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## **What War Did to the Academy, What the Academy Did to War: A 20-Year Retrospective on the Effects of the Post-9/11 Wars**

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# WHAT WAR DID TO THE ACADEMY, WHAT THE ACADEMY DID TO WAR: A 20-YEAR RETROSPECTIVE ON THE EFFECTS OF THE POST-9/11 WARS

*Deborah Pearlstein\**

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## I. INTRODUCTION

When tapped by the Lincoln Administration at the height of the American Civil War to help draft what would become a historic contribution to the development of the law of war, Francis Lieber was working as a professor.<sup>1</sup> It is an aspect of his biography that rarely figures first in most discussions of Lieber. Lieber is most known for his authorship of General Orders No. 100, “Instructions for the Government of Armies of the United States in the Field,”<sup>2</sup> which set forth basic rules for the conduct of forces in war. Today, Lieber’s Code is recognized worldwide for having laid critical groundwork for the modern law of armed conflict. While falling far short of contemporary standards for humanitarian protection in war—and arguably tailored to tolerate just enough violence against civilians to secure the Union’s advantages in fighting the particular war for which it was drafted—

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1. See JOHN FABIAN WITT, *LINCOLN’S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 1* (2012).

2. *Id.* at 8.

there is little question of the significance of Lieber's contribution to international law.<sup>3</sup> Today, the law of war practice group in the American Society of International Law rightly bears his name, as does the center for the study of the law of armed conflict at the U.S. Military Academy at West Point, where students have been instructed in the terms of the Lieber Code since 1863.<sup>4</sup>

Yet without for a moment diminishing the significance of his contributions to law, it is perhaps worth noting in the context of this Symposium that Lieber's contributions to education were rather less noteworthy. As a professor at South Carolina College, where he taught from 1835 to 1856, "Lieber proved to be a desultory teacher . . . mostly because he lacked the patience to give his students a chance to get a word in edgewise."<sup>5</sup> Not exactly the teaching evaluation one aims to receive. In one sense of course, highlighting such criticism seems unfair. No human being can excel in every endeavor, and few achieve what Lieber did in any single effort in a lifetime. Indeed, it was during Lieber's tenure at South Carolina that war would begin to divide not only the country but his own family; one of his sons allied with the South and later died as a member of the Army of the Confederacy.<sup>6</sup> At the same time, the relative weakness of Lieber's teaching is a useful reminder of the complexity of the multifarious roles many academics have come to play—not only as teachers and authors, but also as practicing lawyers, consulted experts, and, in the rarer cases, changers of the world. It is a service that is, at its best, capable of benefitting the lives of students and citizens alike, as lessons learned in academia inform the law and policy of States, and vice versa. It also carries no small measure of risk, and not just to unsatisfied students. Professors enjoy a measure of professional credibility and knowledge that enables them to function equally effectively as either constraints on or enablers of State power. In the two decades since the attacks of September 11, we have seen ample examples of both.

In many respects, legal academia was caught as flat-footed as anyone by the events of 9/11. None of the top three American law schools, for example, had offered courses in National Security Law in

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3. *Id.* at 3.

4. *Lieber Society on the Law of Armed Conflict*, AM. SOC'Y INT'L L., <https://www.asil.org/community/lieber-society-law-armed-conflict> [<https://perma.cc/P4J7-WJEX>]; *About the Lieber Institute*, LIEBER INST. W. POINT, <https://lieber.westpoint.edu/about/lieber/> [<https://perma.cc/SC25-3CMX>].

5. WITT, *supra* note 1, at 176.

6. *Id.* at 180; *see also* NIELS EICHHORN, ATLANTIC HISTORY IN THE NINETEENTH CENTURY: MIGRATION, TRADE, CONFLICT, AND IDEAS 196–97 (2019).

the academic year before the attacks.<sup>7</sup> But the legal academy saw a surge of interest in national security and international law among U.S. students after the attacks, and curricula and course catalogs expanded to respond.<sup>8</sup> Well beyond specialty courses, the rapid developments in law and policy generated in response to the attacks made it necessary for even standard law school classes, from civil procedure to constitutional law, to integrate cases involving foreign relations and national security.<sup>9</sup> Such changes brought with them any number of positive consequences. Students graduating from U.S. law schools now are in a far better position to grapple with the mammoth security challenges facing the United States than lawyers were twenty years ago, when counsel inside the government and out struggled with what were novel fields for many. It has been equally encouraging to see civilian academia more productively engaged with the sprawling American military and military academy, relationships that had become fraught since the Vietnam War, effectively limiting vitally important areas of research and understanding.

Perhaps in part because of academia's relative unpreparedness in 2001, academics' effect on legal policy during the post-9/11 wars was a far more mixed bag.<sup>10</sup> As in Lieber's time, many professors played pivotal roles in challenging government policies in defense of the law—representing clients inside government and out; drafting amicus briefs; helping to inform Congress and members of the press; and writing broadly, including in popular venues, to analyze and highlight the legal significance of U.S. actions.<sup>11</sup> It is equally possible to identify ways in which academics played critical roles in efforts to justify or legitimate legally and morally suspect State behavior. Sometimes this influence was exercised directly, as, for example, legal counsel to government officials.<sup>12</sup> Often the influence of academics was less direct, as when, for example, prominent scholars wrote influential pieces defending the value of torture in interrogation.<sup>13</sup> But just measuring the extent to

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7. See Survey of Law School Course Catalogues (1999–2000) (on file with author).

8. *Id.*

9. See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662, 670 (2009).

10. See *infra* Part III.

11. See generally Andrew Kent, *Constitution and the Laws of War During the Civil War*, 85 NOTRE DAME L. REV. 1839, 1840–47 (2010).

12. See, e.g., Memorandum from John Yoo, Deputy Assistant Gen. Couns., Off. of Legal Couns. & Robert J. Delahunty, Special Couns., Off. of Legal Couns., to William J. Haynes II, Gen. Couns., Dep't of Def. (Jan. 9, 2002), <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB127/02.01.09.pdf> [<https://perma.cc/53S7-QQAF>].

13. See *infra* Part III.A.

which academics advanced or hindered legal development does not fully capture the range of ways in which legal experts influence State policy. Among the more challenging critiques levied against those advocating compliance with international law has been the worry that such efforts, however well intentioned, in fact functioned to legitimate many of the most problematic U.S. policies of the era.<sup>14</sup> As discussed below, some of these critiques are unpersuasive. But as a genre, they are worth taking seriously. For it is now clear that lawyers had a profound impact on the direction of U.S. counterterrorism operations post-9/11, for better and worse. Understanding when and why it could be for worse—and what lessons we should take for academic engagement going forward—is among this Article’s tasks.

The issue is of no small present moment. A large fraction of students entering law school today were young children on September 11, 2001. These students have no living memory of, and have had no necessary exposure to, the shocking pictures of torture from the U.S. detention facility in Abu Ghraib;<sup>15</sup> the harrowing path of U.S. citizen Jose Padilla, held in military custody for years without access to counsel;<sup>16</sup> or the generational impact of U.S. drone strikes on civilian populations in and out of conflict zones overseas.<sup>17</sup> Yet even now that the last U.S. combat troops have exited Afghanistan, lawyers must continue to grapple with the ongoing litigation surrounding U.S. detention in Guantánamo; military commission trials of accused al-Qaeda terrorists; a very active debate in Congress about the fate of still-active authorizations for the use of force; and the growing need to respond to the threat posed by a different set of terrorists operating

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14. See *Former OLC Chief Jack Goldsmith Reflects on Post 9/11 Legal Opinions*, DUKE L. (Nov. 13, 2007), <https://law.duke.edu/news/former-olc-chief-jack-goldsmith-reflects-post-911-legal-opinions-1/> [<https://perma.cc/YP9J-AFH9>].

15. *Iraq Prison Abuse Scandal Fast Facts*, CNN (Mar. 5, 2021, 5:55 PM), <https://www.cnn.com/2013/10/30/world/meast/iraq-prison-abuse-scandal-fast-facts/index.html> [<https://perma.cc/KQD3-GXEL>].

16. Amnesty Int’l, *Further Information on UA 166/03 (AMR/084/2003, 11 June 2003): Incommunicado Detention/Detention Without Charge/Legal Concern*, AI Index AMR 51/030/2004 (Feb. 16, 2004).

17. See Missy Ryan, *‘There Have to Be Limits’: Guantanamo Attorneys Challenge Lifetime Imprisonment Without Charge*, WASH. POST (July 11, 2018), [https://www.washingtonpost.com/world/national-security/there-have-to-be-limits-lawyers-for-guantanamo-inmates-challenge-lifetime-imprisonment-without-charge/2018/07/11/f3933faa-8533-11e8-9e80-403a221946a7\\_story.html](https://www.washingtonpost.com/world/national-security/there-have-to-be-limits-lawyers-for-guantanamo-inmates-challenge-lifetime-imprisonment-without-charge/2018/07/11/f3933faa-8533-11e8-9e80-403a221946a7_story.html) [<https://perma.cc/8HLW-VTZL>].

transnationally and domestically.<sup>18</sup> The mission of preparing students to work in these fields is as important as ever.

More broadly still, it is hardly just law-and-security or international law academics who must grapple with the uncertain real-world impact of their work. The profound challenges facing democracy in the United States and around the world test the propriety of adhering to pedagogical norms of balance and neutrality inside the classroom, especially in the face of violent or anti-democratic speech outside it. All legal academics are bound by professional ethical obligations as both lawyers and teachers. Particularly for those whose work may guide regulation at the boundary between war and peace, there seems an additional moral obligation, to avoid making it easier or more likely for policy makers to act in ways inconsistent with humanitarian or human rights law. Fulfilling that obligation means ensuring we act in full awareness of our work's complex effects.

