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**Detention debates focus on legal procedures surrounding enemy combatant status but fail to question why such a category exists in the first place—the Court’s obsession with the epistemological aspects of detention cedes the critical ontological question of the nature of the world and America’s role in it to dominant power structures that attempt to impose Western control over the entire planet. The key question is critiquing that ontological assumption**

**Williams 07** (Daniel, Associate Professor of Law, Northeastern University School of Law, "After The Gold Rush - Part I: Hamdi, 9/11, and the Dark Side of the Enlightenment" Penn State Law Review, Lexis)

Part II of the Hamdi opinion presents the "threshold question" as a particular variant on Legality - **does the Executive have** the **authority to** [\*406] **detain** U.S. **citizens it deems "enemy combatants"?** n234 **Deems, not proves.** n235 The lexical controversy over what exactly is an enemy combatant does not surface with any urgency here because Hamdi was captured on a battlefield and allegedly carrying a rifle, presumably prepared to shoot at American soldiers. n236 In fact, **Hamdi's lack of agency in this narrative construction is precisely the point of the opinion: it is his "status" that must be at issue, not what he has done, even though "the power to detain an individual as an "enemy combatant' turns on entirely conduct."** n237 And so, O'Connor is careful to circumscribe Hamdi's conduct, pointing out that Hamdi's situation as a Taliban fighter in the armed conflict in Afghanistan puts a border around the analysis. n238 **The effect is to link the legal terminology, "enemy combatant," to images of conventional warfare that people of O'Connor's generation have grown up with. But surely she must know that her opinion would become**, as it has indeed become**, a jurisprudential landmark in this new kind of war, where the enemy is stateless, a network of human missiles of destruction.** And with some diligent investigation, she and the other members of the Court might even understand how **enemy-combatant detention is actually a form of empire** police action, **a militarized management of a global order**. n239 Whether that understanding would change the analysis is impossible to know. But what is knowable is the fact that **cabining the case** to involve an alleged Taliban soldier caught fighting us in a conventional war **shuts off the possibility of seeing the true** global **function of enemy-combatant detentions and thus forecloses a reckoning with the reality of Guantanamo.** Because the act-status distinction does not receive any sustained treatment in the Hamdi opinion - it is just there, as if it were some natural epistemic phenomenon n240 - it takes some effort to decode exactly [\*407] what the AUMF is all about, functionally speaking, as it relates to the legal issue in Hamdi. What **Congress supposedly** did t**hrough the AUMF, through the process of legality,** is to **authorize** not so much the detention of so-called "enemy combatants," but to authorize the **suspension of our entire criminal process** when it comes to citizens deemed to be "enemy combatants." **We lose the force of what is really going on when we glide along the antiseptic prose O'Connor deploys because the case becomes a question about wording - does this piece of legislation contain the sorts of words that authorize the President to executively detain certain individuals? The full force of Congress's purported action can only be appreciated if we remind ourselves of how that criminal process is linked to our Enlightenment heritage.** n241 **By stepping back** and seeing that a very basic narrative choice has been made, that **the story is not about Yaser Hamdi's predicament, but the predicament of Legality itself,** we become attuned to the fact that, **in this drama of dignity and minimal respect, we are obligated to ask ourselves, what has 9/11 done to us, what has it really wrought? What has it unleashed?** For it is possible that in this drama, **Legality is a victim of terrorism**, but not in the way that Viet Dinh had in mind. Try as it might to suppress opening up for consideration issues of national identity by framing the case in terms of status, **the Court's narrative ramifies beyond just the prosaic, though important, question of what minimal process (trivial process, actually) detainees like Hamdi are due. The narrative cannot help but be about the unquestioned power of the sovereign to create a particular ontology in this war on terror. The legal issue that is built atop this ontological creation - the category of "enemy combatant" - is the epistemological question of what legal process ought we install to justify a claim that a** certain **individual falls within this status category** (which is, to put it in epistemological terms, a claim to knowledge). **By framing the case purely in terms of epistemology** (is, or is he not, an enemy combatant?), **the Court de facto concedes to the Executive the power of ontology.** And **that concession is no small matter, if it is true that the "war on terror" is, as many suspect, entwined with our nation's quest for unrivaled global hegemony in the service of managing a particular pax Americana global order. Because the matter of global hegemony is off the jurisprudential table, as is the precarious task of managing the pax Americana global order, the** [\*408] **concession can be glossed over as if it were, indeed, a small matter. It can be glossed over as if Guantanamo - the expression of sovereignty-as-power unshackled from legality - is simply a matter of Executive discretion** in wartime. But the ontological/epistemological distinction cannot hold firm, as the urgency that presumably motivates the ontological project of creating a new category (enemy combatant) leads the Court to cut corners on the epistemological project, which is to establish a set of procedures that, one would think, is dedicated to promoting accurate classifications within the ontological universe created by the Executive. What is camouflaged in all this is the crucial observation that **cutting corners on the epistemological project, by virtue of the overwhelming power of the ontological project** (labeling "enemy combatants"), **is** actually the **adding** of **more muscle to the sovereign**. n242 \* \* \* The deep structure of Hamdi contains among its elements a commitment to "the law of identity," which in formal logic posits a fixed category for a concept - namely, that whatever is, is, and that, according to logic's law of contradiction, that which is cannot be what it is not. n243 In Hamdi terms, **one who is an enemy combatant cannot be other than an enemy combatant, and since everything must either be or not be, the world neatly divides** into those who are enemy combatants and those who are not. In the locution of President Bush, **"either you are with us, or you are with the terrorists,"** n244 **which, in this "reduction of history to a radical either-or," entails** a "vision and reality of **politics as perpetual total war.**" n245 This deep structural commitment to formal logic's "law of identity," which is foundational to Enlightenment's means-ends fetishism - manifested most clearly in the rationalists penchant to divide the world up into the observer and the observed, with philosophy serving as a "mirror" on Nature n246 **- is foundational as well to classical legal** [\*409] **reasoning and thus vital to law's functioning as a structuring system**. But the underside to that function is that it banishes complexity by hiding the social and political order that defines the controversy in any genuinely meaningful sense. **"Enemy combatant" both describes and condemns, in one blow, without the unpleasantries of ambiguity**. n247 And **it does so while denying that those individuals who are adjudicated within this highly simplistic ontological universe are social and historical figures. If we are a global community, then enemy combatants act within it, and their subjectivity, their beingness, is bound up with the goings-on in that global community**. But Hamdi's acceptance of the Executive's politically tendentious ontology bespeaks the law's aspiration to deny the moral and political complexity of all judgment. It denies the distributive nature of judgment, that judgment necessarily must account for what the "community" has done, how the community is complicit in the offending act, as it condemns the individual offender. Judgment is always, therefore, ambivalent. But, as in virtually every area of the law, except here with more rigor, that ambivalence must be suppressed in this war on terror. The reason for this is clear: **the simplistic juridical ontology of "enemy combatants" in this war on terror removes from investigation, and thus further solidifies**, a geopolitical world order that itself may be contributing to the very real threats posed by fanatical Islamists. After all, who can rationally oppose neutralizing terrorists bent on destruction? The question alone banishes from thought the difficult moral and political issues that arise if we openly debated and in other ways confronted the possibility (if not the undeniable reality) of our pursuit of **a pax Americana global order.** As democratic theorist Benjamin Barber [\*410] observes, Americans, with their optimism in technology, "can stand uncomprehending in the face of putative evil, blind to the lessons of mere national interest, certain of its own goodness, and thus intolerant of complexity." n248 **This banishment of complexity is precisely what is at stake in the Court's deference to the Executive's power of ontology. And that deference to the Executive, which is beyond the formal logic on which classical legal reasoning nourishes itself, illustrates how legal reasoning is invested with disguised ideological power.**

**This shift in detention jurisprudence is a manifestation of the underside of the Enlightenment—instrumental rationality’s creeping colonization of the lifeworld has resulted in the resurgence of a pre-enlightenment form of sovereignty which threatens global domination and annihilation of the planet**

**Williams 07** (Daniel, Associate Professor of Law, Northeastern University School of Law, "After The Gold Rush - Part I: Hamdi, 9/11, and the Dark Side of the Enlightenment" Penn State Law Review, Lexis)

