, 2007, at A5.

cessary appeals. I have tried to verdict more than one hundred jury trials and have argued appeals in the U. S. Supreme Court, the Court of Appeals for the Second Circuit, and the New York Court of Appeals. Despite this wealth of experience and the luxury of working with very smart and eager law students in an environment that affords opportunity for reflection, the representation of clients detained in Guantánamo presents unique challenges.

None of the lawyering models that we teach, study, and practice¹⁵ seem to be a comfortable fit. Perhaps the criminal defense paradigm is the model that seems closest because I have an extensive background in the subject and the detainees are imprisoned.¹⁶ But the comparison to criminal defendants starts and ends with that fact. The differences between criminal practice and representing detainees are truly staggering.

B. *The Clients*

It has been reported that 779 detainees have passed through Guantánamo since January 11, 2002.¹⁷ While approximately 600 detainees have since been repatriated or transferred to other countries, at least 171 detainees remain in U.S. custody.¹⁸ The detainees have been exclusively male and the majority of them—542—have been brought to Guantánamo from Afghanistan, Saudi Arabia, Yemen, and

¹⁵ See generally ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION (1990); DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (2004); STEPHEN ELLMANN ET AL., LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING (2009); Robert Dinerstein et al., *Connection, Capacity and Morality in Lawyer-Client Relationships: Dialogues and Commentary*, 10 CLINICAL L. REV. 755 (2004). See discussion *infra* notes 110–16116 & accompanying text.

¹⁶ “The criminal law paradigm is now, and has been from the beginning, the right one to apply to the fight against terrorism.” Eric M. Freedman, *Who’s Afraid of the Criminal Law Paradigm in the “War on Terror?”*, 10 N.Y. CITY L. REV. 323, 323 (2007).

¹⁷ *The Detainees*, *supra* note 8. January 11, 2002, saw the first twenty prisoners arrive in Guantánamo by plane. JOSEPH MARGULIES, GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER 63 (2006).

¹⁸ *The Detainees*, *supra* note 8. Additionally, eight detainees have died in detention at Guantánamo, the latest reported death occurred in May 2011. *Afghan Prisoner at Guantánamo Dies in Apparent Suicide*, REUTERS, May 18, 2011, available at <http://www.reuters.com/article/2011/05/19/us-usa-guantanamo-death-idUSTRE74I04I20110519> (“Inayatullah is the eighth prisoner to die at the detention center . . .”).

Pakistan.¹⁹ Citizens of an additional forty-four countries have been held at Guantánamo, including one U.S. citizen.²⁰

It is understandably difficult for an American lawyer to gain the trust of detainees—most of whom have been unjustly held by the military, tortured, and neglected by doctors.²¹ Also challenging the American lawyer is the fact that the detainees come predominantly from countries where the lawyer-client relationship is either non-existent or at the least very different than the one that exists in the United States. Virtually none of the detainees come from countries with legal systems that are adversarial in nature.²² Accordingly, many detainees are unable to separate the interest of their legal advocate from the interest of the government or the prison guard.

Before reaching Guantánamo, many detainees spent months or years in secret U.S. detention facilities near the Afghan cities of Kandahar and Bagram.²³ The reports of detainee treatment at Kandahar and Bagram are nothing short of horrifying: detainees were subjected to harsh interrogation tactics; psychological and physical torture,²⁴ in-

¹⁹ *The Detainees*, *supra* note 8.

²⁰ *Id.* Yaser Esam Hamdi, a dual citizen of the United States and Saudi Arabia, was released and transferred to the United States on April 5, 2002. *The Guantánamo Docket: Yaser Esam Hamdi*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo/detainees/9-yaser-esam-hamdi> (last visited Sept. 25, 2011).

²¹ *See, e.g.*, CTR. FOR CONSTITUTIONAL RIGHTS, CURRENT CONDITIONS OF CONFINEMENT AT GUANTÁNAMO (2009) *available at* http://ccrjustice.org/files/CCR_Report_Conditions_At_Guantanamo.pdf.

²² *See* Frank E. Vogel, *The Trial of Terrorists Under Classical Islamic Law*, 43 HARV. INT'L L.J. 53, 55–56 (2002).

²³ *See, e.g.*, CTR. FOR CONSTITUTIONAL RIGHTS, ABANDONED AT GUANTÁNAMO 11 (2008), *available at* http://ccrjustice.org/files/Guant%C3%83%C2%A1namo%27s%20Refugees%203d%20ed%20_FINAL_.pdf.

²⁴ The statute defines torture as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.” 18 U.S.C. § 2340(1) (2006). And it defines “severe mental pain or suffering” as

the prolonged mental harm caused by or resulting from— (A) the intentional infliction or threatened infliction of severe physical pain or suffering; (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (C) the threat of imminent death; or (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances

cluding waterboarding,²⁵ stress positions, and strip searches; terrorized by attack dogs; and verbally threatened with rape and death.²⁶ Guards intentionally desecrated the Quran by sitting on it, kicking it, and even dropping it into a latrine bucket.²⁷ Interrogators told detainees that they would spend the rest of their lives in Bagram or Kandahar and Guantánamo.²⁸ A detainee who was later released ex-

or other procedures calculated to disrupt profoundly the senses or personality.

Id. § 2340(2).

²⁵ The purpose of waterboarding is to induce the body's physical response to drowning. Memorandum from Jay S. Bybee, Assistant Att'y Gen., to John Rizzo, Acting Gen. Counsel, Cent. Intelligence Agency 11 (Aug. 1, 2002), *available at* <http://www.fas.org/irp/agency/doj/olc/zubaydah.pdf> ("As we understand it, when the waterboard is used, the subject's body responds as if the subject were drowning—even though the subject may be well aware that he is in fact not drowning."). Here is the CIA's description of the procedure, according to John Bybee's memorandum:

In this procedure, the individual is bound securely to an inclined bench, which is approximately four feet by seven feet. The individual's feet are generally elevated. A cloth is placed over the forehead and eyes. Water is then applied to the cloth in a controlled manner. As this is done, the cloth is lowered until it covers both the nose and mouth. Once the cloth is saturated and completely covers the mouth and nose, air flow is slightly restricted for 20 to 40 seconds due to the presence of the cloth. This causes an increase in carbon dioxide level in the individual's blood. This increase in the carbon dioxide level stimulates increased effort to breathe. This effort plus the cloth produces the perception of "suffocation and incipient panic," i.e., the perception of drowning.