## II. HOW WAR CHANGED THE ACADEMY

In the first years following the attacks of September 11, 2001, the great orator Cicero gained a popularity likely not experienced by a Roman statesman for centuries. Cicero's maxim *inter arma silent leges*—commonly translated as “laws fall silent in wartime”—was invoked repeatedly by scholars, commentators, and federal officials alike.<sup>19</sup> As one prominent American scholar summarized: “It is difficult to read our constitutional history, however, without believing that the Constitution is often reduced at best to a whisper during times of war.”<sup>20</sup> Cicero had long since become a favorite of academics interested

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18. See Charlie Savage & Carol Rosenberg, *Biden Legal Team Divided on Scope of Rights of Guantanamo Detainees*, N.Y. TIMES (July 8, 2021), <https://www.nytimes.com/2021/07/08/us/politics/biden-rights-guantanamo-detainees.html> [<https://perma.cc/SDD6-YST8>]; Katherine Ebright, *A Bipartisan Bill to Rein in Presidential War-Making*, BRENNAN CTR. FOR JUST. (Sept. 30, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/bipartisan-bill-rein-presidential-war-making> [<https://perma.cc/6P4U-ZDJQ>].
19. See Hamdi v. Rumsfeld, 542 U.S. 507, 579 (2004) (Scalia, J., dissenting); John A.E. Vervaele, *Anti-Terrorist Legislation in the US: Inter Arma Silent Leges?*, 13 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 201 (2005).
20. Sanford Levinson, *What Is the Constitution's Role in Wartime?*, FINDLAW (Oct. 17, 2001), <https://supreme.findlaw.com/legal-commentary/what-is-the-constitutions-role-in-wartime.html> [<https://perma.cc/AE3J-7QSH>] (“Does law speak in time of war? And, if so, to whom, and how loudly?”). See also Richard A. Posner, *Desperate Times, Desperate Measures*, N.Y. TIMES (Aug. 24, 2003), <https://www.nytimes.com/2003/08/24/books/desperate-times-desperate-measures.html> [<https://perma.cc/7JWT-ALAG>] (“Since September 11, 2001, the United States has been at war. It is a war

in America's legal response to wars past. By 1998, Cicero's maxim earned a place as the final chapter title of then-Chief Justice William H. Rehnquist's 1998 book, *All the Laws but One*, which charted the United States' imperfect wartime history of protecting otherwise fundamental rights.<sup>21</sup> In the Chief Justice's estimation, broadly consistent with then-received academic wisdom, U.S. history showed that, while laws may not fall "silent" in wartime, they would at least "speak with a different voice."<sup>22</sup> Indeed, the vast weight of scholarly opinion in the years preceding 9/11 was that the courts would, as had been their wont, defer to executive views on all questions of war and foreign affairs,<sup>23</sup> and the executive would, as had been its wont, not much trouble itself with law regulating war.<sup>24</sup>

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unlike our previous wars, but it is a war nonetheless. War places law under pressure."'). Less than a week after the attacks, before any assessment of cause or fault, House Minority Leader Richard Gephardt made this clear: "[W]e're not going to have all the openness and freedom we have had." Senate Minority Leader Trent Lott justified a starker view: "When you're at war," he said, "civil liberties are treated differently." Charles V. Peña, *What Price Security?*, CATO INST. (Sept. 17, 2001), <https://www.cato.org/commentary/what-price-security-0> [<https://perma.cc/NT3S-CSZY>]. Anticipating the effect of potential future attacks on domestic liberties, the forecast has been even worse. See, e.g., Michael Ignatieff, *Lesser Evils*, N.Y. TIMES MAG. (May 2, 2004), <https://www.nytimes.com/2004/05/02/magazine/lesser-evils.html> [<https://perma.cc/DX4M-BUGY>] ("Once the zones of devastation were cordoned off and the bodies buried, we might find ourselves, in short order, living in a national-security state on continuous alert, with sealed borders, constant identity checks and permanent detention camps for dissidents and aliens. Our constitutional rights might disappear from our courts, while torture might reappear in our interrogation cells."').

21. WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 218–25 (1998).
22. *Id.* at 225.
23. See, e.g., LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 132 (2d ed. 1996) ("[F]oreign affairs make a difference. Here, the courts are less willing than elsewhere to curb the federal political branches, are even more disposed to presume the constitutional validity of their actions and to accept their interpretations of statutes, and have even developed doctrines of special deference to them."); Christina E. Wells, *Questioning Deference*, 69 MO. L. REV. 903, 906 & n.14 (citing sources) (2004); Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism, 107th Cong. 162 (2001) (statement of Laurence H. Tribe, Professor of Constitutional Law, Harvard Law School) ("[C]ourts necessarily see but one case at a time and in wartime tend to defer to the executive's greater knowledge and expertise."').
24. See, e.g., LOUIS FISHER, *PRESIDENTIAL WAR POWER* (3d. ed. 1995) (cataloguing examples); HAROLD HONGJUH KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990); ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973).

It was perhaps no small irony that lost in Cicero's service to modern academia was the reality that his famous *inter arma silent leges* maxim had been delivered in his capacity as legal counsel, as part of a defense oration championing the regular rule of law at a time when the Republic was collapsing around him.<sup>25</sup> Defending his client against a charge of murder, Cicero had argued the victim had attacked first.<sup>26</sup> He was making an argument grounded in that most basic principle of criminal law: the ordinary law of murder is silent when arms have already been raised and the victim acts in self-defense. How Cicero's defense oration came to stand for the far broader idea that law is broadly irrelevant (or at least quieter) in wartime may be lost to history. But by 9/11, the academic assumption about what was to come for law in the U.S. response to the attacks was not surprising. Most professors of international law teaching in the American academy around the turn of the millennium had themselves attended law school in the 1970s and early 1980s.<sup>27</sup> This was just after the American war in Vietnam during which U.S. courts indeed had little to say about the war's legality;<sup>28</sup> before the United States ratified the major treaties in international human rights;<sup>29</sup> and before the U.S. Army Field Manual was updated (after the massacre by U.S. troops of civilians in Vietnam at My Lai) to describe the main objective of wartime detention operations for the first time not as the "acquisition of maximum intelligence information," but rather, as the "implementation of the Geneva Conventions."<sup>30</sup> Their

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25. CICERO, PRO MILONE 16–17 (G.P. Goold ed., N.H. Watts trans. 1992).

26. *Id.* at 17–19.

27. See e.g., *School of Law 2002–2004 Academic Bulletin: Faculty and Staff*, IND. UNIV. BULLETINS, <https://bulletins.iu.edu/iub/law/faculty.html> [<https://perma.cc/KR82-CQP5>]; UNIV. OF MICH. L. SCH., THE UNIVERSITY OF MICHIGAN LAW SCHOOL FACULTY 2003–2004, at 34 (2003).

28. See e.g., *Holtzman v. Schlesinger*, 414 U.S. 1316, 1319–20 (1973); *United States v. Sisson*, 399 U.S. 267, 276 (1970).

29. Most major international human rights treaties were just beginning to enter into force in the 1970s. It was not until the 1990s that the United States ratified treaties such as the International Covenant on Civil and Political Rights (in 1992), and the Convention Against Torture (in 1994). See generally Aulona Haxhiraj, *The Covenant on Civil and Political Rights*, 3 JURIDICAL TRIB. 308, 310 (2013); Trent Buatte, *The Convention Against Torture and Non-Refoulement in U.S. Courts*, 35 GEO. IMMIGR. L.J. 701, 704 (2021).

30. JAMES F. GEBHARDT, THE ROAD TO ABU GHRAIB: U.S. ARMY DETAINEE DOCTRINE AND EXPERIENCE 44–50 (2005). See also James J. McGowan, Jr., *Training in the Geneva and Hague Conventions: A Dead Issue?*, ARMY LAW. 5 (1974); William Greider, *Teaching of War Law Revitalized by Army*, WASH. POST, Feb. 14, 1971, at A1. For a more detailed discussion of the evolution of U.S. military doctrine and training



own law professors had been trained in law before the modern Geneva Conventions had come into force.<sup>31</sup> Law had developed an increasing amount to say about the regulation of force during their lifetimes, but it was far from apparent from their own legal education that anyone was listening.

Academia's pessimistic certainty about the fate of law in what would become the post-9/11 wars was no doubt compounded by the sizable gap that had grown between civilian academia and the U.S. military over the late twentieth century. Fueled in part by the growing separation between civilian and military more broadly,<sup>32</sup> thousands of students had come to see graduate education in the 1960s in part as a mechanism to avoid the draft, a path many teachers and administrators facilitated in the interest of channeling their own opposition to the war.<sup>33</sup> At the same time, antiwar backlash on college campuses against students enrolled in Reserve Officers Training Corps ("ROTC") programs led many colleges—including almost the entire Ivy League—to disband or discontinue ROTC programs altogether.<sup>34</sup> The separation was compounded by deeply controversial federal policies in the 1990s requiring LGBTQ members of the military to remain closeted while in

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implementing the Geneva Conventions, see Deborah Pearlstein, *Finding Effective Constraints on Executive Power: Interrogation, Detention and Torture*, 81 IND. L.J. 1255 (2006).