Every ten years or so, the U.S. needs to pick up some crappy little country and throw it against the wall, just to show the world we mean business. Michael Ledeen, holder of the "Freedom Chair" at the American Enterprise Institute n276 [\*418] Freud identified two competing impulses in the human psyche, Eros and Thanatos, which constantly threaten to collapse into one another. n277 This struggle between the life and death instincts within each individual replicates itself in civilizations and thus produces in humanity a deeply embedded and ineradicable unhappiness, or as Freud put it, a "discontent." n278 Freud's darkly pessimistic outlook percolated out of a dark time, the aftermath of an irrational bloodbath that soaked the European Continent and during the rumblings that foreshadowed the next world war. Though Freud's pessimism captured a global mood - Civilization and Its Discontents n279 was an international bestseller and provoked intense debate - the fact that Freud's thinking was the culmination of an Enlightenment epoch seemed to go unnoticed. **In Freud we see an aggressive rationality, a form of relentless analysis that drills into the depths of the mind, the very tool of rationality itself; Freud's monumental achievement is this phenomenon of rationality turned back on itself, boldly attacking the hubris within our own claim to rationality.** That is, the Enlightenment project, by the time Freud inherited it, led to an exploration into the unconscious in an effort to understand ourselves in a way that shocked and fascinated us, for it was precisely this aggressive rationality that unveiled what lay beneath itself - a disturbing cauldron of irrationality that swirls beneath the thin patina of rationality, which we experience as civilized engagement. n280 It is useful to take stock of this under-appreciated facet of Freud's thinking, for **we may suffer the illusion that the social world is rational, and thus conducive to human freedom, when in fact it may be deeply irrational, with human beings frighteningly amenable to manipulation by overt and subtle propagandistic machinations that serve the very narrow interests of the powerful and the privileged. As astonishing as it may be to see how successful such manipulation has been in places like Nazi Germany and modern-day North Korea, it may be more vital, given our current difficulties with terrorism, to be open to how amenable to propagandistic manipulation is a populace of passive consumers who have lost their** [\*419] **self-identity as citizens.** Being open to that possibility has deep implications for our current war-on-terror jurisprudence, and more generally, for the so-called security-liberty balance that occupies so much of our attention in this era of terrorism. n281 The animating idea here is the possibility that **American democracy itself is threatened more profoundly than we care to admit** to ourselves with the irrationality that Freud's work gestures at, that **there is a** dark **side to the Enlightenment, an aspect of "rationality" operating within a framework of irrationality that ought seize our conscience as being itself dangerous and threatening to our flourishing, if not our very survival. Strip away the mythic nationalistic rhetoric that cloaks our high-school history texts and you see the dark side of the Enlightenment at play in virtually all phases of our national life.** n282 As philosopher Albert Borgmann puts it in describing an earlier quest for empire, "**nothing could stand in the way of the aggressive advance of the railroad, not the claims of the Native Americans, nor the resistance of nature, nor the dissoluteness and the distress of humans.**" n283 Jurgen Habermas updates Borgmann's observation to our post-9/11 age: "in the fear driving the technologically heavily armed superpower [the United States], one can sense the "Cartesian anxiety' of a subject who tries to objectify both itself and the world around it in an effort to bring everything under control." n284 **Rationality produced the marvels of science and the explosion of technological prowess because**, as an extraordinarily powerful tool, **rationality equips the human species with the ability to control and** dominate **ever-increasing domains of Nature** - ultimately to accomplish Rene Descartes' dream, where we have "rendered ourselves the lords and possessors of nature." n285 **Unfettered rationality brings** on **the hubris that, given time,** all o**f Nature can be subdued by** human **ingenuity and** [\*420] **determination**. n286 **It is precisely this gold-rush drive to probe the deepest mysteries of Nature** - a drive that is distinctive to modernity itself n287 **- that has led humanity to** live on the **brink of annihilation** since the 1950s, with the onset of the Atomic Age. **It is** precisely the **triumph** of rationality, with its **means-ends ideology, that has led to an ecological crisis that threatens the habitability of the planet.** It is all this that made it at one time (when many of us were school children) sickeningly "rational" to speak of building cozy bomb shelters into which we might retreat in the event of a nuclear attack. **The dark side of the Enlightenment is** essentially **the cult of rationality**, n288 and it is worth putting on the table for discussion**, as we forge deeper into the darkness that we call the war on terror,** that this cult **of rationality is a source of the greatest violence in the world and is what most threatens humanity.** n289 What does all this have to do with Hamdi and the questioning of our commitment to trial by jury as a vitalizing (not just vital) feature of our Enlightenment heritage? The answer lies in the suggestion that the **current ambivalence we are experiencing over the parameters of trial by jury - should it be jettisoned when it comes to the so-called war on terror? - is symptomatic of the larger ambivalence we have over modernity.** That is, **the issue of bracketing or suspending trial by jury when it comes to terrorists is**, I submit, **a manifestation of our temptation to surrender ourselves completely to a form of rationality,** a form of **means-ends thinking, that threatens to destroy us.** n290 **Means-ends rationality,** and the discourse associated with such instrumental modes of thought, **is the medium through which the security-liberty balance juridically expresses itself.** n291 But instrumental reasoning is tempered in a democracy by the fact that the state must always justify itself so that coercion gets transmuted into consent. It has long been thought, especially after Kant hit the scene, that the [\*421] justification of state power in a democracy cannot be rooted in naked instrumental reasoning. n292 In times of relative calm and social stability, these competing impulses for security and justification find some calibrated equilibrium. Calibrating the proper balance between these two impulses is but a single manifestation - probably the most urgent manifestation - of a larger, overarching calibration that takes place in an Enlightenment-driven culture. Modernity's retreat in the face of what has been called post-modernism is in no small measure an expression of our culture's growing "disenchantment" with instrumental reasoning as the governing framework for navigating through life. n293 This grand-scale calibration of instrumental reasoning's reach within a culture is largely invisible to most people, taking place in the rarified arenas of the arts. In the realm of criminal justice and national security, the calibration is ongoing, usually minor and technical, perhaps provoking blistering critique and debate among specialists but largely ignored by the public at large. But enter into our lives a destabilizing event, one that provokes social instability, such as the 9/11 attacks, and this calibration becomes a top priority within mainstream culture. n294 **Calibrating the competing impulses of security and justification is experienced through governmentality, through the workings of administrative agencies populated with bureaucrats and through the operation of our courts, and most obviously** through **the processes of criminal-law adjudication.** n295 But what that calibration expresses is not so prosaic. **Sovereignty itself exists through these competing impulses, just as the human species exists, expresses itself**, as Freud encapsulates it, **through the competing impulses of Eros and Thanatos. That means, when in** times of **crisis we undergo** an **angst over how** best **to calibrate [\*422] the impulses for security and justification - commonly spoken of as the tension between security and civil liberties - and when that calibration leads to a renewed priority for security and a submerging of our impulse for justifying state power through non-instrumental modes of thought, we are witnessing a surge in sovereignty itself**. n296 **Though it may appear to be a surging of a new kind of sovereignty, what we are witnessing is actually the resurrection of one that is quite old. Once we understand that the Western quest for control** and domination **of nature, culminating in Freud's rationalistic investigation into the very source of rationality itself** (human consciousness), **unveiled a cauldron of desires and impulses and drives - that is, once we understand that rationality unveiled a vast,** dark **wellspring of irrationality - then we can appreciate that the quest** for control and domination **ultimately unveils the folly of the quest itself.** And so it is perhaps with America in this post-9/11 age of fear. **The Western drive to control and dominate the globe has now led to a mode of free-market globalization that threatens to obliterate cultural diversity and reduce the world's peoples to passive consumers who have nothing else to offer except their labor. But what that quest for empire has unveiled is something akin to what Freud discovered, that the pursuit of a stable and supposedly rational global order managed by the military force of a sole global hegemon ultimately exposes another vast and dark wellspring of irrationality, manifesting as a cycle of violence, nihilistic violence of the so-called terrorists and the vengeful violence of the superpower committed to stamping out whatever may impede the quest for control and dominance.** And on the micro level, **what legality has produced in Hamdi** - what supposedly apolitical legal rationality has spawned - **is a form of sovereignty that reverts us back to a pre-Enlightenment moment when sovereignty was indivisible and expressed itself ultimately in its capacity to use violence outside any juridical framework.** The very thing [\*423] that our Enlightenment heritage bequeathed us, **Legality,** **has driven us back into that unveiled cauldron of irrational violence**.

**Administrative jurisprudence threatens to destroy the lifeworld sphere in favor of biopolitical system spheres where means-ends rationality enables global domination, totalitarianism, and genocide. Only the ideals of communicative rationality—community-building, dialogue, value-sharing, and persuasion—can reclaim the lifeworld**

Daniel R. **Williams**, Associate Professor, Law, Northeastern University, “After the Gold rush—Part II: Hamdi, the Jury Trial, and Our Degraded Public Sphere,” PENN STATE LAW REVIEW v. 113 n. 1, 20**08**, p. 95-105.

