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# Many Guantánamos: A Reflection on the Work of Human Rights Clinics

by Richard J. Wilson

THIS ARTICLE AND PERSONAL REFLECTION reviews Brandt Goldstein's *Storming the Court: How a Band of Yale Law Students Sued the President — and Won*.<sup>1</sup> The aspect of personal reflection lies in a comparison of the work of two human rights clinics and two cases. The clinics are the International Human Rights Law Clinic at American University's Washington College of Law (WCL Clinic) and Yale University's Lowenstein International Human Rights Clinic (Lowenstein Clinic). I compare the efforts of the WCL Clinic on behalf of Silieses Success, an HIV-positive Haitian asylum seeker, to the Lowenstein Clinic's litigation in the case of *Sale v. Haitian Centers Council, Inc.*<sup>2</sup> Silieses was held at Guantánamo Bay, Cuba, as part of a much larger group of Haitians who were the subject of the Lowenstein Clinic's more protracted litigation in *Sale*, a case that culminated in the U.S. Supreme Court and that forms the legal centerpiece of Goldstein's story. The focus on clinical work for a single client versus the sort of mammoth and prolonged legal battle described in *Storming the Court* also provides a helpful context in which to compare Yale's philosophy of clinical legal education with the WCL Clinic, which continues its work in Guantánamo today with its representation of Omar Khadr, a young Canadian detainee facing trial for war crimes he is alleged to have committed in Afghanistan.

Let me begin with a brief story about Silieses Success, whose story is part of the larger drama depicted in *Storming the Court*. Silieses was a 22-year-old Haitian refugee with AIDS. She fled Haiti by boat in February 1992 along with thousands of other Haitian "boat people" who were forced to leave the country following a coup that replaced Jean Bertrand Aristide, the country's first democratically elected president. She was pregnant at the time, and she and her husband, along with many others in her small boat, were captured by the Coast Guard on the open ocean and detained at the U.S. Naval base at Guantánamo. She gave birth to a son, Ricardo, in the fetid, barbed-wire-enclosed tent camp that was constructed for the purpose of detaining captured Haitians. Silieses and Ricardo were both diagnosed as HIV-positive while in detention. When the two contracted pneumonia from the camp's conditions, she left her husband behind and she and her son were evacuated to Walter Reed Hospital in the District of Columbia. Ricardo died after they arrived and was buried in D.C. The government then took Silieses into immigration custody because she was perceived as a threat to public health and, as her months in custody dragged on, transferred her to New Jersey and then New York City.

Silieses' student attorneys at the WCL clinic, David Anderson and Arzoo Osanloo, played key roles in obtaining her release through their advocacy in the courts, informal lobbying of government officials, and aggressive work with the press and the NGO community. ACT UP, a New York-based advocacy group, can claim significant credit for convincing the government not to continue its detention of Silieses but to instead release her to a sponsoring family in Brooklyn. The government, as has proven the case on many occasions relating to Guantánamo, sometimes responds more quickly to public embarrassment than it does to the threat of litigation.

That lesson, learned by David and Arzoo in their work, is one of the many lessons reflected more broadly in Goldstein's fascinating book.

Among the thousands captured and turned back at Guantánamo, Silieses was the first Haitian detainee to make it to the shores of the United States. Hers is one of the many poignant stories of suffering and loss told by Haitian refugees to their lawyers and the press, even if it only merits brief and oblique mention in Goldstein's text. Rather, as the title implies, the book focuses largely on the efforts of the students and faculty at Yale Law School, particularly those involved in the Lowenstein Clinic. The book also justifiably gives its greatest attention to the efforts of the law school's current dean, Harold Koh, who was one of the lead counsel in the *Sale* litigation.

The Lowenstein Clinic was founded in 1991 under the guidance of Dean Koh and Michael Ratner, his co-teacher and president of the New York-based Center for Constitutional Rights. WCL's Clinic was quite new at the time as well. Only in its third year of operation, the doctrinal areas of asylum and human rights law were relatively new for me, and I was working as the only faculty supervisor with a dedicated group of eight students and a very small number of cases. As is still the case, I taught a course called "The Lawyering Process," a part of the common structure of all of WCL's nine in-house clinics. The WCL Clinic started slowly. In its first year, we handled four asylum cases and were successful in each. We also had taken a few longer-term cases at the Inter-American Commission on Human Rights. I was already exploring new ways to get involved in a broader array of human rights issues, particularly ones that had resonance in the courts of the United States. Although I liked litigation as the primary tool for teaching and advocacy in the clinic, I wanted us to think more broadly about advocacy strategies outside of litigation.