31. Detlev Vagts graduated from Harvard Law School in 1951; Louis Henkin in 1940. See *Alumni Focus: Detlev Vagts (1929–2013): Scholar of International Law and Transnational Law*, HARV. L. TODAY (Aug. 21, 2013), <https://today.law.harvard.edu/detlev-vagts-1929-2013-scholar-of-international-law-and-transnational-law/> [<https://perma.cc/Q7BK-Q3Y9>]; William Grimes, *Louis Henkin, Leader in Field of Human Rights Law, Dies at 92*, N.Y. TIMES (Oct. 10, 2010), <https://www.nytimes.com/2010/10/17/us/17henkin.html> [<https://perma.cc/Y3PF-CGF9>].
32. See Michael C. Desch, *Explaining the Gap: Vietnam, the Republicanization of the South, and the End of the Mass Army*, in SOLDIERS AND CIVILIANS: THE CIVIL-MILITARY GAP AND AMERICAN NATIONAL SECURITY 289, 292–95 (Peter D. Feaver & Richard H. Kohn eds., 2001) (discussing how the transition from the draft to an all-volunteer military force contributed to the growing political gap between the military and civilian society); PETER D. FEAVER & CHRISTOPHER GELPI, CHOOSING YOUR BATTLES: AMERICAN CIVIL-MILITARY RELATIONS AND THE USE OF FORCE 5 (2004).
33. Lawrence M. Baskir & William A. Strauss, *The Draft and Who Escaped It*, in LIGHT AT THE END OF THE TUNNEL: A VIETNAM WAR ANTHOLOGY 460–65 (Andrew J. Rotter ed., 1991).
34. Emma Moore & Andrew Swick, *Leveraging ROTC to Span the Civil-Military Gap*, CTR. FOR NEW AM. SEC. (Sept. 27, 2018), <https://www.cnas.org/publications/reports/working-paper-leveraging-rotc-to-span-the-civil-military-gap> [<https://perma.cc/6FGM-M2KJ>].

service, and to require universities accepting federal funding to allow military recruiters on campus.<sup>35</sup>

Yet even as American litigation and scholarship surrounding the law regulating war began to grow dramatically in the wake of Vietnam<sup>36</sup>—including the production of the first law school casebook expressly devoted to national security, foreign relations law, and the law of armed conflict<sup>37</sup>—law school course offerings in national security law, the law of armed conflict, and the use of force remained relatively sparse even among the top twenty U.S. law schools.<sup>38</sup> Neither Harvard, Yale, nor Stanford offered a course in national security law during the 1999–2000 academic year.<sup>39</sup> That school year, only one of the twelve schools from which we obtained course records offered a stand-alone course in the law of armed conflict or international humanitarian law.<sup>40</sup>

So it was perhaps unsurprising that on September 12, 2001, as the United States embarked upon a mammoth global war effort that would span more than two decades, the Chief Legal Advisor to the National Security Council at the White House (later a State Department Legal Adviser) was a distinguished government attorney who had never taken a course in international law.<sup>41</sup> He was far from alone. While it may never be possible to disentangle fully which aspects of the deeply problematic post-9/11 U.S. detention, interrogation, trial, and use-of-force policies were driven by design and which (at least in part) by

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35. *Id.*; see also *Rumsfeld v. F. for Acad. & Institutional Rts.*, 547 U.S. 47 (2006).
36. Peter Raven-Hansen et al., *A Brief History of the Field of National Security Law*, in NATIONAL SECURITY LAW: FIFTY YEARS OF TRANSFORMATION 33 (2012).
37. *Id.* at 34–35 (citing DONALD N. ZILLMAN, THE MILITARY IN AMERICAN SOCIETY: CASES AND MATERIALS (1978)).
38. In preparing this Article, the author solicited course catalogues from the top twenty American law schools as listed in the *U.S. News & World Report* rankings for 1999–2000 and 2014–2015. The author included courses that covered international law, national security law, pressing geopolitical issues, or implicated contingencies of the “War on Terror.” Some schools were only able to provide catalogues for earlier or later years. See e.g., Course Catalogues for Yale Law School (1999–2000 & 2014–2015) (on file with author).
39. Course Catalogues for Yale Law School, Harvard Law School, and Stanford Law School (1999–2000) (on file with author).
40. Harvard offered a course called “War/International Humanitarian Law: Norms, Crimes, and Institutions” in the 1999–2000 term. Course Catalogue for Harvard Law School (1999–2000) (on file with author).
41. Former Bush Administration National Security Council and State Department Legal Adviser John Bellinger has remarked that he did not take a course in International Law while a student at Harvard Law School. *An Interview with John Bellinger III*, 52 HARV. INT’L L. J. – ONLINE 32 (2010).

ignorance,<sup>42</sup> a qualitative survey of senior national security policy officials who served in the George W. Bush and Barack Obama Administrations between 2001–2019 suggests that fluency in even basic pillars of international law among this group during the post-9/11 era was more of an exception than a rule.<sup>43</sup> Consider one example: The legal obligation for United Nations Member States to seek U.N. Security Council authorization for the use of military force under certain circumstances is set forth in the first instance in the U.N. Charter, a treaty signed and ratified by the United States in 1945.<sup>44</sup> While many aspects of the Charter framework, including the role of the U.N. Security Council, have been the subject of decades-long debate,<sup>45</sup> there

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42. The literature documenting the development and implementation of these programs is rich and deep. *See, e.g.*, JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007); JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* (2008); CHARLIE SAVAGE, *TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY* (2007); DANIEL KLAIDMAN, *KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY* (2012).
43. The study and its implications are discussed in detail in Deborah Pearlstein, *Lawyering the Presidency*, 110 *GEO. L.J.* (forthcoming 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3808071](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3808071) [<https://perma.cc/Q4LY-8LUL>].
44. U.N. Charter art. 2(4) (prohibiting “the threat or use of force against the territorial integrity or political independence of any state”); *see also* U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).
45. Indeed, the vitality of the U.N. Charter Art. 2(4) prohibition on the use of force against the territory of another sovereign without their consent has long been the subject of (to put it mildly) doubt, the rule’s “demise” having been reported on multiple occasions since rumors of its death first emerged half a century ago. *See, e.g.*, Eric Posner, *The U.S. Ignores the U.N. Charter Because It’s Broken*, *SLATE* (Sept. 9, 2013), <https://slate.com/news-and-politics/2013/09/the-u-n-charter-is-broken-what-should-replace-it.html> [<https://perma.cc/T9JF-H6CR>]; Thomas M. Franck, *Who Killed Article 2(4)? Or: Changing Norms Governed the Use of Force by States*, 64 *AM. J. INT’L L.* 809 (1970) (“[T]oday the high-minded resolve of Article 2(4) mocks us from its grave.”). These declarations have appeared especially compelling in recent years in light of a series of high-profile violations of the Charter prohibition. *See, e.g.*, Claus Kress, *On the Principle of Non-Use of Force in Current International Law*, *JUST SEC.* (Sept. 30, 2019), <https://www.justsecurity.org/66372/on-the-principle-of-non-use-of-force-in-current-international-law/> [<https://perma.cc/J9PB-LXY6>] (noting, among others, the Russian annexation of Crimea and the Israeli annexation of the Golan).

is strong legal consensus surrounding, at a minimum, the basic framework: States must seek U.N. Security Council authorization to use armed force against another State unless the target State consents, or unless the attacking State is acting in national self-defense.<sup>46</sup> But in discussions of officials' normative beliefs about the role of the U.N. Security Council, just four of the sixteen officials who sat for oral interviews with the author evinced any working knowledge of this basic legal framework, including its relationship to the U.N. Charter.<sup>47</sup> A substantial majority rather expressed significant uncertainty about or misapprehension of the Charter scheme.<sup>48</sup> As one emphasized: "Nowhere can I recall seeing a document that a nation has to go to the U.N. Security Council."<sup>49</sup>

It is thus perhaps one of the great ironies—and great achievements—of the post-9/11 era that, by any number of available metrics, the attacks of 9/11, and the sweeping changes in counterterrorism policy and practice that ensued, transformed the study of international and national security law in the U.S. legal academy. By 2012, more than 125 law schools in the United States had stand-alone courses in national security law, not including related courses in subjects like counterterrorism law or intelligence law, and scholars had produced at least five different law school casebooks on the subject.<sup>50</sup> In the survey of law school course offerings described above, schools offered ninety-one courses in international law, human rights law, or national security law in the years just before 9/11; fifteen years later, that number had risen to 147.<sup>51</sup> Indeed, merely focusing on the growth of entire courses devoted to these topics undoubtedly underestimates the curricular impact of these issues, as constitutional law professors added landmark Supreme Court cases like *Hamdan v.*

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*But see id.* ("The 'cornerstone' of international law is as stable today as it was in 1970. But it remains surrounded by a grey area.").

46. Pearlstein, *supra* note 43 (manuscript at 27–28).

47. *Id.* (describing total survey pool).

48. *Id.* While the four knowledgeable interviewees had all attended law school at some point, it is worth noting that most U.S. law schools do not require a general course in international law, and even students who take it may not have delved into detailed questions about U.N. Charter application.

49. *Id.* at 28, n.118. (quoting Interview 7); *see also id.* (quoting Interview 9: "Dean Acheson would've gone ape" if he thought the Charter required the United States to get "UN permission to act on behalf of our own national interests.").

50. Raven-Hansen et al., *supra* note 36, at 31.

51. *See* Survey of Law School Course Catalogues, *supra* note 7.

*Rumsfeld*<sup>52</sup> and *Boumediene v. Bush*<sup>53</sup> to their syllabi; civil procedure professors added *Ashcroft v. Iqbal*<sup>54</sup> and *Clapper v. Amnesty International*,<sup>55</sup> and criminal law and First Amendment professors added *Humanitarian Law Project v. Holder*.<sup>56</sup> For better or worse, cases posing core questions of international law and security became staple features of the docket of the U.S. federal courts in the decade following the attacks, and they were accordingly all but impossible to avoid for American law students.