**Habermas’s social ontology illuminates what is at stake in our war on- terror jurisprudence, exemplified by** cases like **Hamdi**. Habermas’s theory of **communicative action entails a society with two basic spheres**, which he calls **the “lifeworld” and “system” spheres**.169 **The lifeworld** sphere—a construct Habermas acquired from Edmund Husserl,170 which roughly correlates with, but broadens, the concept of the public sphere— **consists of** those domains in life that we experience with our family and friends, our cultural life, our **political life outside of organized politics** (especially party politics), and our voluntary associations.171 The mass media, when performing independently of government and corporate interests, is part of the lifeworld sphere. **Communication, participatory dialogue, and persuasion through reasoned discourse, as opposed to coercion, is the** idealized **medium of the lifeworld** sphere.172 **Consensus is the animating feature** of the lifeworld sphere, **which promotes human bonding, community integration, and value-sharing**.173 **The communicative action of the lifeworld** sphere thus **correlates with the “answerability” thesis** discussed above, **the non-instrumentalist understanding of the criminal trial as a process of rational persuasion, where even the accused**, as a Kantian rational agent, **is obliged to consent to** her own **punishment**. **It is that** idealized **integration of the accused with the judgment of the community that gives the** criminal adjudicatory **process its preeminent moral standing** in our Enlightenment culture— preeminent precisely **because that idealized integration is most difficult in matters of crime and punishment.** So, as I have presented it here, **the criminal adjudicatory process**, in its idealized form, **with trial by jury as the centerpiece to** the paradigm of **how the Sovereign justifies and legitimates** the **detention** of the dangerous, **both exemplifies and nourishes the lifeworld** sphere. **Each time a jury deliberates fairly and reaches an honest verdict, it presents itself as a beacon of the lifeworld** sphere, **where rational persuasion** among free and equal persons **is the bedrock value**. Each fair and honest verdict nourishes the lifeworld sphere by **strengthening our commitment to this mode of communicating with each other, even with those who have breached social norms in the most horrific ways. The more awful the crime, the more powerful is the fair and honest verdict** in nourishing the lifeworld sphere. **This** idea perhaps **explains, in** part, why **a criminal trial is** usually **more healing and more strengthening of a community, and hence more desirable, than a resolution through an administrative** **factfinding tribunal. The power of a fair and robust criminal process to heal and strengthen a community is emblematic of the larger point** being suggested here, **that instrumental rationality cannot bind a people together, but instead, when it predominates** and seeps too deep into the culture, **it ruptures what binds individuals, and leads to a passive consumerist individuality that characterizes modern American life.** Those who are familiar with the doctrinal struggles that take place within criminal procedure will understand that **the criminal adjudicatory process is constantly being** tugged out of the lifeworld sphere (where rights are understood as trumps) and **shoved into the system sphere (where the barometer of fairness is accurate outcomes and where “rights” must purchase their way into existence by promoting reliable outcomes).**174 The system sphere is much more recognizable because of how our capitalist economy developed and because of the particular way in which we have cultivated our Enlightenment heritage. **The system sphere is characterized by communicative action motivated and prompted by instrumental reasoning**; means-ends discourse is the language of the system world.175 The system sphere is the world of governmentality and bureaucracy, where more rigid role-playing dominates how people interact. This is a sphere where language and meaning are instrumental in nature and where people are regarded as atomistic, self-interested, and consumeristic.176 **The medium through which the system sphere operates** in the United States **is money and power**. The more complex the society, and the more administrative and bureaucratic, the more important is the role of the system sphere in maintaining social cohesion.177 If that is true, **then the Court’s decision in Hamdi**, as a cultural document rather than just a narrow jurisprudential one, **ought to warn us about an important danger we face** in our culture as we proceed further along towards the darkness that is the so-called war on terror. Kant identified two forms of rationality that roughly correlate with Habermas’s lifeworld and system spheres: instrumental rationality situates the reasoning agent in a particular role with a predetermined end; universal reason (what we typically regard as Kantian rationality) frees the reasoning agent to use reason as an end in itself, which is the sort of reasoning process that undergirds the lifeworld sphere and the jury trial.178 In After the Gold Rush, Part I, I endeavor to show that the Hamdi Court takes on a role within the so-called war on terror—a role that seems so utterly natural, given our pax Americana consciousness, that it is virtually unnoticeable—that conceals how that so-called war exists to hasten the development of Guantanamo-style detention.179 The suggestion here is that **this role with a predetermined end** (winning the “war on terror,” with no articulation of what “winning” means) **propels the Court to use instrumental rationality to undercut the vitalizing expression of Kantian rationality**. In this sense, Hamdi illuminates how deeply indeed we are at war with ourselves. **The implications are far-reaching**. The more reductionist our language and **the more reductionist our mode of adjudication**, governed by instrumental reasoning alone, then **the more mechanistic we become, not only in the legal “system**” we use, **but in the** “system” sphere we inhabit, and thus in the **consciousness we ultimately formulate**. **It is a consciousness in which “whatever does not conform to the rule of computation and utility is suspect.”**180 **The more mechanistic the consciousness, the more total is the power of the Sovereign, with the endgame being one** that the world has already experienced, **a** systemsphere **Nazi regime** that embraced “the same kind of mechanistic thinking that, in an outwardly very different form, contributed to what most people would consider the glories of modern science.”181 And **lest we comfort ourselves with the view that the Holocaust is** sui generis, **an aberration** in a Western culture imbued with an Enlightenment heritage that assures our essential goodness, we would do well to consider the Scottish poet Edwin Muir’s observation: **Think of all the native tribes and peoples**, all the simple indigenous forms of life which Britain trampled upon, corrupted, **destroyed . . . in the name of** commercial **progress.** All these things, once valuable, once human, are now dead and rotten. The nineteenth century thought that machinery was a moral force and would make men better. How could the steam-engine make men better? Hitler marching into Prague is connected with all this. If I look back over the last hundred years it seems to me that we have lost more than we have gained, that what we have lost was valuable, and that what we have gained is trifling, for what we have lost was old and what we have gained is merely new.182 **The true spirit of trial by jury is the resistance against a mechanistic modality where means-ends consciousness is preeminent and where violence to accomplish control and domination**, sweetened with nicesounding words (freedom, democracy) that have devolved into mere gestures, **is too easily unleashed**. The tension in criminal adjudication between this resistance and the attractions of instrumental rationality is no intrinsic feature of 9/11, for that tension permeates, if not defines, the entire enterprise of criminal procedure.183 The more crucial the role of the system sphere in maintaining social cohesion, the more penetrating is that sphere’s influence on human consciousness. **The system sphere operates on and produces a consciousness beholden to means-ends thinking. This** consciousness is peculiarly well-suited to a consumer culture where people are passive and manipulable by corporate and governmental interests. One might, in a very loose sense, correlate the duality of the lifeworld sphere and the system sphere with Jean-Paul Sartre’s distinction between pour-soi (being-for-itself) and en-soi (being-in-itself)—roughly, human existence versus the existence of things.184 **The lifeworld sphere promotes a person’s embrace of** his pour-soi **character** of his existence, his **capacity for action, decision, and heightened consciousness**. The system sphere tugs in the other direction, towards an en-soi consciousness, which is passive and more thing-like185—a consciousness marred by a repression that leads to self-destruction and aggression.186 The **system-sphere consciousness loses the ability to appreciate the sacred in life,** the non-instrumental ways of being, producing what Arthur Koestler characterized as a “civilization in a cul de sac,” an “everybody-for-himself civilization,”187 with masses who distract themselves with television and dim-witted movies, who understand and respond to the world amoeba-like as a source of pain and pleasure, and who cast about for cheap self-help recipes as a salve for a desiccated spiritual ennui. Role-players through and through, **persons within an encompassing system sphere lose the ability to choose their own ends**. That particular ability, the ability to express oneself authentically through the choosing of ones own ends in life, is the most redeeming feature of a healthy lifeworld sphere. Thus, it is here where the entwining relationship of the lifeworld and system spheres becomes crucial in critical theory. Habermas speaks of the system sphere as a product of the lifeworld, for the latter is the locus of energy and meaning-making in a society—things that the “system” needs to function.188 But the “system” sphere, that domain of instrumental reasoning where the impulse to control and dominate always percolates, has a greediness that is hard to contain. It can only be contained within a society that takes seriously the nurturing and empowerment of the lifeworld. Like the struggle between Eros and Thanatos, **the struggle between the lifeworld and the system spheres always contains the threat that the latter will override— ”colonialize**,” to use Habermas’s locution189—**the former**. Many observers of American culture have warned against **this colonization**, which **continues largely unabated**.190 The mass media, properly in the domain of the lifeworld sphere, has been thoroughly hijacked by corporate power; **education no longer serves a democratic culture where critical thinking is the pedagogical aim,** but instead aims to produce the human wrenches and pliers, the spare parts, or the disposable accoutrements, of an economic machinery that serves narrower and narrower interests. Students entering college today are said to resort more often to cheating than previous generations,191 which is hardly surprising when the prevailing attitude among parents and students alike is focused on getting the credentials so as not to be on the outside looking in (a quintessential system-sphere consciousness), when almost every student shares the same major—upward mobility. More and more **decisions that are vital to our** health and well-**being are delegated to experts** **who fill slots within vast bureaucratic apparatuses.** More and more of **life is removed from democratic control**—a symptom of the shrinkage of the lifeworld sphere brought on by the colonization of the system sphere. What we experience, as a culture, is greater and greater anomie and alienation, erosion of social bonds, passivity, drug and alcohol abuse, and violence. **The triumph of the system sphere and the withering of the lifeworld sphere manifests itself in the cozy bombshelter consciousness, where we had once accepted as rational the construction of livable bomb shelters as a suitable response to the specter of nuclear annihilation** because we abandoned the capacity to critique the irrationality of the Cold War system that produced the threat in the first place.192 101 **The democratic project** within our Enlightenment heritage **insists upon a civic maturation where “the people” have the capacity and the willingness to use their own reasoning powers to govern themselves, as** opposed to delegate governance to elites, charismatic charlatans, and socalled experts, all of whom ultimately serve narrower and narrower interests of privilege.193 It is hard to defend the view that American society has moved steadily in the direction of this civic maturation. We seem to be moving away from it, with a populace deeply manipulated by a “public relations industry, whose objective is to engineer consent among consumers of mass culture.”194 So **here is the grim message** that is intricated **in** the **Hamdi** narrative. At **the very moment when it was most propitious to fortify a noninstrumentalist foundation for our commitment to trial by jury (and the other procedural rights that are associated with our criminal justice process) the Court does the precise opposite**.195 It **uses means-ends thinking to place a veil of administrative decency over what most now recognize to be a heinous practice in Guantanamo** Bay. It endorses a style of thinking and a form of consciousness that is itself a key source of the problem we now find ourselves facing. **If it is true**, as Habermas presents it, **that** Islamic fundamentalism, and the **terrorism a**ssociated with it, **operates in a medium of violence arising from a “communicative pathology**”—a “spiral of violence” rooted in a “spiral of distorted communication that leads through the spiral of uncontrolled reciprocal mistrust”196—**then our juridical response to it,** culminating in opinions like Hamdi, **replicates that “breakdown of communication” by bracketing the most crucial institutional embodiment of our commitment to rational and publicly transparent communication** within our Enlightenment culture—the jury trial—**and thereby sapping it of that significance**.197 **This reinforcing “communicative pathology” in this so-called Age of Terror presents the most pressing challenge to our ~~crippled~~ democracy.** The challenge of a healthy democracy is overcoming the very real danger that the form of consciousness that the system sphere operates on and produces—what I’ll abbreviate as the consumer-consciousness, for that captures the passivity and manipulability of the system-sphere person—squeezes out the participatory-dialogue consciousness that is most congenial to the lifeworld sphere.198 Philosopher Albert Borgmann nicely captures the idea here, describing how the Enlightenment project seemingly placed the individual at the center of its ontology, but somewhere along the way led to the individual becoming “little more than an accomplice to a gigantic and systematic enterprise that, though resting on the consent of most people, was given a shape and momentum of its own.”199 The very power of the Enlightenment to produce magnificent technological prosthetics that “subdued and tamed reality” has reduced the individual self to the status of ignoble “consumer.”200 The “consumer” is but an appendage to the system sphere, a mockery of the ennobled, high-functioning individuals who must populate the lifeworld sphere. **The state is too beholden to moneyed interest**, or to corporate power, **to ally itself with promoting the lifeworld**.201 So **government is not the solution to our cultural ills, but rather is one source of the problem**, as it will do nothing to avert the relentless, inexorable expansion of markets and administration. The so-called war on terror, which in my view can be traced to that expansion, has only fueled the state’s alliance with a system-sphere mentality. This may partly explain why “[s]ome say that ours is a world in which real democracy has become impossible, perhaps even unthinkable.”202 In Habermas’s social ontology, **Hamdi falls smack in the middle of the system sphere.** Yaser Hamdi struggled unsuccessfully to remain in the lifeworld sphere against the state’s quest to extend the system sphere, a quest to intensify the exertion of sovereign power through executive and administrative powers.203 However, **the Court cannot reconcile the Sovereign’s desire to erect a simplistic, life-falsifying ontology that includes enemy combatants within a so-called war on terror with the juridical demand for due process merely by constructing a legal regime from certain conceptual remnants** picked out of Mathews v. Eldridge.204 The fact remains that Hamdi endorses and exemplifies the deployment of law to pursue a system-sphere logic—a means-ends rationality—of detecting and detaining bare-life beings who are deemed “dangerous.” **The Court repudiates trial** by jury, which can only be justified ultimately through a lifeworld logic, **at the very moment our commitment to it is most acutely tested.** While civil libertarians applauded the Court’s refusal to issue the blank check to the Executive, too many have ignored the sinister displacement of the most important expression of what is sacred in our Enlightenment heritage with a mode of reasoning that expresses that heritage’s threatening dark side.205 **We falsify the real force of that displacement by marginalizing it to the realm of some state of exception,** as opposed to seeing it as a fortification of a certain global ambition on the part of the United States that continues to be unexamined within the juridical realm, **despite the fact that what is supposedly sacred in that realm—an entire framework of rights that serve as genuine limits to governmental power—is precisely what must be protected by our courts**.206 It is indeed odd to affirm our commitment to the rule of law through the construction of a legal regime, at the hands of all three branches—which is the basis for some scholarly applause for Hamdi—that is itself prompted by a desire to jettison the very legal regime that is supposed to reflect our commitment to the rule of law. **This is law as a shell game**.207 One would think that the **rule of law contains some limit to the Sovereign’s ability to further confine the domain of a particular legal** regime, like the criminal justice system, **and erect another.** One would think that, before punting the issue of what is sacred within a constitutional democracy to the democratic branches of government— Issacharoff and Pildes’s “process approach”208—the Court would note how far we have moved away from the political environment that the Founders knew, gripped now by partisan politics where political party affiliation is “a much more important variable in predicting the behavior of members of Congress vis-à-vis the President than the fact that these members work in the legislative branch.”209 Gripped, indeed, by something far more frightening and ominous: **Our Congress has been hijacked by corporate America and** its enforcer, **the imperial military machine**. . . . We have allowed our institutions to be taken over in the name of a globalized American empire that is totally alien in concept to anything our founders had in mind. I suspect it is far too late in the day for us to restore the republic that we lost a half-century ago.210 One would think that, as part of our self-identity as a nation, our highest Court would confront the most elemental question: by what framework of legality may the Sovereign decide that a United States citizen (or anyone, for that matter) is unworthy of the sort of communicative enterprise that our Enlightenment heritage rightly regards to be the sine qua non of respect for human dignity? Hamdi is but a recent example of the Court’s disinclination to investigate who we are as a nation as part of its obligation to preserve the noble facets of our Enlightenment heritage, all in the name of eschewing the dreaded sin of putting the Good before Liberty.211 And so, **rather than exemplify the triumph of the rule of law, Hamdi exposes its emptiness**.212

**Thus, Miranda and I advocate that the United States federal government provide trial by a jury of the accused’s peers for individuals indefinitely detained under the War Powers authority of the President of the United States.**

**The affirmative is vital to salvage the public sphere[s]—reclaiming trial by jury as a vitalizing process rather than a means to an end is essential to challenging the myth of American exceptionalism which provides the basis for Sovereign power**

Daniel R. **Williams**, Associate Professor, Law, Northeastern University, “After the Gold rush—Part II: Hamdi, the Jury Trial, and Our Degraded Public Sphere,” PENN STATE LAW REVIEW v. 113 n. 1, 20**08**, p. 106-112.

