

Empathy
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The phone calls came in late evening or the middle of the night. Shrill, exact, and unpredictable. I recall crouching at the top of the stairs and watching my father taking the calls. His voice changed perceptibly, becoming more orotund, when he slipped on a professional role. I often thought I could hear a note, almost too quick to grasp, of anger. Shifting from one foot to another and squeezing my face between banisters, I would struggle to make out words. His tone would drop, and I made out terse questions, and silence in response. He placed the receiver slowly back into its cradle. Without saying more, he'd dress and leave the house. Likely I was asleep by the time he returned. Certainly I don't recall being awakened. But I can recall my father the following days—never especially tired, discernibly angered, or irate—as my sister and I prepared and set off for middle school.

Either then or later, I worked out that these were often suicide calls. My father at that time (twenty-five-odd years ago) was a consultant psychiatrist with the British National Health Service, responsible for several psychiatric facilities in North or Central London. As a consultant on call, he would be contacted when a patient at one of those facilities committed suicide—whether it was his patient or not. Night visitations of this nature happened once, sometimes twice, per year. Every time, what impressed me was his detachment, his ability to deal with the issue head-on and then move on without ado.

I suppose I am not unusual in noticing, in the crepuscular glow of fading youth, how my own behavior and instincts echo that of a parent. But it is only recently that I have observed glints of my father's coolness of sentiment in my own professional approach and begun to wonder whether my detachment is for the best or not. Unlike him, I do not deal with death routinized. In the past four years, I have worked on three cases involving detainees in the war on terror. In each of those cases—just as in the large share of cases involving counter-terrorism-related detentions—the facts of the case and the treatment of clients raise powerful reactions in many people's minds. Yet I have been struck by how flinty I can be, and how little affect lingers once I leave the office and head out into blue Manhattan dusks for home. Like a doctor who must accustom himself through emotional tempering to a certain dose of mortality, indeed like my father, I can forge a neutral zone between my clients and myself.

Perhaps my surprise in this regard is the mundane shock of learning that one is one's father's son. Yet if a counsel for a detainee cannot muster some emotional fervor, what hope is there for a larger sea-change in attitudes to the Bush administration's policies on detention? The problem of what distance to maintain with the men detained as "enemy combatants" at Guantánamo Bay in Cuba, Camp Cropper in Iraq, the U.S. Naval Consolidated Naval brig in Charleston, South Carolina is not one for their counsel alone. It is a question that must be grappled with by "experts," scholars, politicians, and the general public, too.

In large measure, the persistent practical failure of Guantánamo—defined either in light of Bush's or Obama's terms and goals—flows from a failure to acknowledge, let alone to engage emotionally, with plain facts and implications of the detentions. That is, public detachment is not

merely a question of distance proper, but a barrier to proper discernment of both full facts and moral coloration of the detention problem. Human kind, T.S. Eliot caustically remarked, cannot bear very much reality. In the case of terrorism detentions, however, the question is more whether they are willing to bear much at all.

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In 2005, I came to my representation of detainees through a series of fortuities rather than any clear plan. My first work was as part of a team representing a pair of U.S. citizens detained in Iraq. For some time, we did not have contact with the clients, who were detained in the Camp Cropper facility located adjacent to the Baghdad International Airport. The military, however, at some point permitted our clients to make monthly phone calls to family or counsel. Thus, unlike many early counsel for Guantánamo detainees, we had at least some contact with detained clients, as opposed to with only family members acting as “next friends” for the jurisdictional purpose of filing a habeas corpus petition.

Yet the calls were scratchy and brief. It was hard to understand much of what was said. And it was passing odd to be conversing with a Camp Cropper detainee while watching the lower Manhattan morning traffic. One of our clients had also been beaten and electrocuted soon after his seizure. Seeing photos of his injuries, released in the course of the habeas litigation, left a deeper impression.

Legal proceedings, like those in almost all the terrorism-related detention cases, snagged on threshold procedural issues, particular the jurisdiction of the federal courts to hear the suit, thanks to the government’s obdurate strategy of resistance to any factual hearing. For almost three years, we litigated an obscure cluster of legal questions surrounding a terse 1949 Supreme Court opinion. The government relied on this opinion to claim that any U.S. detention operation with a multinational component could claim immunity from judicial oversight. It sought, in other words, a blank check from judicial review. The issue went all the way to the Supreme Court, where we won the battle but lost the war. Unanimously, the Court rejected the government’s jurisdictional argument but repudiated, with narrow exceptions, our arguments that standing laws and treaties prohibited the government from holding our clients and then transferring them to far-from-fair criminal trial in Iraqi tribunals.