Scholarship on post-9/11 law and security topics likewise witnessed an explosion in growth. Between 1980–2000, for example, there were 278 published articles in academic legal journals mentioning the U.S. Naval Base at Guantánamo Bay.<sup>57</sup> Between 2001–2021, there were 7,588.<sup>58</sup> Neither was scholarly attention devoted solely to the domestic law implications of U.S. counterterrorism operations. Between 1980–2000, there were roughly 2,108 legal academic articles published referencing the Geneva Conventions in some way.<sup>59</sup> In the twenty years

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52. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). *See generally* Raven-Hansen et al., *supra* note 36, at 36 (noting that the new war generated a series of “blockbuster” national security law opinions).
  53. *Boumediene v. Bush*, 553 U.S. 723 (2008).
  54. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).
  55. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398 (2013).
  56. *Holder v. Humanitarian L. Project*, 561 U.S. 1 (2010).
  57. 278 Search Results for the Term “Guantánamo” Between Jan. 1, 1980 and Dec. 31, 2000, WESTLAW, [\(https://1.next.westlaw.com/Search/Results.html?query=guantanamo&jurisdiction=NY-CS-ALL&contentType=ANALYTICAL&querySubmissionGuid=i0ad62aee0000017fd81ed3ce0423b8b7&searchId=i0ad73aa70000017b41381ca4ec7b159e&transitionType=ListViewType&contextData=\(sc.Search\)\)](https://1.next.westlaw.com/Search/Results.html?query=guantanamo&jurisdiction=NY-CS-ALL&contentType=ANALYTICAL&querySubmissionGuid=i0ad62aee0000017fd81ed3ce0423b8b7&searchId=i0ad73aa70000017b41381ca4ec7b159e&transitionType=ListViewType&contextData=(sc.Search)) (enter “Guantánamo” in the search box; then filter by “Law Review & Journal” in Publication Type; then indicate “01/01/1980 – 12/31/2000” in Date Range) (last visited Mar. 30, 2022).
  58. 7588 Search Results for the Term “Guantánamo” Between Sept. 11, 2001 and Dec. 31, 2021, WESTLAW, [\(https://1.next.westlaw.com/Search/Results.html?query=guantanamo&jurisdiction=NY-CS-ALL&contentType=ANALYTICAL&querySubmissionGuid=i0ad62aee0000017fd827ffa80424af67&searchId=i0ad62aee0000017fd82727096c752baa&transitionType=ListViewType&contextData=\(sc.Search\)\)](https://1.next.westlaw.com/Search/Results.html?query=guantanamo&jurisdiction=NY-CS-ALL&contentType=ANALYTICAL&querySubmissionGuid=i0ad62aee0000017fd827ffa80424af67&searchId=i0ad62aee0000017fd82727096c752baa&transitionType=ListViewType&contextData=(sc.Search)) (enter “Guantánamo” in the search box; then filter by “Law Review & Journal” in Publication Type; then indicate “09/11/2001 – 12/31/2021” in Date Range) (last visited Mar. 30, 2022).
  59. 2108 Search Results for the Term “Geneva Convention” Between Jan. 1, 1980 and Dec. 31, 2000, WESTLAW, [\(https://1.next.westlaw.com/Search/Results.html?query=geneva%20convention&jurisdiction=NY-CS-ALL&contentType=ANALYTICAL&querySubmissionGuid=i0ad62aee0000017fd82468d604243e29&searchId=i0aa62aee0000017fd823aee26c752902&transitionType=ListViewType&contextData=\(sc.Search\)\)](https://1.next.westlaw.com/Search/Results.html?query=geneva%20convention&jurisdiction=NY-CS-ALL&contentType=ANALYTICAL&querySubmissionGuid=i0ad62aee0000017fd82468d604243e29&searchId=i0aa62aee0000017fd823aee26c752902&transitionType=ListViewType&contextData=(sc.Search)) (enter “Geneva Convention” in the search box; then filter by “Law Review & Journal” in Publication Type; then

since 9/11, there have been more than three times that number.<sup>60</sup> The scholarly study of international law, in particular, witnessed a revolutionary turn to the empirical, bringing new understanding to the ways in which different structural mechanisms or incentives—from courts and other institutional actors and organizations,<sup>61</sup> to domestic politics and sociology<sup>62</sup>—influence state decision-making in the real world.<sup>63</sup> And even those numbers cannot capture the breadth of academic engagement through popular publications and newly formed

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indicate “01/01/1980 – 12/31/2000” in Date Range) (last visited Mar. 30, 2022).

60. 6384 Search Results for the Terms “Geneva Conventions” Between Sept. 11, 2001 and Dec. 31, 2021, WESTLAW, [\(https://1.next.westlaw.com/Search/Results.html?query=geneva%20convention&jurisdiction=NY-CS-ALL&contentType=ANALYTICAL&querySubmissionGuid=i0ad62ace0000017fd826705b04248e30&searchId=i0aa62ace0000017fd823ace26c752902&transitionType=ListViewType&contextData=\(sc.Search\)](https://1.next.westlaw.com/Search/Results.html?query=geneva%20convention&jurisdiction=NY-CS-ALL&contentType=ANALYTICAL&querySubmissionGuid=i0ad62ace0000017fd826705b04248e30&searchId=i0aa62ace0000017fd823ace26c752902&transitionType=ListViewType&contextData=(sc.Search))) (enter “Geneva Convention” in the search box; then filter by “Law Review & Journal” in Publication Type; then indicate “09/11/2001 – 12/31/2021” in Date Range) (last visited Mar. 30, 2022).
61. See, e.g., Michael P. Scharf, *International Law in Crisis: A Qualitative Empirical Contribution to the Compliance Debate*, 31 CARDOZO L. REV. 45 (2009) (reporting findings from meetings with former State Department Legal Advisers); Laura A. Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 AM. J. INT’L L. 1 (2010) (reporting findings from interviews with JAG lawyers); see also KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE (2001) (attributing domestic government compliance with European Court of Justice rulings to concerns about political legitimacy).
62. See, e.g., Beth Simmons, *Treaty Compliance and Violation*, 13 ANN. REV. POL. SCI. 273 (2010) (examining the role of domestic political constituencies in promoting compliance with international human rights law); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004) (positing a sociology of State influence on other States).
63. For useful reviews of the field of empirical study, see Emilie M. Hafner-Burton et al., *Political Science Research on International Law: The State of the Field*, 106 AM. J. INT’L L. 47, 91 (2012); Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT’L L. 1 (2012); Beth Simmons, *Treaty Compliance and Violation*, 13 ANN. REV. POL. SCI. 273 (2010) (summarizing compliance literature). See also Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decision Making*, 38 YALE J. INT’L L. 359 (2013); Ashley Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORDHAM L. REV. 827 (2013) (assembling a set of recent examples in which the executive has changed or amended national security policies, changes motivated by the mere prospect that judicial engagement might call the policy’s legality into question).

and quickly influential blogs.<sup>64</sup> Multiple law schools established new centers devoted to research and debate,<sup>65</sup> created new specialty journals focused on national security and international law,<sup>66</sup> and began offering training courses for non-students in the law of war or related subjects.<sup>67</sup>

By the end of the first decade after 9/11, the civilian academy's sweeping embrace of matters of law and war was coupled with encouraging signs of steps to begin closing the civil-military gap that compromised the quality of these studies in the decades leading up to the attacks. In part, the partial re-integration of civilian and military study was visible in the rapidly increasing population of U.S. military veterans, many of whom returned from the post-9/11 wars to enroll in higher education, aided by the Post-9/11 Veterans Educational Assistance Act of 2008 and related federal programs.<sup>68</sup> When federal education aid for veterans initially capped tuition aid to top private law schools, Stanford, New York University, Columbia, and other law schools took steps to provide supplemental aid to boost enrollment among former members of the armed forces.<sup>69</sup> In less direct, but nonetheless important, ways, academics took advantage of countless cooperative programs and conferences co-sponsored by both civilian and military academic hosts.<sup>70</sup> And military veterans joined the civilian

64. See, e.g., OPINIO JURIS, <http://opiniojuris.org/> [<https://perma.cc/UC64-M6V7>]; LAWFARE, <https://www.lawfareblog.com/> [<https://perma.cc/5TJC-BCXM>]; JUST SEC., <https://www.justsecurity.org/> [<https://perma.cc/ZHU6-LDSU>].

65. See, e.g., *Program on International Law and Armed Conflict*, HARV. L. SCH., <https://pilac.law.harvard.edu/#core-team-home> [<https://perma.cc/DS4U-VSG2>]; *Lieber Institute*, W. POINT, <https://lieber.westpoint.edu/> [<https://perma.cc/YCX6-B664>].

66. See, e.g., NAT'L SEC. L.J.; J. NAT'L SEC. L. & POL'Y.

67. See, e.g., *War Crimes and Atrocity Law*, U. VA. L. SCH., <https://www.law.virginia.edu/courses/view/122218605> [<https://perma.cc/U6UX-HNER>].

68. *Veterans Education and the GI Bill*, AM. COUNCIL ON EDUC., <https://www.acenet.edu/Policy-Advocacy/Pages/Other-Issues/Veterans-Education-GI-Bill.aspx> [<https://perma.cc/6R3G-26V8>].

69. Mary Carmichael, *ROTC Back at Harvard After 40 Years*, BOS. GLOBE (Sept. 21, 2011, 3:53 AM), <https://www.bostonglobe.com/metro/2011/09/20/after-year-standoff-harvard-makes-peace-with-naval-rotc/4haBwUhNJCAnqb4LR4wZbI/story.html> [<https://perma.cc/D5GU-SY3T>] (summarizing Harvard's relationship with ROTC following the repeal of "Don't Ask, Don't Tell," the federal policy that required gay and lesbian service members to keep their sexual preferences quiet or face expulsion); see also Christina Pazzanese, *Higher Education and the Military*, HARV. GAZETTE (Apr. 14, 2016), <https://news.harvard.edu/gazette/story/2016/04/higher-education-and-the-military/> [<https://perma.cc/VCM7-FCK5>].