**For** Enlightenment culture to flourish, and its **humane values to maintain a grip on** our **institutions, our public sphere needs to be detoxified** of the poison of consumerism. **This is essential for the pursuit of rational engagement in the public sphere, for a detoxified public sphere is a crucial condition for Legality** itself **to survive**. **Legality** not only expresses the Enlightenment ideal of rational engagement; it also **depends on a broader culture of rational engagement to nourish itself. Institutions cannot** exist to **shape culture, but must arise from that culture to give expression to the ideal**. **The corruption of Enlightenment culture** through consumerism **is what makes U.S. empire-building both possible and necessary**: **possible, because the citizenry are beguiled by the myth of American** benevolence and **exceptionalism**—America as a normative concept; and necessary, because global hegemony is crucial to maintaining consumerism itself, which has its stranglehold on us precisely to the degree that it advances the narrow material interests of the privileged and powerful.214 At the level of rhetoric, radical Islamists pursue a form of jihadism that attacks our Enlightenment ideals because what they see is the dark side of that project, with its decadence, consumerism, and associated drive to destroy traditional ways of life and to dominate the world. Islamic terrorists are post-modernists in that sense, motivated in part by the meta-narrative of globalization in which the United States (and to a lesser extent, Europe) takes on the role of “privileged vanguard of an evolutionary process that applies to all nations.”215 Globalization, with the advent of instantaneous global communication, heightens this fundamentalist revulsion and thereby further provokes spasms of violence.216 **We may be seduced by the imagery of the religious fanatic** spilling out from a madrasas in Pakistan or Saudi Arabia, existing on the far periphery of our gadgetfilled consumeristic world, indoctrinated to despise the West, and recruited and trained by Al Qaeda to become a killing machine. **But that jihadist is a product of an intricate web of commerce** that is rapidly deluding people from non-Western cultures of their traditions and forms of life, leading them into a cycle of wage labor and the pursuit of some modicum of consumer power, **a cycle resting atop manufactured desires for those creature comforts and distractions that today seduce much of the world’s population.** All this is why we ought to understand Hamdi, more broadly, as an early feature of a jurisprudence of globalization. **Globalization** produces not only a jurisprudence of globalized commerce, but it also **produces a jurisprudence of detention—Hamdi being foundational** in that development. **That jurisprudence of detention produced by pax Americana globalization circles back to reform our domestic juridical understanding of detention. Guantanamo** Bay as a detention **site is not merely a feature of our** so-called **war** on terror**; it is a**nother **feature of an entire carceral system** that stretches back to the seventeenth century and that Foucault powerfully dissects in Discipline and Punish.217 **This is why Hamdi**, by blessing Guantanamo-style detention with a veil of administrative decency**, ought to be linked to** a reality that this article gestures at, **a portrait of consumerist decadence that is poisoning our culture and driving our foreign policy**218—and has for over a half century—**to the point where we are on a collision course with fundamentalism of all sorts**.219 The juridical response to this collision course is the rationalistic message to do it better, to accomplish the detention for the sake of preserving life with greater regard for the tragedy of making a mistake. **Hamdi stands for an invigoration of a carceral system flourishing within a biopower-world, where** the regulatory function of **the law operates on the simplest binary** opposition—the **dangerous and** the **normal—and where** the **“normal” has become the** Western **consumer**. When lonely voices in Western culture lament that we are at war with ourselves, we might do well to understand it, at least in part, in precisely these terms, “for it is a sad fact that Western consumerism explodes like a land mine in the midst of the most disadvantaged layers of the world population.”220 That intensive, exploding consumerism either elicits from those who feel themselves outside the globalization promise a defeatist and dark spiritual reaction that history has taught is violence-prone,221 or it becomes “a kind of intellectual sedative that lulls and distracts its Third World victims while rich countries cripple them, ensuring that they will never be able to challenge the imperial powers.”222 The gaping, echoing silence in Hamdi is this crucial fact: “We are witnessing a real resistance to empire.”223 **The instrumentalist side of Enlightenment thought, the Weberian nightmare of disenchantment with the world, and the narrowly tailored quest for administrative effectiveness, where sacredness is lost to the shallow seductiveness of regulatory success**, technological achievement, and the spirit-killing hyperreality that is its telos, **is the cognitive scaffolding of an empire that must always and everywhere use or threaten to use military force to guarantee the conditions for the functioning of the world market, all the while masking its violence with rule-of-law rhetoric**.224 **That militarized management of the global order has and will inevitably produce the blowback of terrorism, with the capture of “enemy combatants” who must be detained on the instrumental logic of security that chokes off the life-affirming values undergirding civil liberties and rights we once thought sacred to our identity** as a nation. **Trial by jury, the highest vitalizing expression of those life-affirming values, is sacrificed for the sake of a global policing operation that finds its raison d’etre in the preservation and spreading of a system-world consumerist way of being.** VII. Conclusion In After the Gold Rush—Part I, I claim that foreign-policy expertise is the same sort of fiction as managerial expertise.225 From that claim, I argue that **judicial deference to the Executive** in matters of foreign affairs **is an overblown manifestation of our legitimate commitment to separated powers**.226 **Judicial deference** in the service of a moral fiction like “foreign-policy expertise” **amounts to an avoidance of thinking substantively about rights and obligations and of confronting urgent globalization** issues. The upshot is this: **what is important to the Court in Hamdi is** not the globalization issues that generate the controversy, but **the maintenance of** domestic orderliness and **neutrality in the government’s pursuit of its global ambitions. This concern for neutrality** and orderliness **manifests in the Court’s institutional refusal to address the** fundamental **concern that Guantanamo-style detention exists not to serve the so-called war on terror, but the war on terror exists to serve Guantanamo**. In that sense, **the war on terror is really a war on ourselves, a form of auto-immune crisis,** as Jacques Derrida characterizes it.227 **Hamdi expresses our own internal war against the criminal-justice system, exhibiting** not just our ambivalence about it, but **our impulse to** detach it from its Kantian moorings and to **make it** **administrative, and tribunal-like**. Just as our technological prowess on 9/11 was whipsawed back against us, thereby threatening to eliminate the distinction between war and peace, so too **the fundamental anxiety we feel towards our criminal justice process is whipsawed back to strike us hard, causing us to unleash that** other collective drive, the **drive towards a form of governmental administration at the heart of Foucault’s “political dream of the plague,”**228 the drive to overcome inhibitions in constructing an MMDI system, and **a drive that threatens the elimination of the distinction between civil detention and criminal punishment**. Viewed from this prism, **Hamdi is an emblem of how our legal culture, and indicative of how Western culture itself, has become paralyzed by an over-commitment to a form of system-sphere reasoning atrophied by a fetish for means-ends maximization**. The dark side of **the Enlightenment**, which has produced a mighty economic machine that is backed by incredible scientific and technological achievements, **has created a world that** for over a half century **has existed on a precipice of annihilation**. We are perhaps even more precariously situated, largely because the internal drive within our culture to measure most everything in terms of financial **profitability—a drive unleashed by the Enlightenment project to control and dominate— is a compulsion with such overwhelming power that the most economically benefitted inhabitants of this planet simply cannot see beyond their own short-term material interests** for the sake of their own children and grandchildren.229 My point here is that **this overwhelming cultural drive threatens the vital and already-eroded life-affirming foundation of our criminal-justice system.** **What if we looked upon** a legal process, such as **the criminal-justice process, as an end in itself rather than as simply a means** to adjudicate? **What if a legal process elicits our allegiance because it expresses a particular form of human solidarity and community engagement**? **What if a legal process pursues a justification that warrants the assent of the losing party simply because that assent-ability is a good in itself**? **What if a legal process is a commitment,** not a tactic or instrumental feature of governmentality or epistemic method? **What if a legal process were a “fact” in our regime of legality—meaning, it exists in a way that justifies itself rather than as an instrument for some other goal—and thereby becomes a source of value within our culture**? Habermas’s **reconstruction of “communicative competence**”—his ideal-speech theory—**helps illuminate the stakes in our war-on-terror jurisprudence**.230 **The point of Habermas’s reconstruction is not** so much to point the way to **establishing a discursive utopia, but rather, to show that internal to the structure of speech is a telos**, **a direction for humanity to achieve truth, freedom, and justice**. **Ethics can be rationally grounded; facts and values, and theory and practice, can be made inseparable**. **Habermas**’s reconstruction **provides a way to understand the jury trial,** and the whole criminal adjudicatory process, **as an** idealized **expression of a way of life, an anticipation of a way of life where truth, freedom and justice are possible. Internal to the criminal adjudicatory process is the answerability thesis, and internal to the answerability thesis is a set of values** that we have come to regard as **constitutive of who we are as human beings worthy of respect and dignity. The practice of adjudicating conflict through a jury trial**—a practice that partakes in the construction of an ideal-speech situation—**contains within it a telos for humanity, a telos that correlates with** that contained in Habermas’s ideal speech situation wherein “the **truth of statements is linked in the last analysis to the intention of the good and true life**.”231 **Hamdi,** then, **does not just bypass a fact-finding process, it denigrates the vitalizing aspect of the jury trial through a form of reasoning that is suffocating humanity and putting it on an irreversible path towards a brave new world**. **It does so through a framework of necessity that is linked to geo-political activity that must be understood without the distorting effects of an American exceptionalism** that regards “America” as a normative concept. What says it all is this 2004 testimony before the House Armed Services Committee. General James Hill, responsible for military readiness in Latin America, essentially complained of being ignored in this age of 9/11 anxieties. His sphere of command ought to get more war-on-terror money, he argued, because Latin America is filled with “radical populists,” by which he meant, “[y]ou know, emerging terrorists.”232 **In the pursuit of empire, we are** forever threatened by “emerging terrorists”; **forever and everywhere threatened by the plague, all the better to pursue the political dream of the plague.** The merits or demerits of **Guantanamo** Bay **as a detention site is beside the point**, an incidental issue **in the larger struggle over the future of globalization and America’s vision of its place within that future**. **Guantanamo-style detention signifies,** despite how it may betray our values, **our need for military hegemony**, a military hegemony that could hardly be justified where the only threat to American hegemony in a globalized marketplace is the surging economic strength of China or a unified Europe. **It is in that sense that the war on terror serves Guantanamo**, rather than the other way around. **What Guantanamo-style detention ratifies—and thus the key to its true function**, which transcends its merits or demerits as an instrument of policy in our so-called war on terror—**is an ontology manufactured through a resurgent sovereignty, one marked by a dividing line between compliant laborers and consumers** on the one hand, **and on the other, violent terrorists** who are said to hate our liberty-loving way of life. **Guantanamo-style detention may betray our values, but it inscribes in our pax Americana consciousness the existence of an evil,** a plague, **that must be vanquished.**233 It may betray our professed self-identity, but **it inscribes the major duality of our time, the happy consumer** in a globalized wonderland **and the** religiously **fanatical terrorist** bent on sabotaging the entire edifice. **Hamdi’s veil of administrative decency**, then, can **mute the betrayal, a**lleviate a bit the sting of it**, all the while silently deepening that inscription, through its Weberian rationality, through its means-ends rationality** that characterizes a system-sphere logic that Habermas warns us against. **It is upon this platform of critique that one can understand Hamdi to be, not a bracketed scenario, a case arising from a state of exception, but rather an ominous cultural document of our post-9/11 anxieties, an expression and reinforcement of the Western quest for control and domination**, born of the Enlightenment, that has, centuries later, generated this “difficult time in our Nation’s history.”