It is, of course, impossible to maintain emotional fever pitch across the span of three years. Family, friends, the mundane clutter of everyday life intervene. Yet some lawyers for detainees, I noticed, maintained rigorous and careful emotional engagement throughout. This was especially true for some lawyers for Guantánamo detainees, who traveled frequently to meet their clients and whose clarity of commitment I came to admire.

But many lawyers, including myself, approached their detention cases with professionalism and some detachment. Physical distance and the practical difficulty of contacting or establishing human connections with detainee clients impeded close connections. And the heavily procedural nature of the litigation, with the briefing and arguments hinging on abstruse issues of jurisdiction and the meaning of the Constitution’s Suspension Clause, meant that the litigation itself drew attention away from human issues toward legal arcana.

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While professional detachment is at least defensible as the appropriate way of managing lawyer-client relationships, public debate about Guantánamo and other detention sites has also been removed from the stories of the people who are in fact detained. Advocates for the detainees in the not-for-profit community have used this detachment to their short-term advantage, building a consensus for closing Guantánamo *not* grounded in the stark human facts of the detentions. Rather, they have focused on how detention operations harm the United States' foreign relations and standing in the world. While this approach has yielded important short-term success, it is far from clear that the ensuing consensus will uniformly benefit the detainees at Guantánamo and elsewhere in the end.

Despite a series of compelling stories about the treatment and fate of detainees that have appeared in the *New York Times* and the *Washington Post*, public debate around Guantánamo has not coalesced around the idea that the Cuban prison facility must be closed because of the moral tragedy of detaining innocents en masse—even though the brute fact of 500 releases from the base in past years make it clear that this is precisely what happened—or the continuing fact of prolonged illegal detentions. Even as the population of the Cuban detention facility dwindles, few commentators or journalists seriously question the Bush Administration's claim that the remaining detainees are "dangerous" in some legally undefined way, despite the fact analogous aspersions on the detainee population have serially collapsed in the past.

Rather, advocacy about detention policy has focused on the harm to "us," and not lingering over the harm to "them." In advocating against Bush-era detention policies, the organization for which I worked and many organizations like it trained rhetorical fire on the symbolic cost of Guantánamo to what Harvard scholar Joseph Nye has called America's "soft power:" its ability to use persuasion and shared norms, embodied in international law and institutions, to secure strategic aims in the geopolitical sphere that would have been too costly to obtain by force alone. For example, one of the most high-profile advocacy campaigns around detention policy—albeit one focused primarily on torture rather than detention—has been Human Rights First's organizing of former generals and other retired military officers. Human Rights First's campaign was but the most extreme example of a trend of using messengers and messages framed less around human rights and hinging more on an appeal to enlightened self-interest. Key institutional funders supporting rights advocates in this field echoed and reinforced this strategy.

The resulting "soft power" arguments aligned human-rights with a growing consensus with the D.C.-based foreign-policy establishment decrying the strategic poverty of President Bush's foreign relations. Foreign policy experts argued that the Bush approach rested on the plainly false assumption that the United States could routinely scare or bully other countries into agreeing to its geopolitical goals, and that military force measured influence. In joining with these critics of Bush, the human rights movement assumed that political change flowed from building coalitions around perceived shared interests, rather than investing in the transformation of perceptions themselves.

The strategy worked in an immediate sense. During the 2008 presidential election campaign, both major-party candidates agreed about the need to close Guantánamo, but also agreed about the reason for their commitment: deterioration of the U.S.'s image in the world. The human cost to detainees figured only incidentally in their manifest calculus. In signing executive orders in January 2009 directing the end to sanctioned torture and aiming toward Guantánamo's shuttering, President Obama brought Human Rights First's coterie of generals to the White House for a photo-opportunity to give him political cover.

Yet arguments abstracted from the felt realities of detention, and hinged on shared, non-rights-based zones of interest, quickly find limits. While human rights advocates might agree with the foreign policy establishment on the stain of Guantánamo, their alliance unravels when it comes to the harder questions of how to handle those detainees. In particular, when it comes to proposals to create a new modality of indefinite detention somewhere else (call it Guantánamo 2.0) or to tinker with the federal courts by fashioning from whole-cloth a set of new "national security courts," few voices in the public sphere decry the very notion of continuing to detain people who have been torn from their lives, locked in cages, and brutalized for years on end.