Although the WCL Clinic's typical caseload was not nearly as dramatic as the crisis-driven, fast-paced, and complex federal court litigation depicted in Goldstein's book, the Success case was a real challenge. The case immediately captured the media's attention, particularly that of Anna Quindlen at the *New York Times*,<sup>3</sup> and the students were under constant public scrutiny from the press. Silieses' case was seen as a "wedge" case for the claims of other Haitians, and the student team and I spent long hours in strategic conversation with many of the characters who make appearances in Goldstein's book, such as Judy Rabinovitz and Lucas Guttentag, both known for their expertise in immigration law and civil rights.

The student team also spoke regularly with high-ranking officials within the INS, including the General Counsel, Joseph Rees, and his deputy, Paul Virtue. Most of the student efforts were focused on getting Silieses released and presenting her asylum petition to an immigration judge. It was clear, as indicated in *Storming the Court*, that the first Bush administration was not interested in allowing any Haitians into the country, let alone the relatively small number who were infected with HIV. Sadly, the same was true with the Clinton administration, which transitioned into office over the winter of 1992-1993. Another lesson of the Haitian litigation was the public exposure of what Dean Koh came to call the "Haiti Paradigm" in U.S. human rights policy; whether in a Democratic or Republican administration, it was a policy that was "close to upside-

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down” because it was “inordinately soft on the illegitimate regime [in Haiti], while unfairly harsh on fleeing refugees.”<sup>4</sup>

I did not want to like *Storming the Court*, but I could not put it down. Goldstein follows *Sale v. Haitian Centers Council, Inc.* through many rounds of litigation, culminating in an argument before the U.S. Supreme Court, as well as innumerable ups and downs of morale, frustrations in gaining access to the base in Guantánamo, and the ultimate triumph of gaining a favorable decision from the New York federal courts, which held that the detention of the refugees was a denial of their constitutional rights and ordered the release of the final group of HIV-positive Haitians into the United States. Unfortunately, although the New York courts held that the detainees being held at Guantánamo had legal rights, the Supreme Court’s ruling in *Sale* did not find the government’s “direct-return” policy for refugees interdicted on the high seas unconstitutional. This meant that Haitian refugees apprehended by U.S. authorities did not have a right to rescue and could be returned to Haiti without violating U.S. constitutional or treaty obligations. This decision has been severely and justifiably criticized by Dean Koh, among others.<sup>5</sup>

costs of this massive litigation were borne by the Lowenstein Clinic. Litigation like this is not inexpensive. Funding certainly did not come from the Haitian clients in Guantánamo, so where did it come from? Also, although Goldstein makes some reference to the changes in student team composition brought about by the end of the school year, there is little to explain how the litigation was supported during the summer months when students were not available, had moved on to summer jobs, or were preparing for a bar examination. Where is that passion for the cause when students justifiably shift attention to their futures?

Most significantly, Goldstein’s narrative centerpiece is the role of the litigators Dean Koh and Joe Tringali, the law firm partner who heroically volunteers his time, in drafting pleadings and arguing in court. As such, the law students are relegated to important but nonetheless secondary support roles. Every time there is an important courtroom battle, it is the lawyers who are front and center in the courtroom, not the students. In a rare student-team reflection on their experience, three Yale law students summarized their involvement in the litigation. In the opening paragraphs, they assert that the Haitian cases were “initiated and litigated” by stu-

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The story of *Storming the Court* is told through the narrative device of shifting locations within chapters, from the reality of Haiti and the Guantánamo camp for the refugees to the relatively rarified environs of Yale Law School and the offices of the clinic’s law firm partner in Manhattan, Simpson Thacher & Bartlett. Goldstein’s numerous interviews bring many of the key actors vividly to life, which carries the narrative along and gives the reader a strong sense of the many individuals involved. The book is strongest in its narrative portraits, the story of the legal issues argued, the legal and non-legal strategies chosen by the Yale team, and how those issues and strategies fared. It is a story with a “happy” ending of sorts, but Goldstein dutifully covers the ups and downs of both failed and successful steps along the way. In a reflective law review article on the litigation, Michael Ratner carefully develops what he saw as “inside” and “outside” non-legal strategies.<sup>6</sup> The inside strategy counted on behind-the-scenes conversation with many individuals whom the Yale faculty and Ratner had connections with in the legal and political community, particularly in the federal government in Washington. The outside strategy involved extensive organizing and agitation for public attention to the issues. One such strategy, for example, called Operation Harriet Tubman, involved the organization of sympathetic hunger strikes supporting the detainees at college campuses around the country, including American University, in the spring of 1993.<sup>7</sup>