**Public deliberation is revolutionary—critical analysis of institutions breaks down institutional justifications for domination and checks Sovereignty—disengagement risks the erosion of all remaining vestiges of democracy**

**Williams 08** (Daniel, Associate Professor of Law, Northeastern University, 11-13-08, "After the Gold Rush—Part II: Hamdi, the Jury Trial, and Our Degraded Public Sphere" Penn State Law Review) pennstatelawreview.org/articles/113%20Penn%20St.%20L.%20Rev.%2055.pdf

The classic Frankfurt School diagnosis of American culture is grim and pessimistic. Jurgen Ilabermas rebels against the pessimism that pervades Dialectic of the Enlightenment, but he does not repudiate the essential diagnosis found there, though he surely seeks to deepen it with what he regards as a more nuanced investigation into the true roots of Enlightenment rationality.157 For our purposes, to this observation of humanity's destructive fetish with means-ends rationality, we may add Habermas's emphasis on the public sphere as an optimistic source of rationality.151\* In the idealized vision that Ilabermas presents, the public sphere consists of voluntary associations dedicated to promoting unconstrained rational interchange among free and equal participants of good will.15 **It is in the public sphere, if truly healthy** (free from the distortions of domination), **that the common good can be gleaned**.160 **It is in the public sphere that government overreaching can be checked and averted.**161 On this view, world **public opinion**, cultivated within vibrant public spheres that somehow escape the distortions of governmental and corporate propaganda, **may function**, in this post-Cold War era that has bled into the Age of Terror, **as the only** potential **countervailing force to the dominant super-power**, the United States. What **a vibrant public sphere provides** are **tools to resist** naturalistic **illusions undergirding social institutions and practices that preserve and promote spheres of inequality and regimes of domination, but that seem to be** socially **necessary**. The idea here is well-rehearsed in the literature of critical theory: that which is socially constructed is made to appear fixed **and natural; that which serves narrow interests of power and privilege is made to appear to serve everyone**.162 **A culture beholden to means-ends thinking** is a culture that **has lost its capacity for critical theorizing, and such a culture is, as a result, at the mercy of its illusions. A vibrant public sphere that** successfully **exposes illusions**, which conceal unhealthy conditions for society, **is crucial to** social **change,** for the **exposing** of **such illusions is exactly what loosens the screws that keep unworthy** social **institutions intact.**163 **A vibrant public sphere is the environment for rendering institutions malleable and open to change**, which is why thinkers from Kant to Habermas regard "the public sphere as the definitive institution of democracy."164 The big problem, however, is that **the "public sphere" in consumerist societies such as ours may itself have evolved into an illusion, propping up the justificatory myth that the Sovereign's activity is in check and in harmony with the consent of the governed**.165 Consider the implications if we find, as an empirical matter, that **the public sphere is beholden to the powerful and privileged but still retains the image of functioning largely in its idealized way. That false consciousness**, to use a very unfashionable phrase, **creates manifold opportunities for a bloated sovereignty**—indeed, perhaps one like we are witnessing today—**and a bloated sovereignty coexists nicely with a consumerist mentality that cannot seem to imagine any alternative to the present, other than a future that consists only of the present just with more snazzy gadgets. Evidence abounds that** this **false consciousness pervades America today, with disastrous consequences. Vital issues of war and peace** (let alone important issues revolving around **health care, education, and economic well-being**) **are presented in stage-managed fashion, with vast sums of money spent on manipulating over-worked, anxiety-riddled consumerists who cling to an anachronistic, jingoistic, pre-Cold War understanding of what this nation stands for in the world.** Voting is no longer the culminating act that follows a period of reflection and probing dialogue and debate, but rather **voting is a reaction to "campaigns,"** operations not unlike military campaigns and Madison Avenue advertising campaigns, **where the human commodity on display (the "candidate") has been selected largely through big-money donors and inside-power politics.**166 **If the hollowed-out nature of democracy captures something real in our culture,** then **is it really surprising that** the great institutional **embodiment of democracy and the most vitalizing expression of the Enlightenment, the right to trial by jury, has been under siege?**167 And **if we abide the erosion of it,** if we find that trial by jury cannot purchase its way into our culture because it cannot satisfy our quest for means-ends efficiency and because we have lost our vocabulary for non-instrumentalist justificatory ways of thinking and being, **then what democratic institutions are next?**

**Our rhetorical argument forces institutions to justify their colonization of the lifeworld, reversing their control and opening up space for public debate**

**Doxtader 97** (Erik W., PhD Northwester, International Research fellowship, Institute for Justice and Reconciliation, “Total War and Public Life: A Critical Theory of American Nuclear Deterrence Policy,” June,

Rhetorical-**arguments** are communicative constellations that instantiate forms of critical publicity by mediating the terms of institutional argumentation and public deliberation. They are **communicative events in which interested citizens define procedures for collective interaction** in a manner **that acknowledges, engage, and if necessary, challenges institutional forms of communication. These challenges develop as public actors call on institutions to define and justify their actions. When institutions respond to these invitations, they often enact contradictions between the ends and means of their policies. If so, the public finds a space and referent for deliberation. Transgressing presumptions of institutional responsibility** – on the basis of private experience or need – **produces the possibility of debate oriented to the collective revision of the norms which underpin practices of institutional representation.** Do **rhetorical arguments** exist? I believe so. They **often appear as legal challenges against the state.** Citizens violate standing laws in order to gain recognition. **This** recognition **culminates in a moment when the state**, called on to employ legal sanctions, **is forced to explain why its activities are just**. **The resulting tension between** the purportedly universal ends of **justice and the enforcement mechanisms of law**, evident for instance in Vaclav Havel’s practice of dissent and ACT-UP’s use of civil disobedience**, shows how** state **institutions can be made vulnerable to the force of public deliberation. In betraying their own standards of behavior, institutional arguments become a basis for political reform.** **Rhetorical arguments are enacted through both transgressive and consensual forms of communication. They fulfill the ontological, epistemic and political functions of public deliberation**. Accordingly, they have a marked value for critical theoretical study. As theory, rhetorical argumentation is a means by which to investigate how institutions use communication to structure public deliberation. In other words, **critique can carry out a process of rhetorical argument on behalf of publics. This occurs as critique discerns questions that public actors can use to understand, ratify and/or criticize the declared terms of institutional policy.** **Answers to these questions produce insight into how institutional arguments intervene in public fora.** What’s more, **the questions themselves furnish resources for deliberation; they transgress systemic norms in order to reintroduce private experiences into processes of collective interest formation**. In light of the constitutive elements of public deliberation, there are three basic topoi that enact this questioning process.First, **public interactions with institutions** may **begin with a systematic questioning of how institutions use communication to define events, methodologies and steering mechanisms. It is important to investigate how institutions deploy definitional arguments in order to discern crises, formulate response plans, and codify the terms of the problem-solving logics.**Second, **an understanding of how institutions rely on definitional argument may lend to public actors an incentive** to query whether such definitions make sense; that is, if institutional readings of events are justified as practical solutions to complex problems. Such questioning is worthwhile to the extent that it reveals how institutions fashion common systems of meaning. Institutions present reasons for their arguments. To the degree that the scope, breadth, and coherence of these reasons may offer an understanding of how institutions account for or ignore public interest, the third question publics might ask it: how do **institutions formulate arguments that extend invitations to accept particular standards or values of judgment, which in turn, structure the commonplaces of human interaction? Such inquiry is important to the extent that it can reveal how institutions ground their actions in relationship to symbol systems that may have their origins in the public domain.**

**The creation of counterpublics through clash with a public sphere is the only method of creating an emancipatory politics.**

**Fraser 90** (Nancy, Henry A. and Louise Loeb Professor of Political and Social Science and professor of philosophy at The New School, “Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy,” Social Text, No. 25/26, (1990))

The point is that, **in stratified societies, subaltern counterpublics have a dual character. On the one hand, they function as spaces of withdrawal and regroupment; on the other hand, they also function as bases and training grounds for agitational activities directed toward wider publics. It is precisely in the dialectic between these two functions that their emancipatory potential resides. This dialectic enables subaltern counterpublics partially to offset, although not wholly to eradi- cate, the unjust participatory privileges enjoyed by members of dominant social groups in stratified societies**. **So far, I have been arguing that, although in stratified societies the ideal of participatory parity is not fully realizable, it is more closely approximated by arrangements that permit contestation among a plurality of competing publics than by a single, comprehensive public sphere**. Of course, contestation among competing publics supposes inter-public dis- cursive interaction. How, then, should we understand such interaction? Geoff Eley suggests we think of the public sphere [in stratified societies] as "the structured setting where cultural and ideological contest or nego- tiation among a variety of publics takes place."24 **This formulation does justice to the multiplicity of public arenas in stratified societies by expressly acknowledging the presence and activity of "a variety of publics." At the same time, it also does justice to the fact that these various publics are situated in a single "structured setting" that advantages some and disadvantages others**. Finally, Eley's formulation does justice to the fact that, in stratified societies, the discursive relations among differentially empowered publics are as likely to take the form of contestation as that of deliberation.