70. See e.g., *About the Lieber Institute*, *supra* note 4 (noting the Lieber Institute academic center and cooperative programs at West Point).

academy as professors as well: today, U.S. law students from California to Texas to Massachusetts can take international law from professors who had previous careers as military lawyers.<sup>71</sup>

Perhaps most important, while a world of disagreement remains about the effectiveness of legal constraints on violations of domestic and international law in U.S. counterterrorism operations post 9/11,<sup>72</sup> the notion that law will simply fall silent in time of war today appears to have remarkably few (if any) academic adherents. In addition to the staggering increase in volume of scholarship about domestic and international law in times of armed conflict, it has become increasingly common to find recognition of, as some authors described it, the “normalization of foreign relations law” in the United States—the view that courts have become increasingly comfortable engaging in questions of law in this realm.<sup>73</sup> Academics who have served as government lawyers in the past two decades have documented the extent to which domestic and international law regulating war influences, shapes, and indeed at times constrains decision-making by U.S. policy makers.<sup>74</sup> Rather than denying the impact of law and lawyers on government decision-making, scholars in recent years have emphasized the important influence of government lawyers in this realm, coupled most recently with an uptick in calls to reform those roles to ensure they function more to limit than expand the substantive scope of presidential

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71. See e.g., *Geoff Corn*, S. TEXAS COLL. L., <https://www.stcl.edu/about-us/faculty/geoffrey-s-corn/> [<https://perma.cc/TDB3-8G54>]; *John Dehn*, LOY. CHI. SCH. L., <https://www.luc.edu/law/faculty/facultyandadministrationprofiles/dehn-john.shtml> [<https://perma.cc/E4WE-WNCN>]; *Rachel VanLandingham*, SOUTHWESTERN UNIV., <https://www.swlaw.edu/faculty/full-time/rachel-e-vanlandingham> [<https://perma.cc/8U33-LZTS>]; *Gaby Blum*, HARV. L. SCH., <https://hls.harvard.edu/faculty/directory/10089/Blum> [<https://perma.cc/5TBU-C92C>].
72. Compare JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11*, at 208 (2012) (arguing “never before has the Commander in Chief been so influenced, and constrained, by law”), with RICHARD ABEL, *LAW’S WARS: THE FATE OF THE RULE OF LAW IN THE U.S. “WAR ON TERROR”* 682 (2018) (“[D]efenders of the rule of law achieved only partial victories—all that is ever possible.”). See also Shirin Sinnar, *Rule of Law Tropes*, 129 HARV. L. REV. 1566 (2016).
73. Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897 (2015); see also Harlan Grant Cohen, *The Death of Deference and the Domestication of Treaty Law*, 2015 B.Y.U. L. REV. 1467 (2015); Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783 (2011).
74. See generally GOLDSMITH, *supra* note 72; Ingber, *supra* note 63, at 359; Deeks, *supra* note 63, at 827 (assembling a set of recent examples in which the executive has changed or amended national security policies, motivated by the prospect that the judiciary might challenge their legality).



power in particular.<sup>75</sup> Given this relative renaissance in scholarly thought, and the curricular changes in legal education noted above, there is some cause for optimism that the coming generation of government counsel will be better prepared to answer complex questions of law in the field than their counterparts were in 2001.

At the same time, that optimism comes with a critical caveat. It is far from certain that academia's vigorous post-9/11 commitment to the study and teaching of national security and international law is either particularly deep, or likely to endure. Today, only a handful of American law schools require students to complete any course in international law, and roughly one fifth of U.S. law schools do not offer the course on an annual basis.<sup>76</sup> Likewise, few of the top five U.S. graduate programs in international affairs and foreign policy (the graduates of which regularly go on to senior positions in government policy) require even a basic introductory course in international law.<sup>77</sup> And for those students who do enroll in international legal studies in law school, they are still likely to encounter a casebook that cites principally to opinions of U.S. courts.<sup>78</sup> While that choice by U.S. casebook authors is understandable in some respects, it makes it more likely that senior lawyers serving in U.S. government are unfamiliar with the primary European courts whose rulings on privacy and surveillance (among other things) have already had a significant impact

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75. See generally Pearlstein, *supra* note 43; Emily Berman, *Weaponizing the Office of Legal Counsel*, 62 B.C. L. Rev. 515 (2021); Oona Hathaway, *National Security Lawyering in the Post-War Era: Can Law Constrain Power?*, 68 UCLA L. Rev. 4 (2021).

76. Ryan Scoville & Milan Markovic, *How Cosmopolitan are International Law Professors?*, 38 MICH. J. INT'L L. 119 (2016) (citing *Country: United States*, PILMAP (2014), <http://pilmap.org/Details/US> [<https://perma.cc/A2E4-DXA3>], which reports that only 4% of U.S. law schools require students to complete a course on international law).

77. See *The Best International Relations Schools in the World*, FOREIGN POL'Y (2018), <https://foreignpolicy.com/2018/02/20/top-fifty-schools-international-relations-foreign-policy/> [<https://perma.cc/P64V-EAEP>]. Foreign Policy Magazine, in collaboration with the Teaching, Research, and International Policy ("TRIP") project at the College of William and Mary, publishes a regular ranking of international relations and foreign policy masters and PhD programs. The latest edition, released in 2018, ranks Columbia University's programs, for instance, in the top five schools for international relations across the two graduate categories. However, its Masters of International Affairs program does not include international law as a core or required class. See *Master of International Affairs (MIA): MIA Core Curriculum*, COLUM. SCH. OF INT'L & PUB. AFF., <https://bulletin.columbia.edu/sipa/programs/mia/#requirementstext> [<https://perma.cc/66GP-53HY>].

78. ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? 146 (2017).

on U.S. government and business alike.<sup>79</sup> And then there is the necessity of sustaining interest in the field once these issues are no longer quite so chronically front page news. As a Red Cross survey conducted a decade after 9/11 found, roughly half of American students between the ages of twelve and seventeen reported never having heard of the Geneva Conventions or international humanitarian law.<sup>80</sup> Whether the changes in the academy wrought by the post-9/11 wars will last long enough to benefit these students and their successors, it may yet be too soon to tell.

### III. HOW THE ACADEMY CHANGED THE WAR

If the post-9/11 wars have been, at least to an extent, a significant boon to the study and teaching of law in related fields, the academy's effect on the course of the war has been a far more mixed bag. Perhaps in part as a result of the United States' general unpreparedness for the attacks or the legal issues arising out of the U.S. response, legal academics were able to have a remarkable impact during the past twenty years in shaping the U.S. response. Some of these contributions unquestionably helped to promote U.S. adherence to legal obligations. Notably, law professors took the lead in key cases challenging the military detention, treatment, and trial of terrorist suspects under domestic and international law;<sup>81</sup> consulted on the drafting of legislation; and wrote detailed analyses essential in helping the press, policy makers, and public understand the sweeping legal implications of government positions.<sup>82</sup>

At the same time, it is equally possible to identify prominent academics who helped to excuse or justify legally and morally suspect

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79. Deborah Pearlstein, *For Facebook's Sake: Getting Conversant with Human Rights*, JUST SEC. (June 10, 2021), <https://www.justsecurity.org/76840/for-facebooks-sake-getting-conversant-with-human-rights/> [<https://perma.cc/K3L4-VZTB>].

80. *Red Cross Survey Finds Young Americans Unaware of the Rules of War*, CISION PR NEWSWIRE (Apr. 11, 2011, 10:00 ET), <https://www.prnewswire.com/news-releases/red-cross-survey-finds-young-americans-unaware-of-rules-of-war-119689069.html> [<https://perma.cc/KBJ7-4YG5>].

81. Neal Katyal, of Georgetown Law School, led the litigation challenging the legality of military commission trials all the way to the Supreme Court. *Hamdan v. Rumsfeld*, 548 U.S. 557, 566 (2006). Jenny Martinez, of Stanford Law School, led efforts to challenge the designation of U.S. citizen Jose Padilla as an "enemy combatant," again culminating in oral arguments in the Supreme Court. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). Alex Reinert, of Cardozo Law School, litigated *Ashcroft v. Iqbal*, 556 U.S. 662, 665 (2009).

82. See, e.g., Martin Lederman, *Understanding the OLC Torture Memos*, BALKINIZATION (Jan. 7, 2005), <https://balkin.blogspot.com/2005/01/understanding-olc-torture-memos-part.html> [<https://perma.cc/M6UU-6EYB>].

U.S. behavior during this period. Perhaps most well-known is the work of law professor John Yoo, who, as a lawyer in the Justice Department Office of Legal Counsel, authored a profoundly flawed memorandum endorsing the President's authority to ignore statutory and international law prohibitions against torture in authorizing "enhanced interrogation techniques" against terrorist suspects.<sup>83</sup> And Yoo was hardly alone among academics prepared to embrace torture,<sup>84</sup> or to advance other sweeping claims of executive power post 9/11.<sup>85</sup>

Our professional and moral responsibility as scholars make it necessary to take account of both forms of academic influence, particularly if it helps to identify ways of improving our performance in the future. As it turns out, experiences of the post-9/11 era have exposed not only the direct means, but also the more subtle mechanisms through which legal academics and lawyers influence State decision-making. Indeed, one of the most challenging critiques levied against lawyers who measured U.S. actions by their compliance with international law has been the worry that such efforts, however well-intentioned, in fact functioned to legitimate many of the most problematic post-9/11 U.S. policies in warfighting. Examining whether these or other critiques are valid sheds light both on the complexity of the multifarious roles many academics have come to play in driving States' legal development, and on the role of legal expertise in policy decision-making more broadly.