Id. at 3–4. What could be a clearer definition of the "threat of imminent death" than a body's physical reaction to imminent death?

Former Secretary of Defense Donald Rumsfeld has denied that military personnel ever engaged in waterboarding, but there is evidence of "water torture" and other uses of water for the same purpose and same effect—simulated drowning—at Guantánamo, which is run by the U.S. military. *See Truthout Contributor Jeffrey Kaye on Guantánamo Water Torture and Rumsfeld's Denials*, PUB. RECORD (Aug. 8, 2011), <http://pubrecord.org/multimedia/9597/truthout-contributor-jeffrey-guantánamo>; *see also* CTR. FOR CONSTITUTIONAL RIGHTS, REPORT ON TORTURE, CRUEL, INHUMAN AND DEGRADING TREATMENT OF PRISONERS AT GUANTÁNAMO BAY, CUBA 28 (2006), *available at* http://ccrjustice.org/files/Report_ReportOnTorture.pdf

²⁶ LAUREL E. FLETCHER ET AL., CTR. FOR CONSTITUTIONAL RIGHTS, GUANTÁNAMO AND ITS AFTERMATH: U.S. DETENTION AND INTERROGATION PRACTICES AND THEIR IMPACT ON FORMER DETAINEES 17, 18–26 (2008) (quoting MARK DENBEAUX ET AL., REPORT ON GUANTÁNAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA 15 (2011), *available at* http://ccrjustice.org/files/Report_GTMO_And_Its_Aftermath_0.pdf).

²⁷ *Id.* at 22–23.

²⁸ *Id.* at 26.

pressed the following: “I felt I would be much luckier if I died. . . . [T]here was no law there.”²⁹

These detention centers were often the second stop on the way to Guantánamo; many detainees were first kept for several weeks or months in a “Prison of Darkness.”³⁰ Men were held there in dark cells with deafening music playing day and night.³¹ The guards’ faces were always covered, and one former detainee was told that he was being held somewhere “where no one knew[] where [he was] and [where] no one [was] going to defend [him].”³² Men disappeared into these “dark prisons.”³³ Many of those who survived—some detainees were in fact killed in custody³⁴—were drugged, chained, and, eventually, boarded onto Cuba-bound planes.³⁵

In attempts to secure intelligence, interrogators exploit the detainees’ lack of understanding of the American criminal justice system. It was common for interrogators to falsely claim to be the detainees’ lawyers.³⁶ This is meant to manipulate the cultural differences because detainees already oftentimes think that their lawyers are FBI or CIA agents.³⁷ Assigning military lawyers, who dress in uniforms similar to the guards’, to represent detainees is equally troubling, as many detainees assume that the attorneys work for the government and not for them.³⁸ Other policies attempt to deter the detainees from using legal assistance in the first place. Interrogators have been known to lie to detainees that their lawyers are either Jewish or homosexual, exploiting prejudices that the detainees might have against these groups.³⁹

Many of the countries from which the detainees come have legal systems based wholly on Islamic law or systems that combine civil and

²⁹ *Id.*

³⁰ *Id.* at 20.

³¹ *Id.*

³² FLETCHER, *supra* note 26, at 20.

³³ *U.S. Operated Secret ‘Dark Prison’ in Kabul*, HUM. RTS. WATCH (Dec. 19, 2005), <http://www.hrw.org/en/news/2005/12/18/us-operated-secret-dark-prison-kabul>.

³⁴ FLETCHER, *supra* note 26, at 23–24. Military autopsies on the deaths of Mullah Habibullah and a taxi driver named Dilawar reported blunt force injuries to the lower extremities and determined the deaths to be homicides. *Id.* at 23.

³⁵ *Id.* at 27–28.

³⁶ David Luban, *Lawfare and Legal Ethics in Guantánamo*, 60 STAN. L. REV. 1981, 1994 (2008).

³⁷ *Id.*

³⁸ Glaberson, *supra* note 10.

³⁹ *Id.*

Islamic religious law.⁴⁰ Traditional Islamic law does not require or provide attorneys for criminal defendants,⁴¹ although many of these countries now allow attorneys to participate in legal proceedings.⁴² For the most part, detainees know little about their home legal systems and little about the American legal system.

Virtually all of the detainees are Muslim.⁴³ Few of the lawyers, however, are Muslim. The lawyers and the clients are unfamiliar with one another; for most of the lawyers, their clients' cultures, economic status, legal systems, everyday lives, religious beliefs, political and governmental structures are completely or mostly unknown. And, vice versa. All of these factors make the establishment of a meaningful attorney-client relationship especially difficult.

Although there are no official statistics for the country of Yemen, its Muslim population is estimated at nearly one hundred percent.⁴⁴ Thirty of the forty-eight countries represented by Guantánamo detainees have Muslim populations of fifty percent or more; fifteen of those countries have Muslim populations of ninety-five percent or more and they represent 631 of the 779 detainees who have passed through Guantánamo.⁴⁵

⁴⁰ *The World Factbook: Legal System*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html?countryName=Saudi%20Arabia&countryCode=sa®ionCode=me&#sa> (last visited Sept. 25, 2011).

⁴¹ See Vogel, *supra* note 22, at 55–56 (explaining that in classical Islamic courts defendants were not represented by attorneys, but now defense attorneys, in theory, are allowed in nearly all Muslim countries).

⁴² *Id.*

⁴³ According to the CIA's World Factbook, ninety-five percent of all Pakistanis are Muslim, ninety-nine percent of Afghans, and one hundred percent of Saudis. *The World Factbook: Religions: Saudi Arabia*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/fields/2122.html?countryName=Saudi%20Arabia&countryCode=sa®ionCode=me&#sa> (last visited Sept. 25, 2011).