The book, however, lacks a sense of the structural relationships between students and teachers in the context of clinical legal education. There is precious little to tell us, for example, how the

dents and that students “were intimately involved in every aspect of the litigation, from filing the first request for a Temporary Restraining Order in March 1992, to spearheading the media campaign ... to reformulating legal claims at trial in March 1993.”<sup>8</sup>

Unquestionably, student voices are heard and respected, and the impassioned debates between Dean Koh and Lisa Daugaard are the best examples of this. Ultimately, however, the students played supporting roles to the “real” lawyers who made the final judgment calls, wrote the briefs, and argued the key cases in court, even when student practice rules may have permitted the students to do so. A telling moment detailing this relationship of student and lawyer appears in one of Koh’s many reflections on the litigation. He argues, as the break-neck pace of Goldstein’s book would suggest, that “Team Haiti,” the student team on the case, was “inexhaustible.” As evidence of this, he points to a moment in the litigation when at 3:00 A.M. on the day an appellate brief was due, the student litigation manager was able to roust out ten students to serve as cite-checkers. “As I watched them disappear down the hall,” he writes, “I began to think that maybe we had a chance after all.”<sup>9</sup>

This moment and many others documented in the Goldstein book demonstrate two central aspects of the case that make it both fundamentally different and similar in some respects to the work of the WCL Clinic. First, the litigation and its accompanying narrative unfold at breathless speed. *Storming the Court* describes lawyers’ working on a cause worth fighting for. Students inspire the decision to get involved in the case out of their devotion to the cause of the Haitian refugees and the need to right a wrong. Quite

tellingly, in the discussions as to the merits of taking on the litigation, one of the students invokes the activist's mantra, "If there's an injustice, there's got to be a lawsuit."<sup>10</sup> Students are willing to pull all-nighters in the name of their new clients, but some litigation requires that the faculty member maintain perspective on the trajectory of cases as a marathon of public interest dedication rather than a single, all-out sprint that contributes to the high burn-out rate in public interest work.

Second, big, high-profile, and fast-moving federal court litigation involving a large group of clients is not the norm in law school clinics. There is some evidence that small cases with individual clients are the best vehicle to initiate a student to the practice of law. This makes sense pedagogically. Students need to approach new skill sets incrementally to optimize their abilities to incorporate them into a pattern of good practice. The skills, ethics, and values necessary for the creation of an actual attorney-client relationship in which the student and his or her client develop a case theory based on the careful investigation of facts and law are neither intuitive nor obvious. They are not taught systematically elsewhere in law school curricula and often are not studied at all before graduates begin legal practice.

This premise leads to three fundamental structural aspects of clinical legal education common to the clinics at WCL. First, students themselves are solely responsible for the decisions made and the actions taken on behalf of a client, including the decision whether to pursue litigation or some other method of advocacy, as well as responsibility for the direction, writing, and argument of all cases in litigation to the extent that court rules permit. Second, students are closely supervised at all stages of their decision-making. The teacher's role is to present the student with a wide range of competent choices for action. Third, the focus is on the lawyering and not the doctrinal aspect of cases. Lawyering skills, ethics, and values are primarily taught in the course accompanying clinic case work, not the law of asylum or international human rights. The primary strength of experiential learning is that it permits the student to make good choices while providing careful supervision in the planning, executing, and reflecting involved in lawyering.

This was the model used in the representation of Silieses Success. Once the case was assigned to the student team, David and Arzoo made all of the choices independent of WCL faculty. The students went to Walter Reed Hospital, helped Silieses through the funeral for Ricardo and in her establishment of connections with the Haitian community, and followed her litigation to New York. They personally attended the first hearing in Immigration Court at the Varick Street detention facility in Manhattan while I "attended" by conference call. This is not the model used in the Lowenstein Clinic, as Goldstein's book and other writings on the Haitian litigation amply demonstrate. Their model might be compared with that used by many large law firms in which an associate prepares pleadings and arguments for the senior partner who then argues the case.