#### A. *Law as Justification*

It is unfortunately easy to find examples in history of academics whose scholarly contributions became, intentionally or not, fodder for political leaders to excuse or justify as legal policies better understood as radically inconsistent with prevailing law.<sup>86</sup> So, too, after 9/11. At

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83. Memorandum from John C. Yoo, Deputy Assistant Gen. Couns., Off. of Legal Couns., to Alberto R. Gonzales, Couns. to the President, Untitled Letter Re: "Enhanced Interrogation" (Aug. 1, 2002), <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB127/020801.pdf> [<https://perma.cc/SRX3-J2BM>] [hereinafter Yoo Torture Memo]; Memorandum from Jay S. Bybee, Assistant Att'y Gen., Off. of Legal Couns., to Alberto R. Gonzales, Couns. to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf> [<https://perma.cc/6CUQ-VZPT>] [hereinafter Bybee Torture Memo].

84. See, e.g., ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* (2002).

85. See, e.g., ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2011).

86. See Sanford Levinson, *Torture in Iraq & the Rule of Law in America*, 133 *DAEDALUS* 5, 7-9 (2004) (discussing Nazi legal theorist Carl Schmitt's influence on the Bush Administration).

roughly the same time that Berkeley Law Professor John Yoo, as a newly-installed attorney in the Justice Department Office of Legal Counsel, was penning his then-confidential memo absolving the President of any need to comply with domestic or international laws prohibiting torture,<sup>87</sup> Harvard Law School Professor Alan Dershowitz was preparing to publish his provocative book, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge*.<sup>88</sup> Dershowitz argued, among other things, that Congress should craft legislation to accommodate the need to use torture in case the government were to detain a suspect it believed had vital knowledge of the location or status of a “ticking bomb.”<sup>89</sup> In Dershowitz’s vision, courts could be empowered to issue judicial “torture warrants” authorizing a predetermined amount of non-lethal pressure—“say, a sterilized needle inserted under the fingernails to produce unbearable pain without any threat to health or life.”<sup>90</sup> Dershowitz saw “the simple cost-benefit analysis for employing such non-lethal torture” as “overwhelming.”<sup>91</sup> In his eyes, it was “surely better to inflict non-lethal pain on one guilty terrorist who is illegally withholding information needed to prevent an act of terrorism than to permit a large number of innocent victims to die.”<sup>92</sup> Neither domestic nor international law need pose an obstacle to the proposal, Dershowitz maintained.<sup>93</sup> Because the U.S. Constitution could be read not to prohibit the use of physical force to “obtain information needed to save lives,” and because the United States had consented to be bound by the Convention Against Torture only to the extent the torture it barred was also prohibited by the U.S. Constitution, the United States could use torture in such cases and “arguably remain in technical compliance with its treaty obligation.”<sup>94</sup>

For some, the national security imperative of counterterrorism post 9/11 furnished an occasion to operationalize theories of international law and executive power they had championed to lesser effect before

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87. Yoo Torture Memo, *supra* note 83.

88. DERSHOWITZ, *supra* note 84. For a summary of the legal flaws with the argument that Dershowitz and the Bush Administration embraced with respect to U.S. obligations under the Convention Against Torture, see Sarah Cleveland, *The United States and the Torture Convention, Part I: Extraterritoriality*, JUST SEC. (Nov. 14, 2014), <https://www.justsecurity.org/17435/united-states-torture-convention-part-i-extraterritoriality/> [https://perma.cc/L68A-3UE4].

89. *See* DERSHOWITZ, *supra* note 84, at 142–45.

90. *Id.* at 141, 144.

91. *Id.* at 144.

92. *Id.*

93. *See id.* at 136.

94. *Id.*

the attacks.<sup>95</sup> Others entered the post-9/11 wars without preconceptions on specific questions of law or security, but ended up embracing new understandings of legal rules and institutions that justified weaker legal constraints on government power in the name of national security.<sup>96</sup> In either form, the work of these scholars had the effect of helping to justify the United States' position that existing legal structures supported its practices of, for example, torture and global surveillance, and, likewise supported the limited jurisdiction of courts to review the interrogation, detention, and trial of terrorism suspects.<sup>97</sup> Yet, while scholars' ordinary professional obligations to research and write in depth and with rigor should seem especially pressing when advancing arguments that support claims to extraordinary power, in too much of the post-9/11 literature, scholars fell notably short. For, despite many of these scholars' chronic, self-effacing claims of only modest knowledge in matters of security policy,<sup>98</sup> they leveraged their status as experts to

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95. See, e.g., Martin S. Flaherty, *History Right? Historical Scholarship, Original Understanding, and Treaties as Supreme Law of the Land*, 99 COLUM. L. REV. 2095 (1999) (reviewing John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1959 (1999)); see also ERIC POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE* 56 (2007).
96. See, e.g., BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* 3–4, 13 (2006); PHILIP B. HEYMANN & JULIETTE N. KAYYEM, *THE LONG-TERM LEGAL STRATEGY PROJECT FOR PRESERVING SECURITY AND DEMOCRATIC FREEDOMS IN THE WAR ON TERRORISM* 9 (2014) (“It is the President who has the information and expertise necessary to detect and infiltrate terrorist networks and incapacitate terrorists. Having outsiders second-guessing these steps would inevitably lead to undue executive branch caution . . . Courts, legislatures and even Inspectors General undermine confidence, move much too slowly and need information that they cannot safely be given. Oversight of executive actions, therefore, should lie exclusively within the operating arms of the executive branch.”).
97. See, e.g., Bybee Torture Memo, *supra* note 83, at 36–37 (quoting THE FEDERALIST NO. 23, at 147 (Alexander Hamilton) (Jacob E. Cooke ed., 1961), “As Hamilton explained, . . . ‘there can be no limitation of that authority, which is to provide for the defence and protection of the community, in any matter essential to its efficacy.’”); OFF. OF THE ATT’Y GEN., U.S. DEP’T OF JUST., *LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT* 6–7, 13–15 (Jan. 19, 2006) (“Because of the structural advantages of the Executive Branch, the Founders also intended that the President would have the primary responsibility and necessary authority as Commander in Chief and Chief Executive to protect the Nation and to conduct the Nation’s foreign affairs.”).
98. See, e.g., POSNER & VERMEULE, *supra* note 95, at 6–7 (“We emphasize that, as lawyers we do not have any expertise regarding optimal security policy.”); DERSHOWITZ, *supra* note 84, at 13 (“This book is . . . from the

make repeated, substantive, yet unsupported claims about the policy necessity of the structural legal arrangements they endorsed. One example: a major terrorist attack will generate “mass panic,” undermining “effective sovereignty,” and requiring visibly different security measures (such as widespread detention) to reassure the population.<sup>99</sup> (Social science literature at the time provided substantial evidence illustrating that “widespread panic is not the pattern following any type of disaster.”)<sup>100</sup> Another example: inadequate detention (or excessive judicial review) would give “aid and comfort” to our terrorist enemies; further, the uncertainty created by requiring judicial review of such detention imposes a burden on security efforts that exceeds any security benefit.<sup>101</sup> (As multiple accounts by military officers and personnel made apparent, America’s legally problematic detention policy was a singular boon to our enemies’ efforts in recruitment.)<sup>102</sup>

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perspective of a defense lawyer and a professor of criminal law and a student of psychology . . . I do not claim the dubious mantle of ‘expert’ on the broad issue of terrorism.”); JOHN C. YOO, *WAR BY OTHER MEANS* xi (2006) (“I did not expect to be involved in many important decisions. My field of research and writing in the university world was war . . . I had not expected to be too busy because the Bush Justice Department . . . focused primarily on a domestic agenda.”).

99. ACKERMAN, *supra* note 96, at 41–45, 89.
100. LEE CLARKE, *MISSION IMPROBABLE* 179 n.54 (1999) (“The pattern, in fact, is one of terror, accompanied by a moment of stunned reflection, or even anomie, followed by fairly orderly response. Even in the horrors chronicled by the [U.S.] Strategic Bombing Survey [established in 1944 to study the effects on cities in World War II devastated by firestorms and, later, nuclear attacks], cities burn, bodies explode, houses fall down and still people do not panic.”) (citations omitted). *See also* Lee Clarke, *Panic: Myth or Reality?*, 2022 *CONTEXTS* 21, 22 (“After five decades studying scores of disasters . . . one of the strongest findings is that people rarely lose control.”); E.L. Quarantelli, *Sociology of Panic*, in *INT’L ENCYCLOPEDIA SOC. & BEHAV. SCI.* 11020, 11021 (Neil J. Smelser & Paul B. Baltes eds., 2001) (discussing that some researchers believe that panic behavior “is very meaningful and far from most conceptions of irrationality”); Kathleen Tierney, *Disaster Beliefs and Institutional Interests: Recycling Disaster Myths in the Aftermath of 9/11*, in 11 *RSCH. IN SOC. PROBS. & PUB. POL’Y* 33, 34 (Lee Clarke ed., 2003) (suggesting that notion of widespread panic after disaster is a “myth”); ALAN O’DAY, *WEAPONS OF MASS DESTRUCTION AND TERRORISM* (2004).
101. ACKERMAN, *supra* note 96, at 45–47; POSNER & VERMEULE, *supra* note 95, at 254–56; YOO, *supra* note 98, at 128–29 (2006).
102. Matthew Alexander, *I’m Still Tortured by What I Saw in Iraq*, *WASH. POST* (Nov. 30, 2008), <https://www.washingtonpost.com/wp-dyn/content/article/2008/11/28/AR2008112802242.html> [<https://perma.cc/3K96-26UX>] (“I learned in Iraq that the No. 1 reason foreign fighters flocked there to fight were the abuses carried out at Abu Ghraib and Guantanamo.”).