⁴⁴ *Yemen*, U.S. DEP'T STATE, <http://www.state.gov/g/drl/rls/irf/2008/108496.htm> (last visited Sept. 25, 2011); see also *The World Factbook: Yemen*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/ym.html> (last visited Sept. 25, 2011);

⁴⁵ *The Guantánamo Docket: Countries of Citizenship*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo/detainees/by-country> (last visited Sept. 25, 2011); *The World Factbook: Religions: Yemen*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/fields/2122.html?countryName=Yemen&countryCode=ym®ionCode=me&#ym> (last visited Sept. 25, 2011).

Most of the detainees at Guantánamo were not captured directly by U.S. forces or during conventional battle.⁴⁶ Almost eighty percent of Guantánamo detainees were seized by the Northern Alliance, tribal warlords, or Pakistani intelligence officers.⁴⁷ Instead of battlefields, they were plucked out of villages, mosques, and homes.⁴⁸ The U.S. military “had no choice but to rely on local intelligence” to help them find and remove alleged al Qaeda and Taliban fighters from Iraq and Afghanistan.⁴⁹ In Afghanistan—a country saturated with tribal feuds and inter-ethnic bloodshed—much of the gathered intelligence was worthless and the Army received tips that “were nothing more than attempts by one tribe to retaliate against another.”⁵⁰ Some detainees who have since been released have said that “personal feuds or failure to pay bribes to local officials led to their arrests” and long-term detentions.⁵¹

The majority of these men were not fighters for—or even affiliated with—al Qaeda or the Taliban. Men of ages fourteen to eighty—farmers, taxi drivers, and many unwilling Taliban recruits—were taken to Guantánamo.⁵² Some were coerced through enhanced interrogation techniques or bribed into lying to interrogators about the terrorist activities of fellow detainees.⁵³ For these reasons, many of those who were eventually released had been wrongfully imprisoned in the first place.⁵⁴

Starting in 2002, detainees went on hunger strikes to protest their harsh treatment and imprisonment without charges.⁵⁵ The mili-

⁴⁶ MARGULIES, *supra* note 17, at 69.

⁴⁷ *Id.*; see also Peter Jan Honigsberg, *Inside Guantánamo*, 10 NEV. L.J. 82, 94 (2009).

⁴⁸ *Id.*

⁴⁹ MARGULIES, *supra* note 17, at 68.

⁵⁰ *Id.*

⁵¹ FLETCHER, *supra* note 26, at 18.

⁵² Andy Worthington, *The Hidden Horrors of WikiLeaks’ Guantánamo Files*, ANDY WORTHINGTON (Mar. 11, 2011), <http://www.andyworthington.co.uk/2011/04/27/the-hidden-horrors-of-wikileaks-guantanamo-files> [hereinafter Worthington, *Hidden Horrors*].

⁵³ Andy Worthington, *WikiLeaks Reveals Secret Guantánamo Files, Exposes Detention Policy as a Construct of Lies*, ANDY WORTHINGTON (Apr. 25, 2011), <http://www.andyworthington.co.uk/2011/04/25/wikileaks-reveals-secret-guantanamo-files-exposes-detention-policy-as-a-construct-of-lies> [hereinafter Worthington, *Wikileaks Reveals*].

⁵⁴ *Id.*

⁵⁵ Kevin Gosztola, *The Hunger Strikers of Guantanamo as Detailed in Files Released by WikiLeaks*, FIREDOGLAKE (May 4, 2011, 12:48 PM),

tary's response to these and other "revolt strategies" has been harsh. In 2006, the government, in accordance with Joint Task Force Guantánamo policy, authorized the forced insertion of feeding tubes to prevent protesters from dying and sully the image of the military.⁵⁶ In many cases, doctors neglected to report injuries or psychological disorders with clear links to torture and did not inquire as to their causes.⁵⁷ One journalist explained, "In my mind the physicians turned a blind eye. My suspicion is that clinicians were aware on some level of mistreatment, at least the possibility of mistreatment, and for whatever reason—fear, orders from superiors—they didn't want to take their clinical encounters in that direction."⁵⁸ In addition to physical maladies, a significant portion of the Guantánamo population suffers from posttraumatic stress disorder (PTSD), depression, memory loss, and paranoia, though many are so distrustful of prison personnel that they fail to seek treatment.⁵⁹

Professors Mark Denbeaux, Joshua Denbeaux, and students of Seton Hall University School of Law compiled a status report on the detainees using solely U.S. government documents in 2006.⁶⁰ The status report revealed that fifty-five percent of the detainees had not committed any hostile acts against the United States or its coalition allies.⁶¹ Only eight percent of the detainees were "characterized as al Qaeda fighters."⁶² Forty percent had no affiliation with al Qaeda and eighteen percent had no affiliation with either al Qaeda or the Taliban.⁶³

Most detainees were seized and held by mistake.⁶⁴ During the months after September 11, 2001, the United States "dropped leaflets promising generous rewards for 'al-Qaeda and Taliban murderers.'"⁶⁵

<http://my.firedoglake.com/kgosztola/2011/05/04/the-hunger-strikers-of-guantanamo-as-detailed-in-files-released-by-wikileaks>.

⁵⁶ *Id.*

⁵⁷ Courtney Hutchison, *Guantanamo Docs Neglected, Concealed Medical Evidence of Torture, Study Finds*, ABC NEWS (Apr. 26, 2011), <http://abcnews.go.com/Health/MindMoodNews/guantanamo-docs-neglected-concealed-medical-evidence-torture-study/story?id=13460240>.

⁵⁸ *Id.*

⁵⁹ David J. R. Frakt, *The Difficulty of Defending Detainees*, 48 WASHBURN L.J. 381, 394 (2009).

⁶⁰ DENBEAUX ET AL., *supra* note 26.

⁶¹ *Id.* at 2.

⁶² *Id.* (emphasis added).

⁶³ *Id.*

⁶⁴ See Worthington, *Wikileaks Reveals*, *supra* note 53.

⁶⁵ FLETCHER, *supra* note 26, at 17 (quoting DENBEAUX ET AL., *supra* note 26, at 15).