## 2AC

### Case

**Giving up on connecting to conventional democratic institutions creates a higher level of cooptation and complacency.**

**Lobel 07** (Orly Lobel, Assistant Professor of Law, University of San Diego, THE PARADOX OF EXTRALEGAL ACTIVISM: CRITICAL LEGAL CONSCIOUSNESS AND TRANSFORMATIVE POLITICS, Harvard Law Review, 2007, Vol. 120)

Both the practical failures and the fallacy of rigid boundaries generated by extralegal activism rhetoric permit us to broaden our inquiry to the underlying assumptions of current proposals regardin**g transformative politics** — that is, attempts to produce meaningful changes in the political and socioeconomic landscapes. The suggested alternatives produce a new image of social and political action. This vision **rejects a shared theory of social reform, rejects formal programmatic agendas, and embraces a multiplicity of forms and practices.** Thus, it is described in such terms as a plan of no plan,211 “a project of pro- jects,”212 “anti-theory theory,”213 politics rather than goals,214 presence rather than power,215 “practice over theory,”216 and chaos and openness over order and formality. As a result, **the contemporary message rarely includes a comprehensive vision of common social claims, but rather engages in the description of fragmented efforts.** As Professor Joel Handler argues, the commonality of struggle and social vision that existed during the civil rights movement has disappeared.217 There is no unifying discourse or set of values, but rather an aversion to any metanarrative and a resignation from theory. Professor Handler warns that **this move away from grand narratives is self-defeating precisely because only certain parts of the political spectrum have accepted this new stance: “[T]he opposition is not playing that game . . . . [E]veryone else is operating as if there were Grand Narratives . . . .”**218 Intertwined with the resignation from law and policy, the new bromide of “neither left nor right” has become axiomatic only for some.219 The contemporary critical legal consciousness informs the scholarship of those who are interested in progressive social activism, but less so that of those who are interested, for example, in a more competitive securities market. Indeed, an interesting recent development has been the rise of “conservative public interest lawyer[ing].”220 Although “public interest law” was originally associated exclusively with liberal projects, in the past three decades conservative advocacy groups have rapidly grown both in number and in their vigorous use of traditional legal strategies to promote their causes.221 **This growth in conservative advocacy is particularly salient in juxtaposition to the decline of traditional progressive advocacy.** Most recently, some thinkers have even suggested that there may be “something inherent in the left’s conception of social change — focused as it is on participation and empowerment — that produces a unique distrust of legal expertise.”222 Once again, this conclusion reveals flaws parallel to the original disenchantment with legal reform. **Although the new extralegal frames present themselves as apt alternatives to legal reform models and as capable of producing significant changes to the social map, in practice they generate very limited improvement in existing social arrangements. Most strikingly, the cooptation effect here can be explained in terms of the most profound risk of the typology — that of legitimation. The common pattern of extralegal scholarship is to describe an inherent instability in dominant structures by pointing, for example, to grassroots strategies,223 and then to assume that specific instances of counterhegemonic activities translate into a more complete transformation. This celebration of multiple micro-resistances seems to rely on an aggregate approach — an idea that the multiplication of practices will evolve into something substantial.** In fact, **the myth of engagement obscures the actual lack of change being produced,** while the broader pattern of equating extralegal activism with social reform produces a false belief in the potential of change. **There are few instances of meaningful reordering of social and economic arrangements and macro-redistribution.** Scholars write about decoding what is really happening, as though the scholarly narrative has the power to unpack more than the actual conventional experience will admit.224 Unrelated efforts become related and part of a whole through mere reframing**. At the same time, the elephant in the room — the rising level of economic inequality — is left unaddressed and comes to be understood as natural and inevitable.**225 This is precisely the problematic process that critical theorists decry as losers’ self-mystification, through which **marginalized groups come to see systemic losses as the product of their own actions and thereby begin to focus on minor achievements as representing the boundaries of their willed reality.** The explorations of micro-instances of activism are often fundamentally performative, obscuring the distance between the descriptive and the prescriptive. The manifestations of **extralegal activism** — the law and organizing model; the proliferation of informal, soft norms and norm-generating actors; and the celebrated, separate nongovernmental sphere of action — **all produce a fantasy that change can be brought about through small-scale, decentralized transformation. The emphasis is local, but the locality is described as a microcosm of the whole and the audience is national and global.** In the context of the humanities, Professor Carol Greenhouse poses a comparable challenge to ethnographic studies from the 1990s, which utilized the genres of narrative and community studies, the latter including works on American cities and neighborhoods in trouble.226 T**he aspiration of these genres was that each individual story could translate into a “time of the nation” body of knowledge and motivation.**227 In contemporary legal thought, a corresponding gap opens between the local scale and the larger, translocal one. **In reality,** although there has been a recent proliferation of associations and grassroots groups, **few new local-statenational federations have emerged in the United States** since the 1960s and 1970s, and many of the existing voluntary federations that flourished in the mid-twentieth century are in decline.228 **There is, therefore, an absence of links between the local and the national, an absent intermediate public sphere, which has been termed “the missing middle” by Professor Theda Skocpol.229 New social movements have for the most part failed in sustaining coalitions or producing significant institutional change through grassroots activism.**

Professor Handler concludes that this failure is due in part to the ideas of contingency, pluralism, and localism that are so embedded in current activism.230 **Is the focus on small-scale dynamics simply an evasion of the need to engage in broader substantive debate?** It is important for next-generation progressive legal scholars, while maintaining a critical legal consciousness, to recognize **that not all extralegal associational life is transformative. We must differentiate, for example, between inward-looking groups, which tend to be self- regarding and depoliticized, and social movements that participate in political activities, engage the public debate, and aim to challenge and reform existing realities.2**31 We must differentiate between professional associations and more inclusive forms of institutions that act as trustees for larger segments of the community.232 As described above, extralegal activism tends to operate on a more divided and hence a smaller scale than earlier social movements, which had national reform agendas. **Consequently, within critical discourse there is a need to recognize the limited capacity of small-scale action. We should question the narrative that imagines consciousness-raising as directly translating into action and action as directly translating into change.** Certainly not every cultural description is political. Indeed, it is questionable whether forms of activism that are opposed to programmatic reconstruction of a social agenda should even be understood as social movements. In fact, **when groups are situated in opposition to any form of institutionalized power, they may be simply mirroring what they are fighting against and merely producing moot activism that settles for what seems possible within the narrow space that is left in a rising convergence of ideologies. The original vision is consequently coopted, and contemporary discontent is legitimated through a process of self-mystification.**

**Facts K: 2AC**

**Facts are fun!**

**Thinkquest No Date** “Interesting Facts” http://library.thinkquest.org/J0112739/man\_facts.htm

**Facts are fun for every one. If you see one you like tell someone and then test their wits.** **Did you know that the manatees can hear well even though they do not have external ear lobes? Did you know that manatees have trouble with depth perception?** Their colors are usually gray or gray-brown. They are typically about 9-10 feet long and weigh about 1,000 pounds. **Did you know that manatees have three fingernails on each flipper** and when they get into shallow water the manatee walks on its nails? **Did you know that manatees never stop losing teeth.** They grow new teeth in the back of the mouth which push the teeth in the front of the mouth out? Manatee are related to the elephant. They have three toes like elephants and have very dense bones with no bone marrow.

**Baudrillard is a terrible argument—that’s a fact**

**Leitch ’96** By Professor Vincent B Leitch – Chair in English George Lynn Cross Research Professor University of Oklahoma Postmodernism--: Local Effects, Global Flows – p.19-20

To enter into orbit is to split off from the real into hyperreality; to generate high-velocity saturations beyond any use, profit, or symbolism into haphazard ecstatic accumulations; to revolve in worldly yet otherworldly autonomous cycles out of reach, harmless (hopefully), paradoxically protective, subject only to virtual catastrophes; to aspire not to progress, transcendence, self-reflection, liberation, or revolution but to excesses of accumulation with each passing circuit. More than anything else, money has become orbital. Baudrillard says of "the mass of floating money whirling about the Earth in an orbital rondo," "A pure artifact, it enjoys a truly astral mobility; and it is instantaneously convertible. Money has now found its proper place, a place far more wondrous than the stock exchange: the orbit in which it rises and sets like some artificial sun" (33). Money is likened to a theatrical planet, an artifact in a hyperreal realm, and not to a black hole, because it poses a virtual, not a real, threat, as the Crash of 1987 illustrates. Orbits are artificial paradises monitored in real time. This is the originality of virtual economics**. Baudrillard's accounts of the accursed share and of orbitalization possess explanatory power and exhibit inventiveness, but they are finally hyperbolic and declamatory, too sweeping and lacking in detail. Counter-evidence and qualifications, not to mention ground-level data, receive scant attention.** This is theory going into orbit. **Focused single-mindedly on extreme phenomena in Western societies, Baudrillard's studies seem remote from the quotidian matters preoccupying our lives. Viewed from the vantage of genre, Baudrillard in his late work gives up scholarship and normative science in favor of the literary essay and cultural journalism, specializing in stylish provocation. The** mixture of outrage and **fatalism is quite** unlike Derrida's messianism and his project to renew heritage. While Baudrillard renounces Marx and political economy, Derrida opts for a critical reconsideration and return to Marx. Both seem to be **resigned** socialists, who seek in light of changing circumstances new accounts of economy and speculation—**without, however, worrying systems of exploitation, which seems a crucial limitation.**

**Detention PIC: 2AC**

**Perm do both**

**Detention is the period of custody BEFORE a trial**

**The Free Dictionary No Date**

de·ten·tion (d-tnshn)

n.

1. The act of detaining.

2. The state or a period of being detained, especially:

a**. A period of temporary custody while awaiting trial.**

b. A period of confinement to a detention home.

c. A form of punishment by which a student is made to stay after regular school hours.

3. A forced or punitive delay.

**Imprisonment implies a term**

**The Hindu 12**

http://www.thehindu.com/news/national/life-imprisonment-means-jail-term-for-entire-life-sc/article4133231.ece

Life **imprisonment implies a** jail **term for the convict’**s entire life, the Supreme Court has held, clearing a misconception on this sentence.

**Political euphemisms are inevitable**

**Schuler 13** (Dave, 7-15-13, "Euphemisms" The Glittering Eye) theglitteringeye.com/?p=20362

I think there’s something that people should keep in mind. **Our political vocabulary is chock-full of euphemisms. What used to be known**, with brutal accuracy, **as “the War Department” is now** called **“the Department of Defense”.** The unmanageable agglomeration of government functions that includes **the Border Patrol**, the **Customs Service**, the **Coast Guard**, the **Secret Service, and many other components** that were originally parts of the Treasury, the Department of Justice, the Department of Agriculture, and just about every other major government agency **now has the Orwellian-sounding name “the Department of Homeland Security”. We do not have a justice system. We have a legal system.** We believe, in an article of faith as mystical as transubstantiation, that our legal system is the best way of administering justice. Maybe it is. Maybe justice is an accident (in Aristotelian terms) of the legal system. But it’s not a justice system and we shouldn’t expect justice from it.

**Reality shapes language—focus on discourse distracts from solving the problem**

Matthew **Roskoski** and Joe **Peabody**, Florida State University, “A Linguistic and Philosophical Critique of Language Arguments”, 1991, http://debate.uvm.edu/Library/DebateTheoryLibrary/Roskoski&Peabody-LangCritiques.