Yet while it is easy to criticize this form of academic justification, it is less clear how best to guard against its dangers going forward. Scholars' right to raise challenging arguments that force a reconsideration of prevailing norms is, of course, the very essence of academic freedom. Most of this work fell squarely within that tradition, one essential to preserving liberal democracy. At the same time, it should be possible to bolster external mechanisms capable of mitigating the real-world impact of unethical or baseless academic claims. To the extent scholars are acting as practicing lawyers (whether or not in government), more robust policing of legal ethics rules could help steer them away from claims that violate core rules of the legal profession.<sup>103</sup> To the extent scholars are publishing their work in scholarly venues, more rigorous publisher attention to peer review, including as part of the process of student-edited law reviews, could help achieve similar ends for work lacking empirical support. Policy makers at times have no choice but to make difficult decisions quickly based on incomplete information. Academics, as a general matter, rarely face the same time constraints. It should be harder for scholars to claim the mantle of expertise and to insist upon their substantive ignorance at the same time. Authors, editors, ethicists, and publishers can do an invaluable service to law and policy by making sure their professors have done their homework first.

### *B. Law as Legitimation*

Dissenting from the Supreme Court's infamous decision in *Korematsu v. United States*, in which the Court upheld the exclusion of Japanese-American citizens from their homes in a vast military area on the West Coast, Justice Jackson warned that the Court's ratification of the military's order was in some respects more dangerous than the order itself:

[A] judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency . . . But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of

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103. There are also a number of reforms that might be pursued to enhance the quality of advice by government legal counsel in particular. *See, e.g.*, Pearlstein, *supra* note 43 (manuscript at 45–46); Emily Berman, *Weaponizing the Office of Legal Counsel*, 62 B.C. L. REV. (2021); ANNIE L. OWENS, AM. CONST. SOC'Y, REFORMING THE OFFICE OF LEGAL COUNSEL: LIVING UP TO ITS BEST PRACTICES (2020).

transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.<sup>104</sup>

Jackson warned about the dangers of legal legitimation—the prospect that post hoc judicial approval, or perhaps even mere judicial engagement, might succeed in normalizing conduct otherwise better marginalized as exceptional.<sup>105</sup>

In the post-9/11 era, multiple scholars raised concerns that efforts by academics and advocates to embrace international law, in challenging many of the most problematic aspects of U.S. counterterrorism policy, paradoxically produced a similarly legitimating effect. Writing with the benefit of his own experience in both academia and government (as head of the Office of Legal Counsel from 2003–2004), Jack Goldsmith argued that the raft of “best-selling books, reports, blog posts,” and lawsuits challenging the legality of post-9/11 policies managed only “to uncover, challenge, change, and then effectively approve nearly every element of the Bush counterterrorism program.”<sup>106</sup> Yes, Goldsmith argued, all that work had persuaded Congress and the courts to add some “restrictions and accountability strings” to existing counterterrorism policies, but in the end had really only succeeded in codifying the basic outlines of the original program.<sup>107</sup> Rebecca Ingber raised similar concerns, suggesting that the availability of international legal arguments in support of some aspects of executive policy (like wartime detention) made it easier for the executive to continue policies with weaker rights protections than those available under domestic law because of the assumption that executive compliance with international law ensured at least a minimum set of institutional checks and international support.<sup>108</sup> Samuel Moyn has recently taken such legitimation concerns even further. He maintains

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104. *Korematsu v. United States*, 323 U.S. 214, 245–46 (Jackson, J., dissenting).

105. *See, e.g., id.*

106. GOLDSMITH, *supra* note 72, at xi–xii (2012).

107. *Id.* at xii–xiv.

108. Rebecca Ingber, *International Law Constraints as Executive Power*, 57 HARV. INT’L L.J. 49, 96, 99–101 (2016). Ingber highlights the continuation of military detention policies for terrorist suspects, even U.S. citizens, for years after 9/11. She notes that organizations, such as the ACLU, declined to take the position in briefs to the U.S. Supreme Court that indefinite military detention of a U.S. citizen was necessarily a violation of the U.S. Constitution. *Id.* at 99 (citing Brief Submitted on Behalf of the American Civil Liberties Union as *Amici Curiae*, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 02-7338), 2002 WL 33962810, at 27–29). *See also* Brief for the American Bar Association as *Amicus Curiae* in Support of Petitioners at 11a–14a, 20a–21a, *Hamdi v. Rumsfeld* 542 U.S. 507 (2004) (No. 03-6696).



that efforts by academics and non-governmental organizations (“NGOs”) to demand compliance with international laws regulating the conduct of war effectively prolonged the war’s duration, either by tamping down popular resistance that would otherwise have given rise to a greater push for ending war by the American people, or by giving President Obama and members of his Administration some degree of moral or psychological comfort in their actions that helped them rationalize their role in the continued use of military force.<sup>109</sup>

There can be little question that even the most rigorous, good faith scholarship or advocacy can have unintended consequences, even consequences that are the opposite of one’s intent. While there is surely a vast moral and ethical difference between lawyers and scholars who advance profoundly flawed or unethical legal arguments in the interest of supporting a favored policy, and lawyers and scholars who advance legally sound arguments to uncertain ends, all should be self-conscious about the range of effects a seemingly straightforward legal analysis can have. Indeed, if arguments like Moyn’s were substantiated, it should lead proponents of the legal regulation of war, both inside academia and out, to a fundamental reassessment of the project of international humanitarian law.

Yet concerns about the legitimating effect of legal arguments advanced outside the courts are far easier to raise than prove. There remains significant room, for example, for good faith disagreement about the accuracy of Goldsmith’s assessment of recent history. He is, of course, correct that Congress ultimately codified the Supreme Court’s view in *Hamdi v. Rumsfeld*,<sup>110</sup> holding that a 2001 statute authorized the use of military detention for members of al-Qaeda, the Taliban, and associated forces, so long as those detentions complied with baseline standards under international law.<sup>111</sup> Indeed, the 2001 Authorization for Use of Military Force (“AUMF”) and associated codifications remain on the books today—and the subject of growing and increasingly bipartisan criticism on Capitol Hill.<sup>112</sup> On the other hand, dismissing the effect of *Hamdi* and subsequent developments as

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109. SAMUEL MOYN, *HUMANE: HOW THE UNITED STATES ABANDONED PEACE AND REINVENTED WAR* (2021).

110. *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

111. Authorization for Use of Military Force, Pub. L. No. 107-40 § 2, 115 Stat. 224–25 (2001); 18 U.S.C. § 4001.

112. *See Authorizations of Use of Force: Administration Perspectives: Hearing Before the S. Comm. on Foreign Rels.*, 117th Cong. (2021) (statement of Sen. Menendez, Democratic Chair of the S. Comm. on Foreign Rels.) (“In my view it is irresponsible to keep outdated authority on the books to address future hypothetical threats for which it was never intended”), <https://www.foreign.senate.gov/hearings/authorizations-of-use-of-force-administration-perspectives-080321> [<https://perma.cc/YM2A-NFBA>].

doing no more than adding a few “accountability strings” risks underestimating key real-world impact of legal attention to detention practices post-9/11. Among others, legal limitations and other burdens associated with those AUMF-based detentions have remained significant enough that no U.S. President has seen fit to bring any new prisoners to Guantánamo Bay since 2008.<sup>113</sup> And the U.S. military has been gradually extricating itself from post-9/11 detention operations ever since.<sup>114</sup>

Moyn’s argument, that the U.S. embrace of humanitarian legal restrictions prolonged U.S. participation in the post-9/11 wars (by tamping down otherwise change-producing public outrage about war’s violence),<sup>115</sup> is even less persuasive. As a matter of causation, the relative lack of any popular uprising in the United States against our prolonged post-9/11 wars is radically overdetermined. Indeed, it has been easy for Americans to live in near total ignorance of war’s existence, much less human cost. Across all three presidential debates during the 2020 election campaign, for example, no candidate fielded a single question about Afghanistan.<sup>116</sup> For eighteen years (including the first eight years after 9/11), Department of Defense policy prohibited all media coverage of the return of fallen soldiers to U.S. soil.<sup>117</sup> Neither is there much occasion for the vast majority of Americans to come into contact with members of the military at all. Today, fewer than one half

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113. Sarah Almkhitar et al., *The Guantánamo Docket*, N.Y. TIMES (Oct 14, 2021), <https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html> [<https://perma.cc/3DUT-VQZ4>].

114. See, e.g., Thomas Gibbons-Neff et al., *Pentagon Accelerates Withdrawal from Afghanistan*, N.Y. TIMES (May 26, 2021), <https://www.nytimes.com/2021/05/25/us/politics/us-afghanistan-withdrawal.html> [<https://perma.cc/3XK8-PV3L>]; Jane Arraf & Eric Schmitt, *U.S. to Announce Troop Drawdown from Iraq*, N.Y. TIMES (July 25, 2021), <https://www.nytimes.com/2021/07/24/world/middleeast/iraq-biden-us-forces.html> [<https://perma.cc/6W4Q-SUQV>].

115. See MOYN, *supra* note 109, at 252–55.

116. Bonnie Kristian, *The U.S. Has Little to Show for 2 Decades of War in Afghanistan: Not Even a Mention at the Presidential Debates*, BUS. INSIDER (Oct. 28, 2020, 10:08 AM), <https://www.businessinsider.com/no-mention-of-us-wars-at-biden-trump-presidential-debates-2020-10> [<https://perma.cc/5MDV-METW>].