The cash incentive caused local militia and village leaders in Pakistan and Afghanistan to seize men and turn them over to the Pakistani army without proof of terrorist affiliations.⁶⁶ The army then turned over 369 “suspects” to the CIA, receiving compensation of up to \$5,000 for each man.⁶⁷

C. *The Lawyers*

When the prison at Guantánamo was first established in 2002, the organized bar avoided direct involvement with the legal issues presented by the detention of so-called “enemy combatants.”⁶⁸ The first lawyers to become involved with the representation of Guantánamo detainees were death penalty lawyers and civil rights activists, such as Clive Stafford Smith and Joseph Margulies.⁶⁹ Together with the CCR,⁷⁰ these lawyers advocated for the rule of law in the aftermath of September 11, 2001.⁷¹ These lawyers viewed the detention of “enemy combatants” at Guantánamo as an issue of great constitutional importance.

Within a few years, the American Bar Association (ABA) and “mainstream” lawyers became increasingly involved in the representation of detainees.⁷² Many of these lawyers have come from some of the biggest law firms in the United States.⁷³ The lawyers who have vo-

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See Peter Margulies, *The Detainees Dilemma: The Virtues and Vices of Advocacy Strategies in the War on Terror*, 57 *BUFF. L. REV.* 347, 369 (2009).

⁶⁹ *Id.*

⁷⁰ The CCR is a non-profit legal organization which aims to protect the rights guaranteed by the U.S. Constitution and the Universal Declaration of Human Rights. *About CCR*, *CTR. FOR CONST. RTS.*, <http://www.ccrjustice.org> (last visited Sept. 25, 2011). Since September 11, 2001, CCR has brought several cases challenging the Bush administration’s detention and interrogation policies during the “War on Terror.” See, e.g., *Boumediene v. Bush*, 553 U.S. 723 (2008); *Rasul v. Bush*, 542 U.S. 466 (2004).

⁷¹ Margulies, *supra* note 68, at 369.

⁷² *Id.*

⁷³ Some of the law firms participating include: Perkins Coie; Shearman & Sterling; Proskauer Rose; Mayer, Brown, Rowe & Maw; Blank Rome; Manatt, Phelps & Phillips; Allen & Overy; Paul, Weiss, Rifkind, Wharton & Garrison; Hunton & Williams; Holland & Hart; Dorsey & Whitney; and Covington & Burling. Mark Denbeaux & Christa Boyd-Nafstad, *The Attorney-Client Relationship in Guantánamo Bay*, 30 *FORDHAM INT’L L.J.* 491, 498–99 n.29 (2007). I asked a senior litigation partner at one of these firms how corporate clients reacted to the fact that their law firm was involved in the Guantánamo litigation. He responded that the corporate clients know better than anyone the importance of lawyers.

lunteered to represent those detained at Guantánamo come from every facet of the profession. They include lawyers from medium and small firms,⁷⁴ military lawyers, solo practitioners, law professors, and federal defenders.⁷⁵ They also come from diverse specialties: criminal and civil litigation, transactional work, and subspecialties in substantive areas. Many lawyers began by representing more than one detainee.⁷⁶

The representation of detainees by large firms drew the ire of certain government officials, notably Charles “Cully” Stimson, the former Deputy Assistant Secretary of Defense for Detainee Affairs.⁷⁷ Mr. Stimson stated in a 2007 interview that he was dismayed that lawyers from such firms would choose to represent prisoners at Guantánamo, and that the firms’ corporate clients should consider ending their business relationships.⁷⁸ Mr. Stimson withdrew these remarks and issued an apology after drawing considerable criticism from legal circles;⁷⁹ he ultimately resigned over his statements.⁸⁰ Mr. Stimson’s accusations that the Guantánamo defense attorneys are somehow “un-American” because they represent detainees exhibits one of the many challenges faced by these lawyers.

D. *Guantánamo Law*

The history of Guantánamo is unprecedented. Congress passed the Authorization for Use of Military Force Against Terrorists (AUMF) in the shadow of the aftermath of the September 11, 2001, terrorist attacks on the United States. On September 18, 2001, Congress enacted the AUMF allowing the President to use appropriate force against those who “planned, authorized, committed or aided

⁷⁴ *Id.*

⁷⁵ For a discussion regarding the challenges faced by military defense lawyers at Guantánamo, see Matthew Ivey, *Challenges Presented to Military Lawyers Representing Detainees in the War on Terror*, 66 N.Y.U. ANN. SURV. AM. L. 211 (2010).

⁷⁶ The cost of representation is borne entirely by the lawyer or the firm. Costs include transportation (traveling to Guantánamo takes at least a full day depending on one’s departure point), food and lodging (actually inexpensive), interpreters (\$1,200 to \$1,500 a day), and time away from the office. Outsiders’ cellular and smart phones do not work at the base and email access is both limited and slow.

⁷⁷ See Neil A. Lewis, *Official Attacks Top Law Firms Over Detainees*, N.Y. TIMES, Jan. 13, 2007, at A1.

⁷⁸ *Id.*

⁷⁹ See Heilprin, *supra* note 14.

⁸⁰ See Donna Miles, *Gates Recommends PACOM, NORTHCOM Successors; DoD Official Resigns*, AM. FORCES PRESS SERV. (Feb. 2, 2007), <http://www.defense.gov/news/newsarticle.aspx?id=2915>.

the terrorist attacks.⁸¹ In 2004, the Supreme Court held that the government was authorized to detain persons captured while fighting U.S. forces in Afghanistan for the duration of the conflict.⁸² The military base at Guantánamo Bay was chosen by the Bush administration because it was believed to be outside the jurisdiction of the U.S. judicial system.⁸³ But later in 2004, the Supreme Court held that Guantánamo is not outside the jurisdiction of the U.S. courts.⁸⁴ In reaction to this holding, Congress passed the Detainee Treatment Act (DTA or the “Act”) in 2005.⁸⁵ This Act took away the jurisdiction of courts and granted exclusive jurisdiction to the U.S. Court of Appeals for the District of Columbia Circuit to review detainee status decisions made by the Combatant Status Review Tribunals (CSRTs).⁸⁶ Continuing the tension between the judicial and legislative branches, the Supreme Court held that the DTA did not apply to pending habeas cases at the time of enactment.⁸⁷ Congress reacted by passing the Military Commissions Act of 2006 (MCA) to eliminate jurisdiction over all pending and future causes of action brought by detainees.⁸⁸ In 2008, the Supreme Court held in *Boumediene v. Bush* that detainees at Guantánamo had a right to habeas corpus under the U.S. Constitution and that the MCA was an unconstitutional suspension of that right.⁸⁹ Once President Obama took office, he requested that military judges suspend all war crime trials, a request with which they complied.⁹⁰ Lastly, in March 2011, President Obama lifted the suspension on military tribunals.⁹¹

⁸¹ Authorization to Use Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)).