Previously, we have argued that the language advocates have erroneously reversed the causal relationship between language and reality. We have defended the thesis that reality shapes language, rather than the obverse. Now we will also contend that to attempt to solve a problem by editing the language which is symptomatic of that problem will generally trade off with solving the reality which is the source of the problem. There are several reasons why this is true. The first, and most obvious, is that we may often be fooled into thinking that language "arguments" have generated real change. As Graddol and Swan observe, "**when compared with larger social and ideological struggles, linguistic reform may seem quite a trivial concern," further noting "there is also the danger that effective change at this level is mistaken for real social change"** (Graddol & Swan 195). The second reason is that the **language we find objectionable can serve as a signal** or an indicator **of the corresponding objectionable reality.**  The third reason is that **restricting language only limits the overt expressions of any objectionable reality, while leaving subtle and** hence **more dangerous expressions unregulated.** Once we drive the objectionable idea underground it will be more difficult to identify, more difficult to root out, more difficult to counteract, and more likely to have its undesirable effect. The fourth reason is that **objectionable speech can create a "backlash" effect that raises the consciousness of people exposed to the speech.**  Strossen observes that "ugly and abominable as these expressions are, they undoubtably have had the beneficial result of raising social consciousness about the underlying societal problem..." (560).

### K Top: 2AC

#### The public sphere is reflexive and self-correcting—any criticism they have can be overcome by our method because the public sphere critiques itself

Simon **Susen**, Lecturer, Social and Political Theory, Birbeck College, University of London, “Critical Notes on Habermas’s Theory of the Public Sphere,” SOCIOLOGICAL ANALYSIS, v. 5 n. 1, Spring 20**11**, p. 46-47.

 (c) The bourgeois public sphere is critical not only of premodern and modern states, but also of **itself,** for it constitutes an intersubjectively constructed realm based on open and **reflexive** discourses. “It provide[s] the training ground for a critical public reflection still preoccupied with itself” (ibid.: 29; italics added). The self-critical reflexivity of linguistically equipped entities―who, as communicatively interconnected subjects, form the public sphere―is an **invaluable resource** for discursively mediated forms of action coordination in the modern era. Dialogically created public spheres cannot exist without the critical reflection upon the socio-historical constitution of potentially uncritical subjects. The rational-critical character of the modern public sphere is rooted in social actors’ capacity to engage in intersubjective discourse oriented towards the communicative coordination and normative regulation of social life. It is not irrelevant to note that the rational-critical analysis of the public sphere forms part of the rational-critical constitution of the public sphere. Hence, Habermas’s theory of the public sphere is situated in, and can be critiqued by, the public sphere itself. “

His theory and his practice assume that critical debate is at the heart of all intellectual activity and every healthy public sphere, and it is clear that he expects his own writing to face the criticisms and contestations with which he regularly confronts his opponents” (Kramer 1992: 256). Engagement in critical discourses, produced by prolific public spheres, is a constitutive element of modern social life. The normative potential of the bourgeois public sphere emanates from critical discursiveness able to question the taken-for-grantedness of accepted forms of quotidian experience. In this sense, the struggle over the creation of an emancipatory society “is a struggle to make publicity a source of reasoned, progressive consensus formation” (Calhoun 1992a: 28). The public sphere is a collective realm in which individuals’ cognitive ability to take on the role of critical and responsible actors is indicative of society’s coordinative capacity to transform itself into an emancipatory project shaped by the normative force of communicative rationality.

**Engagement with the law is crucial—the legal code acts as a “translator” that negative steering mechanisms can understand and be controlled by**

Jeffrey **Flynn**, Middlebury College, “Communicative Power in Habermas’s Theory of Democracy,” EUROPEAN JOURNAL OF POLITICAL THEORY v. 3 n. 4, 20**04**, p. 439.

While The Theory of Communicative Action focused on aspects of the ‘colonization of the lifeworld’ by the system, the **deliberative politics** of Between Facts and Norms **depicts a way in which the normative resources of the lifeworld, through the medium of law, can be marshaled to effectively contend with money and power**. According to Habermas, **law acts as a ‘transformer’, taking the normative messages of ordinary language and translating them into the ‘complex legal code’ which**, while open to normative reasons, **can** also **communicate with the** functional steering **media of money and power**. While Habermas had earlier claimed that the most we could hope for was a ‘democratic dam against the colonizing encroachment of system imperatives on areas of the lifeworld’, in Between Facts and Norms the function of law goes beyond that.22 Indeed, **law functions as a hinge between system and lifeworld**, with a much more significant role:

**The legal code** not only **keeps one foot in** the medium of ordinary language, through which **everyday communication** achieves social integration in the lifeworld; **it** also a**ccepts messages that originate there and puts these into a form that is comprehensible to the special codes of the power-steered administration and the money-steered economy.** To

 this extent, the **language of law**, unlike the moral communication restricted to the lifeworld, **can function as a transformer in the society-wide communication circulating between**

**system and lifeworld**.

**While the legal system is embedded in the social contexts of the lifeworld, it is also able to relate functional systems in a way that unmediated ordinary language cannot**.

**K Top: A2 “Burn It Down”**

**Pragmatic steps are necessary to solve—intermediate reforms demonstrate the viability of a fuller transformation**

Erik Olin **Wright**, Professor, Sociology, University of Wisconsin, “Guidelines for Envisioning Real Utopias,” SOUNDSINGS, 4—**07**, www.ssc.wisc.edu/~wright/Published%20writing/Guidelines-soundings.pdf

5. Waystations The final guideline for discussions of envisioning real utopias concerns the importance of waystations. The central problem of **envisioning real utopias concerns** the **viability of institutional alternatives that embody emancipatory values, but** the practical **achievability of** such **institutional designs** often **depends upon the existence of smaller steps**, intermediate institutional innovations **that move us in the right direction but only partially embody these values.**Institutional **proposals which have an all-or-nothing quality** to them **are** both **less likely to be adopted** in the first place, **and** may **pose more difficult transition-cost problems** if implemented. The catastrophic experience of Russia in the “shock therapy” approach to market reform is historical testimony to this problem.Waystations are a difficult theoretical and practical problem because there are many instances in which partial reforms may have very different consequences than full- bodied changes. Consider the example of unconditional basic income. Suppose that a very limited, below-subsistence basic income was instituted: not enough to survive on, but a grant of income unconditionally given to everyone. One possibility is that this kind of basic income would act mainly as a subsidy to employers who pay very low wages, since now they could attract more workers even if they offered below poverty level earnings. There may be good reasons to institute such wage subsidies, but they would not generate the positive effects of a UBI, and therefore might not function as a stepping stone.**What we** ideally **want,** therefore, **are intermediate reforms that** have two main properties: first, they concretely **demonstrate the virtues of the fuller program of transformation, so they contribute to** the ideological battle of **convincing people that the alternative is credible and desirable**; and second, **they enhance the capacity for action of people, increasing their ability to push further in the future**. Waystations that increase popular participation **and bring people together in problem-solving deliberations** for collective purposes are particularly salient in this regard. This is what in the 1970s was called “**nonreformist reforms”: reforms that are possible within existing institutions and that pragmatically solve real problems while at the same time empowering people in ways which enlarge their scope of action in the future.**

**Cooptation isn’t offense—the alternative is equally at risk for cooptation—you should affirm an optimistic outlook towards the law to reform and redefine it for positive purposes**

**Lobel 7, Assistant Professor of Law**

[February, 2007; Orly Lobel is an Assistant Professor of Law, University of San Diego. LL.M. 2000 (waived), Harvard Law School; LL.B. 1998, Tel-Aviv University, “THE PARADOX OF EXTRALEGAL ACTIVISM: CRITICAL LEGAL CONSCIOUSNESS AND TRANSFORMATIVE POLITICS”, 120 Harv. L. Rev. 937]

**A critique of cooptation often takes an uneasy path. Critique has** always **been and remains not simply an intellectual exercise but a political and moral act. The question we must constantly pose is how critical accounts of social reform models contribute to our ability to produce scholarship and action that will be constructive. To critique the ability of law to produce social change is inevitably to raise the question of alternatives.** In and of itself, **the exploration of the limits of law and the search for new possibilities is an insightful field of inquiry.** However, **the contemporary message that emerges from critical legal consciousness analysis has often resulted in the distortion of the critical arguments themselves.** **This distortion denies the potential of legal change in order to illuminate what has yet to be achieved or even imagined**. Most importantly, **cooptation analysis is not unique to legal reform but can be extended to any process of social action and engagement**. **When claims of legal cooptation are compared to possible alternative forms of activism, the false necessity embedded in the contemporary** [\*988] **story emerges - a story that privileges informal extralegal forms as transformative while assuming that a conservative tilt exists in formal legal paths.** In the triangular conundrum of "law and social change," **law is regularly the first to be questioned, deconstructed, and then critically dismissed.** The other two components of the equation - social and change - are often presumed to be immutable and unambiguous. **Understanding the limits of legal change reveals the dangers of absolute reliance on one system and the need**, in any effort for social reform, **to contextualize the discourse, to avoid evasive, open-ended slogans, and to develop greater sensitivity to indirect effects and multiple courses of action.** Despite its weaknesses, however, **law is an optimistic discipline**. It operates both in the present and in the future. Order without law is often the privilege of the strong. **Marginalized groups have used legal reform precisely because they lacked power. Despite limitations, these groups have often successfully secured their interests through legislative and judicial victories**. **Rather than experiencing a disabling disenchantment with the legal system, we can learn from both the successes and failures of past models, with the aim of constantly redefining the boundaries of legal reform and making visible law's broad reach.**

**Agamben K: 2AC**

**States of exception are created through securitizing speech acts, but these require public acceptance in order to take hold. Public dialogue can successfully de-securitize issues—empirically proven by the East-West crisis in Europe**

Jennifer **Mitzen 11,** PhD, University of Chicago, Associate Professor of Political Science at Ohio State University, Michael E. Newell, “Crisis Authority, the War on Terror and the Future of Constitutional Democracy,” PDF