I do not mean to suggest that the Lowenstein Clinic's approach is misguided or that WCL's clinical program employs the only right approach. Over the years we have found that some of the WCL Clinic's most noteworthy and public efforts — the litigation on behalf of Fauzyia Kassindja, the Togolese asylum client fleeing female genital mutilation, or the early efforts on behalf of victims of General Augusto Pinochet in the Spanish courts — are closer to the Yale model than to WCL's traditional clinical model described above. Perhaps the most relevant comparison to the Lowenstein Clinic's Guantánamo work is the WCL Clinic's current representa-

tion of Omar Khadr, one of the more than 500 foreign citizens detained at Guantánamo as enemy combatants today, much like the "screened out" Haitians of more than a decade ago. Professor Muneer Ahmad and I agreed to take on Omar's representation in July 2004 with the initial idea that it would be assigned to students. It became almost immediately apparent, however, that the traditional model would not work in this case, which poses a challenge to the prevailing clinical model because of security clearance and attorney visit limitations. Further challenges arose when Omar was charged with war crimes by a military commission in November 2005. He now faces trial in Guantánamo for those alleged offenses and WCL students will not be approved for attendance or participation at his trial. We have therefore come to treat Omar's case as a kind of "hybrid" to our clinical model, with faculty acting as in-court counsel<sup>11</sup> and students taking the lead on such issues as international litigation, freedom of information requests, client correspondence, some press issues, and research on legal questions.

The WCL Clinic has struggled to adapt to the demands of large-scale litigation without facing the same scope and speed of demands that, as *Storming the Court* shows, confronted the Lowenstein Clinic. Although the Guantánamo detainee case is a challenge for us in defining the clinic student's role, the case continues to be one of the most requested by incoming students. Those who have participated assert that they would not trade their role in this litigation for another more traditional role in the clinic. The WCL Clinic is now exploring the use of outside counsel in addition to its current team to meet the additional demands of such large-scale, prolonged litigation. A first for human rights clinics includes our new collaboration with the international human rights clinic at the University of Virginia's law school, where a student team is performing important research for some of our legal motions in the Guantánamo case.

I might add one final note regarding the networking of clinical programs and the case of Silieses Success. In 1993, after her release from custody to live with a family in Brooklyn, we transferred representation of Silieses on her asylum case in Immigration Court to the Immigrant and Refugee Rights Clinic at CUNY Law School in Queens. Ms. Success died quietly of complications from AIDS before her case was resolved.

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## ENDNOTES: Many Guantánamos

<sup>1</sup> Brandt Goldstein, *Storming the Court: How a Band of Yale Law Students Sued the President — and Won* (New York: Scribner, 2005, 384 pp., hbk.).

<sup>2</sup> 113 S. Ct. 2549 (1993).

<sup>3</sup> See e.g. Anna Quindlen, *N.Y. Times*, "In Prison for Being a Haitian with HIV" (Jan. 5, 1993) at A17.

<sup>4</sup> Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 Yale L.J. 2391, 2392 (1994).

<sup>5</sup> See e.g., Harold Hongju Koh, *The Haitian Centers Council Case: Reflections on Refoulement and Haitian Centers Council*, 35 Harv. Int'l L. J. 1 (1994).

<sup>6</sup> Michael Ratner, *How We Closed the Guantanamo HIV Camp: The Intersection of Politics and Litigation*, 11 Harv. Hum. Rts. J. 187, 204-217 (1998).

<sup>7</sup> *Id.* at 215.

<sup>8</sup> Victoria Clawson, Elizabeth Detweiler, and Laura Ho, *Litigating as Law Students: An Inside Look at Haitian Centers Council*, 103 Yale L. J. 2337, 2338-2339 (1994). Clauson and Ho appear in *Storming the Court*, while Detweiler does not.

<sup>9</sup> Koh, *The Haitian Centers Council Case* at 6, n. 22.

<sup>10</sup> *Storming the Court* at 29.

<sup>11</sup> A student did share oral argument with me in federal court last spring on a complicated motion for preliminary injunction.