117. *Obama Administration Lifts Blanket Ban on Media Coverage of the Return of Fallen Soldiers*, NAT’L SEC. ARCHIVE (Feb. 26, 2009), <https://nsarchive2.gwu.edu/news/20090226/index.htm> [<https://perma.cc/ZC96-VF2V>]; CRISIS COORDINATION CTR., OFF. OF THE SEC. OF DEF., PUBLIC AFFAIRS GUIDANCE: OPERATION DESERT STORM CASUALTY AND MORTUARY AFFAIRS (1991).

of one percent of Americans serve in the U.S. Armed Forces.<sup>118</sup> More, even if Americans had been paying closer (or any) attention, post-9/11 metrics of public opinion make it far from apparent that a war of greater brutality would have triggered greater public hostility. In the first decade after the attacks, one of the most popular shows on television was “24,” a weekly celebration of the effectiveness of torture as an essential interrogation device in responding to the perennial “ticking bomb” to be disarmed.<sup>119</sup> More recent opinion polls continue to show that the public is roughly evenly divided on whether it is ever acceptable for the country to use torture in interrogation.<sup>120</sup>

While these examples may thus offer particularly weak support for the notion that certain legal positions can help legitimate, rather than curtail, problematic State policy, these scholars nonetheless do the academic study of international law a favor by focusing on the extent to which legal rules and incentives operate not simply by shaping State decision-making writ large, but by shaping decision-making by particular individual officials charged with conducting affairs of State. Moyn may well be faulted for failing to substantiate his hypothesis that legal commitments to end torture and minimize civilian casualties made it psychologically easier for members of the Obama Administration to support the continued use of force (it would of course be profoundly concerning were the effect otherwise).<sup>121</sup> But he is right to insist that lawyers recognize their capacity to influence the individuals who are guided by their counsel. Indeed, a more empirically oriented inspection of this form of influence, considered below, raises the prospect that legal analysis may not only be capable of legitimating moral or policy choice, but of effectively supplanting it.

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118. *Demographics of the U.S. Military*, COUNCIL ON FOREIGN RELS. (July 13, 2020, 8:00 AM), <https://www.cfr.org/backgrounders/demographics-us-military> [https://perma.cc/TP9H-JYMN].

119. *See 24*, IMDB, <https://www.imdb.com/title/tt0285331/> [https://perma.cc/R3M2-CSV5]; *see also* DERSHOWITZ, *supra* note 84, at 143 (discussing the “ticking bomb” scenario, a hypothetical situation where a bomb has been activated and the only person who may have information to prevent or minimize the potential damage from an explosion of the bomb is the suspect, who refuses to disclose this information).

120. Alec Tyson, *Americans Divided in Views of Use of Torture in U.S. Anti-Terror Efforts*, PEW RSCH. CTR. (Jan. 26, 2017), <https://www.pewresearch.org/fact-tank/2017/01/26/americans-divided-in-views-of-use-of-torture-in-u-s-anti-terror-efforts/> [https://perma.cc/Z6B2-XZ6D].

121. Indeed, hypothesizing that efforts to adhere to procedures aimed at limiting civilian casualties gave war leaders psychological comfort is far different from arguing that policy makers thought compliance with humanitarian rules was necessary or sufficient cause for the use of military force in the first instance, or that such limits led leaders to prolong a war they otherwise believed to be without independent moral or political justification.

C. *Law as Moral Avoidance*

Accounts of the Obama Administration national security process invariably describe internal administration debates as “lawyerly,” perhaps an unsurprising consequence of an administration in which the President, Vice President, Secretary of State, and many other senior policy advisors all held law degrees.<sup>122</sup> That professional ethos clearly brought some advantages, including a commitment to a regularized decision-making process that considered the views of competing voices inside the Executive Branch.<sup>123</sup> It is also perhaps unavoidable in such circumstances that legal counsel and substantive legal requirements end up organizing and setting the “framework” for policy discussion, as policy-makers anticipate having to justify their actions to Congress, the courts, and the general public.<sup>124</sup> Yet while it is neither surprising nor necessarily problematic that law should come in this way to “suffuse the basic process of [policy] choice,”<sup>125</sup> the post-9/11 years raised the prospect that exclusive or overly myopic attention to legality might come to eclipse or even supplant policy makers’ attention to an action’s moral, strategic, or practical advisability.

Consider two anecdotes from a qualitative study I undertook, surveying senior national security policy officials who served in the Bush and Obama Administrations between 2001–2017.<sup>126</sup> As one senior Bush Administration official described, in internal decision-making about whether or not to adhere to the Geneva Conventions in the early years after 9/11, counsel would often develop legal guidance in relative isolation from agency policy officials, a practice the official characterized as a “disaster.”<sup>127</sup> Lawyers’ “perspective on these issues is almost always narrower than the national interest writ large,” the official noted.<sup>128</sup> “The lawyers were asking, ‘what can we do to give the President flexibility?’ And presidential flexibility is an important idea. But there are broader interests here.”<sup>129</sup> In this account, the early bureaucratic disconnect between lawyers and the range of administration policy makers helped facilitate the embrace of options

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122. CHARLIE SAVAGE, *POWER WARS: INSIDE OBAMA’S POST-9/11 PRESIDENCY* 65 (2015).

123. *Id.* at 66–67.

124. Pearlstein, *supra* note 43 (manuscript at 4, 7).

125. See ABRAM CHAYES, *THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW* 103 (“The requirement of justification suffuses the basic process of choice.”).

126. Pearlstein, *supra* note 43 (manuscript at 2, 12).

127. *Id.* at 37–38.

128. *Id.*

129. *Id.* at 38.

that lawyers stretched to deem legal, even when key members of the policy team would have rejected them on policy grounds as insensible.

By contrast, accounts of Obama Administration decision-making describe lawyers as integrated at every stage of the policy-making process, so much so that senior policy makers began internalizing a legal-analytical approach. “You end up having operators who never went to law school, but the legal issues keep recurring and so they get used to them and even raise them themselves,” noted one interviewee.<sup>130</sup> So it was that in identifying examples in which legal rules changed policy outcomes, four separate administration policy decision-makers cited the President’s decision not to use military force against Syria following that country’s 2013 use of chemical weapons.<sup>131</sup> The President decided against the use of force, in this account, in substantial measure because legal counsel were not convinced such an attack would be lawful. In one sense, this is indeed an important example of law (or at least, lawyers) functioning as an effective constraint on power. Yet a fifth official, also directly involved in decision-making, suggested a different reading.<sup>132</sup> Noting that the President had a range of concerns about the wisdom of a U.S. military intervention in Syria at that time, the official suggested the law might have served in that instance as more of “an off ramp” for an action the President was, that official believed, disinclined to take under any circumstances. That it nonetheless seemed to take a legal analysis—indeed, an unusual legal analysis capable of producing a conclusive “no” in a field in which the law is rife with shades of gray—to settle the presidential decision raises a different question. Had the lawyers approved, would the President have been more likely to pursue military action, notwithstanding deep policy reservations about its wisdom?

It is easy to see why the application of international law to the complex questions of the post-9/11 wars could so wholly capture the interest of lawyers, teachers, and policy makers alike, as the accounts of internal deliberation, and the explosion of external writing on the subject made clear.<sup>133</sup> The law that exists in the field is intricate and challenging to master. Legal counsel and legal academics seem especially knowledgeable and authoritative about its effects, and the law in general seems reassuringly concrete to reporters struggling to make sense of shifting policy, and to policy makers who, in the fog of war, are constantly compelled to make impossibly weighty decisions based on imperfect information about life and death. The law can seem

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130. SAVAGE, *supra* note 122 at 66 (quoting Lisa Monaco, Homeland Security Advisor to President Obama).

131. Pearlstein, *supra* note 43 (manuscript at 19).

132. *Id.* at 43.

133. *See supra* note 62 and accompanying text.

like a lifeline of relative clarity in a universe of chronic ambiguity. For no matter how much ambiguity the law itself contains, the relatively formal task of legal interpretation is still easier and more cabined than the far more free-form task of exercising integrated moral and political judgment. It is always easier to answer questions about what is legal than it is to answer questions about whether some action is good idea.

Yet *pace* Lieber—who hoped that “the laws of war provided a framework for ethical decision making”<sup>134</sup>—it is a mistake to imagine that analysis of an action’s legality can stand in for an assessment of its moral, strategic, or practical advisability. Indeed, it was the West Point Lieber Institute itself that recently published an essay emphasizing that “[t]he law of armed conflict was not designed to serve as a comprehensive normative framework for debating the rights and wrongs of war.”<sup>135</sup> The law of armed conflict does not distinguish, for example, between the relative justness of the cause of the warring parties—but policy makers certainly should. The law of armed conflict likewise categorically tolerates the loss of innocent, civilian life in certain circumstances. Yet while it is easy to conclude that some such losses are legal, policy makers will make better decisions if they nonetheless ensure their framework for decision-making equally requires that they internalize the independent moral and political costs. Indeed, even when the law itself requires a greater range of moral considerations, law speaks in a language that makes it possible to keep the real costs of decision-making comfortably abstract, far removed from the lived experience of war.<sup>136</sup> Legal guidance in war—whether lawyer to client, or scholar to public—should take care to emphasize that the question of what the law permits not function to settle the question of what States should do.

#### IV. CONCLUSION

It is entirely necessary and appropriate that legal academics—as scholars and lawyers—engage in the technical work of studying, evaluating, and applying the law. It is indispensable to providing specific and meaningful guidance to warriors, and to exposing the gaps in the law that remain. But it is a mistake for academics or lawyers—and especially for academics who are lawyers—to foster a view that

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134. WITT, *supra* note 1, at 368 (describing Lincoln’s internal deliberations in 1862).

135. Aurel Sari, *Israeli Attacks on Gaza’s Tower Blocks*, LIEBER INST. FOR L. & WARFARE (May 17, 2021), <https://lieber.westpoint.edu/israeli-attacks-gazas-tower-blocks/> [https://perma.cc/R2EJ-YTDR].

136. See Naz K. Modirzadeh, *Cut These Words: Passion and International Law of War Scholarship*, 61 HARV. INT’L L.J. 1, 53 (2020).

legal analysis raises or can answer all wartime questions, or can absolve policy makers from the burden of grappling with the practical, entirely concrete, consequences of their decisions. It is equally a mistake to assert the law makes clear more than it does. In addition to instructing policy makers on what the law is, legal academics can play a critical role in cautioning policy makers about the limits of legal reasoning as a tool for human decision-making when, as will continue to happen in the years ahead, the law alone is not enough.