⁸² *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004).

⁸³ See WORTHINGTON, *supra* note 2, at xii.

⁸⁴ *Rasul v. Bush*, 542 U.S. 466 (2004).

⁸⁵ Joseph R. Pope, Comment, *The Lasting Viability of Rasul in the Wake of the Detainee Treatment Act of 2005*, 27 N. Ill. U. L. Rev. 21, 28-31 (2006).

⁸⁶ *Id.* at 28.

⁸⁷ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

⁸⁸ Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, and 42 U.S.C.); see A. Hays Butler, *The Supreme Court's Decision in Boumediene v. Bush: The Military Commissions Act of 2006 and Habeas Corpus Jurisdiction*, 6 RUTGERS J.L. & PUB. POL'Y 149, 152 (2008).

⁸⁹ 553 U.S. 723 (2008).

⁹⁰ Peter Finn, *Plan to Eliminate Prison Faces Hurdles*, WASH. POST, Jan. 22, 2009, at A6.

⁹¹ Peter Grier, *Obama Orders Guantánamo Tribunals to Resume. Is He Abandoning His Pledge?*, CHRISTIAN SCI. MONITOR (Mar. 7, 2011),

The only vehicle that could, at least theoretically, address what rights—if any—the detainees might have was the writ of habeas corpus.⁹² The use of the writ, however, raised several questions, including whether the protections of the U.S. Constitution—including the writ of habeas corpus—applied to foreign nationals held at Guantánamo. In 2008, the Supreme Court held that constitutional protections did apply to these individuals, and that they could therefore petition for writs of habeas corpus.⁹³

While detainee treatment at Guantánamo enhances the existing distrust, government policies further prevent a lawyer from adequately performing his duties. Upon his inauguration in January 2009, President Obama announced his plans to close Guantánamo, ban the use of enhanced interrogation techniques, and review the current Guantánamo detention policy.⁹⁴ In May of that same year, however, the President announced that he would revamp rather than reject the Bush policy of trying detainees in military tribunals.⁹⁵ On January 21, 2010, the Obama administration then announced that, pursuant to a Justice Department-led task force's findings, fifty of the 106 detainees would be held indefinitely.⁹⁶ Only a handful of the detainees have been charged. In January 2010, forty-seven uncharged detainees were deemed "too dangerous to release," though the government was not forced to present evidence supporting this claim.⁹⁷ Then, on March 7, 2011, President Obama formally authorized Guantánamo to detain prisoners indefinitely.⁹⁸

Other questions remain largely unanswered or unclear. Namely, if the court found that the petition warranted relief, what relief was it empowered to grant? What is the burden of proof: proof beyond a reasonable doubt, clear and convincing evidence, preponderance of

<http://www.csmonitor.com/USA/Justice/2011/0307/Obama-orders-Guantanamo-tribunals-to-resume.-Is-he-abandoning-his-pledge>.

⁹² Military Commissions Act of 2006, 28 U.S.C. § 2241.

⁹³ *Boumediene*, 553 U.S. 723.

⁹⁴ *Guantanamo Bay Timeline*, WASH. POST, <http://projects.washingtonpost.com/guantanamo/timeline/> (last visited Sept. 25, 2011).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Worthington, *Hidden Horrors*, *supra* note 52.

⁹⁸ Exec. Order No. 13567, 76 Fed. Reg. 13,277 (Mar. 7, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/03/07/executive-order-periodic-review-individuals-detained-guant-namo-bay-nava>; Grier, *supra* note 91.

the evidence, or “some evidence”?⁹⁹ And who has it—the government or the petitioner?¹⁰⁰ Who could be considered a petitioner, considering that in some instances a family member of a detainee authorized the petition—a so-called “next friend” petition—among others?¹⁰¹ May he engage in taking depositions—if so, of whom? Is the government required to turn over exculpatory information?¹⁰²

III. THE CHALLENGES THAT LAWYERS FACE WHEN REPRESENTING DETAINEES

The first, most fundamental—and confounding—difference between Guantánamo and our criminal justice system is that there have been and are no charges! Our two remaining clients¹⁰³ have been detained for more than nine years and neither has been charged. In the United States, notice of the charges is the beginning of almost every criminal case.¹⁰⁴ With this information, the attorney can begin the representation; without it, there is no real place to start. But maybe that is not true. In the United States, one could start with a description of the client’s rights and explain the process and procedures that would follow.¹⁰⁵ However, it was impossible to explain rights and procedures because for several years the law specifically provided that the detainees had no rights,¹⁰⁶ and the then-restrictive

⁹⁹ See generally *Boumediene v. Bush*, 553 U.S. 723 (2008).

¹⁰⁰ *Id.*

¹⁰¹ The government routinely disputed whether the lawyer was empowered or “authorized” to act on behalf of a detainee. Since agency law is a fundamental part of our legal system, the issue of authority to act is an entirely appropriate question to ask except when dealing with the detainees, given the circumstances discussed herein. See generally RESTATEMENT (SECOND) OF AGENCY (1958).

¹⁰² As a practical matter, many judges have already ordered the government to turn over exculpatory evidence. See, e.g., *Al-Madhwani v. Obama*, 642 F.3d 1071, 1077 (D.C. Cir. 2011) (“The district court’s Case Management Order (CMO) requires the government to produce all ‘reasonably available’ exculpatory evidence . . .”).

¹⁰³ We represented two other detainees who were also not charged but were returned to their home country.

¹⁰⁴ See FED. R. CRIM. P. 3.

¹⁰⁵ See FED. R. CRIM. P. 5.