The absence of tangible human stories and detail also opened a space for advocates for Guantánamo 2.0. Because those giving voice to the detainees have been far too few and far between, such advocates for renewing Guantánamo were able to leverage the lingering (false) impression that detainees are necessarily murderous and untrustworthy "terrorists," not human beings. Hence, Brookings Institute scholar Benjamin Wittes could advocate continued indefinite detention for many Guantánamo detainees based in part on his "instinct" about the detainees and his feeling that their stories "just ring false."¹ In light of the exhaustive and increasingly large amount of powerful evidence of injustice, unnecessary suffering, and governmental arrogance or indifference, the ease with which Wittes disregards the human facts of detainees is breathtaking. But perhaps that ease is also the fault of lawyers such as me, who have not given adequate public voice to the experience of their clients, and who have acquiesced to a public strategy of alliance-building over the direct appeal to compassion.

Moreover, the foreign-relations framing of detention advocacy drove inexorably toward a concentrated focus on detention in Guantánamo to the exclusion of detention operations in Iraq and Afghanistan. In my court hearings that I attended and participated in around my Iraq representation, one could not but be aware of the clammy pressure imposed by continuing military operations in Iraq. Absent a public consensus around the "harm" of detention operations, such as the one that developed around Guantánamo, the 20,000-plus detentions in Iraq, however brutal and unjust they might have been, simply aroused no outrage comparable to that manifested over the Cuban base. The same was true of Bagram Airforce Base in Afghanistan. To be fair, litigation strategy aimed at securing jurisdiction over Guantánamo before raising the harder questions posed by farther shores reinforced this tendency. But at bottom, public condemnation of Bush's detention policies hinged less on the human stuff behind those detentions, and more on a Harvard University professor's abstract theory about how optimal deployment of U.S. influence on the geopolitical stage—a choice of foundations that decisively set limits to what could be done.

Advocates for detainees are not the first to discover the limits of public support for human rights due to the exigencies of international relations. This was the experience of Cold War advocates for

racial equality too. Historian Mary Dudziak has shown through marvelous research how post-World War II civil rights gains came in part because of a growing understanding within the political establishment that segregation and Jim Crow were extracting a heavy toll to the United States' legitimacy among third-world countries that were then the focus on Cold War competition. But just as Cold War imperatives furnished the basis for consensus on the early stages of segregation's unraveling, so too did the fading of those imperatives constrained on how far the civil rights movement could get.² Just as Cold War imperatives provided a lever for social change, so too did Cold War logic enable opponents of segregation to tar the NAACP and its supporters as a subversive Communist-bloc threat to the American way of life, limiting the tools with which racial equality could be achieved.³

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Short-term advocacy success is not always consistent with longer-term substantive goals. What the great and the great at foundations want to fund won't always (or even usually) transform public debate. Writing at the dawn of the Obama Administration, with a slew of executive orders about Guantánamo still sinking in, it is far from clear how well the trade-offs have been managed by those who care about detention issues. From this perspective, it is necessary to question strategic choices, even if answers are few on the ground. Would the advocacy around detention issues, or even the results in specific cases, have been different if lawyers had grappled earlier and more publically with the human costs of detention policy? More intimately, should I have identified and repudiated my own professional detachment earlier? Or would the differences in race, ethnicity, and religion that separate the Guantánamo detainees from the mass of the American public have rendered such a strategy nugatory and ineffective from its inception? Whether and how I could have done things different is not a question I might not answer any time soon, even if I can step toward a framing of the question. I only hope the future yields up no new glut of opportunities to test the limits of empathy, and, for me, the bonds of inherited habit that link me to my father.

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¹ Benjamin Wittes, *Law and the Long War: The Future of Justice in the Age of Terror* 84-86 (New York, Penguin Press, 2008).

² Mary Dudziack, *Desegregation as a Cold War Imperative*, 41 *Stanford Law Review* 61 (1988).

³ Carol Anderson, *Eyes Off the Prize: The United Nations and the African-American Struggle for Human Rights, 1944-1955* (Cambridge, Cambridge University Press: 2003).