But **overlooked by this understanding of the state of exception** and crisis authority thus far **is the public's acceptance of such terms. If all a state-representative must do is utter the word “security"** in relation to a certain issue **to gain unprecedented control over that issue then** this raises the question: **why do government leaders not securitize multiple issues if all that is required is a persuasive speech act?** Agamben very occasionally refers to a "presidential political vocabulary" used ui invoking the state of exception, but he overlooks the need of tins vocabulary to persuade its target audience, the citizens, within popular sovereignty (Agamben, 2005). Michael **Williams offers** two **points to clarify** the exact workings of **securitization in a democratic state: the persuasiveness of a speech act and the role of the media. As Williams explains, "Casting securitization as a speech-act places that act within a framework of communicative action... [which] involves a process of argument, the provision of reasons, presentation of evidence, and commitment to convincing others of the validity of one's position.** **Communicative action** (speech-acts) are thus not just given social practices, they **are implicated in a process of justification."** (Williams, 2003) Furthermore, Williams stresses that "political communication is increasingly bound with images..." and, therefore, "**the speech-act of securitization... is a broader performative act which draws upon a variety of contextual, institutional, and symbolic resources for its effectiveness**" (Williams, 2003). This critique of Waever s theory argues that **there is an audience at which the speech-act is directed, that all media of communication may contribute to the debate, and that the audience must be convinced in order for the securitization to stick.** Thus, all images, **media coverage, political messages and relevant resources have the potential to contribute to a successful, or unsuccessful- securitization speech-act. While** the **securitizing** move **allows for the temporary use of exceptional**- sometimes covert, **measures, it does not suspend the popular** and political **discourse on how best to handle the crisis, and this conversation can** sometimes **lead to its desecuritization** (Waever, 1995). In conventional warfare, the desecuritization of the crisis almost invariably occurs with a cease-fire or surrender from one of the warring parties. When crises take on less concrete forms such as financial crises or security crises that lack a definable conclusion, their desecuritization is less concrete as well. **Waever argues that the East-West relationship in Europe during the 1970's and 1980's was a security issue that did not confer a precise conclusion, and that this characteristic allowed the persistent popular and political discourse to lead to the desecuritization of the issue:** "A great deal of the East-West dialogue of the 1970s and 1980s, especially that on "non-military aspects of security," human rights, and the whole Third basket of the Helsinki Accords, could be regarded as a discussion of where to place boundaries on a concept of security: To what degree were Eastern regimes "permitted" to use exn-aordinary instruments to limit societal East-West exchange and interaction? " (Weaver, 1995) Waever explains that "negotiated desecuritization and lunitation of the use of the security speech act," led to a "speech act failure," and the subsequent desecuritization of the relationship between Eastern and Western Europe (Waever, 1995). **When an issue is securitized executive authorities are granted significant decision-making authority, but the** conversation among the media, academics and government elites over the issue contuiues, and as Waever pouits out tins **dialogue can shift the consensus to reject the state of exception**, or, in other words, cause desecuritization. The **desecuritization of an issue means that it is now subject to political and legal analysis and is no longer sheltered by the security frame. This creates the potential for the polity's legal recovery as obligations to transperancy**, the constitution and checks and balances are reinstated. A full recovery would require a return to the status quo ui relation to constitutional laws and balances of powers and international treaties and norms prior to the crisis. However, if the exceptional policies invoked in the crisis are legitimized by the other branches of government, a new precedent is set for future executives facing a crisis scenario.

**Messiah Turn:**

**A. They cause Messianic politics – causes the worst violence**

**Kohn 6** [Margaret, Asst. Prof. Poli Sci @ Florida, “Bare Life and the Limits of the Law,”.Theory and Event, 9:2, <http://muse.jhu.edu/journals/theory_and_event/v009/9.2kohn.html>, Retrieved 9-26-06//]

Is there an alternative to this nexus of anomie and nomos produced by the state of exception? Agamben invokes genealogy and politics as two interrelated avenues of struggle. According to Agamben, "To show law in its nonrelation to life and life in its nonrelation to law means to open a space between them for human action, which once claimed for itself the name of 'politics'." (88) In a move reminiscent of Foucault, Agamben suggests that breaking the discursive lock on dominant ways of seeing, or more precisely not seeing, sovereign power is the only way to disrupt its hegemonic effects. **Agamben clearly hopes that his theoretical analysis could contribute to the political struggle against authoritarianism, yet he only offers tantalizingly abstract hints about how this might work. Beyond the typical academic conceit that theoretical work is a decisive element of political struggle, Agamben seems to embrace a utopianism that provides little guidance for political action.** He imagines, "One day humanity will play with law just as children play with disused objects, not in order to restore them to their canonical use but to free them from it for good." (64) **More troubling is his messianic suggestion that "this studious play" will usher in a form of justice that cannot be made juridical. A**

**gamben might do well to consider Hannah Arendt's warning that the belief in justice unmediated by law was one of the characteristics of totalitarianism**. It might seem unfair to focus too much attention on Agamben's fairly brief discussion of alternatives to the sovereignty-exception-law nexus, but it is precisely those sections that reveal the flaws in his analysis. It also brings us back to our original question about how to resist the authoritarian implications of the state of exception without falling into the liberal trap of calling for more law. **For Agamben, the problem with the "rule of law" response to the war on terrorism is that it ignores the way that the law is fundamentally implicated in the project of sovereignty with its corollary logic of exception. Yet the solution that he endorses reflects a similar blindness**. Writing in his utopian-mystical mode, he insists, "the only truly political action, however, is that which severs the nexus between violence and law."(88) Thus **Agamben, in spite of all of his theoretical sophistication, ultimately falls into the trap of hoping that politics can be liberated from law, at least the law tied to violence and the demarcating project of sovereignty.**

**The impact is massive extermination**

**Joines 99** (Richard E., Professor of English – Auburn University, “Contretemps: Derrida's Ante and the Call of Marxist Political Philosophy”, Cultural Logic, 3(1), Fall, http://clogic.eserver.org/3-1&2/joines.html)

29. Marxists argue that we are unable to imagine communism before its arrival, but "the someone or something" that follows hard upon the messianic event Derrida speaks of will usher in an opposite unimaginable concept of the political and establish the *rangordnung* of Nietzsche's ancient desires. Derrida's "appeal for an International whose essential basis or motivating force [is] not class, citizenship, or party" ("MS," p. 252) should be read and understood as a threat to any potential international organized around such concepts. Marxists witnessed the actualization of a similar, yet philosophically inadequate, threat in the twentieth century,17 but **the new Messiah waited for (without waiting) will make Hitler and Mussolini look like rank amateurs. Marxists have the ability to recognize the content of this messianicity, yet they stubbornly persist in the delusion that Derrida is speaking of "something familiar," and that he is not a "class enemy." Certainly, he is not. He is worse, and we call him "comrade" at great risk to creating a communist future.**

**Prison Abolition K: 2AC**

**Juries can disregard unjust law**

**Brummer 87** (Bennett, Public Defender, Eleventh Judicial Circuit of Florida, "TRIAL BY JURY: AN EXPERIMENT IN DEMOCRACY IN THE COURTS") [www.pdmiami.com/trial\_by\_jury.pdf](http://www.pdmiami.com/trial_by_jury.pdf) [gender modified]

**Jury trials were not intended to reach the same results that a non-jury trial would reach**. To the contrary, **the disadvantages of jury trial were accepted because of the jury's ability to disregard rules of law and reach a result that a judge could not or would not reach.** After serving as a juror, **a**n English **writer noted:** And **the horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked** (some of them are good), **not that they are stupid** (several of them are quite intelligent), **it is simply that they have got used to it**. . . . **Our civilization has decided,** and very justly decided, **that determining the guilt or innocence** of a man **is a thing too important to be trusted to trained [individuals] ~~men~~.** If it wishes for light upon that awful matter, it asks men who know no more law than I know, but who can feel the things that I felt in the jury box. When it wants a library cataloged, or the solar system discovered, or any trifle of that kind, it uses up its specialists. But when it wishes anything done which is really serious, it collects twelve of the ordinary men standing round. The same thing was done if I remember right, by the Founder of Christianity. (Chesterton, G. K., 1968, p. 55.) Juries represent the "passional elements in our nature" and thus keep the administration of law in accord with the wishes and feelings of the community. (Holmes, O. W., 1920, p. 237.) **Although jurors as well as judges are subject to personal limitations and to prejudice against unpopular litigants, the limitations of a group of jurors are preferred over those of an individual judge.**

**The alt demand is hopelessly utopian and trades off with meaningful reforms.**

**Herbert** 20**08**

Nick, The abolitionists’ criminal conspiracy, the guardian july 2008, British Member of Parliament for South Downs, http://www.theguardian.com/commentisfree/2008/jul/27/prisonsandprobation.youthjustice

Last week saw an International Conference on Penal Abolition. With such a heady ambition, what can be next? A global conference to abolish crime? **The ambition of an eccentric minority to abolish prison isn't just dotty. It's a distraction from a real and pressing agenda**, which is **to reform prisons** which simply aren't working. A century ago, prisons had hard labour and treadmills. Today, they have colour TVs in cells. **Jails may have changed, but the enduring truth that they are necessary has not. We will always have a small minority of offenders who**, by their behaviour, **pose so great a threat to the lives and property of the law-abiding majority that they must be kept apart from us. Ignoring this reality and arguing for the total abolition of prison is a hopelessly utopian goal that does the credibility of penal reformers no service**. The case for penal abolition rests on a series of tenuous assertions. Let's set aside the obvious, if uncomfortable, fact that part of the purpose of prison is to punish. **It's said that short-term prison sentences don't work, because recidivism rates are** shockingly **high** and there is little time for any restorative programmes to work. **But since the evidence is that longer sentences have lower recidivism rates, and provide the opportunity to rehabilitate offenders, this might be an argument to lengthen sentences, not abolish them altogether**. After all, another purpose of prison is to incapacitate offenders. Of course, overcrowded prisons that are awash with drugs, and a system which gives short-term prisoners no supervision or support on release, is almost calculated to fail. But **this could equally be an argument** – the one which the modern Conservative party is making – **for a complete transformation of prison regimes and a system of support for offenders when they are released from jail. It's a logical non sequitur on a grand scale to argue that because short-term prison sentences currently aren't working, we should therefore stop using them at all**. Abolitionists say that short-term prison sentences have a poorer recidivism rate than **community sentences**.

 In fact, both **have a lamentable record – and one that has deteriorated in the last ten years**. But the difference is hardly surprising, since **the worst recidivists are bound to end up in jail**. According to Home Office figures (pdf), only 12% of those sentenced to prison have no previous convictions. Over half have five or more previous convictions, and over a third have ten or more. Those who say that prison should be reserved for serious or serial offenders tend to ignore the fact that it already is. **Serial offenders who end up with custodial sentences have usually run through the gamut of weak community sentences already**. If we want to avoid magistrates having little choice but to send them down, the logical thing to do is to make community sentences far more effective. Yet **the perverse reaction of the abolitionists is to recommend that the very community disposals that have, by definition, already failed are used again**. Over a third of unpaid work requirements are not completed. Drug rehabilitation requirements have an even worse record – fewer than half are completed. **If a fraction of the energy and resources that are being devoted to the cause of penal abolition were directed to thinking seriously about how better to design non-custodial punishments, short-term prison sentences would be less necessary**. **What do the abolitionists really want? If it's the end of all custody, including for the most serious and dangerous offenders, then we can dismiss their demands as truly silly**. If it's the abolition of short-term custodial sentences, then the effect on the overall prison population will be minimal. Justice ministry tables show (pdf) that over 87% of the current prison population are serving sentences of over 12 months. Abolishing prison for those serving, say, six months or less would mean watering down 60,000 sentences – but it would reduce the prison population by less than 7,000. The more effective and sustainable way to reduce the prison population in the long term is to reduce re-offending, as the Conservative party's radical "rehabilitation revolution" proposes. **It would be nice to live in a society where there were no prisons, just as it would be nice if there were no hospitals because there was no illness**. But until someone steps forward with a ten-year plan to Make Crime History, **jails are here to stay. The challenge is to create prisons with a purpose – not to hold lazy conferences making futile calls for their abolition**.