¹⁰⁶ See *Boumediene v. Bush*, 553 U.S. 723, 733–36 (2008). It was not until June 12, 2008, that the Supreme Court granted Guantánamo detainees the protection of the Constitution, including the right to habeas corpus. *Id.* at 795. This officially gave prisoners the right to contest their detention, but the request for an official charge is still routinely ignored.

procedures outlined¹⁰⁷ were later found to be unconstitutional.¹⁰⁸ So what can the lawyer and the client talk about if and when the relationship reaches this level of trust?

A serious challenge for the lawyers is simply explaining their presence to the detainees. After all, virtually all of the lawyers are from the West: the place where the detainees' captors come from. What distinguishes the lawyers from the captors? This problem is compounded because, on occasion, guards have also told detainees that their lawyers will prevent them from going home.¹⁰⁹

The development of the relationship between the client and the attorney often hinges on which model the lawyer follows. Since the late 1970's, several lawyering models, in addition to the traditional "paternalistic" model, have become popular.¹¹⁰ The understanding of the paternalistic approach was strongly influenced by the conception of the lawyer as an expert.¹¹¹ The lawyer was sought out for her expertise: once the lawyer was presented with the "problem" and solved it (i.e., provided her advice to the client) the client would follow it.¹¹² Counseling Guantánamo clients is not quite the same as counseling clients in the United States. In the United States, a lawyer's role is that of a "zealous advocate" for the client,¹¹³ but it is difficult to be a zealous advocate when the landscape is so undefined.

The adversarial system remains one of the hallmarks of the American conception of procedural justice.¹¹⁴ Since the 1980s, American lawyers have moved in the direction of a "client-centered" approach to legal representation,¹¹⁵ as opposed to a "paternalistic" approach, which was traditional. The "client-centered" approach

¹⁰⁷ See *In re Guantánamo Detainee Cases*, 344 F. Supp. 2d 174 (D.C. Cir. 2004). The restrictive procedures document, amended in 2008, provides that lawyers may gain access to their clients' information on a "need to know" basis. *Id.* at 175.

¹⁰⁸ *Boumediene*, 553 U.S. at 723.

¹⁰⁹ Luban, *supra* note 36, at 1996.

¹¹⁰ See generally Mark Spiegel, *The Case of Mrs. Jones Revisited: Paternalism and Autonomy in Lawyer-Client Counseling*, 1997 BYU L. REV. 307 (1997).

¹¹¹ See, e.g., RESTATEMENT (SECOND) OF AGENCY (1958).

¹¹² *Id.*

¹¹³ See MODEL RULES OF PROF'L CONDUCT pmb1. (2002) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."); *Id.* at R. 1.3, cmt. 1 (2002) ("A lawyer must also act . . . with zeal in advocacy upon the client's behalf.").

¹¹⁴ See Alexandra D. Lahav, *Portraits of Resistance: Lawyer Responses to Unjust Proceedings*, 57 UCLA L. Rev. 725, 781-82 (2010).

¹¹⁵ See Denbeaux & Boyd-Nafstad, *supra* note 73, at 494; see also Binder, *supra* note 16.

involves the client in the decision-making process, and instructs that the lawyer's central responsibility is "to enable the client to exercise his right to choose."¹¹⁶ In the client-centered approach, the relationship can become quite collaborative. The acceptance of the client-centered model reduces the prevalence of the attorney-centered (paternal) model of representation.

As noted, there is little in common between most lawyers and clients and little common ground on which to build a meaningful attorney-client relationship. And some lawyers have found the client-centered model unsuited for the representation of Guantánamo detainees.¹¹⁷ Consequently, the paternalistic model of attorney/client representation has become more common in the representation of detainees in Guantánamo.¹¹⁸

The client-centered attorney-client relationship is frustrating for the Guantánamo lawyers because they are restricted in access to their clients and client information in ways that were not previously encountered. Not only is access to clients difficult but it is limited by the time and cost of travel, the availability of space at the base, and the delays in mail service (early on in the representation, receiving mail could take several weeks each way).¹¹⁹ Distance, time, and the unavailability of modern methods of communication make it impossible to get timely decisions from the client.

Though the world of habeas litigation can move quite slowly, that is not always so. Sometimes decisions are needed quickly and the client may be inaccessible by virtue of distance, time, or disability. Disability, specifically the inability to make rational decisions, can be a consequence of PTSD because the various symptoms make it harder for the individual to make rational choices. In these circumstances, who should make the decision?

It is not uncommon for a client's statements to be considered classified. If classified, in order to discuss them with the client, a law-

¹¹⁶ Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. Rev. 717, 720 (1987).

¹¹⁷ See Denbeaux & Boyd-Nafstad, *supra* note 73, at 508.

¹¹⁸ *Id.*

¹¹⁹ Though mail service has improved (and in extreme emergencies a phone call might be approved), letters from the client (typically in Arabic) have to be translated by a privilege team into English so that classified information can be redacted before the letters are sent to the lawyer. Letters from the lawyer have to be translated into the language of the client, sent to the privilege team for possible redaction, and then sent to the client.

yer has to seek permission from the government or the court.¹²⁰ Of course, the lawyer is permitted to ask the client about his statements and the circumstances under which they were made. Many clients, however, have made statements over several years while under extreme conditions, and thus, their abilities to recall those statements are diminished by the passage of time and PTSD.¹²¹

The habeas lawyer's notes of client interviews have to be shared with a "privilege team"¹²² to determine whether they contain classified information. If classified information is discovered, the notes are redacted and the classified information becomes available only at the secure facility.¹²³ In fact, motions containing classified information must be prepared at the secure facility and filed under seal.¹²⁴

In the government's view, there are no rules that apply to their contact with the detainees.¹²⁵ For example, the "no contact" rule of the various professional responsibility codes¹²⁶ is ignored by the government. Government officials continue to routinely interrogate clients even though they are represented by counsel.¹²⁷ The interrogators' likely justification is that they are not purposely looking for

¹²⁰ The federal U.S. District Courts for the District of Columbia has issued protective orders prohibiting detainee lawyers from discussing classified information with their clients, and effectively limiting communication with clients. See Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, *In re Guantanamo Detainee Litig.*, 577 F. Supp. 2d 143 (D.D.C. Sept. 11, 2008) [hereinafter Protective Order].

¹²¹ AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 463–67 (4th ed., text rev. 2000) [hereinafter DSM-IV-TR].

¹²² For a detailed discussion of the protective order procedures see generally Brendan M. Driscoll, Note, *The Guantánamo Protective Order*, 30 FORDHAM INT'L L.J. 873 (2007). The privilege team is a team of government lawyers who are *not* participating in any of the litigation who review various documents for classified information. They are prohibited from communicating with the government lawyers handling the habeas cases. Imagine trying to explain to a client the concept of a privilege team.

¹²³ See Protective Order, *supra* note 120. Though the lawyers are from many states, including Hawaii—in addition to other countries such as the United Kingdom—there is only one "secure facility" and it is located in the Washington D.C. area.

¹²⁴ See *id.* at 154.

¹²⁵ See *id.*

¹²⁶ See, e.g., N.Y. CODE OF PROF'L RESPONSIBILITY DR 7-104(A)(1) (2007).

¹²⁷ The subject of interrogation is complex because most detainees were subject to at least three different types of interrogation: the first often accompanied by the use of enhanced interrogation techniques; the second interrogation over time by law enforcement agents in an effort to sanitize the earlier coerced statements; and finally, interrogations for intelligence information, which continue to occur to this day.

incriminating information; rather, they are looking for intelligence. Many detainees are resistant to trusting an American legal advocate because of the nature of their detention (i.e., they are being detained by the U.S. government) as well as the circumstances under which they were captured.

The detainees brought to Guantánamo did not arrive at a traditional prison; they arrived at an interrogation facility.¹²⁸ Some captives were starved before being transported to Guantánamo, then subjected to beatings, and deprived of sleep once they got there.¹²⁹ One prisoner, Abu Zubaydah, was held for four and a half years in a secret Central Intelligence Agency prison before being transferred to Guantánamo where he endured waterboarding torture eighty-three times.¹³⁰

Moreover, many detainees who were subjected to “enhanced interrogation techniques” suffer from severe PTSD¹³¹ or continuing stress disorder.¹³² With specific regard to torture, “[m]ost trauma experts . . . agree that the psychiatric diagnosis of PTSD is relevant for torture survivors.”¹³³ Psychological symptoms exhibited by torture survivors (e.g., anxiety, depression, irritability and/or aggressiveness, emotional instability, self-isolation or social withdrawal, and angry outbursts) match closely the symptoms of PTSD.¹³⁴ One of the consequences of enhanced interrogation techniques is PTSD and a consequence of that, which I have personally observed, is an emergence of behavioral issues. Though the government attributes certain beha-

¹²⁸ Luban, *supra* note 36, at 2022.

¹²⁹ Frakt, *supra* note 59, at 385.

¹³⁰ Worthington, *Hidden Horrors*, *supra* note 52.

¹³¹ DSM-IV-TR, *supra* note 121, at 463.

¹³² *Id.* Although active torture (physical and mental) is no longer present at Guantánamo, detainees are still held by the people who conducted the torture, still in the same location, still subjected to isolation, and still interrogated.

¹³³ Mark Costanzo et al., *Psychologists and the Use of Torture in Interrogations*, 5 ANALYSES SOC. ISSUES & PUB. POL’Y 7, 13 (2007).

¹³⁴ DSM-IV-TR states the following regarding PTSD:

The individual [suffering from PTSD] has persistent symptoms of anxiety or increased arousal that were not present before the trauma. These symptoms may include difficulty falling or staying asleep that may be due to recurrent nightmares during which the traumatic event is relived, hypervigilance, and exaggerated startle response. Some individuals report irritability or outbursts of anger or difficulty concentrating or completing tasks.

DSM-IV-TR, *supra* note 121, at 463–67.

vioral issues, such as self destructive behavior, throwing of feces,¹³⁵ and angry outbursts, to anti-American activity, a much more likely explanation is the triggering of PTSD.¹³⁶ Failure to recognize the difference will disadvantage those detainees who are sick as opposed to those detainees whose political beliefs are antagonistic to the West.

How does the lawyer learn from the client, who suffers from PTSD, what he told the authorities, and how he was treated during the interrogation? Flashbacks are common because these experiences are often re-lived during retelling, and thus, it is not unusual for the client not to be able to relate much information even after several years. So in those circumstances, the lawyer has little choice except to wait. Even when the client can tell some of the story, it can be unbearable to watch and hear.

The presence of severe PTSD can create a condition of “diminished capacity” within the meaning of Rule 1.14 of the ABA Model Rules of Professional Conduct, the sole ethical rule that refers to a client’s mental health status.¹³⁷ The combined circumstances and limitations affecting the client, as discussed, may justify the lawyer taking protective action. The rule permits a lawyer to act when a client’s

¹³⁵ Charlie Savage et al., *Details of Lives in an American Limbo*, N.Y. TIMES, Apr. 25, 2011, at A1.

¹³⁶ Bob Egelko, *Ex-Guantanamo Inmates Studied*, S.F. CHRONICLE, Nov. 17, 2008, at A4 (“[T]wo-thirds of former prisoners interviewed between July 2007 and July 2008 suffered from psychological problems, including nightmares, angry outbursts, withdrawal and depression.”).

¹³⁷ Rule 1.14 provides the following:

(a) When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client’s interests.

MODEL RULES OF PROF’L CONDUCT R 1.14 (2002).

“capacity to make adequately considered decisions . . . is diminished” because of “mental impairment or for some other reason.”¹³⁸

Determining whether a client with a possible case of PTSD has diminished mental capacity can prove challenging for lawyers in general,¹³⁹ and these difficulties are compounded at Guantánamo. Because the ABA provides little guidance to lawyers attempting to determine whether a client may have diminished capacity,¹⁴⁰ a lawyer’s determination is often based on the totality of interactions with the client.¹⁴¹ Clearly, this process is very difficult for Guantánamo defense lawyers because they have such limited access to their clients. Lawyers representing Guantánamo detainees are therefore often left without a full understanding of their clients’ mental state, which seriously compromises their ability to provide adequate representation.¹⁴²

Rule 1.14 permits the lawyer to act when the lawyer reasonably believes the client has diminished capacity and cannot act in her own best interests.¹⁴³ The lawyer can take reasonably necessary protective action.¹⁴⁴ Many of the clients have been subjected to torture and suffer from PTSD. Is PTSD diminished capacity and thus a disability within the meaning of Rule 1.14? Of course the answer is “it depends.” It depends on the depth and extent of its effect on the client and, in particular, how it impacts the client’s communication abilities and his capacity to think rationally.¹⁴⁵ In view of the fact of torture, dissimilarity in cultures, the lack of access to the client, and the

¹³⁸ *Id.*

¹³⁹ See Carol M. Suzuki, *When Something is Not Quite Right: Considerations for Advising a Client to Seek Mental Health Treatment*, 6 HASTINGS RACE & POVERTY L.J. 209, 218–20 (2009).

¹⁴⁰ The ABA has attempted to offer more direction in recent years, but the lawyer is still responsible for identifying whether the client has diminished mental capacity. See Evan R. Seamone, *The Veterans’ Lawyer as Counselor: Using Therapeutic Jurisprudence to Enhance Client Counseling for Combat Veterans with Posttraumatic Stress Disorder*, 202 MIL. L. REV. 185, 214–18 (2009).

¹⁴¹ *Id.* at 206 n.96.

¹⁴² Some lawyers have sought and received permission from a habeas judge to have the client examined by a forensic psychologist. Such an examination has proved to be extremely useful for a better understanding of the client. It would also be useful in the habeas cases and in the military commission cases, if and when brought.

¹⁴³ MODEL RULES OF PROF’L CONDUCT R 1.14 (2002).

¹⁴⁴ *Id.*

¹⁴⁵ See James A. Cohen, *The Attorney-Client Privilege, Ethical Rules, and the Impaired Criminal Defendant*, 52 U. MIAMI L. REV. 529, 573–79 (1998).

client's lack of familiarity with U.S. legal concepts, lawyers for detainees should consider stepping in to protect the client's interests.

For those few who have been charged, their lawyers' ability to effectively do their job is compromised at every step of the process. Once a detainee is in civilian court or before a military commission, a judge might prevent him from answering certain questions on the stand for fear that the detainee may reveal classified interrogation techniques and/or classified information.¹⁴⁶ Lawyers are also prevented from discussing classified information with their clients.¹⁴⁷ "Classified" has been defined as

anything written or oral that the government has in its possession or has ever had in its possession that it marks as classified or tells the attorney is classified; this includes most of the information relating to the facts of the client's detainment and information necessary to defend the client.¹⁴⁸

Besides infringing on a detainee's right to due process, the government compromises a lawyer's ability to be an effective advocate. The lawyers are prohibited from disclosing classified information with the client even if the client was the source of the information unless the court or the government attorney consents.¹⁴⁹ Work product is sent to a privilege team for governmental review, then a redacted version is returned to the lawyer so that classified information does not appear in any document¹⁵⁰ not housed in the secure facility.¹⁵¹ The government justifies circumventing attorney-client privilege by reasoning that because the government attorney does not have access to the documents, the privileged relationship is not violated.¹⁵² However, in practice, this inhibits the detainee's willingness to disclose information to his attorney for fear of government observation, which in turn limits the lawyer's ability to effectively represent her client.¹⁵³

¹⁴⁶ See Frakt, *supra* note 59, at 397.

¹⁴⁷ Luban, *supra* note 36, at 1994.

¹⁴⁸ *Id.*

¹⁴⁹ See Frakt, *supra* note 59, at 397.

¹⁵⁰ Honigsberg, *supra* note 47, at 105; see also Protective Order, *supra* note 122, ¶ 6.

¹⁵¹ Court papers containing classified material must be prepared at the secure facility. H. Candace Gorman, *Filing Court Papers, Guantanamo Style*, HUFFINGTON POST (Apr. 12, 2007, 4:21 PM), http://www.huffingtonpost.com/h-candace-gorman/filing-court-papers-guant_b_45703.html.

¹⁵² Honigsberg, *supra* note 48, at 105.

¹⁵³ *Id.*

Communication with other lawyers is also restricted in unusual ways. In most circumstances, lawyers informally discuss cases, clients, judges, adversaries, and legal and factual matters. In Guantánamo matters, despite having security clearance, we are only allowed to discuss matters pertaining to other detainees' individual situations if they are directly relevant to the representation of our client.¹⁵⁴

The discovery process in habeas cases and in military commission cases has been hindered because the government is sometimes unwilling to produce documents, ignores discovery requests, sends last-minute discovery “dumps” when a military commission finally gives the government a deadline, and loses or destroys evidence.¹⁵⁵ The government creates so many challenges for the detainee lawyers because Guantánamo is, first and foremost, an interrogation facility, and the role of the lawyer, typically, is to prevent the interrogator from getting information from his client.¹⁵⁶ A testament to the success of these obstacles is that many detainees ultimately refuse representation.¹⁵⁷

IV. CONCLUSION AND LESSONS LEARNED

If I were to start all over again, what would I do differently? Though much of what occurred was beyond my and the other lawyers' control, I would strive to learn more about where the clients came from and who they are. Not just the clients' backgrounds (about which I did learn), but about their countries of origin, other countries in the region, the religion of Islam, the economy and politics in the region, the system of law as it exists in theory and how it is actually applied, and their culture. Because the law and process were so uncertain, I had little to tell the clients; as a result, I stayed away. Had I to do it again, I would have tried to spend much more time with the clients early on, even though the logistics were difficult.

I also should have paid more attention to the clients' state of mind and mental health. In addition to being in custody without changes for a term without apparent end, clients were tortured and

¹⁵⁴ See Protective Order, *supra* note 120, ¶ 29 (“Petitioners’ counsel shall not disclose to a petitioner-detainee classified information not provided by that petitioner-detainee. Should a petitioner’s counsel desire to disclose classified information not provided by a petitioner-detainee to that petitioner-detainee, that petitioner’s counsel will provide in writing to the privilege review team” (internal citations omitted)).

¹⁵⁵ Frakt, *supra* note 59, at 394–95.

¹⁵⁶ See Luban, *supra* note 36, at 2022.

¹⁵⁷ See Frakt, *supra* note 59, at 382.

1450

SETON HALL LAW REVIEW

[Vol. 41:1427

kept in isolation. Their conditions caused mental illness to which I should have been more aware.